Environmental Hearing Board

Adjudications and Opinions

2004

Volume II

COMMONWEALTH OF PENNSYLVANIA
Michael L. Krancer, Chairman

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OF THE

ENVIRONMENTAL HEARING BOARD

2004

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 2004.

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

ADJUDICATIONS

OPINIONS

2004

ENVIRONMENTAL HEARING BOARD DECISIONS

ENVIRONMENTAL HEARING BOARD PRACTICE AND PROCEDURE

COMMONWEALTH OF PENNSYLVANIA
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARI

JAMES B. POTRATZ	:	
	:	
v.	:	**EHB Docket No. 2003-084-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ERIE CITY WATER AUTHORITY, Permittee	:	**Issued: May 12, 2004**

OPINION AND ORDER ON MOTION TO AMEND AMENDED NOTICE OF APPEAL

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board grants a motion to amend an appeal where it seeks to supplement legal issues raised in the notice of appeal and where no prejudice will result to the opposing parties.

OPINION

On April 4, 2003, this appeal was filed in the name of James B. Potratz and, at the direction of the Erie City Council, the City of Erie averring that the Department of Environmental Protection (Department) had abused its discretion when it issued a water supply permit to the Erie City Water Authority for the fluoridation of Erie City water. The notice of appeal was amended as of right on April 23, 2003 pursuant to 25 Pa. Code § 1021.53(a). The city solicitor for the City of Erie filed a motion to withdraw the City as an appellant asserting that without the consent of

the mayor or city solicitor, counsel for the appellants had no legal right to represent the City of Erie in the appeal. The Board granted the motion, amended the caption of the appeal to strike the City of Erie as an appellant and allowed the appeal to proceed in the name of Mr. Potratz.

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

Mr. Potratz now moves the Board to allow him to amend his appeal pursuant to 25 Pa. Code § 1021.53(b)(3), which grants the Board discretion to allow a notice of appeal to be amended to include "alternate or supplemental legal issues, identified in the motion, the addition of which will cause no prejudice to any other party or intervenor." Mr. Potratz seeks to amend his appeal to raise issues concerning the constitutionality of the authorized use of hydrofluorosilic acid to fluoridate the public water supply.

The Erie City Water Authority objects to the motion to amend on the basis that Mr. Potratz is not simply seeking to add supplemental legal issues but new factual objections. Pursuant to § 1021.53(b) (1) and (2), a notice of appeal may be amended if it is based upon facts discovered during discovery of hostile witnesses or Department employees or that were discovered during preparation of the appellant's case and could not have been previously discovered with due diligence. The Erie City Water Authority asserts that Mr. Potratz's proposed amendment meets neither of these criteria.

Leave to amend a notice of appeal may be granted by the Board if an appellant establishes that he meets one of the conditions set forth in § 1021.53(b) as enumerated above.

Based on our review of the issues Mr. Potratz wishes to add to his appeal, we find that he satisfies the criteria of § 1021.53(b)(3). The issues he wishes to raise are an amplification of the legal issues already raised in his appeal. They appear to supplement the legal basis for his objection to the fluoridation permit.[1] Further, this is a unique situation since the matter has been up on appeal during which time no action was taken, including discovery. Discovery has only just begun. Therefore, we find no prejudice to the Erie City Water Authority.

Therefore, we shall permit Mr. Potratz to amend his appeal as set forth in his motion.

[1] Moreover, the Environmental Hearing Board Rules Committee has proposed amending rule 1021.53 to allow for a more liberal standard for amending appeals after the 20-day amendment as of right period. If adopted, the revised rule would allow amendment of an appeal for good cause shown and as otherwise allowed by law.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

ORDER

AND NOW, this 12th day of May, 2004, the Appellant's Motion to Amend the Amended Notice of Appeal is ***granted***.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administration Law Judge
Member

DATE: May 12, 2004

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CITY OF TITUSVILLE	:	
	:	
v.	:	**EHB Docket No. 2003-097-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HASBROUCK SAND & GRAVEL, INC., Permittee	:	**Issued: May 19, 2004**

OPINION ON MOTION TO COMPEL ANSWERS TO INTERROGATORIES

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board denies a Motion to Compel Answers to Interrogatories seeking expert discovery prior to the deadlines set forth in the Board's prehearing orders. The Department may answer such expert interrogatories and/or serve its expert reports in accordance with the Board's prehearing orders setting forth specific deadlines for providing expert information. In order not to prejudice any party, pursuant to 25 Pa. Code Section 1021.101 (b) the Board will enter an Order extending only the discovery deadline past the current deadlines for providing expert information. Appellant may also seek leave from the Board to supplement its expert reports based on information revealed in the Department's answers to expert interrogatories and/or expert reports.

OPINION

Presently before the Board is the Appellant's, City of Titusville's (Titusville), Motion to Compel Discrete Answers to Interrogatories. Titusville seeks to compel the Pennsylvania Department of Environmental Protection (Department) to answer certain interrogatories seeking apparently expert discovery. Titusville argues that the information it seeks concerns the substance of and bases for determinations reached by the Department during a permit application process. As such, the argument goes, this information is discoverable and should not be shielded from timely disclosure simply because such determinations may have required the Department to utilize its expertise. Titusville further argues that it needs this information to prepare its own expert reports which are due thirty days before the Department's answers to expert interrogatories and/or service of its expert reports.

The Department counters that the discovery sought by Appellant is "clearly within the scope of expert discovery and it is proper for the Department" to defer answering such questions until it files its expert reports and/or answers the expert interrogatories in accordance with the Board's Pre-hearing Order Number One. The Department further contends that its position is fully in accord with the Board's recent decision in *Borough of Edinboro v. DEP,* 2003 EHB 725, where the Board held, pursuant to our Rules, that if the Department wished to present expert testimony it is required to file expert reports or answers to expert interrogatories even if its experts are Department employees.

Discovery in Board proceedings is governed by our Rules of Practice and Procedure in conjunction with the Pennsylvania Rules of Civil Procedure. *See* 25 Pa. Code Section 1021.102(a). Full disclosure of a party's case underlies the discovery process. *Pennsylvania Trout et al v. DEP et al,* 2003 EHB 652, 657. The "integrity of the adjudication process requires

that all parties promptly and with thoroughness respond to discovery requests." *Hein v. Hein,* 717 A.2d 1053, 1056 (Pa. Super. 1998). Moreover, as recently stated in *Dauphin Meadows, Inc. v. DEP et al,* 2003 EHB 612, 615, we should not lose sight of the fact that "the purpose of discovery is to prevent surprise and unfairness and to allow a fair hearing on the merits."

Pre-hearing Order Number One is based on 25 Pa. Code Section 1021.101 which is entitled "Pre-hearing procedure." Subsection (a) lists the *initial* dates that the parties are given to complete discovery, serve expert reports, and file dispositive motions. Subsection (b) provides that the parties may "propose alternate dates for the conclusion of discovery, the service of expert or *supplemental reports,* and the filing of dispositive motions." Of course, this subsection also provides that the Board may issue subsequent prehearing orders incorporating the alternate dates proposed by the parties "or other dates the Board deems appropriate." The rules envision broad based discovery so that the trial is as fair as possible. One of the ways to insure fairness is to make sure the parties are aware of the strengths and weaknesses of not only their cases but also their opponents. The Board is given great flexibility to fashion a discovery schedule that will accomplish these goals.

The initial periods set forth in 25 Pa. Code Section 1021.101(a) are just that—the initial time periods set forth in the Rule. It is the extremely rare case that these deadlines are not extended at least once and in most cases, several times, during the prehearing phase of an Appeal. This is usually accomplished by a joint request from the parties with a proposed Order that is usually adopted by the Board. What has developed is that the parties simply extend the original deadlines. It may make a great deal of sense to conduct some discovery before the exchange of expert reports and/or answers to expert interrogatories at the beginning of a case. This is especially true in the case where the Appellant has the burden of proof and may not even

have retained an expert when its Appeal is filed.

However, if deadlines are extended it may not make as much sense or be as fair to all parties to simply extend each deadline in some kind of legal lockstep. Here, the Department is certainly justified in taking advantage of the Rules and arguing that it should be able to serve its answers to expert interrogatories or expert reports on the date set forth in our pre-hearing order. Likewise, Appellant makes a strong argument that it may be prejudiced because it may need the information in the Department's answers to expert interrogatories or in its expert reports to prepare its own expert reports which are due first.

Luckily, this Gordian Knot can be easily untied. We have several options but we think the best is simply to extend the discovery deadlines past the deadlines for the filing of the expert reports. Moreover, if either of the parties need to file supplemental reports based on something in the other party's expert reports or answers to interrogatories they can certainly file a motion requesting leave to do so. In this way, the Department will gain the benefit of not having to "hurry" its responses to expert discovery yet at the same time the Appellant will not be prejudiced in the preparation of its case and in its understanding of the bases of the Department's action.

We will issue an Order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITY OF TITUSVILLE	:	
	:	
v.	:	**EHB Docket No. 2003-097-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HASBROUCK SAND & GRAVEL, INC., Permittee	:	**Issued: May 19, 2004**

ORDER

AND NOW, this 19th day of May, 2004, after review of the Appellant's Motion to Compel Discrete Answers to Interrogatories and the Department's Response and Memorandum of Law, it is ordered as follows:

1) The Motion to Compel is **denied.**

2) Discovery is extended until **September 15, 2004.**

3) All other prehearing deadlines remain as earlier set forth.

4) The parties shall file a *joint status report* on or before **August 25, 2004.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: May 19, 2004

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PENNSYLVANIA FISH AND BOAT COMMISSION	:	
v.	:	**EHB Docket No. 2004-053-R (Consolidated with 2004-054-R and 2004-055-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, GLACIAL SAND AND GRAVEL COMPANY, PIONEER MID-ATLANTIC, INC. and THE LANE CONSTRUCTION COMPANY	:	**Issued: May 24, 2004**

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By Thomas W. Renwand Administrative Law Judge

Synopsis:

A petition for supersedeas is denied where there is simply insufficient evidence to conclude that endangered mussels and fish are present in the proposed dredging areas covered by the permittees' permit amendments. While the petitioner presented very informative and illuminating testimony on the species of endangered mussels at issue in this case, the surveying methods used to detect the presence of mussels, and fish habitat, they did not present evidence that endangered mussels and fish are indeed present in the permit areas. The granting of a supersedeas is an extraordinary remedy that will be issued only where it is clearly demonstrated

that it is warranted. Since the burden in a supersedeas proceeding is on the petitioner to demonstrate the likelihood of success on the merits and the irreparable harm that will be suffered if a supersedeas is not granted, the petitioner was required to come forth with more than speculation that adverse effects may occur in the absence of a supersedeas.

OPINION

This matter involves an appeal and request for supersedeas by the Pennsylvania Fish and Boat Commission (Fish and Boat Commission or Commission) of the Department of Environmental Protection's (Department) issuance of amendments to water obstruction and encroachment permits held by Glacial Sand & Gravel Company, Pioneer Mid-Atlantic, Inc. and the Lane Construction Company (the permittees). The amended permits authorize commercial sand and gravel dredging at certain mile points in the Allegheny River. The areas are located within Pool 8 of the Allegheny River.

In support of their applications for the permit amendments, the permittees submitted mussel surveys for the areas of the river to be affected. The species of mussel of concern in this proceeding is the northern riffleshell mussel, which is listed as both a federal and state endangered species. In its petition for supersedeas, the Fish and Boat Commission has challenged the mussel surveys and the Department's approved protocol for conducting the surveys, as well as the lack of fish surveys.

A supersedeas hearing was held on April 22, 2004. Following the hearing the parties also filed briefs in support of their positions.

Supersedeas is an extraordinary remedy that will be granted only where clearly warranted. *Oley Township v. DEP*, 1996 EHB 1359, 1361-62. The factors the Board will consider are the following: (1) irreparable harm to the petitioner; (2) the likelihood of the

petitioner prevailing on the merits; and (3) the likelihood of injury to the public or other parties, such as the permittee in third-party appeals. 25 Pa. Code § 1021.63 (a). The Fish and Boat Commission bears the burden of proof in this supersedeas proceeding. *Fifer v. DEP*, 2000 EHB 1234, 1237. In order to prevail on its supersedeas petition, the Fish and Boat Commission must show, based on the evidence presented at the hearing, that the Department acted unreasonably or contrary to law.

Mussel Surveys and DEP Approved Protocol

It is the contention of the Fish and Boat Commission that the protocol approved by the Department for conducting mussel surveys is inadequate. The Commission asserts that the Department-approved protocol establishes insufficient sampling time and effort to detect threatened and endangered mussels, results in sampling of only half the river channel, excludes near shore areas from sampling and relies on inadequate buffer zones to protect mussel species of concern. It advocates the use of two other protocols, namely the Smith protocol and the Ohio River protocol. It is the Commission's contention that these protocols produce a more accurate survey than the one approved by the Department.

One criticism of the Smith protocol is that it was designed to evaluate potential locations for a new bridge and that the largest area ever evaluated using this protocol was 0.2 mile (T. 59), much smaller than the areas to be evaluated for dredging. As to the Ohio protocol, the record contains little evidence demonstrating its superiority or inferiority to the approved protocol. However, the Department's water pollution biologist supervisor, Thomas Proch, testified that as part of a consent order and agreement in another case, the Department has agreed to evaluate the Ohio River protocol against the Department's. (T. 175)

The protocol approved by the Department is designed to determine the presence or

absence of mussels, not the actual number of mussels or their density. It is the contention of the Department that the actual number or density of mussels is irrelevant because if *any* threatened or endangered mussel species are found, dredging will be prohibited in that segment and adjacent segments of the stream. The Department-approved protocol has performed in practice, i.e. it has been successful in finding mussels, including the northern riffleshell. (T. 178-79) Using the Department-approved protocol in the present matter, the consultant for the permittees found that no endangered mussels were present in the permit area.

The northern riffleshell mussel has been found on at least three occasions in the Allegheny River upstream of the permit area. Two northern riffleshell mussels were found in 1999 in Pool 8 at river miles 58.8 and 58.9 using the Department's approved protocol. (T.274) In addition, employees of the U.S. Fish and Wildlife Service, Robert Anderson and Patty Morrison, found a northern riffleshell mussel on a dive in 2000 at river mile 58.85, one tenth and a half miles upstream of the permit area. (T. 50)

Based on the fact that the northern riffleshell mussel has been found upstream of the permit area and its contention that the permit area is a suitable habitat for this type of mussel, the Fish and Boat Commission asserts there is a reasonable likelihood, using the correct protocol, that the northern riffleshell mussel could be found in the permit area.

In determining whether to grant the Fish and Boat Commission's petition, we must keep in mind that superseding a Department action is an extraordinary remedy that may be granted only where the evidence indicates it is clearly warranted. The Fish and Boat Commission presented excellent testimony by Robert Anderson and Patty Morrison regarding the northern riffleshell mussel and its habitat and the mussel surveying protocols advocated by the Fish and

Boat Commission. Their testimony was extremely illuminating and helpful.[1] However, at best, what we can garner from the case presented by the Fish and Boat Commission is that the northern riffleshell mussel may be present in the permit area, or it may not be. Most notably, the Fish and Boat Commission presented no evidence that the Smith or Ohio River protocols would have yielded different results than the approved protocol. The Commission presented no evidence that endangered mussels are indeed present in the sections of the Allegheny River to be dredged. In order to carry its burden of proof in this supersedeas, the Commission was required to present more than mere speculation that endangered mussels may be present in the proposed dredging areas. When asked why no mussel surveys were performed by the Fish and Boat Commission in support of its petition for supersedeas, the Commission's chief of environmental services, John Arway, testified that they were unable to do so due to weather but they intended to perform their own mussel surveys as soon as the weather allowed. (T. 209-10) While it is understandable that no diving could be conducted during the time between the last set of permit revisions in December 2003 and the supersedeas hearing in April 2004, this does not explain why no surveys were conducted at the time the Fish and Boat Commission commented on the proposed amendments in April and August 2003.

Nonetheless, the Fish and Boat Commission has stated it intends to conduct its own mussel surveys in the subject area. Should further mussel surveys conducted by the Fish and Boat Commission yield results showing that endangered mussel species are present in this area, the Commission may again seek a supersedeas from the Board, including a temporary supersedeas. Additionally, if endangered mussels are found to be present, the Department's policy, as set forth at the hearing, is to prohibit dredging in such areas.

[1] We also wish to commend all of the parties for their excellent briefs and presentations at the supersedeas hearing.

Fish Surveys

The Fish and Boat Commission also contends that the Department erred in not requiring the permittees to perform fish surveys. Again, the Fish and Boat Commission provided no evidence that threatened or endangered fish are present in the areas covered by the permit amendments. According to the testimony of the Department's Mr. Proch, the Department did not require a fish survey because it only documents the fish present in a particular area at a particular time; it cannot search for or assess fish habitat. (T. 181,186, 241) The Fish and Boat Commission produced no evidence that threatened or endangered fish habitat exists in the areas to be dredged.

As with the mussel surveys, in order to succeed on its petition for supersedeas the Fish and Boat Commission was required to come forth with more than mere speculation that threatened or endangered fish habitat may be present in the proposed dredging area.

Likelihood of Success on the Merits and Irreparable Harm

As stated earlier, the burden is on the petitioner, in this case, the Fish and Boat Commission, to demonstrate that a supersedeas is warranted. It must show that the likelihood of adverse effects occurring is not merely speculative. As noted in the permittees' brief, the harm that the Fish and Boat Commission has alleged is as follows: (1) dredging in the permit area might cause harm to the northern riffleshell mussel because this endangered species was found upstream of the permit area four years ago and (2) dredging in the permit area might affect the fish habitat that has historically been suspected of inhabiting other locations in Pool 8. Without more than mere speculation that threatened or endangered mussels or fish may exist in the areas to be dredged, the Fish and Boat Commission has not met its burden of proving that they are likely to win on the merits or that irreparable harm will occur. In short, there is simply not

sufficient evidence to warrant the granting of a supersedeas.

Conversely, permittee Glacial Sand and Gravel Company (Glacial) did demonstrate that it will suffer injury if the supersedeas is granted. Glacial presented testimony on the injury its business would incur if the permit revisions are superseded.

Based on the evidence presented at the supersedeas hearing, we cannot grant the supersedeas requested by the Fish and Boat Commission. However, if the Fish and Boat Commission's surveys find the presence of threatened or endangered mussels or fish habitat in the permitted areas, it may again file a supersedeas petition with the Board.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNSYLVANIA FISH AND BOAT COMMISSION	:	
	:	
	:	
v.	:	**EHB Docket No. 2004-053-R**
	:	**(Consolidated with 2004-054-R**
	:	**and 2004-055-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, GLACIAL SAND AND GRAVEL COMPANY, PIONEER MID-ATLANTIC, INC. and THE LANE CONSTRUCTION COMPANY	:	

ORDER

AND NOW, this 24th day of May, 2004, the petition for supersedeas filed by the Pennsylvania Fish and Boat Commission is ***denied.***

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administration Law Judge
Member

DATE: May 24, 2004

See following page for service list

EHB Docket No. 2004-053-R
(Consolidated with 2004-054-R
and 2004-055-R)

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SCHLOMO DOTAN	:	
	:	
v.	:	**EHB Docket No. 2003-225-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 4, 2004**

OPINION AND ORDER ON AMENDED MOTION FOR LEAVE TO AMEND NOTICE OF APPEAL

By George J. Miller, Administrative Law Judge

Synopsis:

The Board denies in part a motion to amend a notice of appeal from a denial of coverage under a General Permit to also challenge the issuance of a prior administrative compliance order from which no timely appeal had been filed. The Board grants the motion in all other respects because the proposed Amended Notice of Appeal would clarify the Appellant's contentions as to other issues and only add legal issues that would not prejudice the Department.

BACKGROUND

This appeal is from the Department's July 10 and August 6, 2003 denial of coverage to the Appellant, Schlomo Dotan, under the NPDES General Permit for Storm Water Discharges Associated with Construction Activities for his project, the Woodridge Spring Residential subdivision, in Blair Township, Blair County, Pennsylvania.

The Appellant filed the original Notice of Appeal *pro se* on September 8, 2003 in which he objected to the Department's action on the ground that work under the coverage

of the General Permit given him by the Department on February 28, 1995 had been delayed for four of the five years of the coverage period by litigation with Blair Township over his subdivision plan. This litigation was decided in his favor resulting in his application for renewal of coverage. The Appellant claimed that he was therefore entitled to an extension of coverage by the General Permit for the time taken by the litigation, and therefore the Department's denial was improper. He acknowledged that the Department had denied coverage based in part on his enforcement history in 1995, but the Notice of Appeal said that reliance on this history may be time barred. In addition, he said it is unreasonable to require an individual NPDES permit as a form of punishment when the Appellant had been prohibited from performing by the Township.

The Appellant's motion to amend seeks to clarify the grounds for appeal set forth in the original notice and to include an appeal from a compliance order issued by the Department to the Appellant on August 22, 2003, after the July 2003 denial of coverage. That compliance order required the Appellant to cease all earth disturbance activities at the site and to implement specified best management practices. The Appellant says that as a *pro se* with no legal training he was not aware of the need to appeal this compliance order at the time he filed his appeal in September from the denial of coverage under the General Permit.[1] The motion states, however, that the Department may have based its denial of coverage under the General Permit based on the violations alleged in the August 22, 2003 compliance order so that the July 10, 2003 denial coverage and the August 22, 2003 Compliance Order comprise one action of the Department.[2] The motion also claims that the Department will not be prejudiced by adding objections to the August 22, 2003

[1] Amended Motion, Paragraph 13.
[2] Amended Motion, Paragraph 15.

Compliance Order because it knew that no penalties were assessed in connection with the 1995 Compliance Order and because both parties will benefit from the final resolution of the validity of the July 10, 2003 denial if based on the violations alleged in the August 22, 2003 Compliance Order.[3]

The proposed Amended Notice of Appeal, among other things, attacks this compliance order as being unfounded because the Appellant's activity at the site was timber harvesting and did not involve construction activities for which a permit was required.[4] It also claims that the Department's actions were unreasonably and unfairly discriminatory in that they did not afford the Appellant treatment similar to that afforded to other similarly situated parties.

The grounds cited by the Department in its letter denying coverage involved in the original appeal were that the Appellant had failed to respond to an administrative order dated August 18, 1995 requiring him to comply with requirements of the permit including an approved sedimentation and control plan. The Department's notice of denial said that before and after the Order was issued, the Department made numerous attempts to resolve the outstanding civil penalties for erosion and sediment control violations that occurred at the site, but that the Appellant had refused to resolve these civil penalty issues.[5]

The Department opposes the motion to amend as a baseless attempt by the Appellant's "new counsel" to avoid the Board's requirement for filing a timely appeal from the Department's August 22, 2003 Compliance Order. The Department states that

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[3] Amended Motion, paragraph 19.
[4] Proposed Amended Notice of Appeal, paragraphs 3.16 and 3.17.
[5] Department letter of August 6, 2003 attached to Notice of Appeal.

the Board has no jurisdiction over an untimely appeal, and that the denial of coverage and the issuance of the August 22, 2003 Compliance Order were separate actions of the Department. [6]

In addition, the Department says that all of the facts on which the proposed Amended Notice of Appeal is based, particularly the claims made in paragraphs 3.29, 3.30 and 3.35, were known or should have been known by the Appellant through the exercise of due diligence when the original appeal was filed.[7] Paragraph 3.29 says that, contrary to the Department's assertion in the letters denying coverage, no civil penalties had ever been assessed against the Appellant by the Department. Paragraph 3.30 states that any failure to maintain best management practices at the site were due to a cease and desist order issued by Blair Township. Paragraph 3.35 of the proposed Amended Notice of Appeal states that the Department's actions were otherwise arbitrary, capricious, unreasonable and contrary to law. The Department also claims that paragraph 3.36 is improper because it makes allegations of discrimination that are based on information that through the exercise of due diligence could have been discovered prior to the filing of the appeal. [8]

DISCUSSION

The Board's Rules of Practice and Procedure at 25 Pa. Code § 1021.53(b), permit the amendment of an appeal after the 20-day period for amendment as of right if appellant establishes that the requested amendment satisfies one of the following conditions:

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[6] Department Response, paragraphs 3, 18, 19.
[7] Department Response, paragraph 16.
[8] Department Response, paragraph 18.

(1) It is based upon specific facts, identified in the motion, that were discovered during discovery of hostile witnesses or Departmental employees.
(2) It is based upon facts, identified in the motion, that were discovered during preparation of appellant's case, that the appellant, exercising due diligence, could not have previously discovered.
(3) It includes alternate or supplemental legal issues, identified in the motion, the addition of which will cause no prejudice to any other party or intervenor.

However, the Board's rules do not authorize an amendment to an existing appeal designed to challenge a different action by the Department that could have been appealed at an earlier time. To the contrary, the Board's Rules at 25 Pa. Code § 1021.52(a) require a person to whom a Department action has been directed to file the appeal within 30 days after it has received written notice of the action. Accordingly, we will deny the motion to amend the appeal to the extent it seeks to challenge the Department's August 22, 2003 Compliance Order because the Appellant failed to file an appeal from that action within 30 days of his receipt of the order.[9] We reject Appellant's contention that the compliance order and the denial of coverage under the General Permit were all one action because the denial of coverage may have been based on the Appellant's failure to comply with this compliance order as well as the earlier order issued in 1995. These actions were separate actions taken by the Department under different regulatory authority and at different times.

[9] An affidavit attached to the Department's response states that the order was issued on August 22, 2003. The compliance order states that the order was sent to Appellant on that date by Fax and mail. The Appellant's motion and affidavit state that as a *pro se* litigant he was unaware of the necessity for appealing this order when he filed his appeal on September 8, 2003. Motion, paragraph 13; Affidavit, paragraph 12. No appeal of the compliance order has been filed with the Board.

Therefore, the motion to amend the proposed Amended Notice of Appeal to include paragraphs 3.16 to 3.20, 3.22 to 3.25, 3.26 (on page 6 of the Amended Notice of Appeal) and 3.28 as well as paragraphs 3.30 to 3.34 of the Amended Notice of Appeal will be denied because they all relate to a late challenge to the August 22, 2003 Compliance Order over which the Board has no jurisdiction.The Board will permit the amendment to the notice of appeal of all other paragraphs of the Amended Notice of Appeal as a welcome clarification to the grounds for appeal. We read the remaining paragraphs of the Amended Notice Appeal to set forth nothing new other than the addition of two legal theories. The first is the claim set forth in paragraph 3.35 of the proposed amendment that the Department's actions were otherwise arbitrary, capricious, unreasonable and contrary to law, regulations and policies of the Department. The second is the claim set forth in paragraph 3.36 that the Department's actions were unreasonably and unfairly discriminatory in that they did not afford the Appellant treatment similar to that afforded to other similarly situated parties. We view these claims as no more than a claim that the Department abused its discretion, an issue that is involved in every appeal to the Board.[10] While the discrimination claim is based on facts that might have been known prior to the filing of the original appeal, the Department nevertheless will not be prejudiced by the addition of this claim at this time since discovery is in the very early stages.[11]

---

[10] The abuse of discretion standard includes actions motivated by partiality, bias, prejudice or ill-will. *Defense Logistics Agency v.DEP*, 2001 EHB 337, 347-348.

[11] Department Response, paragraph 5. *Potratz v. DEP*, EHB Docket No. 2003-084-R (Opinion issued May 12, 2004).

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

SCHLOMO DOTAN	:	
	:	
v.	:	**EHB Docket No. 2003-225-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 4th day of June, 2004, IT IS HERBY ORDERED as follows:

1. The Appellant's motion to amend the notice of appeal is **DENIED** with respect to the following paragraphs of the Amended Notice of Appeal: 3.16 to 3.20, 3.22 to 3.25, 3.26 on page 6 of the Amended Notice of Appeal, 3.28, and 3.30 to 3.34.

2. The Appellant's motion to amend notice of appeal is **GRANTED** with respect to all other paragraphs of the Amended Notice of Appeal. The Appellant shall file an amended notice of appeal with the Board within 15 days in conformance with this order

ENVIRONMENTAL H EARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Member

DATED: June 4, 2004

c: DEP, Bureau of Litigation:
Attn: Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAI

PENNSYLVANIA FISH AND BOAT COMMISSION	:	
v.	:	**EHB Docket No. 2004-053-R (Consolidated with 2004-054-R and 2004-055-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GLACIAL SAND AND GRAVEL COMPANY and PIONEER MID-ATLANTIC, INC., and THE LANE CONSTRUCTION COMPANY, Permittees	:	**Issued: June 17, 2004**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Permittees' motion to dismiss based on untimeliness and administrative finality is denied. Where the Appellant filed its notice of appeal within 30 days after notice of the Department's action appeared in the Pennsylvania Bulletin, its appeal is timely notwithstanding the fact it had received actual notice of the action at an earlier date. The Board's rules do not create an exception to this general principle for appeals by government agencies. Secondly, issues challenging the protocol used to conduct mussel surveys and the Department's failure to require certain information are not barred by administrative finality as they relate to new dredging

areas covered by the amended permits.

OPINION

This matter involves three appeals filed by the Pennsylvania Fish and Boat Commission (Fish and Boat Commission) from permit amendments issued by the Department of Environmental Protection (Department) to three dredging companies (Permittees), allowing dredging in select areas of the Allegheny and Ohio Rivers. The Fish and Boat Commission filed a petition for supersedeas in this matter, and a hearing was held on April 22, 2004. In an Opinion and Order issued on May 24, 2004, the Board denied the petition for supersedeas. *Pennsylvania Fish and Boat Commission v. DEP*, EHB Docket No. 2004-053-R (Consolidated) (Opinion and Order issued May 24, 2004).

The Permittees have filed a motion to dismiss on the basis that the appeals are untimely and are barred by administrative finality. The Board will evaluate a motion to dismiss in the light most favorable to the non-moving party and will grant the motion only when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Ainjar Trust v. DEP*, 2000 EHB 505, 507.

Timeliness

The approval of the permit amendments authorizing dredging in additional areas was concurrently communicated to the Permittees and the Fish and Boat Commission by letters dated September 13, 2003 and December 3, 2003. Notice was not published in the Pennsylvania Bulletin at that time. Permittees contend that it was the Department's policy at that time not to publish notice of such approvals in the Pennsylvania Bulletin. The Fish and Boat Commission did not appeal the permit amendments within 30 days of receiving actual notice of the approvals. Since it did not do so, Permittees contend its subsequent appeal is untimely.

Subsequently, in January of 2004, the Department did publish notice of the permit amendments in the Pennsylvania Bulletin. The Fish and Boat Commission filed an appeal within 30 days of notice appearing in the Bulletin. It is the contention of the Permittees that since the Fish and Boat Commission had actual notice of the permit amendments long before it was published in the Pennsylvania Bulletin, and because it was not the Department's policy at that time to publish such notice in the Bulletin, the Fish and Boat Commission was required to file its appeal within 30 days of receiving actual notice.

Contrary to the Permittees' assertion, in its response the Department states that it was in fact its policy to publish notice of permit amendments in the Pennsylvania Bulletin and that the failure to do so when the September 13 and December 3, 2003 approval letters were issued was simply an administrative failure on its part.

The Board's rule on this matter is clear:

> (1) The person to whom the action of the Department is directed or issued shall file its appeal with the Board within 30 days after it has received written notice of the action.
>
> (2) Any other person aggrieved by an action of the Department shall file its appeal with the Board within one of the following:
>
> i. Thirty days after notice of the action has been published in the Pennsylvania Bulletin.
>
> ii. Thirty days after actual notice of the action if a notice of the action is not published in the Pennsylvania Bulletin.

25 Pa. Code § 1021.52.

Since the Fish and Boat Commission was not the party to whom the Department's action was directed, but rather a party allegedly aggrieved by that action, it had thirty days from the date notice appeared in the Pennsylvania Bulletin in which to file its appeal, regardless of whether it had received actual notice prior to that publication. *Lower Allen Citizens Action*

Group, Inc. v. DER, 538 A.2d 130 (Pa. Cmwlth. 1988); *Fontaine v. DEP*, 1996 EHB 1333, 1337-38.

The Permittees argue that because the Fish and Boat Commission is not a private citizen or citizens group "interested" in the outcome of a Department proceeding, but rather an arm of state government that was afforded a right to participate in the proceedings leading up to the issuance of the permit amendments, they should be required to file their appeal within 30 days after receiving actual notice of the Department's action.

As the Fish and Boat Commission correctly points out, in the context of rulemaking the Board had received a comment that it should consider adding a third category of persons who had participated in the administrative process leading up to the action and who had received written notice of the action. The comment suggested that this category of persons should be required to file their appeal within 30 days of actual notice. The Board declined to adopt this suggestion, stating in its preamble to the rulemaking "Even though third parties may have participated in the administrative process leading to the Department's action, they ordinarily cannot afford to participate with the full assistance of counsel and experts as can be done by the permittee. After the Department takes action, these third party appellants ordinarily need time to consult counsel, experts and others in the affected community to prepare a proper appeal." 28 Pa. B. 4714.

The Permittees assert that this rationale does not apply to the Fish and Boat Commission, which has counsel and experts at its disposal unlike an ordinary citizen or citizens group. While this may be true, nonetheless, there is no exception created in the Board's rule at § 1021.51 for government entities such as the Fish and Boat Commission. The Board could have adopted a separate rule for state agencies, requiring that they file their appeal within 30 days of actual

notice, but chose not to do so. We also choose not to do so here in the context of a motion to dismiss.

Therefore, based on 25 Pa. Code § 1021.51, we find that the Fish and Boat Commission's appeal was timely filed.

Administrative Finality

Under the doctrine of administrative finality, "one who fails to exhaust his statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by his statutory remedy." *DER v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765, 767 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977). In an appeal of a permit amendment, the appellant may challenge only those issues pertaining to the amendment, not conditions that appeared in the original unappealed permit. *People United to Save Homes v. DEP*, 1996 EHB 1428.

The Permittees challenge the following objections by the Fish and Boat Commission:

1) The approvals in this case should be rescinded because DEP had inadequate information to assess the impacts of dredging in two areas within Pool 8 (Area 1 and 2).
2) DEP did not require the Permittees to conduct additional mussel surveys recommended by the Fish and Boat Commission and permitted the Permittees to follow the DEP Protocol.
3) DEP did not require the Permittees to conduct a fish community survey.

It is the Permittees' contention that the Fish and Boat Commission is challenging the "rules of the game" which were established when the permits were originally issued. The Permittees point out that the permits establish the mechanism for how the Department intended

to incrementally approve portions of the area covered by the permits for dredging over the life of the permits. This included what protocol was to be followed in conducting mussel surveys and what information needed to be submitted for approval.

In response, the Fish and Boat Commission argues that these matters are not administratively final because the issues raised in the current appeals are not issues that could have been raised in the context of the Department's issuance of the original permits since they did not authorize dredging in the new permit areas. In other words, the Fish and Boat Commission is challenging these matters with regard to their application to the new dredging areas covered by the amended permits and, therefore, could not have been raised in an appeal of the original permits.

As set forth in *Riddle v. DEP*, 2002 EHB 321, 327, (citing *Bethlehem Steel Corp. v. DER*, 309 A.2d 1383 (Pa. Cmwlth. 1978), "The doctrine of administrative finality has no application where the issues raised are raised in a different proceeding in which new facts are relevant to the propriety of the Department's action." Moreover, as set forth in *Wheatland Tube Co. v. DEP*, EHB Docket No. 2003-221-L (Opinion issued March 16, 2004), "the doctrine of administrative finality was never intended to insulate a permit from any changes or review of those changes for all of time." As further set forth in *Wheatland*,

> That these types of issues tend to arise on a regular basis in Board appeals is due to the fact that Departmental permits, sewage plan approvals, and the like last a long time. They need to be reviewed and possibly updated or modified over time, but the basic, organic document remains in place. When those changes, renewals, or updates are made, the question often arises as to what can and cannot be challenged in an appeal from the change, renewal, or update....In evaluating a claim of administrative finality, it is critically important to determine precisely what action is being appealed. Only issues that relate to *that action* may be raised....That challenge will turn on the factors relevant to the

> current change, which may or may not resemble factors that were considered when the original action was taken.

Id. at 3-4 (emphasis in original)

Here, the Fish and Boat Commission may not challenge the appropriateness of the mussel survey protocol or lack of a fish survey as these issues relate to the original permit in general. However, they may challenge these issues as they relate to the new dredging areas added by the permit amendments. Indeed, they could not have challenged these issues as they relate to the new dredging areas prior to this. Therefore, we find that the doctrine of administrative finality does not bar the Fish and Boat Commission from raising the issues in question with respect to the new dredging areas.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNSYLVANIA FISH AND BOAT COMMISSION	:	
	:	
v.	:	**EHB Docket No. 2004-053-R (Consolidated with 2004-054-R and 2004-55-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GLACIAL SAND AND GRAVEL COMPANY and PIONEER MID-ATLANTIC, INC., and THE LANE CONSTRUCTION COMPANY, Permittees	:	

ORDER

AND NOW, this 17th day of June, 2004, the Permittees' motion to dismiss is *denied*.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administration Law Judge
Member

DATE: June 17, 2004

EHB Docket No. 2004-053-R
(Consolidated with 2004-054-R
and 2004-55-R)

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BROAD TOP TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2004-012-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WSI SANDY RUN LANDFILL, INC., Permittee	:	**Issued: June 21, 2004**

OPINION AND ORDER GRANTING MOTION TO DISMISS

By: Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board grants the Department's motion to dismiss for mootness where the action from which the appeal was taken—a purported minor permit modification—was subsequently rescinded by the Department and the Department restored the permit to the condition that existed prior to the appealed action.

FACTUAL BACKGROUND

This appeal concerns an action taken by the Department of Environmental Protection (DEP) with respect to the Sandy Run Landfill located in Broad Top Township, Bedford County (the Landfill). The Landfill is operated pursuant to Solid Waste Permit No. 101538 (the Permit), and the permittee is a corporate entity called WSI Sandy Run Landfill, Inc. (Permittee).[1] By letter dated November 5, 2003, DEP issued a Minor Permit Modification (11/5/03 Modification) to the Permittee. The 11/5/03 Modification purported to change the name of the permittee on the

[1] Affidavit of John F. Krueger, at ¶¶ 1-4 and attached exhibit A.

Permit from "WSI Sandy Run Landfill, Inc." to "WSI Sandy Run Landfill, LLC."[2] Notice of this modification to the Permit was not published in the Pennsylvania Bulletin.

On December 2, 2003, Broad Top Township faxed a letter to DEP complaining that it wasn't notified that the Permittee had filed a minor permit modification application in advance of DEP's approval of the application and issuance of the 11/5/03 Modification.[3] The township indicated in the letter that it had "earlier this week" received from DEP a copy of the application and had also learned of the application's approval by DEP in the 11/5/03 Modification.[4] DEP responded to the township on December 15, 2003 with a letter apologizing for not forwarding a copy of the application to the township when it was first filed and explaining DEP's action in modifying the Permit.[5]

In its letter, DEP explained its purported minor permit modification of the Permit as follows:

> Art Streeter of North East Waste Services (NEWS) contacted Lee Ann Murray of our office this past summer and briefly discussed their plans to change the name of all three landfill subsidiaries in Pennsylvania from corporations (Inc.) to limited liability corporations (LLC). In deference to DEP, NEWS decided to submit the minor permit modifications and gain approval before submitting the needed paperwork to the Department of State. As you know, our region approved this name change in early November. . . . This leaves us in the awkward situation of having issued a permit in the name of an entity that does not yet technically exist. . . . In hindsight, NEWS probably should have submitted paperwork to both DEP and the Department of State at the same time with the hope that both would be finalized around the same time.

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[2] Krueger Affidavit, at ¶ 4 and exhibit A. Changing the permittee on the Permit from WSI Sandy Run Landfill, *Inc.*—a corporation—to WSI Sandy Run Landfill, *LLC*—a limited liability company—would on its face seem to involve more than simply a change in a single corporate entity's name; some confusion created by the 11/5/03 Modification's treatment of the transaction as simply a name change apparently impelled this appeal.

[3] Krueger Affidavit, at ¶ 5 and exhibit B; Appellant's Response to Motion, at ¶¶ 2-3. According to the township's letter, DEP had previously committed to provide the township with copies of applications pertaining to the Landfill so that the township would have an opportunity to review and comment on any such applications before DEP acted on them. *See* Krueger Affidavit, at exhibit B.

[4] *Id.* The date on the township letter is November 21, 2003, which would seem to indicate that the township was aware of the 11/5/03 Modification as early as the week of November 21, 2003 and in any event by no later than December 2, 2003 when the letter was faxed by the township to DEP.

[5] Appellant's Motion Response at ¶ 4 and attached exhibit.

> As to the significance of this change, it is our understanding that the main reason corporations have been switching to LLCs is for a more favorable tax status. . . . We believe that it has no effect on the obligations of the permitee [sic] to operate in accordance with their operating permit and the rules and regulations of DEP.

Appellant's Motion Response, attached exhibit, at page 1.

After receiving DEP's December 15th letter, Broad Top Township filed this appeal with the Board on January 12, 2004, objecting that the 11/5/03 Modification is unlawful. Specifically, Appellant asserts that it was unlawful for DEP to issue the challenged minor permit modification because, in reality, the Permittee was not simply changing its name—given that a corporation and a limited liability corporation have a distinct legal status. According to Appellant, the limited liability corporation called "WSI Sandy Run Landfill, LLC" is necessarily a distinct, separate entity from the corporation called "WSI Sandy Run Landfill, Inc." Therefore, because two different entities are involved, the transaction would legally require a transfer of the rights granted under the Permit from the Permittee (*i.e.*, the corporation) to "WSI Sandy Run Landfill, LLC" (*i.e.*, the limited liability corporation). And a transfer of rights under the Permit would trigger the requirements found in 25 Pa. Code § 271.221, which Appellant contends were not complied with by the Permittee.[6]

In addition, Appellant objected that the fact that the limited liability corporation, WSI Sandy Run Landfill, LLC, did not actually exist as of the date of the 11/5/03 Modification's issuance rendered DEP's action invalid—it being unlawful to issue a solid waste permit to a non-existent entity.[7] The appeal seeks a determination by the Board that DEP's action was unlawful and the consequent revocation of the 11/5/03 Modification.

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[6] *See* Notice of Appeal, at ¶¶ 3, 4, 5, 8, 9, 11, 12. Pursuant to section 271.221 a transfer of rights granted under a solid waste permit "may not be made without obtaining permit reissuance." 25 Pa. Code § 271.221(a). The regulation specifies the content of an application for permit reissuance to effect a transfer of permit rights and, among other things, requires public notice of the proposed transfer. *See* 25 Pa. Code § 271.221(b).

[7] *See* Notice of Appeal, at ¶¶ 1, 2, 6, 10, 13.

A few days before the township's appeal was filed, DEP received a letter from the Permittee on January 9, 2004 requesting that the name of the permittee on the Permit be restored to WSI Sandy Run Landfill, Inc.[8] In other words, assuming the 11/5/03 Modification was valid the Permittee asked DEP to undo the modification effected by the 11/5/03 Modification and to restore the Permit to the condition existing prior to DEP's purported modification. DEP agreed to the Permittee's request and, on February 20, 2004, DEP issued a modification of the Permit which expressly undoes the 11/5/03 Modification and modifies the Permit to restore the name of the permittee to WSI Sandy Run Landfill, Inc. (the 2/20/04 Modification).[9]

The 2/20/04 Modification purports to rescind the 11/5/03 Modification and restore the Permit to the form in which it existed prior to the action challenged in this appeal. The township did not appeal the 2/20/04 Modification, and the time for any such appeal has long since passed. Moreover, the township has admitted that DEP's 2/20/04 Modification has effectively restored the parties to the status which existed prior to issuance of the 11/5/03 Modification.[10]

DISCUSSION

Presently before us is DEP's motion seeking dismissal of the appeal as moot or, alternatively, for lack of jurisdiction because the Notice of Appeal was untimely filed.[11] DEP first asserts that the appeal has been rendered moot by issuance of the 2/20/04 Modification, which completely undid the action taken in the 11/5/03 Modification and restored the *status quo ante*. DEP argues that the Board is unable to grant any meaningful practical relief to Appellant under the circumstances, that Appellant no longer has the necessary stake in the outcome, and consequently the appeal should be dismissed. *See In re Glancey*, 518 Pa. 276, 282 (1988) ("It is

[8] Krueger Affidavit, at ¶ 7 and exhibit C; Appellant's Motion Response, at ¶ 5.
[9] Krueger Affidavit, at ¶ 8 and exhibit D; Appellant's Motion Response, at ¶ 6.
[10] Appellant's Motion Response, at ¶ 6.
[11] The Board will grant a motion to dismiss where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *See, e.g., Burnside Township v. DEP*, 2002 EHB 700, 702; *Goetz v. DEP*, 2001 EHB 1127, 1131.

axiomatic that a court should not address itself to moot questions and instead should only concern itself with real controversies, except in certain exceptional circumstances.").

Relying on the content of the township's letter, DEP additionally contends that the township had actual notice of the 11/5/03 Modification by no later than December 2, 2003. DEP argues that the township's third-party appeal was not timely filed within thirty days of actual notice of the agency action being appealed, see 25 Pa. Code § 1021.52(a)(2)(ii); therefore the Board lacks jurisdiction over this appeal and it should be dismissed on this alternative ground.

In response, the township does not confront DEP's mootness argument except to refer to the objections stated in its notice of appeal and to assert, without explanation, that there are issues of material fact which preclude granting the motion. Contrary to this assertion, however, Appellant admitted in its response that the 2/20/04 Modification restored the parties to the condition which existed prior to the DEP action challenged in this appeal.

Appellant's opposition focuses on DEP's argument that the appeal was untimely filed. The township contends that its appeal of the 11/5/03 Modification was timely because it did not have actual notice of DEP's action until it received DEP's December 15, 2003 letter explaining the action the agency had taken. Since the appeal was filed on January 12, 2004, within thirty days of December 15, 2003, Appellant argues that it filed its appeal within thirty days of receiving actual notice of the 11/5/03 Modification.

We agree with DEP that this appeal has been rendered moot by the 2/20/04 Modification, and consequently we need not resolve the dispute over when the township received actual notice. The appropriate inquiry in determining whether a case is moot is whether the agency will be able to grant effective relief, or whether the litigant has been deprived of the necessary stake in the outcome. *Horsehead Resource Development Company, Inc. v. Department of Environmental*

Protection, 780 A.2d 856, 858 (Pa. Cmwlth. 2001), *appeal denied*, 568 Pa. 708 (2002); *see Bensalem Tp. Police Benevolent Association, Inc. v. Bensalem Tp.*, 777 A.2d 1174, 1178 (Pa. Cmwlth. 2001) ("where intervening changes in the factual matrix of a pending case occur which eliminate an actual controversy and make it impossible for the court to grant the requested relief, the case will be dismissed as moot").

The Board is unable to grant any effective relief to Appellant with respect to the purported permit modification that forms the subject of this appeal. Aside from a declaration by the Board that DEP's 11/5/03 Modification was unlawful, Appellant has already obtained precisely the relief to which it would be entitled had it prevailed in this appeal—*viz.*, rescission of the 11/5/03 Modification and restoration of the Permit to the condition existing prior to the challenged action. *See Borough of Edinboro v. DEP*, 2000 EHB 1167 (appeal rendered moot where DEP issued letter expressly withdrawing previously-issued letter that formed basis of appeal); *Commonwealth Environmental Systems, L.P. v. DEP*, 1996 EHB 340, 341 (appeal of an action affecting a solid waste permit becomes moot when DEP issues a subsequent modification superseding the prior appealed action); *Empire Sanitary Landfill, Inc. v. DEP*, 1991 EHB 66 (same); *see also Solebury Township v. DEP*, Dkt. No. 2002-232-K, 2004 Pa. Envirn. LEXIS 1 (EHB, Jan. 16, 2004) (appeal of section 401 water quality certification was rendered moot when DEP subsequently revoked the certification).

Rescission of the 11/5/03 Modification is the only legally cognizable interest Appellant seeks to advance in this appeal. Consequently, at this point Appellant no longer has the necessary stake in the outcome of this litigation; even if Appellant were successful in proving that the 11/5/03 Modification was legally invalid, such a determination would be a meaningless academic exercise. *See Kilmer v. DEP*, 1999 EHB 846, 849 (the "inability to do anything

meaningful beyond opining whether [DEP] made a mistake is the essence of the mootness doctrine"); *see also Silver Spring Township v. Department of Environmental Resources*, 368 A.2d 866 (Pa. Cmwlth. 1977) (appeals challenging temporary variance and plan approval which had expired were moot); *Brumage v. DEP*, 2002 EHB 496 (appeal of a pillar permit authorizing removal of certain coal dismissed as moot where coal removal had already taken place and appellants did not seek a supersedeas).

There are no facts material to the mootness question which are genuinely in dispute, Appellant having admitted that the 2/20/04 Modification was issued and was not appealed and, that the 2/20/04 Modification completely undid the DEP action challenged in this appeal. The township's reference to the objections stated in its Notice of Appeal offers no comfort because those objections merely cite the reasons Appellant believes the 11/5/03 Modification was unlawful and should be revoked. Finally, Appellant does not argue that any exceptions to the mootness doctrine apply here.[12]

Accordingly, we enter the following order.

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[12] Where certain exceptional circumstances are present, the Board will review a question that is otherwise moot. Exceptions to the general rule are made where the disputed conduct is of a recurring nature yet likely to repeatedly evade review, or where the case involves issues of great public interest. *See, e.g., Sierra Club v. Pennsylvania Public Utility Commission*, 702 A.2d 1131, 1134 (Pa. Cmwlth. 1997), *aff'd*, 557 Pa. 11 (1999); *Del-AWARE Unlimited, Inc. v. Department of Environmental Resources*, 551 A.2d 1117, 1120 (Pa. Cmwlth. 1988), *appeal denied* 525 Pa. 606 (1990).

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

BROAD TOP TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2004-012-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WSI SANDY RUN LANDFILL, INC., Permittee	:	

AND NOW, this 21st day of June 2004, it is hereby ordered that the Department's Motion to Dismiss is granted, the appeal at EHB Dkt. No. 2003-012-C is hereby dismissed as moot, and the docket shall be marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Member

THOMAS W. RENWAND
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Administrative Law Judge
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BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

Dated: June 21, 2004

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

LOUIS F. HANKIN	:	
	:	
v.	:	**EHB Docket No. 2003-186-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND PLUMSTEAD TOWNSHIP, PERMITTEE	:	**Issued: July 9, 2004**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

Plumstead Township's Motion For Summary Judgment in this Part II/WQM Permit case, in which the Department joined, is denied. The matters highlighted by the Appellant, the proximity of the permitted facility to residential or recreational land, the adequacy of odor control devices and stormwater management, are not subject to administrative finality in this particular Part II/WQM Permit case. However, the scope of the stormwater issue in this appeal may be constricted by other unappealed actions relating to stormwater management at the Facility. The exact constriction in scope, if any, will have to be defined later. Moreover, there are disputed issues of fact which need resolution through trial.

Introduction

This case presents, once again, the interplay of the doctrine of administrative finality with the three-part process for planning and permitting a sewage treatment facility under Act 537 and the Clean Streams Law. This appeal involves the third and final step of the three-step process. Louis F. Hankin (Hankin or Appellant) appeals the Department's granting of a Part II water quality management permit (Part II/WQM Permit) to Plumstead Township for the construction of a sewage treatment facility (Facility) on property adjoining property owned by Hankin in Plumstead Township, Bucks County. Currently before the Board is the Motion of Plumstead Township, Permittee, for Partial Summary Judgment (Motion). The Department joins in the Plumstead Township Motion. The gist of Plumstead Township's Motion is that the subjects raised in the appeal already have been conclusively determined in the earlier planning and permitting stages of the project, from which no appeal was taken, and are, thus, administratively final at this third and final stage of the process.

Factual and Procedural Background.

The Part II/WQM Permit under appeal here is the product of the culmination of the usual three-stage planning and permitting process under Act 537 and the Clean Streams Law. In *Perkasie Borough Authority v. DEP,* 2002 EHB 764, we explained this three step process as follows:

> To describe the process mechanically, when a project, as here, involves the construction of a new sewage treatment plant three things have to happen. First, the new facility is presented as part of a Sewage Facilities Act Section 537 Plan. Second, the proponent of the facility applies for and secures a National Pollutant Discharge Elimination System (Part I/NPDES) permit under § 202 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§ 691.1- 691.1001 (Clean Streams Law or CSL), 35 P.S. §691.202. The focal point of the NPDES or Part I permit is that it establishes the location(s) of the discharge point(s) and sets the effluent limitations for the discharge into the receiving waters. Finally, in

> step three, the facility proponent applies for and secures a water quality management (WQM/Part II) permit, which authorizes construction and operation of the sewage facility pursuant to § 207 of the Clean Streams Law. 35 P.S. §691.207. The essence of the Part II permit is that it authorizes construction and operation of the proposed treatment [plant] pursuant to construction plans which are submitted for review by the Department.

Id., at 771-72.

The proposed Facility is intended to treat sewage from a planned subdivision known as Estates at Timberly Farms (Timberly Farms). The Plumstead Township Board of Supervisors granted final approval of the subdivision plans for Timberly Farms on September 17, 2002. The Department conditionally approved the Planning Module for Land Development for Timberly Farms revising the Plumstead Township Official Sewage Facilities Plan on October 19, 2001. Step one of the process was completed on March 26, 2003 when the Department granted final approval of the Planning Module. Hankin did not appeal either the conditional or final approval of the Planning Module by the Department. Step two was completed on February 26, 2003 when the Department issued the Part I Permit (also called an NPDES Permit) to Plumstead Township for the Facility. Hankin did not appeal this action by the Department. Step three of the process, which is the subject of this appeal, was completed on July 17, 2003 when the Department issued the Part II/WQM Permit which authorizes the construction and operation of the Facility. Hankin filed a Notice of Appeal (NOA) on August 15, 2003 challenging that action by the Department.

The NOA is straightforward. Paragraph 7 outlines Appellant's four objections in subparts designated as a – d, as follows:

a. The failure by Plumstead Township or the Department to perform an analysis of failing septic systems upon adjoining and nearby properties, including the on-lot sewage disposal system servicing Hankin's lot.

b. The proposed facility is located less than 250 feet from recreation lands.

c. The proposed facility does not include scrubbers, or any other odor mitigating components despite the proposed facility's close proximity to nearby residential and recreational uses.

d. There is no storm water management proposed in connection with the sewer facility and there has not been compliance with the NPDES Storm Water Requirements for the facility.

Plumstead Township's Motion argues that each of these grounds are covered by administrative finality at this stage of the process in that they have been dealt with and determined in the earlier two stages of the planning and permitting process. Either alternatively or concomitantly, Plumstead argues that there are no disputed facts regarding these matters and that it is entitled to judgment as a matter of law thereon. Appellant, of course, disagrees with both theories. We will proceed to discuss only objections b. through d. because Appellant has conceded in its Brief in Opposition to the Motion that subject a. "is a component of the Act 537 Plan amendment....As such, Appellant concedes that the failure of the Township to properly evaluate nearby private septic systems should have been the subject of an appeal from the Act 537 Plan amendment, rather than from the Part II Permit." Brief in Opposition to Joint Motion for Summary Judgment of Plumstead Township and Department of Environmental Protection at 3.[1]

Standard of Review

The Board's standard of review of a summary judgment motion is well established.

> Our standard for review of motions for summary judgment has been set forth many times before. We will only grant summary judgment when the record, which is defined as the pleadings, depositions, answers to

[1] In this day and age of tenacious litigation where too many hold the perception that any concession is impossible because it would show weakness or undermine a negotiating position, we appreciate and respect the candor by Appellant and his counsel in this regard. Actually, and perhaps paradoxically, a candid and honest concession like this one works to enhance and reinforce the reputation of the legal profession and the attorney involved in the eyes of courts. We will accomplish the consensual dismissal of NOA Paragraph 7.a. by separate Board Order.

> interrogatories, admissions, affidavits, and certain expert reports, show that there is no genuine issue of material fact *and* the moving party is entitled to judgment as a matter of law. *Holbert v. DEP*, 2000 EHB 796, 807-09 *citing County of Adams v. DEP*, 687 A.2d 1222, 1224 n. 4. (Pa. Cmwlth. 1997). *See* Pa. R.C.P. 1035.1. Also, when evaluating a motion for summary judgment, the Board views the record in a light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Holbert*, 2000 EHB at 808 (citations omitted).

Goetz v. DEP, 2003 EHB 16, 18-19 (emphasis in original); *Perkasie Borough Authority v. DEP,* 2002 EHB 764, 770, W*heelabrator Falls Inc. v. DEP*, 2002 EHB 514, 520.

Discussion

We have outlined the overarching approach we take to the application of administrative finality in context of the three-step Act 537/Clean Streams Law continuum, as follows:

> Our review of these cases tells us that there are no categorical or mechanically applicable answers to the question of what particulars are or are not included in any of the respective steps along the continuum and, thus, what is administratively final upon completion of a certain step. The result of each of the cases cited is heavily dependent upon its procedural posture, its specific factual and legal background and the nature of the arguments made by the parties. This case, likewise, will not involve, nor could it, our setting forth a universally applicable prescription of the subjects which are included in and excluded from each of the three steps of the process. We will, however, attempt to parse out, in the context of the factual, legal and procedural background of this case, in light of the arguments made by the parties and with the guidance of the cases cited before, which matters are included in this Part II permit appeal and which are not.

Perkasie Borough, 2002 EHB at 773; *See also Greenfield Good Neighbors Group,* 2003 EHB 555, 571 (*citing Perkasie Borough*). Accordingly, we will examine each objection in the NOA "in the context of the factual, legal and procedural background of this case, in light of the arguments made by the parties and with the guidance of [precedent.]" *Perkasie Borough, 2002 EHB at 773.*

Facility Located Less Than 250 Feet From Recreational Land

Appellant contends that the proposed sewage treatment facility will be located less than 250 feet from recreational lands, which is contrary to the recommendation in the Department's Domestic Wastewater Facilities Manual (DWFM). Plumstead Township says this issue was completely and conclusively determined in the earlier stages of the process. We will refer to this issue in shorthand as the "proximity" issue or question in the appropriate context. Plumstead Township points out that the Department considered the distance of the Facility from recreational lands during the Act 537 Plan Approval process. Plumstead Township also argues that there is no genuine issue of material fact in that the undisputed facts show that the Department complied with applicable requirements regarding the location of the Facility in relation to recreational lands.

We reject both of Plumstead Township's arguments. While the Department may very well have considered the question of the location of the sewage treatment facility in relation to occupied dwellings or recreational areas as part of an earlier step in the process, it cannot be conclusively said now, on the basis of this record, that this question was not or should not also be considered as part of the Part II/WQM Permit review process. Section 207 of the Cleans Streams Law establishes the requirement that the Department approve and permit "[a]ll plans, designs, and relevant data ... for the erection, construction, and location of any treatment works or intercepting sewers by a person or municipality[.]" 35 P.S. §691.207(a). Additionally, the DWFM, the Department's guidance document regarding the design and construction of domestic wastewater treatment facilities, identifies plant location in relation to an occupied dwelling or recreational area as a consideration in design and construction of treatment facilities. Domestic Wastewater Facilities Manual, Doc. ID # 362-0300-001, at 36 (1997).

Further, the record shows that the Department actually did consider the proximity question in connection with the Part II/WQM Permit process. Mr. Dudley, the Department's Southeast Region's Chief of the Municipal Planning and Finance Section, who was responsible for the review of this PartII/WQM Permit, states that, "[t]he Department considered [the] distance [of the Facility] from recreation lands through Departmental staff review of the plans submitted with the applications for the Part II Permit and for the Act 537 Plan update." Dudley Affidavit, ¶3. Since the Department affirmatively did consider the proximity question in the Part II/WQM Permit review process, it is certainly open to review in this appeal of the Part II/WQM Permit.

That the Department did in fact consider the proximity issue in this permit review process is an important point. As Judge Labuskes correctly and insightfully pointed out in the recent case of *Wheatland Tube Company v. DEP*, Docket No. 2003-221-L (Opinion issued March 16, 2004), in addressing administrative finality in the context of a permitting action, "[t]he key question is not whether [certain proposed changes to a permit] were approved, it is whether they were considered and acted upon. *Id.*, *slip op.* at 7 (emphasis added). Here, it is clear that the Department considered the proximity question in its consideration and action on this Part II/WQM Permit.

Plumstead Township's alternative argument is easily dispatched. Our review of the record shows that the facts relating to this matter are not undisputed and triable issue or issues are evident. The DWFM states in relevant part:

> Plant Location – In general, to avoid local objections, a wastewater treatment plant site should be as far as practicable from any present built-up area or any area which will probably be built up within a reasonable future period. It is recommended that the treatment plant be at least 250 feet from an occupied dwelling or recreational area. The direction of prevailing winds should be considered when selecting the plant site. If a

> critical location must be used, special consideration must be given to the design and type of plant provided. Space should be provided to allow for plant expansion in the event of a population expansion or requirement for additional treatment. Compatibility of treatment process with the present and planned future land use, including noise, potential odors, air quality, and anticipated sludge processing and disposal techniques should be considered.
>
> Where a site must be used which is critical with respect to these items, appropriate measures should be taken to minimize adverse impacts.
>
> Local soil characteristics, geology, hydrology, and topography should be considered.

DWFM at 36. To pare the matter to its core, Plumstead Township and the Department say that Part II/WQM Permit is in accord with these provisions while Appellant says it is not. The factual disputes run along these lines. Appellant contends that his property and another neighboring property both are recreational areas and are located less than 250 feet from the Facility. Plumstead Township argues that private property is not considered "recreational areas" by the Department, thus the sewage treatment facility is at least 250 feet from an occupied dwelling or recreational area. Plumstead Township also argues that the Part II/WQM Permit contains provisions to mitigate adverse impacts associated with locating a sewage treatment facility in proximity to occupied dwellings or recreational areas. Thus, no summary judgment can be granted and we will have to have a trial on all of these disputed questions.

We also question whether compliance or non-compliance with the provisions of the DWFM would be dispositive for either side. The DWFM is a "manual," not a regulation. Thus, it seems to us that, at least in this case, the issue of the Facility's proximity to residences and recreational land is open for trial and that the answer to the question of whether this Part II/WQM Permit is appropriate with regard to those questions is not inextricably tied to the language of the DWFM.

Lack Of Scrubbers Or Other Odor Mitigating Components

The odor control question is not precluded by administrative finality in this particular case. It is obvious that the Department considered this issue in this permit review process and, indeed, took specific action thereon. The Part II/WQM Permit itself has a specific condition addressing potential malodors. Permit Condition Relating to Sewerage (General) No. 6, states that '[i]f, at any time, the sewage facilities covered by this permit create a public nuisance, including but not limited to, causing malodors...DEP may require the permittee to adopt appropriate remedial measures to abate the nuisance[.]" Not surprisingly, Mr. Dudley, testified to the fact that the Department did consider odor control with respect to this permit review. He says in his affidavit, "[t]he Department considered potential odors through the Part II Permit's Condition Relating to Sewerage No. 6[.]" Dudley Affidavit, ¶ 3. Thus, this question is squarely within the purview of this appeal and is not precluded by administrative finality. *See Wheatland Tube Company, supra.*

The proximity question is related to the Appellant's objection regarding the Part II/WQM Permit's lack of provision for scrubbers, or any other odor mitigating components. Appellant contends that because of the proximity of the Facility to occupied dwellings and/or recreational lands, the Part II/WQM Permit should have included specific requirements for scrubbers or other odor mitigating components. Into this question then come all the disputed and unresolved factual questions we just talked about in the previous section in connection with the proximity question.

Even aside from the strict confines of the proximity question as defined by the DWFM, the question for trial here is whether Condition Relating to Sewerage (General) No. 6 is sufficient in light of all the circumstances. Accordingly, summary judgment is not appropriate and this objection will remain for trial.

Stormwater Management

Appellant contends the Department abused its discretion by issuing the Part II/WQM Permit without stormwater management plans. Plumstead Township argues it is entitled to summary judgment on this issue because all necessary permits and approvals regarding stormwater management have been obtained and are not part of the water quality management permitting process.

This question is not within the coverage of administrative finality in this case. Mr. Dudley, again, testified that stromwater management was an issue addressed by the Department in this Part II/WQM Permitting process. The outcome of the Department's consideration of the issue is reflected in two conditions of the Part II/WQM Permit. First, Permit Condition Relating to Erosion and Sediment Control (General) No. 6 provides: "The permittee shall comply with the Individual or General NPDES Permit for Stormwater Discharges Associated with Construction Activities issued by DEP or the County Conservation District." Second, Permit Condition Relating to Sewerage (Operation and Maintenance) No. 17 provides: "Stormwater from roofs, foundation drains, basement drains or other sources shall not be admitted directly to the sanitary sewers."

The stormwater management issue, then, is clearly within the ambit of this Part II/WQM Permit and this appeal. *See Wheatland Tube Company, supra.* As in the case of the Part II/WQM Permit conditions relating to odor control, the question for trial will be whether the two aforementioned conditions are adequate under all the facts and circumstances of this case. Appellant says they are not and the Department and Plumstead Township say they are. Trial will be needed to resolve that question.

While the categorical issue of stormwater management is not completely precluded here by administrative finality, the question remains; what are the proper confines to our investigation of that categorical issue in this trial? We see from the record that stormwater management for the Facility has been the subject of prior permitting actions, which were not appealed and, thus, may not be collaterally challenged in this appeal. *Winegardner v. DEP,* 2002 EHB 790, 793. The Bucks County Conservation District issued NPDES Permit No. PAR10D704 to the developer of Timberly Farms on March 14, 2003 for the discharge of stormwater during construction activities.[2] Wynn Affidavit, ¶14 and Exhibit P-5c. Additionally, Mr. Wynn, the Plumstead Township engineer, testifies in his affidavit that the stormwater management plan approved by the Plumstead Township Board of Supervisors as part of the subdivision process includes stormwater management for all improved areas in Timberly Farms, including the sewer treatment facility. Wynn Affidavit, ¶¶10 & 11.

So while the "stormwater issue" is in the case, these other unappealed actions relating to stormwater management at the Facility may constrict the scope of our review of stromwater matters in this appeal. The precise scope of our consideration of this issue in this case is not yet explicitly definable. It depends on the exact nature and particulars of the previous actions relating to stormwater. We cannot attempt to fix the precise definition of the scope of the stormwater issue in this appeal now.

As an alternative request for relief, Plumstead Township's Motion requests this objection be dismissed because all applicable stormwater requirements have been met. As noted above, the extent of the Department's evaluation of stormwater management issues in this Part II/WQM permitting process is not clear. Similarly, it is not clear that Plumstead Township, as the moving

[2] The Department delegated authority to implement the NPDES general permit program for stormwater discharge to the Bucks County Conservation District. Dudley Affidavit, ¶ 3.

party, is entitled to judgment as a matter of law on this issue. Thus, no summary judgment will be granted.

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LOUIS F. HANKIN	:	
	:	
v.	:	**EHB Docket No. 2003-186-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND PLUMSTEAD TOWNSHIP, PERMITTEE	:	

ORDER

AND NOW this 9th day of July, 2004 it is hereby **ORDERED THAT,** the Motion of Permittee, Plumstead Township, for Summary Judgment, in which the Department joined, is **DENIED**

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

DATED: July 9, 2004

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

STEPHANIE ADAM, et al.	:	
	:	
v.	:	**EHB Docket No. 2002-189-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, STATE CONSERVATION COMMISSION, BERKS COUNTY CONSERVATION DISTRICT and QUAIL RIDGE FARM, Permittee	:	**Issued: July 12, 2004**

OPINION AND ORDER ON APPELLANTS' APPLICATION FOR FEES AND EXPENSES

By George J. Miller, Administrative Law Judge

Synopsis:

The Board dismisses an application for an award of counsel fees and expenses under the Costs Act because the Board's adjudication in the Appellants' favor was the result of the Appellants' appeal and not the result of any adjudication initiated by a state agency. The claim that fees might be awarded for creating a common benefit is also denied because no statute authorizes an award under these circumstances.

OPINION

The Appellants' Application for Fees and Expenses seeks an award for costs and attorneys fees against the Appellees in the total amount of $58,323.00, following the Board's adjudication in their favor.[1] That adjudication set aside the approval by the Berks County Conservation District (District) of the nutrient management plan submitted by Quail Ridge Farm (Quail Ridge) on the ground that the nutrient management plan and the

[1] EHB Docket No. 2002-189-MG (Adjudication issued May 12, 2004).

regulations of the State Conservation Commission (Commission) improperly failed to consider phosphorus levels resulting from the application of manure. The fee application was based on the provisions of the Costs Act.[2] This Act authorizes the imposition of fees and costs on an agency of the Commonwealth in favor of a prevailing party in an adversary adjudication initiated by a Commonwealth Agency.

Both the Commission and Quail Ridge seek dismissal of the petition. The Commission says it did not initiate an adversary adjudication against the Appellants and Quail Ridge properly says it is not a Commonwealth Agency.

We are compelled by applicable law to dismiss the Application for Fees and Expenses. Counsel fees and expenses may be awarded only where authorized by statute or by an established exception to this general rule.[3] The Costs Act does not authorize such an award because Section 3(a) of the Costs Act[4] permits such a recovery only when the state agency has initiated an adversary adjudication against the party seeking the award. It provides as follows:

> Except as otherwise provided or prohibited by law, a Commonwealth agency that initiates an adversary adjudication shall award to a prevailing party, other than the Commonwealth, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer finds that the position of the agency, as a party to the proceeding, was substantially justified or that special circumstances made an award unjust.

Neither the Berks County Conservation District nor the Commission initiated any action or adjudication against the Appellants. The Commission issued its regulations and the District approved the nutrient management plan submitted by Quail Ridge without any

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[2] Act of December 13, 1982, P.L. 1127, *as amended*, 71 P.S. §§ 2031-2035.
[3] *Snyder v. Snyder*, 620 A.2d 1133, 1138 (Pa. 1993).
[4] 71 P.S. § 2033(a).

reference to the Appellants. It was the Appellants who initiated the appeal that resulted in the Board's adjudication in favor of the Appellants.

The Costs Act was never intended to apply to this situation. As pointed out by Chief Judge Krancer in *Solebury Township v. DEP*,[5] the Costs Act applies only to some prosecutorial or enforcement action by a state agency directed at the party seeking recovery of costs and fees. That opinion reasoned in part:

> The Costs Act's definition of 'adversary adjudication' must be informed by the statement of the Legislature that its purpose in passing the Costs Act was to 'deter administrative agencies...from initiating substantially unwarranted actions against individuals [and other entities.]' 71 P.S. § 2032(c)(2). We recently observed that the 'Costs Act is designed to deter unwarranted actions by a government agency against an individual, business or organization'. *Raymond Proffitt Foundation v. DEP*, 1999 EHB 124, 131. We have also noted that,
>
> > The phrase 'initiates an adversary adjudication' [] means[s] that the Costs Act is applicable only in those cases in which an agency takes, upon its own initiative, some action against a party. This construction is consistent with section 2031(c)(2) of the Act which provides that it is the intent of the General Assembly to 'deter the administrative agencies of this Commonwealth from initiating substantially unwarranted actions against individuals, partnerships, corporations, associations and other nonpublic entities.' 71 P.S. § 2031(c)(2). It is apparent that the idea was to create a deterrent to abusive exercise of prosecutorial power.
>
> *Martin v. DER,* 1986 EHB 101, 104. Clearly, then, an adversarial adjudication is a <u>prosecutorial or enforcement action initiated by an agency</u>.[6]

Indeed, the Appellants in their Reply to the Commission's Response to the Application concede that they cannot make a reasonable argument that any appellee initiated an adjudication against the Appellants. They argue, however, that fees and

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[5] EHB Docket No. 2002-323-K (Opinion issued March 4, 2004).

[6] Slip. op. at 5 (*emphasis in original*).

expenses may be awarded as an exception to the general rule because the adjudication created a "common benefit." The Appellants argue that the result of requiring the Commission to adopt regulations that track the intent of the General Assembly to control phosphorus by nutrient management plans will benefit all persons who would be harmed by phosphorus pollution of surface or ground water from field applications of manure at Quail Ridge Farm stretching from Perry Township to users of the waters of Lake Ontelaunee and through to the Chesapeake Bay.

We find no basis for an award of fees under these circumstances. Section 2503 of the Judicial Code[7] sets forth a number of exceptions to the general rule for recovery of counsel fees, but does not authorize recovery of fees as taxable costs for a common benefit. In each of the cases relied upon by the Appellants as authority for an award of counsel fees for establishing a common benefit or fund, the courts denied the request.[8]

Because we have no statutory authority to award fees and costs in this case, we enter the following:

---

[7] 42 Pa C.S. § 2503

[8] The Appellants' Reply relies on *Jones v. Muir*, 515 A.2d 855 (Pa. 1986)(denial of fees for creating a fund) and *Warehime v. ARWCO Corp.*, 679 A.2d 1317 (Pa. Super. 1996)(denying fees for creating alleged common benefit). Their Reply also cites *Snyder v. Snyder*, 620 A.2d 1133, 1138 (Pa. 1993). This decision denied recovery for a judge's claim for necessary costs of judicial administration. It is material only because it sets forth the general rule that counsel fees may not be awarded except when authorized by statute or an established exception.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STEPHANIE ADAM, et al.	:	
	:	
v.	:	**EHB Docket No. 2002-189-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
STATE CONSERVATION COMMISSION,	:	
BERKS COUNTY CONSERVATION	:	
DISTRICT and QUAIL RIDGE FARM,	:	
Permittee	:	

ORDER

AND NOW, this 12th day of July, 2004, the Appellants' Application for Fees and Expenses is hereby **DENIED**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: July 12, 2004

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

FRANK PLESCHA AND THERMAL FLUX CORP.	:	
v.	:	**EHB Docket No. 2003-139-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 12, 2004**

OPINION AND ORDER ON DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

By: Michael L. Krancer, Chief Judge and Chairman

Synopsis:

The Department's Motion for Summary Judgment is denied in part and granted in part. The Motion is denied to the extent it seeks judgment with respect to its interpretation of various aspects of the residual waste regulations. The interpretations offered are not as a matter of law reasonable and do not appear to be supported by the plain language of the residual waste regulations. Furthermore, resolution of the application of particular aspects of the regulations must rest upon the development of a trial record. However, since Appellant did not contest the Department's request for summary judgment on the question of whether Mr. Plescha is the owner/operator within the meaning of the Solid Waste Management Act of the facility in question, summary judgment is granted on that subject.

I. Introduction

This case involves questions under the Commonwealth's residual waste program

and, particularly, whether a permit is required for certain operations conducted by Thermal Flux. The Department insists that a permit is required for the operations involved while the Appellants insist that no permit is required. Before us today is the Department of Environmental Protection's (DEP or Department) Motion For Summary Judgment (Motion) which focuses on the interpretation of three specific provisions of the residual waste regulations as applied to the facility in question. The Motion also seeks summary judgment on the Department's allegation that Mr. Plescha is an owner/operator of the facility in question.

II. Factual and Procedural Background

The Thermal Flux facility (Site or Facility), which is the focal point of our case, is located in Philadelphia. There does not seem to be much dispute about the essential facts of Thermal Flux's operations. The crux of the dispute, as we will see, is the legal implications, if any, of those operations.

The facility engages in the collection and recycling of forklift tires.[1] According to Thermal Flux, a forklift tire consists of two components: (1) a steel hub or center which is encapsulated in; (2) solid rubber. For a fee paid to Thermal Flux, it collects forklift tires which have been used from various industrial material handling equipment dealers and leasing companies. At the Facility, Thermal Flux "deconstructs" the wheels by heating the metal band core so that the bond between the rubber and the steel gives way. The commercial prize for Thermal Flux is the steel core itself. The steel core has two potential paths at or from Thermal Flux. First, the core may be re-encapsulated with rubber by an off-site separate re-manufacturer and marketed as re-formulated forklift

[1] Our recitation of Thermal Flux's operations is taken from Thermal Flux's Memorandum of Law In Opposition to the Department's Motion For Summary Judgment.

tires. These remanufactured forklift tires are marketed by Thermal Flux as its "Lazarus" line of products. Second, the cores can be sold as a high-value scrap metal.

The rubber portion of the wheel is fed through two machines. First is a shredder which cuts the tires into 4-inch pieces. Then there is a "rasper" machine which further reduces the size of the rubber pieces. The resultant shredded rubber is referred to as "crumb rubber" and it can be made to different sizes at the Facility. The crumb rubber is then sent off-site to a company which paints it and from there it is sent to a company known as "Coastal Shapes" in Virginia Beach, Virginia. The crumb rubber is marketed by Coastal Shapes and Thermal Flux as a joint venture, profit- and cost-sharing arrangement with Thermal Shapes.

It appears that Thermal Flux has been in operation since approximately 1996. However, it has had the rubber-shredding machines only since the Spring of 2002.

On May 21, 2003 the Department issued an Administrative Order to Thermal Flux and its alleged owner/operator, Mr. Frank Plescha.[2] It is this Administrative Order from which Thermal Flux and Plescha appeal and that appeal forms the basis of our jurisdiction in this case. The Order recites that neither Thermal Flux nor Plescha has ever received a permit under the Solid Waste Management Act, 35 P.S. §§ 6018.101 *et seq.* (SWMA), to conduct the activities at the Facility. The Order recites that Thermal Flux's and Plescha's unpermitted activities on the Site constitute violations of the SWMA as well as a nuisance thereunder and, further, the activities constitute a danger of pollution to the Commonwealth's waters under the Clean Streams Law. The Order requires Thermal Flux and Plescha to immediately cease accepting and processing waste tires at

[2] The Administrative Order is attached to the Department's Motion For Summary Judgment as Exhibit "A".

the Site without a permit; to remove all waste tires from the Site within 30 days; and submit to the Department records relating to the ordered disposal.

III. Legal Background Regarding The Pending Motion For Summary Judgment

Thermal Flux's and Plescha's main defense to the Order is that its activities do not need a permit and the Administrative Order, therefore, is issued without authority and is of no legal force or effect. Thermal Flux/Plescha Notice of Appeal (NOA). Basically, Thermal Flux argues that it is not within the permit requirement either because it is not dealing with waste, or because it is within an exception to the permit requirements applicable to waste facilities. Among other things, the NOA asserts three specific regulatory grounds of defense which will be our points of discussion in analyzing the Department's Motion because it seeks now a dispositive determination that, as a matter of law, these provisions do not apply to Thermal Flux's operations.

A. 25 Pa. Code § 287.101(b)(7)

First, Appellants claim that their facility is exempt from permitting under 25 Pa. Code § 287.101(b)(7). Section 287.101 is the lead-off section of Subchapter C of the Residual Waste Regulations. That Subchapter is entitled "General Requirements For Permits and Permit Applications". Section 287.101 is entitled "General Requirements For Permit". Not surprisingly, this section sets forth the general proposition that a person may not own or operate a residual waste disposal or processing facility unless the person or municipality has first applied for and obtained a permit for the activity from the Department under this article. 25 Pa. Code § 287.101(a). However, the Section 287.101(a) general affirmative requirement for a permit is qualified by the proviso that this is "except as provided in subsection (b)." *Id.* 25 Pa. Code § 287.101(b) provides that

a permit is not required "for one of the following":... (7) [p]rocessing that results in the beneficial use of scrap metal." 25 Pa. Code § 287.101(b)(7). Thermal Flux argues that it falls within this exception to the permit requirement because it is doing "processing that results in the beneficial use of scrap metal."

B. Sizing, Shaping or Sorting/25 Pa. Code § 287.1 Definition of "Waste"

Thermal Flux argues that the tires which arrive at its facility are not waste because of the exception to the definition of waste applicable to materials being recycled and involving the "sizing, shaping or sorting" of the materials appurtenant to recycling. The specific regulatory provision involved is 25 Pa. Code § 287.1 (definition of "waste") and, in relevant part, reads as follows:

> (ii) Materials that are not waste when recycled include materials when they can be shown to be recycled by being:
>
> > (A) Used or reused as ingredients in an industrial process to make a product or employed in a particular function or application as an effective substitute for a commercial product, provided the materials are not being reclaimed. This includes materials from the slaughter and preparation of animals that are used as raw materials in the production or manufacture of products. Steel slag is not waste if used onsite as a waste processing liming agent in acid neutralization or onsite in place of aggregate. Sizing, shaping or sorting of the material will not be considered processing for the purpose of this subclause of the definition.

25 Pa. Code § 287.1. Thermal Flux says that its action with respect to the tires constitutes sizing, shaping or sorting thereof in connection with recycling, and accordingly, the material is not waste. If not waste, then no permit requirement is triggered.

C. Source Separated Recyclable Material/25 Pa. Code § 287.1 (Definition of "Processing and "Transfer Facility")

Both the definition of "processing" and the definition of "transfer facility" have the following identical exception:

> The term does not include a collection center that is only for source separated recyclable materials, including clear glass, colored glass, aluminum, steel and bimetallic cans, high-grade office paper, newsprint, corrugated paper and plastics.

25 Pa. Code § 101 (definitions of "processing" and "transfer facility").[3] Thermal Flux argues that its operation is a collection center that is only for source separated recyclable material. Thus, its operation is exempted from being considered either "processing" or as a "transfer facility." It follows from there, according to Thermal Flux, that no permit is required.

DEP's Motion For Summary Judgment seeks a dispositive declaration in its favor and against Thermal Flux and Plescha on the three separate residual waste regulations we have just outlined. As the Department describes it, Appellants' objections to the Administrative Order (except for the Department's allegation that Plescha is the "owner/operator" of the Facility) relate to the Department's conclusions of law in the Administrative Order, especially the overarching conclusion that the Facility needs a permit. The Department seeks summary judgment, then, on the propriety of the Department's interpretation of its regulations. The centerpiece of the Department's Motion is the Affidavit of William Pounds, Chief of the Department's Division of Municipal and Residual Waste, Bureau of Land Recycling and Waste Management. Mr.

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[3] As we noted about these definitions in *Tire Jockey Services*, 2002 EHB 9899, *vacated and remanded, Tire Jockey Service, Inc. v. DEP*, 836 Pa. Cmwlth. 1026 (2003), "[w]e have not misstated the regulations, it is true that the regulations except from the definition of "processing", which is a *verb*, "a collection center...", which is a noun.

Pounds sets forth what he testifies is the Department's "interpretation" of various aspects of the Department's residual waste regulatory program, including aspects of the particular regulations at issue in this Motion. In short, he testifies that the materials at issue here are considered "waste" under the residual waste regulations and that none of the subject exceptions to the permitting requirement apply to these facts.

IV. Summary Judgment Standard

The standard we apply in reviewing summary judgment motions is set forth in Pa. R.C.P. 1035.1-1035.5 which are incorporated into our rules pursuant to 25 Pa. Code § 1021.94 and the numerous summary judgment cases the Board has decided. See e.g., *Hankin v. DEP*, Docket No. 2003-186-K (Opinion issued July 9, 2004), *slip op.* at 4-5. In short, there must be no genuine issues of material fact or defense which could be established, and the moving party is entitled to judgment as a matter of law. When deciding a motion for summary judgment, we look at the record in the light most favorable to the non-moving party.[4] *Eighty-Four Mining Company v. DEP*, Docket Nos. 2003-181-K (Opinion issued March 17, 2004), *slip op.* at 5, *citing Allegro Oil & Gas, Inc. v. DEP,* 1998 EHB 1162, 1164.

V. Discussion

A. Owner/Operator Issue

Before we turn to the regulatory interpretation questions, we note that Appellants did not contest in their reply papers the Department's allegation that Mr. Plescha is the "owner/operator" of the Facility as that term is defined by the Solid Waste Management Act. Thus, we will grant the Department summary judgment as to that issue.

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[4] The "record" includes the following to the extent they exist and are submitted: pleadings, depositions and answers to interrogatories, admissions and affidavits and expert reports. Pa. R. Civ. P. 1035.1

B. Exception To Permit Requirement For Processing That Results In The Beneficial Use Of Scrap Metal, 25 Pa. Code § 287.101(b)(7)

The heart of the Department's argument that this exception to the permit requirement does not apply is the affidavit of William Pounds. Mr. Pounds testifies on the Department's "interpretation" of this exception. He states as follows:

> As 25 Pa. Code Section 287.101(b)(7) is interpreted by the Department, the exception set forth therein applies only when scrap metal is being processed in a manner that directly results in its beneficial use, but does not apply to the processing of waste material that includes scrap metal, in order to extract the scrap metal from that material, even if the extracted scrap metal is ultimately used beneficially.
>
> ...
>
> Even assuming that the scrap metal extracted from the material handling tires at Thermal Flux is ultimately used beneficially, that beneficial use is not a direct result of the processing that takes place at Thermal Flux, but rather directly results from processing that occurs elsewhere.

Pounds Affidavit (DEP Motion For Summary Judgment Exhibit D), ¶¶ 11, 16.

In Mr. Pounds's construct, the determinative factor is whether the beneficial reuse is the direct result of the operation at Thermal Flux. As we understand Mr. Pounds's testimony, this "direct result" concept is variegated and involves at least two or, perhaps, three related ideas. First, from a temporal and process standpoint, the scrap metal has to come about as the direct result of the physical operation Thermal Flux imposes upon the tires. There can be no intervening process or temporal steps. Second, there can be no other material involved but the scrap metal. This is what Mr. Pounds means when he says that the exception does not apply to "processing of waste material that includes scrap metal." Third, that the scrap metal must be beneficially reused at the Thermal Flux site, not from operations that occur on some other site.

To put the Department's conceptualizations into practice in this case, the Thermal Flux operation is disqualified from the Section 101.287(b)(1) exclusion because: (1) the material, *i.e.*, the forklift tires consist of both rubber and metal; (2) the scrap metal being salvaged at Thermal Flux is not being beneficially reused as a direct result of the processing that takes place at Thermal Flux's site, that is, the beneficial reuse directly results from processing that occurs elsewhere, off the Thermal Flux site; and possibly (3) there is a disqualifying intervening process or time between the operation done at Thermal Flux and the actual realization of scrap metal. The third disqualifier flows from the second.

As is apparent, Mr. Pounds's approach to the regulatory exception is a highly developed, complex and nuanced one. As the Department does not cite a single case which establishes or even lends credence to this construction of the Section 287.101(b)(7) exception we have to conclude that it is wholly internally devised at the Department. That in itself is, of course, not problematic, as long as the construct devised within the Department is a reasonable interpretation of the regulation in question. Under *DEP v. North American Refractories Company*, 791 A.2d 461 (Pa. Cmwlth. 2002), the Board is to grant deference to the Department's interpretation of its own regulations where its interpretation is reasonable. Our task for now is to see if the Department's interpretation of the Section 287.101(b)(7) exception is necessarily reasonable as a matter of law. We have no problem concluding for our current purposes that it is not and that the Department's Motion on this issue, therefore, must be rejected.

The words "directly" or "direct result" do not appear in the language of the Section 287.101(b)(7) exception. The regulation on its face provides that the exception

applies to "processing that results in the beneficial reuse of scrap metal." It does not say "processing that directly results or results directly in the beneficial reuse of scrap metal." Thus, the requirement of the Department that the beneficial reuse "directly result" from the activity at Thermal Flux is not supported by the plain language of the regulation. Whether "direct result" is viewed from either a temporal/process or from a location viewpoint, those requirements are not imposed by the plain language of the regulation.

Also, the "direct result" concept, to the extent it is based on the location of the reuse, is undermined by the recent Commonwealth Court case of *Tire Jockey Service, Inc. v. DEP*, 836 A.2d 1026 (Pa. Cmwlth. 2003). There, in interpreting the definition of "waste" in 25 Pa. Code § 287.1, the Court, in vacating our decision on the subject, rejected the notion that a material cannot qualify as being within the exception to the definition of waste solely on the basis that the reusable material was reused at some other site. The Commonwealth Court had this to say on the subject:

> Here, Tire Jockey does not "process" or "reclaim" its tires before the tires are used or reused. Tire Jockey merely sorts and shapes the tires, separating the serviceable from the non-serviceable tires and cutting the non-serviceable tires into pieces. Nevertheless, DEP maintains that the tires are still "waste" because Tire Jockey does not size, shape and sort the tires for its own use at the Fairless Hills Facility. We fail to see the relevance of the fact that Tire Jockey does not actually use or reuse the tires at its own site.
>
> ***
>
> Based on the foregoing, we conclude that, under subparagraph (ii), waste tires are no longer "waste" once it can be shown that the tires will be recycled by being used or reused as an ingredient in an industrial process to make a product or by being employed in a particular function or application as an effective substitute for a commercial product. This is the case despite the fact that another entity sizes, shapes and sorts the materials beforehand at another location. The EHB erred in concluding otherwise.

Id. at 1030 (emphasis added).[5]

The upshot of this is that the "direct result" requirement, whether viewed as a temporal/process requirement or a site/location requirement, or both, does not come from the plain language of the regulation. The Department obviously is not entitled to judgment as a matter of law on this subject.

The Department's other proviso, that the material being handled is excluded from the exception because the material being handled "includes scrap metal" as opposed to being scrap metal only, is likewise lacking in support in the plain language of Section 287.101(b)(7). There is nothing in the language which supports the notion that the processing necessarily excludes processing of materials which "include[] scrap metal" and includes only material that is solely scrap metal. The definition of "processing," which is a word included in the exception, indicates that the material involved in the "processing" for this exception does not have to be exclusively scrap metal. Processing is defined in relevant part as:

> A method or technology used for the purpose of reducing the volume or bulk of municipal or residual waste or a method or technology used to convert part or all of the waste materials for offsite reuse.

25 Pa. Code § 287.1(emphasis added). The focus here is on "residual waste" and "waste materials." These are universal and non-exclusive terms referring to the entire realm of residual waste, not particular and exclusive terms referring to singular, discreet and unitary categories thereof. When these universal and non-exclusive terms are used in the

[5] We also note in this regard that with respect to the (ii)(A) exception itself, the only demarcation the plain language of the regulation makes with respect to this on-site versus another location matter is with respect to the use of steel slag. It is only with respect to steel slag that the regulation specifically states that the use in recycling has to be "onsite". 25 Pa. Code § 287.101 (definition of "waste"). Clearly, the Environmental Quality Board knew how to impose a same-site or on-site requirement in connection with the recycling exception to the definition of "waste". It did so only with respect to steel slag.

context of this exclusion, it is unreasonable to conclude as a matter of law that the exception is activated only with respect to particular unitary categories of "residual waste." Yet, that is what the Department's interpretation does.

Imposing a "direct result" requirement as envisioned by the Department may be a good idea, from a policy point of view, to attach to the Section 287.101(b)(7) exception. In fact, the Department's Reply Brief adds yet another heretofore unannounced aspirational "requirement" to be associated with Section 287.101(b)(7). The Department says that the exception should be predicated on a finding by the Department that harm or threat to the health, safety or welfare of the people or environment of this Commonwealth will not result from the regulatory exception. Department Reply Brief pp. 2-3, 4. That, however, is not the point we deal with today. The point today is that not one hint of the Department's elaborate and detailed requirements, or of course the aspirational one just referred to, are imposed by the plain language of the regulation or by any fair reading thereof. The Environmental Quality Board or the Legislature, upon appropriate petition and process, could impose any of the Department's provisos outlined in Mr. Pounds's affidavit or the Department's aspirational requirement on the Section 287.101(b)(7) exception. The Department, however, cannot impose them by fiat in the guise of "interpreting" it.

C. Does the Operation at Thermal Flux Fall Within the Subparagraph (ii)(A) Exception To The Definition of "Waste" In The Residual Waste Regulations

The crux of the issue here is whether what happens to the tires at Thermal Flux can be characterized as "sorting, sizing or shaping" the material. The Department's point here is quite specific. Its position is that the use of the particular technology at Thermal

Flux, *i.e.*, high temperatures to break the bond between the rubber and the metal portions of the tires, is not sorting, shaping or sizing. The Department puts it succinctly this way in its brief:

> In *Tire Jockey*, [the] Commonwealth Court determined that the cutting up of the tires at the facility was sizing, shaping or sorting, and, therefore, not processing. However, the use of a technology that generates high temperatures to break the bond between the rubber and metal portions of the industrial tires at [Thermal Flux] is not, by any stretch of the imagination, sorting, shaping or sizing. Rather, it is processing, with the result that those industrial tires do not qualify for the subparagraph (A) exception.

Department Brief, p. 9-10.

The Department's position, which inextricably attaches the concept of sorting, shaping or sizing to a particular technology or methodology, finds no support that we can see in the language of the regulations. We agree with Thermal Flux that there is no requirement in the regulation itself that the sizing, shaping or sorting be accomplished by a "low-tech" (cutting) versus a higher "tech" (*via* application of heat) method. In fact, there is no stipulation in the regulations which relates in any way the sizing, shaping or sorting to any particular technology or methodology.

That the Department's position here cannot be said to be reasonable is evident in the very line it attempts to draw in this case. Sizing, sorting and shaping by cutting is fine, but by application of heat, it is not. Where is that line to be drawn? Where does the line between an allowed technology and a disallowed one fall? The Department cannot and does not cite any regulation that even talks about such a technology-based discrimination in this context. Nobody could know from looking at the regulations about any such demarcation because the regulations do not provide even a hint thereof.

Clearly, there is neither a qualifying nor a disqualifying technology or

methodology outlined in the regulations relating to sizing, shaping or sorting, and to maintain that there is one is unreasonable. So the "how it is done" (*i.e.*, the sizing, shaping or sorting) is not necessarily dispositive in all cases as the Department would have us hold. In this regard, the testimony of Mr. Pounds in *DEP v. Tire Jockey Services*, 2002 EHB 9899, *vacated and remanded, Tire Jockey Service, Inc. v. DEP*, 836 A.2d. 1026 (Pa. Cmwlth. 2003), which is recited at length in Thermal Flux's brief, is very instructive. The bottom line is that Mr. Pounds testified that a process of grinding nickel-cadmium batteries to extract small pieces of nickel and cadmium qualified as being included in the concept of "sizing, shaping, or sorting". Again, how it is done may have some relevance to the overall legal determination of whether we have sizing, shaping or sorting under the regulation, but the key is whether it is done. Moreover, as Mr. Pounds's testimony in *Tire Jockey* about nickel-cadmium batteries demonstrates, the particular facts of each such operation determine whether it is done, *i.e.*, whether we have "sorting, shaping or sizing."

Based on the above discussion, the Department is obviously not entitled to judgment as matter of law on this question. Moreover, we will need a trial to develop the facts of this case to answer the only question posed by the regulations: do we have sizing, shaping or sorting here.

D. Does the Operation at Thermal Flux Qualify The Materials Involved as "Source Separated Recyclable Materials" Under the Residual Waste Regulations?

DEP's point with respect to the "source separated recyclable materials" provision is that the in Board's *Tire Jockey* opinion we determined that the list of source separated recyclable material in the residual waste regulations is exclusive. *Tire Jockey*, 2002 EHB

at 1023-26. The list does not include tires, either car tires as in *Tire Jockey*, or forklift tires as in this case, and, therefore, the materials here cannot qualify as "source separated recyclable materials." DEP points out that this particular aspect of the Board's *Tire Jockey* opinion was not disturbed on appeal. Thermal Flux counters that the Commonwealth Court vacated the entirety of the Board's opinion in *Tire Jockey* and that, therefore, it should not be precedential here on this point. Also, Thermal Flux maintains that we got it wrong in *Tire Jockey* anyway. Thermal Flux says that the list of source separated recyclable materials is not exclusive.

It is true that although the Commonwealth Court did vacate our *Tire Jockey* opinion in its entirety, it did so without disapproval of our legal analysis of this provision of the residual waste regulations in that case. We also think that our analysis in *Tire Jockey* of the exclusivity issue, and even aside from the exclusivity question, whether automobile tires would be required to be included in the list of source separated recyclable materials was correct and potentially applicable here. The essence of our analysis there was that the Department's interpretation of the "source separated recyclable material" exception to be exclusive instead of open-ended is reasonable and therefore to be credited as under the principle of *DEP v. North American Refractories Company*, *supra*.

However, we will not grant summary judgment on this issue now. We are mindful that both our *Tire Jockey* opinion as well as the Commonwealth Court's *Tire Jockey* opinion are under consideration for review by the Pennsylvania Supreme Court. Whether the *Tire Jockey* case will be taken up by the Supreme Court, and if it is, whether this particular issue may be treated by the Supreme Court, we cannot predict. But, we

will not close an issue here and now which may be under advisement as we write by the Supreme Court and which may be under further advisement by the Commonwealth Court and/or the Board as a result of the Supreme Court's action.

IV. Conclusion

For the foregoing reasons, the Department's Motion For Summary Judgment will be denied as to the regulatory interpretation questions but granted with respect to its allegation that Mr. Plescha is the "owner/operator" of the Facility within the meaning of the Solid Waste Management Act. An appropriate Order consistent with this Opinion follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANK PLESCHA AND THERMAL FLUX CORP.	:	
	:	
v.	:	**EHB Docket No. 2003-139-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 12, 2004**

ORDER DENYING SUMMARY JUDGMENT IN PART AND GRANTING SUMMARY JUDGMENT IN PART

AND NOW this 12th day of July, 2004, upon consideration of the Department's Motion For Summary Judgment and the Appellants' reply thereto, it is hereby ordered that the Motion is **DENIED** with respect to the interpretation and application in this case of : (1) 25 Pa. Code § 287.101(b)(7); (2) the definition of "sizing, shaping or sorting" in the 25 Pa. Code § 287.1 definition of "waste"; and (3) the definition of "source separated recyclable materials" in 25 Pa. Code § 287.1 definitions of "processing" and "transfer facility." Summary judgment is **GRANTED** to the Department with respect to its allegation that Mr. Plescha is the "owner/operator" of the Facility within the meaning

of the Solid Waste Management Act.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Member

DATED: **July 12, 2004**

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SHIPPENSBURG TOWNSHIP P.L.A.N. (Protecting Land and Neighborhoods)	:	
v.	:	**EHB Docket No. 2004-099-L (Consolidated with 2004-100-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SHIPPENSBURG PROPERTIES, L.P. and PennDOT DISTRICT 8-0, Permittees	:	**Issued: July 14, 2004**

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

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

Synopsis:

The Board denies a motion for summary judgment that complains of procedural errors allegedly made during a permit application process where the movant fails to show that the errors compel the Board to remand the permits or take other action at this time.

OPINION

The Department of Environmental Protection (the "Department") issued Water Obstruction and Encroachment Permit No. E21-351 to Shippensburg Properties, L.P. authorizing the installation of certain encroachments in Burd Run in Shippensburg Township, Cumberland County in connection with the construction of a shopping center. The Department issued Water Obstruction and Encroachment Permit No. E21-356 to the Pennsylvania Department of Transportation ("PennDOT") authorizing alteration of an existing encroachment in connection

with the same project. Shippensburg Township P.L.A.N. ("PLAN") appealed from the issuance of those two permits. We consolidated the appeals.

Although these appeals are in their infancy, PLAN has moved for summary judgment.[1] It argues that the permits should be remanded immediately because the Department failed to comply with four procedural requirements in conducting its review of the permit applications. First, PLAN alleges that the Department requested public comments on the PennDOT application before the application was complete. The application was not complete because it did not contain copies of municipal floodplain management regulations and an engineer's certificate certifying compliance with 25 Pa. Code Chapter 106.[2] Secondly, the Department did not approve PennDOT's environmental assessment in writing. It approved it, just not on the assessment form itself and in writing. (PLAN adds that the form was not signed and certified by the applicant as required by the instructions on the application forms.) Third, Shippensburg Properties, not PennDOT, gave notice to the pertinent municipalities that an application had been submitted for the PennDOT permit. There is no dispute that the notice was given; PLAN's concern is that PennDOT and PennDOT alone was required to give the notice. Fourth, although the Department required Shippensburg Properties to supplement its initially incomplete application within sixty days, Shippensburg Properties failed to submit one required document until 67 days later. The Department is alleged to have erred by failing to require Shippensburg Properties to file a new application and application fee after the sixtieth day.

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[1] The Board resolves motions for summary judgment in accordance with the standards set forth in Pa.R.C.P. 1035.1. *See Hankin v. DEP*, EHB Docket No. 2003-186-K, slip op. at 4-5 (July 9, 2004).

[2] It is important to note that PLAN is *not* contending that it is entitled to summary judgment because of the lack of an engineer's certificate. Rather, at this point it only complains of the premature request for public comments. The lack of a certificate is mentioned as the reason why the comments were requested too early.

We will assume for purposes of argument that the Department committed the four procedural errors cited by PLAN. The fatal defect in PLAN's argument, and the reason that its motion must fail, is that it has neglected to address or even acknowledge the line of Board cases holding that procedural errors such as those at issue here will not result in the Board interfering with a permit unless the errors are shown to have some continuing relevance. *Kleissler v. DEP*, 2002 EHB 737, 750-51; *Stevens v. DEP*, 2002 EHB 249, 259; *O'Reilly v. DEP*, 2001 EHB 19, 51; *Hopewell Township v. DEP*, 1996 EHB 956, 975; *Kwalwasser v. DEP*, 1986 EHB 24, 55. As we explained in *O'Reilly*, "A party who would challenge a permit must show us that errors committed during the application process have some continuing relevance." 2001 EHB at 51. *See also Kleissler*, 2002 EHB at 751 ("[W]e remind the parties that it makes no sense to dwell inordinately on the permit application review process if any alleged defects are immaterial in the final analysis."); *Kwalwasser*, 1986 EHB at 55 (Board will not interfere with permit where errors are "purely procedural, easily correctable, and environmentally inconsequential"). In short, we will not remand a permit to correct harmless procedural errors.

PLAN, in effect, has asked us to teach the Department a lesson by remanding the permits and ordering it to sign all of the forms, seek more public comments, charge a new fee, and require PennDOT instead of Shippensburg Properties to notify the municipalities. Other than encouraging a greater regard for mandated procedures in the future, however, PLAN does not explain what practical purpose would be served by ordering such relief in these appeals. PLAN does not explain why the four errors that are alleged to have occurred are anything other than purely procedural, easily correctable, and environmentally inconsequential. It has failed to show or even allege that the errors have some continuing relevance in these appeals. It has not

demonstrated that any immediate, meaningful purpose would be served by remanding the permits to correct the errors.[3]

It would not be appropriate for us to fill in the missing prong in PLAN's analysis, but even if we were to speculate, it is not immediately obvious to us that the Department's errors would compel a remand. For example, the pertinent municipalities received notice that a permit application was in the works. Further, the public appears to have had ample opportunity to comment, and in fact, PLAN took advantage of that opportunity. The only practical result of a remand on the 60-day issue would be the payment of a new application fee. Finally, there is no dispute at this point that an environmental assessment was submitted and approved. Although the Board has significant authority to take action regarding permits once it determines that the Department has erred, *Warren Sand and Gravel Company v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975), we will not be quick to exercise that authority simply for the sake of making a point or to correct harmless or immaterial errors. PLAN is entitled to pursue the issues raised in its motion as these cases progress further, but it is not entitled to the award of any particular relief at this stage as a matter of law.

Accordingly, we issue the order that follows.

[3]PLAN did note that further proceedings after a remand might lead to a resolution of the other issues identified in this appeal. That is not a legitimate reason to vacate the permits. Further, there is nothing to prevent the parties from engaging in settlement discussions during the course of these appeals, if that is what PLAN has in mind.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SHIPPENSBURG TOWNSHIP P.L.A.N. (Protecting Land and Neighborhoods)	:	
v.	:	**EHB Docket No. 2004-099-L (Consolidated with 2004-100-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SHIPPENSBURG PROPERTIES, L.P. and PennDOT DISTRICT 8-0, Permittees	:	

ORDER

AND NOW, this 14th day of July, 2004, it is hereby ordered that the Appellant's Motion for Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: July 14, 2004

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

REV. DR. W. BRAXTON COOLEY, SR., CHARLES CHIVIS, DIANE WHITE, WENDI J. TAYLOR, EVELYN WARFIELD, & FRANK DIVONZO	:	
v.	:	**EHB Docket No. 2003-246-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION & THE HARRISBURG AUTHORITY, Permittee	:	**Issued: July 16, 2004**

OPINION AND ORDER DENYING JOINT MOTION TO DISMISS OF THE PERMITTEE AND THE DEPARTMENT

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

The Department's and the Permittee's Joint Motion to Dismiss raising four preliminary legal challenges to the viability of the appeal is denied. None of the preliminary challenges can be resolved without the development of some factual record. First, the question whether Appellants have standing to pursue this appeal cannot be determined at this stage of the litigation. Second, it cannot be determined now whether the appeal may be precluded by administrative finality or mootness. The administrative finality/mootness question is tied to the question whether a subsequently issued air quality Plan Approval, which was not appealed, completely "supersedes" or "supplants" the earlier issued Plan Approval covering the same Facility which was appealed. There is ambiguity about that question and it cannot be answered at this stage of the proceedings.

Third, the Appellants do sufficiently allege that intentional racial discrimination is behind the Plan Approval issued and, thus, that claim survives a motion to dismiss. Fourth, and finally, whether the Department should have incorporated a specific emission standard for PM-2.5, even though there is no specific affirmative requirement under the Air Pollution Control Act or its regulations that it do so, is a question of fact which cannot be resolved at this stage of the proceedings.

I. Factual Background

This appeal involves the Harrisburg Materials, Energy, Recycling and Resource Facility (HMERRF or Facility), a waste-to-energy facility located in Harrisburg. On September 10, 2003, the Department of Environmental Protection (Department or DEP) issued an Air Pollution Control Act Plan Approval (Original Plan Approval) to the Harrisburg Authority (Authority) covering the Facility. The Original Plan Approval was designated Plan Approval No. 22-05007A. Appellants appealed that action to the Board on October 10, 2003. The Appellants are a host of individuals living in Harrisburg or Middletown. At that time Appellants were *pro se*, that is, they were acting on their own without counsel.

The Notice of Appeal (NOA) specified two grounds for appeal as follows:

> (1) The Department issued the permit without making any investigation regarding possible violations of the Civil Rights Act of 1964, Title VI, Section 601, 42 U.S.C. § 2000d as it is required to do. The Department is the recipient of federal financial resources from the [EPA] which requires the Department to prevent racial discrimination.
>
> (2) In granting the permit, the Department failed to give any consideration to the emission of PM 2.5 and the amount of PM 2.5 in the ambient air.

Notice of Appeal at ¶ 3.

From October, 2003 until April, 2004 the appeal lay dormant as Appellants were attempting to secure *pro bono* counsel to represent them. On December 9, 2003, the Board entered its First Order Extending Pre-Trial Deadlines (First Order) by which fact discovery was extended to March 19, 2004 and expert discovery until April 16, 2004. Appellants did not undertake discovery during either the original Pre-Hearing Order No. 1 time period or the period of the First Order. They were still focusing on obtaining *pro bono* counsel. According to the periodic status reports that are filed pursuant to Board Order, no side has undertaken any discovery. On April 5, 2004, counsel entered an appearance on behalf of Appellants.

In the meantime while Appellants were not represented by counsel, the Authority applied for, and the Department issued, a second Plan Approval (New Plan Approval) to the Authority covering the Facility. The Authority filed the application on October 27, 2003 and the Department issued the New Plan Approval on February 5, 2004. The New Plan Approval was designated as No. 22-05007B. The essence of the New Plan Approval was to cover the reconfiguration of the equipment at the Facility from two 400-tons-per-day (TPD) combustors to three 266-TPD combustors. This New Plan Approval was not appealed by Appellants. This fact will become quite important to our discussion in this Opinion on this Motion to Dismiss the NOA.

Almost immediately after obtaining counsel, Appellants filed a request for supersedeas on April 13, 2004. The Authority and the Department filed a Joint Motion to Dismiss the request for supersedeas on April 16, 2004. A conference call among the Board and the parties regarding the supersedeas request and the motion to dismiss it was held on April 22, 2004. On the conference call, the Authority and the Department

expressed the desire to engage in pre-emptive motion to dismiss practice which they said would raise issues at the outset which struck to the heart of the viability of the pending appeal. Part of the rationale for this request was the notion that it would serve judicial and the parties' economy to have those foundational legal issues tested before the parties and the Board were put to the task of having this litigation progress any further. If the Authority and the Department were successful on any of the grounds they intended to assert, the appeal would be dispatched before putting the parties to the task of discovery and further expenditure of time and resources on this litigation. As a result of that conference call, the Board issued an Order dated April 22, 2004 holding the supersedeas in abeyance pending the filing by the Authority and the Department of a joint motion to dismiss the NOA and disposition thereof.

Before us today is the Authority's and the Department's Joint Motion to Dismiss (Motion) which is the product of the April 22, 2004 conference call and Order. The Motion raises four foundational issues which the Authority and the Department argue are fatal *ab initio* to the appeal and require dismissal of the appeal now. First, the Motion argues that the appeal, being of the Original Plan Approval, is moot, and that the New Plan Approval is insulated from any attack by the doctrine of administrative finality. Second, the Motion posits that Appellants have no standing. Third, it argues that Appellants' appeal should be dismissed because they are required to show intentional discrimination which they cannot do. Fourth, and finally, the Motion argues that the Department was not required to have placed a condition in the permit regarding PM-2.5 because such a requirement did not exist at the time either Plan Approval was issued.

II. Standard of Review

As we recently stated in *Neville Chemical Company v. DEP*, 2003 DEP 530, "[t]he Board evaluates motions to dismiss in the light most favorable to the non-moving party. A motion to dismiss may only be granted where there are clearly no material factual disputes and the moving party is entitled to judgment as a matter of law." *Id.* at 531 (citations omitted). In reviewing this Motion we have considered the various exhibits which the parties have placed before us in the Motion and the Appellants' reply to the Motion.

The Authority and the Department remind us that discovery has expired in this case. That may be a suggestion that the standard of Pa. R.C.P. 1035.2(2) and 1035.3(a)(2) should apply here, which, in the summary judgment context, requires that a non-moving party show that there is evidence in the record which, if credited, would establish the facts essential to the cause of action. We will not apply that requirement here. That requirement applies in a summary judgment context where discovery is completed and the matter is *sub judice* upon a record consisting of some or all of the following: pleadings, depositions, answers to interrogatories, admissions, affidavits and expert reports. Pa. R.C.P. 1035.1, 1035.2(2). While the discovery deadlines of Pre-Hearing Order No. 1 and the First Extension thereof have expired, and we have considered materials submitted to us as exhibits to the Motion and the reply papers, discovery has not been completed. Indeed, discovery has not yet even commenced. Moreover, the Authority and the Department sought this Motion upon the basis that there were certain legal theories that needed to be tested before the parties undertook any

discovery or further work on this litigation. Thus, we will apply the usual motion to dismiss standard here. That standard involves no record having yet been made.

III. Discussion

A. Standing

We will deny the motion to dismiss as to standing. A motion to dismiss made prior to any discovery even having been taken is obviously too early to dispositively determine the question of standing. We have held before that there is not even a requirement that a Notice of Appeal contain allegations as to standing. *Beaver Falls Municipal Authority v. DEP,* 2000 EHB 1026, 1028. The proceedings are far too young procedurally to even discuss the parties' competing views of standing, let alone make any determinations about them.

B. Administrative Finality/Mootness

There does not seem to be much dispute as to the facts about the history and circumstances of the issuance of the Original Plan Approval and then the application for and issuance of the New Plan Approval. The significant question is the legal interpretation to be accorded those events with respect to the relationship, if any, between the Original Plan Approval and the New Plan Approval. The Authority and the Department contend that the New Plan Approval completely supersedes the old one, rendering the old one moot and the failure to appeal the new one fatal to Appellants' case because of administrative finality.

The Authority's and the Department's argument here on both the mootness and administrative finality issues is premised entirely on the assertion that the New Plan Approval completely and totally supersedes in all respects the Original Plan Approval.

The Authority and the Department repeat over and over again in their motion papers that the New Plan Approval "supplants" or "supersedes" the Original Plan Approval. However, repetition of an assertion does not make it true. Noticeable, partially because of the repetition of the assertion, is the absence each time of the citation to any authority, either in the case law, the Air Pollution Control Act,[1] or its regulations which supports the proposition offered either as a matter of law, or from Appellants' allegations.

It seems to us that their interpretation that the New Plan Approval "supplants" or "supersedes" the original Plan Approval is not required as a matter of law or the alleged facts and, furthermore, it is not the only interpretation possible. Thus, the request that the case be dismissed on these grounds cannot be granted at this stage.

We approached a question of the nature we face today in *Drummond v. DEP*, 2002 EHB 413. In *Drummond* we were faced with an appeal of an original permit, the issuance in the meantime of an amended permit, and the failure of Appellant to appeal the amended permit. *Id.* at 414. First, we today, as we did in *Drummond*, reject the notion that an appeal of an original permit automatically "covers" any subsequent amendment or new permit covering the same subject matter. *Id.* at 426. We also acknowledge here today, as we did in *Drummond*, that the New Plan Approval is administratively final and there having been no appeal of the New Plan Approval, the New Plan Approval, to the extent it effectuated changes from the original one, is beyond the reach of Appellant's pending appeal. *Id.* Those observations, however, neither in *Drummond* nor here end the analysis. As we said in *Drummond*:

> However, the finality and unappealability of the Amended Permit does not operate here to smother the entirety of Drummond's challenges

[1] Act of January 8, 1960, P.L. 2119 (1959), *as amended*, 35 P.S. §§ 4001-4106.

of the Original Permit. We have held that a permit condition that has remained in continuous effect cannot be attacked in a permit modification if it was not challenged in the original permit. *Tri-State River Products, Inc. v. DEP*, 1997 EHB 1061; *Empire Sanitary Landfill, Inc. v. DEP*, 1996 EHB 345. By the same token, in this case, a permit condition or provision associated with the Original Permit which remains in continuous effect not being changed by the Amended Permit, or part of the review process for the Original Permit which was not revisited for the Amended Permit, *is* proper subject matter for this appeal of the Original Permit. The problem here is that in many instances, the record is not yet clear on exactly what conditions or provisions, or part or parts of the review process associated with the Original Permit, do remain in continuous effect now in light of the Amended Permit. We sort out what we can on this now and leave the rest for trial.

We start with the proposition that the finality of the Amended Permit bars Drummond from challenging obvious changes effectuated by the Amended Permit such as the location of the loadout facility and the two added Special Conditions regarding loadout flow and passby flow. However, beyond that, it is not clear on this record what particular other matters may be in the same category. For example, even though the Amended Permit addresses E & S controls it is not clear to us nor does MC Resource explain why or how this issue is administratively final. Thus, triable issues remain as to precisely what aspects of the Original Permit are still intact and what aspects of the Department's review process as to the Original Permit are still pertinent.

For much the same reason that the finality of the Amended Permit does not operate to defeat the entirety of Drummond's appeal, neither does the doctrine of mootness. We disagree with MC Resource that *Valley Forge Chapter of Trout Unlimited*, 1997 EHB 1160, cited by MC Resource in support of its argument on mootness, calls for complete dismissal of Drummond's appeal. In that case the appellant challenged the Department's reissuance of an NPDES permit claiming that the permit failed to require the Permittee to dechlorinate the effluent from its treatment plant as required by the law. *Valley Forge Chapter of Trout Unlimited*, 1997 EHB at 1161. Recognizing its error, the Department issued an amended permit with the dechlorination requirement and explicitly revoked the erroneous part of the original permit. The Board granted the Permittee's unopposed motion to dismiss for mootness. *Id.* at 1162-63. Drummond's NOA in this case, however, alleges general deficiencies with the process of granting the Original Permit and the conclusion that the Department reached regarding the impacts this project would have on the environment. Unlike the specific permit amendment in *Valley Forge Chapter of Trout Unlimited* that fixed the specific issue raised in the notice of appeal, here the NOA is much broader and alleges

> more systemic and generic deficiencies. Therefore, the Permit Amendment does not moot Drummond's appeal in full.

Id. at 426-28.

Here, Appellants are not contesting any aspect of the technical mechanical reconfiguration of the equipment of the Facility which is the *raison d'etre* of the New Plan Approval. Instead, they are alleging that the Original Plan Approval decision was in some respect tainted by intentional discrimination. That infirmity, if there is one, could be a continuing aspect of a Plan Approval which is an amended or a revised one and, thus, subject to relief if warranted. We cannot conclude now, as the Authority and the Department would have us do, that that challenge to the Original Plan Approval is necessarily, as a matter of law, in any and all respects smothered by the act of issuing the New Plan Approval or by the New Plan Approval itself. As in *Drummond*, it is not yet clear on the record, nor would one expect it to be clear at a motion to dismiss stage, what life, if any, the Original Plan Approval may continue to have in light of the New Plan Approval. The bottom line is that we cannot conclude now that the issuance of the New Plan Approval automatically cuts off Appellants' appeal by operation of the mootness doctrine and administrative finality.

In a sense we may have here the mirror image of our recent cases of *Wheatland Tube Company v. DEP*, Docket No. 2003-221-L (Opinion issued March 16, 2004) and *Hankin v. DEP*, Docket No. 2003-186-K (Opinion issued July 9, 2003). In those cases we addressed whether elements of a permit were subject to administrative finality because the same or similar permit conditions or issues had been addressed in prior unappealed Department actions. The essence of the holdings in those cases was that if the subjects challenged in the appealed action had been considered and acted upon with

respect to the permit or action being appealed, then those subjects are not administratively final. Here, we do not know what subjects were and were not considered anew and acted upon in the New Plan Approval. Appellants could at least argue that the appeal of the Original Plan Approval is extant and applicable to the extent that matters, subjects or terms were simply lifted from the Original Plan Approval and grafted into the New Plan Approval without renewed consideration and that, accordingly, the New Plan Approval does not make the Original Plan Approval completely legally extinct.

The law does not require the conclusion that the Original Plan Approval is a complete nullity with no relationship at all to the New Plan Approval. The Authority and the Department point to no case law, nor any provision of the Air Pollution Control Act or the air regulations which compel the conclusion that a subsequent Plan Approval necessarily supersedes and negates an earlier one. This, then, is different from the situation the Board faced in *Stewart & Conti Development Co., Inc. v. DEP*, Docket No. 2002-059-L (Opinion issued January 12, 2004) which the Authority and the Department rely on heavily. That case was an appeal of an Act 537 Plan which called for the use of a package plant for Stewart & Conti's development. In the midst of the appeal, that Plan was changed to provide for the use of holding tanks for their subdivision. Obviously, the new Plan totally pre-empted the old one as one mode of sewage treatment for the development was substituted for another different mode, the two modes being mutually exclusive. This led the Board to note that, "[t]here is no question here that the new plan supplanted the old plan. This is not a case where, say, a later revision deals with a different area of the Township than the earlier plan revision. Had the later revision left

planning for the Stewart & Conti development unchanged, this would have been a different case." *Id., slip op.* at 3 n. 2. Indeed, Stewart & Conti did not even contest the fact that the new Plan superseded the old one. Here, it is not so clear either as a matter of law or as a matter of fact that the New Plan Approval supplants the Original Plan Approval. Also, of course, unlike in *Stewart & Conti*, the Appellants in this case allege that the New Plan Approval does not completely supplant the Original Plan Approval.

We do not see that the language of the New Plan Approval provides that it supplants completely or supersedes the Original Plan Approval. As we pointed out in our earlier quote from the *Drummond* case, a determination of administrative finality in *Valley Forge Chapter of Trout Unlimited v. DEP*, 1997 EHB 1160, rested significantly on the fact that the second permit in that case revoked the erroneous part of the earlier permit. *Id.* at 1162-63. We do not have that in this case. True, there does not appear to be a reference in the New Plan Approval stating that it is an amendment to the Original Plan Approval or that the Original Plan Approval continues in some respect. All of this serves to highlight that the situation is ambiguous and needs to be fleshed out. We do not grant motions to dismiss where that is the case.

Various other circumstances which have been pointed out to us also render the relationship between the New and the Original Plan Approval unclear at this point in the proceedings. There is nothing in any of the surrounding correspondence that we have seen that requires the conclusion that the New Plan Approval supersedes the Original Plan Approval. The Authority and the Department make much of the language in the cover letter transmitted the Original Plan Approval, which provides:

> The approval is specific to the combustion units and ancillary equipment in the Harrisburg Authority's application. A change in the number of

> units would require a new application from the [A]uthority and a new authorization from the Department.

Joint Motion, Ex. B. However, this language is not dispositive on the subject for several reasons. First, a DEP cover letter does not in and of itself establish the law on a particular point. Second, the language is not linked to any reference to the Air Pollution Control Act, or the regulations promulgated thereunder, which establish that this language is making the point for which the Authority and the Department cite it in the context of this Motion. Third, the language could mean simply that any new equipment configuration would be considered as a "major modification" as opposed to a "minor modification" under the Air Pollution Control Act and its regulations. Specifically, 25 Pa. Code § 127.14(a)(9) provides, in essence, that no plan approval is required for a physical change in equipment configuration when the Department has determined that the physical change is of "minor significance." The language cited by the Authority and the Department from the transmittal letter for the Original Plan Approval could be a reference to this provision and not a reference at all to whether a new Plan Approval would have the legal effect of superseding the original one.

We also note that the Original Plan Approval is Plan Approval No. 22-05007A and the New Plan Approval is Plan Approval No. 22-05007B. The same number with only a different letter designation could mean that the New Plan Approval is a continuation of the Original Plan Approval, not that it supersedes the Original Plan Approval. On the other hand, it could mean just that; it does supersede the Original Plan Approval. Still, on another hand, that difference in designation from "A" to "B" could mean nothing. Facts will have to be developed on that ambiguity.

The Authority's technical consultant, the Department, and even counsel for the

Authority have variously and at different times referred to the New Plan Approval process as an "amendment" or a "revision" process. For example, in an October 27, 2003 letter from the Authority's consultants to the Department submitting the application covering permitting of the new configuration, the consultant states that it is enclosing "an application to amend Plan Approval 22-05007A" and that this is an "application to amend (Revision 3.0)...." Appellants' Memorandum Ex. C.1. The Department, likewise, in an undated document entitled "Summary of the Proposed Air Plan Approval for the Harrisburg Materials Energy Recycling and Recovery Facility," which offers the Department's description and characterizations of the Authority's October 27, 2003 submission, states that the Authority submitted "an application to amend" the Original Plan Approval. Appellants' Memorandum Ex. C.1. The Department's Press Release, dated February 5, 2004, announcing the Department's granting of the New Plan Approval states that the Department had issued the Original Plan Approval in September, 2003 and that "the Authority then submitted an application in October amending the design..." Authority Memorandum Ex. C. Finally, counsel for the Authority, in a letter dated February 6, 2004 to one of the Appellants, transmitting to her a copy of the DEP press release just mentioned, refers to it as announcing the "approval of the amended Air Quality Plan Approval." Joint Memorandum, Ex. C.

Thus, the Authority's consultant, the Department, and counsel for the Authority have described the New Plan Approval in terms consistent with it being an amendment or even a revision to the Original Plan Approval. Clearly, the matter cannot be resolved at the motion to dismiss stage along the lines the Authority and the Department now put forward in their motion papers.

C. The Racial Discrimination Issue/Section 601 & 602 Of Title VI of the Civil Rights Act of 1964

We start our analysis of this question by identifying the ground on which we are situated for this discussion. We identify our setting for this particular case, and this particular Motion, because the setting directs and informs our discussion and the outcome of our deliberations on this Motion. First, there have been numerous cases from the United States Supreme Court, Courts of Appeals, and District Courts discussing Sections 601 and 602 of Title VI of the Civil Rights Act of 1964 in the environmental justice context.[2] It is evident from those cases that a Law Review article could be written on this subject, and undoubtedly many have been. That is not what we are here to do today. Second, we are deciding a Motion to Dismiss. We have already outlined the standard of review that we, or any court, applies to a motion to dismiss. In short, there must be no potential that the Appellants' claim can be valid as a matter of law and all inferences must be drawn in Appellants' favor. Third, the Authority and the Department themselves seem to agree that if intentional racial discrimination can be shown to be behind the Department's permitting action here, that permitting action is infirm. That is an important point to stress. The Authority and the Department state that Section 601 of Title VI "requires Appellants to prove intentional discrimination by the Department in the issuance of the New Plan Approval..." Joint Memorandum of Law at 19. They then turn

[2] *Alexander v. Sandoval*, 532 U.S. 275 (2001)(rejecting application of Section 601 of Title VI beyond intentional discrimination); *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 274 F.3d 771 (3rd Cir. 2001)(regulations adopted pursuant to Section 602 of Title VI proscribing disparate impact discrimination do not create rights enforceable under section 1983), *cert. denied*, 536 U.S. 939 (2002); *South Camden Citizens In Action v. New Jersey Department of Environmental Protection*, 254 F. Supp. 2d 486 (D.N.J. 2003)(motion to dismiss intentional discrimination case denied because the Court could not say beyond doubt that there is no set of facts alleged that, if proved, would entitle plaintiffs to relief); *Chester Residents v. Seif*, 944 F. Supp. 413 (E.D. Pa. 1996)(Section 601 of Title VI claim requires allegation of discriminatory intent and no private cause of action exists to enforce regulations adopted pursuant to Section 602 of Title VI), *rev'd, Chester Residents Concerned For Quality Living v. Seif*, 132 F.3d 925 (3rd Cir. 1997), *vacated*, 524 U.S. 974 (1998).

to their key point in supporting the right to dismissal of the Appellants' case: Appellants cannot sustain that burden. *Id.* Then, paragraphs 92-105 of the Joint Motion set forth factual allegations, the sum and substance of which are that the facts show no intentional discrimination in this case.

From this background, it is not difficult to see that we cannot dismiss Appellants' case now. While the Authority and the Department could, perhaps, end up being absolutely correct in their allegations, *i.e.*, there was no intentional discrimination here which would justify relief to Appellants, such a determination is, by its nature, dependent upon the facts to be developed through discovery and, possibly, trial. As the Court correctly pointed out in this same situation in *South Camden v. NJDEP*, 254 F. Supp. 2d 486 (D.N.J. 2003), a case relied upon by the Authority and DEP, "it is inappropriate at this stage of these proceedings to argue the merits of the case, as the NJDEP Defendants have done in their moving papers." *Id.* at 499. The Authority and the Department have done here what the NJDEP Defendants did in *South Camden*: they have argued the merits of the case on a motion to dismiss. While that may or may not be inappropriate, as characterized by the *South Camden* court, it is certainly inapposite for the purpose of a motion to dismiss.

It is important for us to note, on the other side of the coin, and for our purposes going forward, that we see Appellants as saying that no cause of action in their favor lies absent a showing of intentional discrimination. While there is some discussion of "discriminatory effects" in Appellants' supersedeas papers and their response papers on this Motion, they seem to realize that *Alexander v. Sandoval*, 532 U.S. 275 (2001),

stands in the way of their winning the day on a claim of discriminatory effects—unless, of course, intentional discrimination lies behind those effects.

The important inquiry for the purposes of this Motion to Dismiss is whether the Appellants have alleged that the process employed, decisions made or action taken by the Department included intentional discrimination, not whether the Appellants will or will not successfully prove their allegations. That is the inescapable essence of a motion to dismiss in this context. The former is the question the motion to dismiss, by definition, raises, not the latter. The latter question can be resolved only upon further development of the record.

We think that Appellants do allege intentional discrimination and, thus, they survive a preemptory motion to dismiss. Their NOA, which was drafted and submitted before they obtained counsel, states that:

> (1) The Department issued the permit without making any investigation regarding possible violations of the Civil Rights Act of 1964, Title VI, Section 601, 42 U.S.C. §2000d as it is required to do. The Department is the recipient of federal financial resources from the [EPA] which requires the Department to prevent racial discrimination.

Notice of Appeal, at ¶ 3. The allegation that the Department issued the permit without making any investigation regarding the Civil Rights Act can be taken, and we do so take it for the purposes of a motion to dismiss, as an allegation that the Department's failure to perform the investigation was intentional and that intentional racial discrimination motivated the declination to perform any investigation. In the Appellants' Memorandum of Law opposing the Joint Motion, they say, "the fact that DEP did not conduct a civil rights investigation, even after being alerted to the need by the appeal of [the Original Plan Approval], could suggest DEP was intentionally discriminating." Appellants' Memorandum at 12.

The Authority and the Department do not concede that no investigation was done and, of course, disagree vehemently with any suggestion that intentional discrimination in any form had any role whatsoever in the permitting decision or the process associated therewith. However, these are issues that are for discovery and determination in later proceedings in this case and which cannot be determined on a motion to dismiss.

The Authority and the Department cite the recent *South Camden v. NJDEP* case which we have discussed already. In that case, though, upon its review of the allegations of intentional discrimination in the Complaint, the Court concluded that the defendants' motion to dismiss would have to be denied because the Court could not say "beyond doubt" that there is no set of facts alleged by plaintiffs in the complaint, which, if proven, would entitle them to relief. Joint Memorandum at 23-24 *citing South Camden*, 254 F. Supp. 2d at 499. We find ourselves in the same spot here today as did Judge Orlofsky in *South Camden.* While the allegation in the *South Camden* pleadings were surely more copious on the subject, reading Appellants' papers here, we cannot say that, beyond doubt, there is no set of facts alleged by Appellants which, if proven, would entitle them to relief.

D. PM-2.5

Both the Original and New Plan Approvals contain an emission limitation for PM_{10}, but not for PM-2.5. The PM_{10} covers particles up to 10 microns in diameter while PM-2.5 covers particles up to 2.5 microns in diameter. The crux of Appellants' complaint is that there should be a PM-2.5 emission limitation. The Authority and the Department counter that there are no extant requirements or regulations that would require an emission limitation for PM-2.5. They say that although EPA is in the process

of supplementing the existing specific limitations for PM_{10} with an anticipated new standard for PM-2.5, that proposal for the tighter standards "[has] been tied up in litigation until recently." Joint Memorandum at 26. In other words, the new stricter requirement is not here yet. For that reason, the Authority and the Department conclude that the Appellants' claim that there should be an emission limitation for PM-2.5 is faulty as a matter of law.

The Authority's and the Department's position is easily dispatched, at least at a motion to dismiss stage. That there is no absolute requirement that a certain parameter be regulated in a permit does not mean that to do so would be *per se* unlawful. We are actually quite surprised that the Department would join in an argument to this effect. We would think that many permit conditions which the Department imposes on an everyday basis are not absolutely required by law to be imposed. We had thought that the Department's view on that subject was as long as a permit condition is not prohibited by law and it is reasonable under the circumstances, it is lawful to impose it. Indeed, that is what we would think the Department would tell us that its authority to impose conditions in permits is all about.

This approach is specifically provided for in the air regulations. Section 127.12b of the regulations entitled "Plan approval terms and conditions" provides as follows:

> (b) At a minimum, each plan approval shall incorporate by reference the emission and performance standards and other requirements of the act, the Clean Air Act or the regulations adopted under the act or the Clean Air Act.

25 Pa. Code § 127.12b(b)(emphasis added). Thus, it is but a minimum requirement that extant standards be incorporated into permits. That does not mean that other standards

are, by definition, and as a matter of law, prohibited to be incorporated into permits by condition.

Thus, the question is not whether a PM-2.5 emission limit is specifically required, but, instead, the question is whether under all the facts and circumstances of this case and this permit, there should have been a PM-2.5 emission limitation. The answer to that question will have to await trial on all the issues which pertain to that question.

To the extent that the Authority and the Department are arguing that this challenge is precluded by administrative finality, we cannot conclusively so hold now for the reasons we have already discussed on that topic earlier in this opinion. We simply need more of a record in order to approach that potential question.

IV. Conclusion

Based on the foregoing analysis, we deny the Motion in its entirety and the parties will need to advance to the discovery stage. An appropriate Order consistent with this Opinion follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

REV. DR. W. BRAXTON COOLEY, SR., CHARLES CHIVIS, DIANE WHITE, WENDI J. TAYLOR, EVELYN WARFIELD, & FRANK DIVONZO	:	
v.	:	**EHB Docket No. 2003-246-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION & THE HARRISBURG AUTHORITY, Permittee	:	**Issued: July 16, 2004**

ORDER

AND NOW this 16th day of July, 2004, upon consideration of the Joint Motion of the Authority and the Department to Dismiss and the Appellants' response thereto, the Motion is **DENIED.** It is further **ORDERED** that the Appellants' motion to file a sur-reply brief is denied as moot. It is further **ORDERED** that counsel for Appellants, the Authority and the Department shall meet and confer on the terms of a mutually acceptable Case Management Order which shall govern discovery and possible summary judgment practice and they shall submit a Joint Proposed Case Management Order to the Board for its approval and entry by no later than **Monday, August 2, 2003.**

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

DATED: July 16, 2004

Service list on following page.

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

EARTHMOVERS UNLIMITED, INC.	:	
	:	
v.	:	**EHB Docket No. 2003-108-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 16, 2004**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

An appeal of the Department's disapproval of the Appellant to act as a subcontractor on a tire remediation project is found to be moot where the tire pile in question has been removed and where the Department has abandoned the policy under which the Appellant was found to be ineligible to participate in such projects.

OPINION

This appeal involves the Department of Environmental Protection's (Department) disapproval of Earthmovers Unlimited, Inc. (Earthmovers) as a subcontractor on a waste tire remediation project that the Department funded in Antis Township, Blair County. The Department approved an application for a waste tire remediation grant submitted by Antis Township and the township solicited requests for proposals. Earthmovers bid on the project. The

Department informed Antis Township that it would not approve Earthmovers as a subcontractor based on alleged outstanding violations of the Solid Waste Management Act. Antis Township ultimately rejected Earthmover's bid and awarded the contract to another company. The tires on the site have since been removed.

Earthmovers appealed, challenging the Department's determination that it was not eligible to enter into a contract with Antis Township to perform the waste tire remediation project based on alleged violations of the Solid Waste Management Act.

The procedural history of this case is as follows: On June 5, 2003, the Department filed a motion to dismiss, to which Earthmovers responded on July 7, 2003. The motion was denied in an opinion and order issued on July 31, 2003. *Earthmovers Unlimited, Inc. v. DEP*, 2003 EHB 521. On August 8, 2003, the Department moved for reconsideration. The motion was denied in an opinion and order issued on August 27, 2003. *Earthmovers Unlimited, Inc. v. DEP*, 2003 EHB 577.

On February 4, 2004, the Department filed a motion for summary judgment. The Board originally granted the motion for summary judgment based on Earthmover's failure to file a timely response. *Earthmovers Unlimited, Inc. v. DEP*, EHB Docket No. 2003-108-R (Opinion and Order on Motion for Summary Judgment issued March 30, 2004). However, Earthmovers filed a petition for reconsideration, which the Board granted in an opinion and order of April 28, 2004. *Earthmovers Unlimited, Inc. v. DEP*, EHB Docket No. 2003-108-R (Opinion and Order on Petition for Reconsideration issued April 28, 2004). We now address the merits of the Department's motion for summary judgment.

Summary judgment may be granted where the record shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Pa.R.C.P.

1035.2(2); *Frank Plescha and Thermal Flux Corp. v. DEP*, EHB Docket No. 2003-139-K (Opinion and Order on Motion for Summary Judgment issued July 12, 2004), *slip op.* at 7; *Holbert v. DEP*, 2002 EHB 796, 807-09, *citing County of Adams v. DEP*, 687 A.2d 1222, n. 4 (Pa. Cmwlth. 1997). When evaluating a motion for summary judgment, the Board views it in the light most favorable to the non-moving party. *Eighty-Four Mining Company v. DEP*, EHB Docket No. 2003-181-K (Opinion issued March 17, 2004), *slip op.* at 5; *Goetz v. DEP*, 2003 EHB 16.

The Department advances several arguments in support of its motion for summary judgment. Because we agree with the Department's contention that this matter is moot, we need not address the other grounds advocated by the Department in its motion.

In determining whether a case is moot, the appropriate inquiry is whether the litigant has been deprived of the necessary stake in the outcome or whether the agency will be able to grant effective relief. *Horsehead Resource Development Co., Inc. v. DEP*, 780 A.2d 856, 858 (Pa. Cmwlth. 2001); *Al Hamilton Contracting Co. v. DER*, 494 A.2d 516, 518 (Pa. Cmwlth. 1985); *Tinicum Twp. v. DEP*, 2003 EHB 493, 496. An exception exists to the mootness doctrine where the Department's conduct is capable of repetition yet likely to evade review, where issues of great public importance are involved, or where a party will suffer a detriment without a decision. *Sierra Club v. PUC*, 702 A.2d 1131, 1134 (Pa. Cmwlth. 1997), *aff'd*, 557 Pa. 11 (1999).

We find that this matter is moot since there is no effective relief the Board can grant to Earthmovers. The tire pile on which Earthmovers wished to bid for cleanup has been removed. Thus, even if the Board were to find in favor of Earthmovers, there is no longer a project on which to bid. Nor may the Board award monetary damages to Earthmovers for loss of the contract.

Further, the Department has abandoned the policy that led to Earthmovers being found ineligible for the project. The Department's disapproval of Earthmovers as being eligible to bid on the project was based, according to the Department's motion, on an informal, unwritten policy that it had at the time that persons with outstanding environmental violations were not eligible to subcontract on waste tire remediation projects funded under the Waste Tire Remediation Act. (Department's Motion, Exhibit 11, para. 7) Based on the Department's determination that Earthmovers was operating an unpermitted construction and demolition landfill, the Department found Earthmovers to be ineligible to subcontract on the project in question. (Department's Motion, Exhibit 9, p. 32)

According to the affidavit of Gayle Leader, the Department's Assistant Director of the Bureau of Land Recycling and Waste Management, the Department abandoned that informal, unwritten policy on or about November 21, 2003. According to Ms. Leader, in the future contractors will be evaluated on a case-by-case basis and will be provided an opportunity to be heard before being deemed ineligible. (Department's Motion, Exhibit 11, para. 8)

Because the Department has abandoned its practice of a straight ban on all contractors with environmental violations from participating in the tire remediation program, this case is not one capable of repetition yet evading review.

Earthmovers asserts this matter involves significant issues of public importance such as whether the Department is required to publish its new policy and whether the Department may debar a corporate citizen from participating in a legislatively authorized grant program. However, what Earthmovers is asking us to do is simply issue an advisory opinion with regard to the Department's new policy. The appropriate time to consider these matters is if and when an appeal is filed under the new policy.

In *Solebury Township. v. DEP*, EHB Docket No. 2002-323-K (Consolidated) (Opinion and Order issued January 16, 2004), the Board considered whether the Department's rescission of a 401 Water Quality Certification, which formed the basis for the appellants' appeals, rendered the appeals moot. The appellants had argued that the Department had granted the 401 certification with the use of an illegally truncated review process. In asserting that the appeals had not been rendered moot by rescission of the 401 certification under appeal, the appellants argued that the truncated review process was likely to be repeated in various projects throughout the Commonwealth and, therefore, the Board should consider the legality of the process at this time. In rejecting the appellants' argument, the Board held "beyond wanting us to issue an advisory opinion, all Appellants...convey the message that they want the Board to act in the role of a watchdog....The flaws in these lines of reasoning are apparent and obvious. If 'it,' meaning the granting of the 401 Certification with the allegedly improper truncated review process, or any other allegedly deficient process for that matter, does happen again in connection with this or any other Section 401 Certification anywhere else, an appeal from that action would lie." *Slip op.* at 8.

Likewise, in the present case, any review of the Department's new policy of reviewing contractors' eligibility to participate in tire remediation projects must occur in an appeal by a contractor found ineligible under the new policy. Aside from a declaration regarding the legality of the Department's new policy, we can grant Earthmovers no effective relief. *See Broad Top Township v. DEP*, EHB Docket No. 2004-012-C (Opinion and Order issued June 21, 2004), p. 6 (Where a minor permit modification was rescinded by the Department, the Board held that "even if Appellant were successful in proving that the 11/5/03 Modification was legally invalid, such a determination would be a meaningless academic exercise.")

Earthmovers has not been evaluated by the Department under the new standard, and there is nothing to suggest that it would not be eligible to participate in a waste tire remediation project under the Department's new criteria for evaluating potential subcontractors. Simply stated, Earthmovers wants us to define the parameters of the Department's new policy when that issue is not before us. Earthmovers was found to be ineligible under a policy that banned participation in the waste tire remediation program by anyone with any outstanding environmental violations. Under the new policy, outstanding violations will still be considered in determining whether a subcontractor is eligible to participate in the tire remediation program but it will be done so on a case-by-case basis. Therefore, under the new policy Earthmovers may or may not be eligible to subcontract for waste removal. To determine at this stage whether Earthmovers should be eligible under the Department's new policy is premature and amounts to a declaratory judgment.

Earthmovers cites the Board's decision in *Eighty-Four Mining Co. v. DEP*, EHB Docket No. 2003-181-K (Opinion and Order on Motion for Summary Judgment issued March 17, 2004) in support of its argument that this case is not moot. That case dealt with a fire in an underground coal mine. In that case, the Department argued that an appeal of several compliance orders was rendered moot by compliance with the orders. Chief Judge Krancer found that the appeal was not moot for several reasons. First, because the Department refused to rescind or vacate the orders, they must have some continuing effect. Second, it could not be concluded that the orders did not impose some continuing obligations and requirements on the part of the appellant. Finally, there was an important public policy consideration that safety orders issued under the Bituminous Coal Mining Act should be complied with immediately and, therefore, there should not be a disincentive to immediate compliance by finding an appeal of such orders moot. These types of issues are not involved in the present case.

Therefore, we find that the appeal of Earthmovers is moot for the reasons set forth in this decision.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EARTHMOVERS UNLIMITED, INC.	:	
	:	
v.	:	EHB Docket No. 2003-108-R
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 16th day of July, 2004, the Department's motion for summary judgment is granted, and this appeal is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administration Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

EHB Docket No. 2003-108-R

DATE: July 16, 2004

Chief Judge Michael L. Krancer and Judge Bernard A. Labuskes are recused.

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FRED W. LANG, JR., JOYCE E. SCHUPING, DELORES HELQUIST and SHERRY L. WISSMAN	:	
v.	:	**EHB Docket No. 2003-145-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MAPLE CREEK MINING, INC., Permittee	:	**Issued: July 21, 2004**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board has the power and authority to vacate all or part of a consent order and agreement or to amend its terms where it finds that the Department's entry into the agreement was an abuse of discretion. The permittee's motion for summary judgment based on mootness is denied where there is effective relief that the Board can grant.

OPINION

Background

On September 11, 2002, Maple Creek Mining, Inc. (Maple Creek) and the Department of Environmental Protection (Department) entered into a Consent Order and Agreement (CO&A) to address alleged subsidence damage to a pond located on the property of the Appellants (the Lang

pond). Thereafter, on June 4, 2003, they entered into an amendment to the initial CO&A (amended CO&A), which is the subject of this appeal.

The amended CO&A required Maple Creek to perform a number of tasks, including hydrologic monitoring, providing a means of supplementing water to the Lang pond, adding supplemental water to the Lang pond if it fell below a certain level, and submit to the Department a calculation of costs of adding supplemental water at the conclusion of the monitoring period.

Maple Creek contends that its obligations under the CO&A, with the exception of submitting a calculation of costs, ended on November 30, 2003. The calculation of costs was submitted to the Department on December 8, 2003. The Department considered Maple Creek's submission, the Appellants' submissions and other information available to it and determined what it considers to be the operation and maintenance costs for the Lang pond. The Department issued a letter dated March 17, 2004, directing Maple Creek to provide for the permanent payment of the operation and maintenance costs, as calculated by the Department, by either making a lump sum payment to the Appellants or establishing a financial mechanism providing payments to the Appellants *ad infinitum*. The operation and maintenance costs calculated by the Department are higher than Maple Creek's figure but lower than that calculated by the Appellants.

Maple Creek also contends that it received a letter from the Appellants, dated November 21, 2003, informing Maple Creek to remove all pipes and other materials used to add water to the Lang pond and that they would not be allowed on the property after November 30, 2003 to perform monitoring or other work without prior consent. Maple Creek contends this precludes it from taking further action with respect to the Lang pond.

Summary Judgment

The matter now before us is a motion for summary judgment filed by Maple Creek. The Board is authorized to grant summary judgment when the record establishes that there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. 25 Pa. Code 1021.94(b); Pa.R.C.P. 1035.2; *Hankin v. DEP*, EHB Docket No. 2003-186-K (Opinion and Order on Motion for Summary Judgment issued July 9, 2004), p. 4-5; *Holbert v. DEP*, 2002 EHB 796, 807-09, *citing County of Adams v. DEP*, 687 A.2d 1222, n. 4 (Pa. Cmwlth. 1997). When evaluating a motion for summary judgment, the Board must view the record in the light most favorable to the non-moving party; all doubts as to the existence of a genuine issue of material fact must be resolved in favor of the non-moving party. *Hankin, supra* at 5 (*citing Goetz v. DEP*, 2003 EHB 16, 18-19).

Consent Order and Agreement

The first argument Maple Creek raises in support of its motion for summary judgment is that the only relief the Board can grant in an appeal of a CO&A is to vacate the CO&A or those portions of the agreement that are contrary to law. It asserts that the Board has no power to rewrite the terms of a CO&A. In response, the Appellants assert that under the Board's *de novo* review power, as set forth in *Warren Sand & Gravel Co. v. DER*, 341 A.2d 556 (Pa. Cmwlth. 1975), the Board may substitute its discretion for that of the Department where the Department acts with discretionary authority, which the Appellants contend it did in this case.[1]

In *City of Chester v. PUC*, 773 A.2d 1280 (Pa. Cmwlth. 2001), *petition for allowance of appeal denied*, 788 A.2d 379 (Pa. 2001), the Commonwealth Court considered a consent decree entered into between the Public Utility Commission (PUC) and the Southeastern Pennsylvania

[1] The Department takes no position with regard to this matter.

Transportation Authority (SEPTA) that agreed that SEPTA would not be required to contribute toward the cost of maintaining railroad crossings. The court held that the consent decree was not binding on anyone that was not a party to the proceeding involving the consent decree because it would violate the due process rights of anyone not a party to that settlement. Likewise, in the present case, the terms of the CO&A cannot be held to be binding on the Appellants since they were not parties to the CO&A.

Neither party disputes that the Board has jurisdiction over appeals of CO&A's entered into by the Department and another party. Indeed, the Board has held that the Department's entry into a CO&A is a matter subject to review by the Board. *Burroughs v. DER*, 1992 EHB 1084; *Throop Property Owners Assn. v. DER*, 1988 EHB 381, 396. The dispute in the present case centers on what relief the Board may grant if it determines that one or more terms of the CO&A are contrary to law. Maple Creek argues that a CO&A is essentially an "agreement," and neither the Board nor any entity can change the terms of the agreement without the consent of the parties. The Appellants, on the other hand, argue that a CO&A is an "order," and the Board may substitute its discretion for that of the Department and change the terms of the order, e.g. by ordering additional monitoring than that proposed by the CO&A.

In *DER v. Bethlehem Steel Corp.*, 367 A.2d 222 (Pa. 1976), *cert. denied*, 430 U.S. 955 (1977), the Pennsylvania Supreme Court defined a CO&A as an "order" enforceable in Commonwealth Court. In that case, the court considered the CO&A as an order from which no timely appeal had been taken by the appellant since the appellant had entered into the CO&A with the Department. This line of reasoning was reiterated by the Commonwealth Court in *DER v. Landmark International, Ltd.*, 570 A.2d 140 (Pa. Cmwlth. 1990). Thus, at least for purposes of enforcing a CO&A, the courts have interpreted it as being an "order." Likewise, the Board has

also referred to a CO&A as being a final "order" of the Department. *Empire Coal Mining and Development, Inc. v. DEP* 1995 EHB 1130, 1140.

However, the Board has also held that in interpreting the terms of a CO&A, we must apply the principles of contract law. In a one-judge opinion, *Benjamin Coal Co. v. DER*, 1989 EHB 683, 685, then Chairman Woelfling held that "a consent decree or a consent order must be construed in accordance with contract law principles." *Citing International Organization Masters, Mates and Pilots of America, Local No. 2 v. International Organization Masters, Mates and Pilots of America, Inc.*, 439 A.2d 621 (Pa. 1982). *See also AH & RS Coal Corp. v. DEP*, 1995 EHB 1074, 1080-81 ("We must interpret the CO&A to give effect to the intentions of the parties – discernable by the language they employed. If the language is unambiguous, the intentions of the parties will be determined on the basis of the clear wording of the contract." *Citing Frickert v. Deiter Bros. Fuel Co., Inc.*, 347 A.2d 701 (1975).)

In *Bethlehem Mines Corp. v. DER*, 1984 EHB 62, 87-88, the Board considered the question of what relief may be granted in an appeal of a CO&A. In that case, the Department's entry into a CO&A was found to be an abuse of discretion. In a one-judge opinion, the Board held "Under the authority of *Warren Sand & Gravel, supra,* the Board can substitute its discretion for DER's when DER has abused *its* discretion; thus we probably have the authority to order specific modifications of the instant agreement." However, the Board declined to do so, stating it did "not wish to discourage future settlement negotiations of the sort which led to the agreement" and also because it preferred to defer to the expertise of the Department.[2]

However, in the case of *Pennsylvania Human Relations Commn. v. Ammon K. Graybill, Jr. Real Estate*, 393 A.2d 420, 422 (Pa. 1978), the Pennsylvania Supreme Court considered the

[2] The *Bethlehem* case dealt with the issue of work safety rules in deep coal mines.

legal effect of a consent decree and held "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." The question, then, is whether the same principle applies to a CO&A.

Black's Law Dictionary defines "consent decree" as "A court decree that all parties agree to . – Also termed consent order." Black's Law Dictionary 419 (7th ed. 1999). The definition of "consent order" says "See consent decree under decree." *Id.* at 300. In *Benjamin Coal, supra,* the Board uses the terms "consent decree" and "consent order" interchangeably. 1989 EHB 686. Furthermore, in applying the laws of contract interpretation to a CO&A, the *Benjamin Coal* case cites a Pennsylvania Supreme Court decision addressing the legal significance of a consent decree.[3]

Based on the definition of "consent order" and the Board's interpretation of a consent order as being the equivalent of a consent decree, we find that the same principles that apply to a consent decree with regard to what relief a court may grant also apply to a CO&A. On that basis, we find that we have the power to vacate all or part of a CO&A.

We further find that we may change the terms of a CO&A where we find an abuse of discretion by the Department. Although the holding in *Ammon K. Graybill,* 393 A.2d at 422, was that a court may not unilaterally change the terms of a consent decree, the facts of that case can be distinguished from those of the present case. In *Ammon K. Graybill*, both of the parties to the appeal were also parties to the consent decree. Although the court found that the appellee had not ratified the consent decree and, therefore, it was not final, the court went on to say that where the parties to an appeal have ratified a consent decree the parties are bound by it, and the court may not unilaterally change its terms. However, in the present case, the Appellants were not parties to

[3] *International Organization Masters,* 439 A.2d 621.

the CO&A that is the subject of this appeal, yet they are certainly affected by its terms. In short, they are third party beneficiaries of the CO&A. Furthermore, to hold that the Appellants are bound by the terms of the consent order and agreement would violate their due process rights since they were not a party to the settlement. *City of Chester*, 773 A.2d 1280.

Moreover, Section 4(c) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, as amended, 35 P.S. § 7514(c), states that no action of the Department adversely affecting a person shall be final until that person has had the opportunity to appeal the action to the Board or until 30 days have passed. An appellant's right to a hearing before the Board provides the appellant with due process. *Smedley v. DEP*, 2001 EHB 131. Thus, no party can enter into an "agreement" with the Department that allows the constitutional due process rights of a third party to be bypassed. As noted in *Smedley*:

> The Board protects the procedural due process rights of persons who allege and can prove that they are adversely affected by an action of DEP, a governmental agency. Under the Environmental Hearing Board Act the Board is established as a quasi-judicial body to review appeals from DEP actions and no action of the Department adversely affecting a person shall be final until the Board has heard the appeal.

Id. at 156 (citing 35 P.S. § 7514(c); *Fiore v. DER*, 665 A.2d 1081, 1086 (Pa. Cmwlth. 1995).) Any party who enters into a CO&A does so knowing and accepting the full risk that the CO&A may not stand as is or may not stand at all.

Therefore, if we find that any of the terms of the CO&A constitute an abuse of discretion by the Department, under our power of *de novo* review we may substitute our discretion for that of the Department and either vacate or change the terms thereof.

Mootness

A matter becomes moot when an event occurs that deprives the Board of the ability to

provide effective relief. *Horsehead Resource Development Co., Inc. v. DEP*, 780 A.2d 856, 858 (Pa. Cmwlth. 2001); *Al Hamilton Contracting Co. v. DER*, 494 A.2d 516, 518 (Pa. Cmwlth. 1985); *Tinicum Twp. v. DEP*, 2003 EHB 493, 496. Maple Creek asserts that it has complied with all the terms of the amended CO&A. It argues that because the only relief available to the Board is to vacate the amended CO&A, and it has already complied with all of the terms thereof, there is, in fact, no relief the Board can grant. The Department filed a response agreeing that the matter is moot. Additionally, both Maple Creek and the Department assert that if the Appellants wish to challenge the Department's determination of operation and maintenance costs and the financial mechanism for paying them, they must do so in the context of an appeal of the March 17, 2004 letter.

The Appellants assert that this matter is not moot for a number of reasons. First, they dispute that Maple Creek has complied with all of the terms of the CO&A. They contend that Maple Creek has not properly performed the monitoring or added supplemental water as required and has not installed the equipment required by the CO&A. Second, the Appellants dispute that what was required by the CO&A is sufficient and attach letters from engineer Troy Scott of American Geosciences in support of their claim. Third, they assert that the question of whether the amended CO&A should have ever been entered into in the first place remains a viable issue. Fourth, the Appellants assert that the Board retains the power to vacate the CO&A. Fifth, the Appellants argue that this matter is capable of repetition yet will evade judicial review and involves issues of great public importance, both of which, if true, are exceptions to the mootness doctrine. Finally, the Appellants have indeed filed an appeal of the March 17, 2004 Department letter. *See Lang et al. v. DEP*, EHB Docket No. 2004-090-R. The Appellants attach a number of exhibits to their response in support of their contentions.

As noted earlier, summary judgment may only be granted where there are no disputed issues of fact. Viewing this matter in the light most favorable to the Appellants, we find that summary judgment is not appropriate since the Appellants' response raises contested material facts. If the terms of the CO&A have not been complied with or are inadequate, as asserted by the Appellants, then there is effective relief that the Board may grant should we find that entering into the CO&A was an abuse of the Department's discretion. Based on this, we find that the matter is not moot and summary judgment is denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

ORDER

AND NOW, this 21st day of July, 2004, Maple Creek's motion for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administration Law Judge
Member

DATE: July 21, 2004

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

For the Commonwealth, DEP:
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Southwest Regional Counsel

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SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 2003-341-CP-L**
v.	:	**Issued: August 11, 2004**
CLINT HUNTSMAN	:	

OPINION AND ORDER ON MOTION FOR DEFAULT JUDGMENT

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

Synopsis:

The Board enters judgment by default as to liability against an individual that has not answered or otherwise responded to a complaint for civil penalties filed pursuant to the Clean Streams Law, a notice of praecipe for entry of default judgment, and two motions for default judgment. A hearing will be scheduled to determine the amount of the penalty that should be assessed.

OPINION

On December 9, 2003, the Department of Environmental Protection (the "Department") filed a complaint for civil penalties against Clint Huntsman ("Huntsman") for alleged violations of the Clean Streams Law, 35 P.S. § 691.1 *et seq.* The Department attached a notice to defend to the complaint. The Department served the complaint by certified mail on January 15, 2004. Huntsman received the complaint on January 20, 2004, as evidenced by the U.S. Postal Service green receipt card. Huntsman has never answered or otherwise responded to the complaint.

On March 24, 2004, the Department filed and served a notice of praecipe for entry of default judgment notifying Huntsman that, unless he responded to the complaint, judgment could be entered against him. Huntsman did not respond.

On May 25, 2004, the Department moved for default judgment. The Department served Huntsman with a copy of the motion. Huntsman did not respond. On July 12, we denied the motion because it was not apparent at that time that Huntsman had been served with a copy of the complaint by certified mail, as required by the Board's rules. 25 Pa. Code § 1021.71(b). On July 14, the Department filed and served a second motion for default judgment, which included a certificate of service stating that the original complaint had been served by certified mail. Huntsman has not responded to the second motion.

It was incumbent upon Huntsman to answer the complaint within 30 days of service. 25 Pa. Code § 1021.74(a). The Board's rules provide as follows:

> A defendant failing to file an answer within the prescribed time shall be deemed in default and, upon motion made, all relevant facts in the complaint may be deemed admitted. Further, the Board may impose any other sanctions for failure to file an answer in accordance with § 1021.161 (relating to sanctions).

25 Pa. Code § 1021.74(d). Section 1021.161 reads as follows:

> The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including those permitted under Pa.R.C.P. 4019 (relating to sanctions regarding discovery matters).

25 Pa. Code § 1021.161.

In situations such as the one presented here, the Board historically has granted judgment by default as to liability and scheduled a hearing to determine the amount of the penalty to be

assessed. *DER v. Allegro Oil and Gas Company*, 1991 EHB 34; *DER v. Canada-Pa., Ltd.*, 1987 EHB 177. (*See DEP v. Tessa Ltd.*, 2000 EHB 280, 289-95, for a general discussion of default judgment.) We see no reason to depart from that practice here.

Accordingly, we enter the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 2003-341-CP-L**
v.	:	
CLINT HUNTSMAN	:	

ORDER

AND NOW, this 11th day of August, 2004, the Department's unopposed motion for entry of default judgment is granted. The facts set forth in the Department's complaint are deemed admitted. Huntsman is liable for civil penalties under the Clean Streams Law for (a) allowing accelerated erosion and resulting sedimentation of a water of the Commonwealth from earth disturbance activities, (b) conducting earth disturbance activities without an NPDES permit and an erosion and sedimentation control plan, and (c) failing to install, implement, and maintain best management practices. A hearing will be scheduled to receive evidence regarding the amount of the civil penalties to be assessed.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: August 11, 2004

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

For the Commonwealth, DEP:
M. Dukes Pepper, Jr., Esquire
Southcentral Regional Counsel

For Defendant:
Clint Huntsman
14125 Mountain Green Road
Willow Hill, PA 17271

kb

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SECRETARY TO THE BOARD

DELAWARE RIVERKEEPER, a/k/a MAYA van ROSSUM, DELAWARE RIVERKEEPER NETWORK AND THE AMERICAN LITTORAL SOCIETY	:	
v.	:	**EHB Docket No. 2003-083-MG (consolidated with 2003-229-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PORTLAND BOROUGH, Permittee	:	**Issued: August 12, 2004**

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis

The Board dismisses appeals by public interest groups challenging the Department's approval of a revision to a Borough's sewage facilities plan for a central sewage treatment plant and collection system within the Borough and the issuance of a related NPDES Permit. Although the plan revision contemplated possible further development of the sewage treatment plant to accommodate flows from a neighboring township, that option was not approved by the Department. The Department's approval of the central treatment system as the alternative selected by the Borough for its sewage needs did not require simultaneous or joint sewage plan revisions by both municipalities. The appellants failed to prove that the Department improperly accepted the Borough's assessment of sewage needs and decision to completely sewer the Borough rather than continue to rely on on-lot sewage facilities as a method for sewage disposal or that the consideration of alternative means of sewage disposal was inadequate. The appellants also did not prove that the proposed sewage facilities or the discharge of treated effluent

into the Delaware River will measurably degrade the water quality in the Delaware River, cause significant harm to wetlands or adversely affect threatened or endangered species. However, the Board does find that the appellants adduced sufficient evidence of their interest in the outcome of the litigation to demonstrate their standing to appeal.

Background

These are appeals from the Department of Environmental Protection's (Department) approval of the Sewage Facilities Plan (Plan or Act 537 Plan) of Portland Borough that includes construction of a central sewage treatment works and the issuance by the Department of an NPDES Permit (Permit) for the discharge of wastewater from the proposed treatment works to the Delaware River. The Appellants are non-profit organizations, the Delaware Riverkeeper Network, the American Littoral Society and the Delaware Riverkeeper, a/k/a Maya van Rossum (collectively, Appellants).

The notice of appeal from the Department's approval of the Plan, as amended, claims that the Department failed to consider alternatives to the discharge from the approved facility to the Delaware River, which discharge would impact "the aesthetic, recreational, ecological, environmental and commercial qualities" of the Delaware River. In addition, the Appellants object to this approval on the ground that the proposed treatment facility is not the best environmentally acceptable alternative, that the facility provides far more than two times the capacity required by Portland Borough without properly evaluating alternatives, and that the Plan does not advance the policies of the Sewage Facilities Act and the Clean Streams Law. Finally, the Appellants objected to the Department's approval of the Plan for Portland Borough because it approved a reserve of

treatment capacity for neighboring Upper Mount Bethel Township without requiring the submission and approval of a revised sewage facilities plan for that township.

The Notice of Appeal from the issuance of the related Permit raises all of the foregoing objections to the issuance of the permit. The Appellants also claim, among other things, that the approved discharge would degrade water quality, that the approved 105,000 gallons per day (gpd) treatment capacity exceeds the needs of Portland Borough, failed to consider alternatives to the stream discharge or the likelihood of industrial dischargers to the treatment works, and failed to assure protection to a National Scenic River or account for the possible designation of the Delaware River as a special protection area by the Delaware River Basin Commission. The Appellants also objected to this approval on the grounds that the public benefits of the proposed treatment system do not outweigh the environmental harms to the natural, scenic, historic and aesthetic values of the environment, including wildlife and wildlife habitat. Finally, the Appellants objected to this approval on the ground that the Department failed to assure compliance with all applicable statutes and regulations mandated for the protection of the Commonwealth's natural resources as required by Article I, Section 27 of the Pennsylvania Constitution.

The Department and Portland Borough contend that these approvals are in compliance with all relevant statutory and regulatory requirements. In their view, the need for a central treatment system in Portland Borough is clear, and that the proposed treatment system is the best environmentally acceptable method of meeting the sewage treatment needs of Portland Borough and protecting the Delaware River from sewage pollution. They contend that the discharge from the treatment system will not adversely

affect water quality in the Delaware River, but will protect the River from discharges from malfunctioning on-lot treatment systems in the Borough. Finally they contend that the reserve of capacity for the Township contained in the Plan is not properly before the Board in this appeal because nothing in the Department's approval of the Plan or the discharge permit authorizes a treatment system for treatment of a flow in excess of the requirements of the Borough and nothing in the Department's actions approves service to the Township.

The hearing on the merits was held before Judge George J. Miller on April 20-23 and 26-28, 2004. The record consists of a transcript of 1,679 pages and over 170 exhibits, including a 252 paragraph stipulation of facts,[1] as well as stipulations as to qualifications of expert witnesses[2] and the admissibility of exhibits.[3] The parties have submitted extensive proposed findings of fact, conclusions of law and legal memoranda.[4] After consideration of these materials we make the following:

FINDINGS OF FACT[5]

THE PARTIES AND INTERESTS OF THE APPELLANTS

1. Appellant Maya van Rossum is the "Delaware Riverkeeper" who advocates for the protection and restoration of the ecological, recreational, commercial and aesthetic qualities of the Delaware River, its tributaries, ecosystems and habitats. She is the

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[1] Ex. B-1. The Stipulation is cited as "Stip. ___."

[2] Ex. B-3.

[3] Ex. B-2.

[4] The last brief was filed on August 10, 2004.

[5] The transcript for April 20-23 and April 26, 2004 is cited as "Tr. __". Due to a duplication of page numbers in Volumes VI and VII for hearings on April 27 and April 28, citations to those portions of the transcript will also include the relevant date. The Appellants' exhibits are cited as "DRN-__"; Portland Borough's as "PB-__"; and the Department's as "C-__".

executive director of the Appellant Delaware Riverkeeper Network, a not-for-profit membership organization affiliated with Appellant the American Littoral Society. (Stip. ¶¶ 1-2; Tr. 88, 89, 106-07)

2. Appellant the American Littoral Society, of which Ms. van Rossum is a member, is a not-for-profit membership corporation whose mission and purpose includes environmental protection and conservation of ecological, recreational, commercial and aesthetic qualities of, among other things, aquatic life and fisheries of the Delaware River. (Stip. ¶¶ 4,5; Tr. 88-89)

3. The Department of Environmental Protection (Department) is the agency of the Commonwealth of Pennsylvania that is empowered to administer and enforce the Clean Streams Law[6] (CSL) and the Sewage Facilities Act[7]. (Stip. ¶¶ 16, 38)

4. Portland Borough is a small municipality in the northeastern portion of Northampton County. It is bounded on the East by the Delaware River and is otherwise surrounded by neighboring Upper Mount Bethel Township. It is located approximately five miles southeast of the Delaware Water Gap and 30 miles northeast of the Allentown-Bethlehem-Easton area. (Stip. ¶¶ 17, 52-54; Ex. PB-85) It is one-half square mile in area. (Bucci, Tr. 1238), and has 579 residents. (Stip. ¶ 55)

5. Members of the American Littoral Society, as well as other residents of areas adjacent to the proposed treatment works, testified to their enjoyment of the Delaware River, and their opposition to the project because they believed it would degrade the quality of the Delaware River, would render the River less appealing from a recreational

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[6] Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001 (Clean Streams Law).

[7] Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20a (Sewage Facilities Act).

point of view, would discourage them and recreational customers of some of these witnesses from using the Delaware River for recreational purposes and would reduce their enjoyment of wildlife near their residences. (Tr. 13-18, 21-22, 32, 43, 53-59, 89, 91, 93)

6. Earl and Margaret Ackerman own a family campground and rent canoes and kayaks for trips on the Delaware River. They are concerned that the perception by customers that there is pollution to the River from the outfall will negatively impact their business. (Tr. 14-22, 31; *see also* M.Ackerman, Tr. 42,43)

7. Leona Fluck organizes canoe tours of the Delaware River in the area of Portland Borough. She is personally concerned about the water quality and the fish and wildlife in the River. She is also concerned about how her clients will feel about seeing the outfall in the River and may no longer include the stretch of the River near Portland on her tours. (Tr. 218-23)

8. Several other individuals testified about their use and enjoyment of the Delaware River for recreation and observation of wildlife. (*See generally* testimony of Bob Gerwig, Charles Kull and Judith Henckel)

9. Specifically, Ms. van Rossum and others testified that the existence of the large treatment works and discharge pipe on the shores of the River would discourage them and others from recreational use of the River. (Tr. 43, 109)

THE ACT 537 PLAN

Background and Approval

10. Problems with on-lot sewage disposal systems in the Borough are widespread and present an immediate health and environmental hazard. (Fisher,[8] Tr. 457; Arner,[9] Tr. 595-96)

11. Because of those conditions, the Borough determined that the official Act 537 Sewage Facilities Plan for the Borough (adopted in 1970) was not adequate to meet the existing and future sewage needs of the Borough. (Stip. ¶ 60)

12. The Borough had recognized a need for a solution to this problem for many years. The Borough's comprehensive plan in 1966 called for construction of a public sewage system by 1970 and projected construction between 1970 and 1975. (Bucci, Tr. 1242-44; Ex. PB-58)

13. The need for such a treatment system in the Borough was also recognized in June 1981 by the Commonwealth's COWAMP Plan. That Plan recognized "problems with on-lot wastewater disposal" in the Borough and "the need for a treatment plant and collection system." (Ex. PB-56)

14. The solution to the problem did not appear practical until about 1998 when the Borough was advised by Northampton County of the availability of grant funds that might be used for this purpose. (Ex. PB-58; Bucci, Tr. 128-29, 1242-44)

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[8] Richard Fischer is a certified sewage enforcement officer for several municipalities in Monroe and Northampton Counties, including Portland Borough and Upper Mount Bethel Township. He testified as an expert. (Tr. __; Ex. PB-__; Ex. B-3 ¶)

[9] Michelle Arner is a certified sewage enforcement officer employed by East Penn Engineering Co. She holds a B.S. degree from the University of Wisconsin. She testified as an expert. (Tr. 595; Exs. PB-96; 103; B-3, ¶ 8)

15. Sometime thereafter the Borough authorized its engineers, Brinjac Engineering, to conduct a feasibility study for a package treatment plant with capacity to treat about 50 gpd of sewage solely for treatment of sewage flows within the Borough. (Bucci, Tr. 1237; Gralski, Tr. 894; Ex. DRN-1)

16. The purpose of this feasibility study was to provide cost estimates for a sewer system for the Borough. (Gralski, Tr. (4/28) 1043-44)

17. Other funding became available to the Borough through the proposal of an industrial park by the Bangor Area School District Regional Development Authority (Development Authority) to be located on a 100 acre property (Industrial Park) that straddled the Borough and the Township boundary line. One parcel on this property, located within the Borough, is occupied by Ultra Poly Corporation; all other parcels in this project are unoccupied. (Bucci,[10] Tr.1245-47; Reinhart,[11] Tr. 808)

18. The Development Authority was the outgrowth of the volunteer efforts of the Superintendent of the Bangor Area School District, John Reinhart, who was concerned about the absence of significant businesses in the school district's tax base. (Tr. 793-94)

19. Mr. Reinhart's efforts led to the formation of Portland Industrial Park as the most promising site within the school district for economic development, the formation of the Development Authority and securing a grant as a result of a bond issue undertaken by Northampton County to promote the Industrial Park including the development of a sewage treatment plant. (Reinhart, Tr. 793-96, 818-22, 857-60)

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[10] Kay Bucci is the Mayor of Portland Borough. She has served in that role for the past 15 years. She is a life-long resident of the Borough and loves the Delaware River viewing it as an integral part of her family's heritage. (Tr. 128, 1235-37)

[11] John Reinhart serves as the Superintendent of the Bangor Area School District. He is also a native of the Bangor area which includes Portland Borough. As explained later, he has worked to facilitate the economic development of the region. (Tr. 851-52)

20. The Development Authority's grant application appeared to be favorably received in late 2001. (Reinhart, Tr. 820)

21. Brinjac Engineering began work in earnest on the development of the Plan in 2002 primarily through William Gralski.[12] (Gralski, Tr. 714)

22. At the Department's request, Mr. Gralski sought a determination from the Township concerning its desire to participate in the planning process. (Gralski Tr. 718-19; Tr. (4/27) 954-55)

23. Thereafter, the Township Chairman replied by letter dated March 12, 2002, to Portland's Mayor confirming an agreement that Portland Borough would develop the Plan in which 100,000 gpd of sewage capacity would be reserved for the Township's future use. (Bucci, Tr. 1250-52; Ex. DRN-3)

24. The Northampton County General Purpose Authority issued a grant to the Borough in the amount of $3,231,225 by grant agreement dated May 20, 2002. Under the terms of this agreement these grant funds must be used by the Borough for construction of the sewage treatment facility by May 19, 2005, absent some other agreement. (Ex. DRN-2; Gralski, Tr. (4/28) 1062-65)

25. Following a Borough meeting in April 2002 at which Mr. Gralski made a presentation on the proposed treatment system, the Borough on June 10, 2002 adopted a resolution approving the Act 537 Plan as the "official plan" of the Borough and scheduled the completion of construction of the sewage treatment system by October, 2004. (Stip. ¶¶ 63, 64; Ex. PB-7; *see also* Exs. C-1 at Appendix-L; PB-3(d); DRN-34)

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[12] William Gralski, P.E. is a senior civil engineer at Brinjac Engineering, Inc. He worked as the project manager for the preparation of the Borough's Act 537 Plan. He testified as an expert in matters related to the preparation of that Plan. (Tr. 877-79; Exs. PB-108; B-3, ¶ 5)

26. As a part of its work in developing the Plan, Brinjac Engineering undertook a sewage facilities needs study of the Borough and documented the results of that study in a *Final Act 537 Plan Technical Report* in August 2002. This analysis is discussed in greater detail below. (Stip. ¶ 62; Gralski, Tr. 920-21, (4/27) 883)

27. The Borough's Act 537 Plan revision was submitted to the Department for approval in August 2002. (Stip. ¶¶ 18,19, 41; Ex. C-1; PB-3(a)-(d); DRN-32-34)

28. The Department's initial review of the Plan was initially conducted by Harleth Davis, then a Sanitary Sewage Specialist with the Department with significant experience in Act 537 planning. (Tr. 1066-67; Stip. ¶ 79)

29. He visited the Borough and reviewed the Borough's tax map to get an idea of individual lot sizes. (Tr. 1085-89)

30. He reviewed the exhibits to the Plan, including a bog turtle survey and the Uniform Environmental Report over a period of about four weeks. (Tr. 1138)

31. He held discussions with personnel at Brinjac Engineering several times a week to obtain a better understanding of aspects of the Plan. (Tr. 1139)

32. He utilized the Department's "Blue Book" checklist for the review of sewage plans and the Department's guidance on sewage needs identification. (Tr. 1139-42)

33. In addition to reviewing the Plan, he consulted the current evaluation of needs set forth in the Plan in discussions with others at the Department, and documents developed by the Lehigh Valley Planning Commission. (Tr. 1085)

34. He considered soil data, U.S. census information and County population projections in his analysis of sewage needs. (Tr. 1085, 1149-51)

35. In his analysis of alternatives he concluded that there was no alternative that required further consideration or that was better than the selected alternative. (Tr. 1153-56)

36. He also considered whether the Plan complied with the Sewage Facilities Act, the Clean Streams Law, and the Department's regulations thereunder. He found no inconsistencies or conflicts. (Tr. 1142-46)

37. The selected alternative under the Plan provides for the construction of a new wastewater treatment plant with an initial average daily design flow of 105,000 gpd and a sewage collection system for the Borough. The Plan provides for the following allocation of the plant's capacity as follows:

- Portland Borough-65,332 gpd for the Borough's current needs;
- Industrial Park-35,000 gpd for current and future growth;
- Future Borough Growth-4,688 gpd.

(Exs. DRN-32; PB-3; C-1)

38. Following the Department's review of the Borough's Plan and other information provided to it by the Borough and Brinjac Engineering, including a Uniform Environmental Report dated December 2002, Kate Crowley of the Department approved the Plan update revision on March 5, 2003. (Stip. ¶¶ 23, 43, 70; Tr. 959; Ex. PB-1)

39. The Department's approval of the Plan was for construction of a 105,000 gpd wastewater treatment plant to be located in the Portland Borough portion of the Industrial Park and a collection system in Portland Borough to consist of approximately 18,000 lineal feet of gravity sewers and mains, 4,000 feet of low-pressure sewers and force main, and a pump station with the capacity of 200,000 gpd. (Exs. PB-1; DRN-32; Stip. ¶ 187)

40. The Department's approval of the Plan was conditioned on obtaining an NPDES Permit for the proposed effluent discharge, a Water Quality Management Part II Permit for the construction and operation of the proposed sewage facilities and such other approvals as may be required if encroachment to streams or wetlands will result from construction of the project. (Stip. ¶ 71)

Capacity for Upper Mount Bethel Township

41. The Act 537 Plan contemplates possible future construction of additional capacity at the wastewater treatment plant of 100,000 gpd to account for additional flows from Upper Mount Bethel Township. (*E.g.*, Gralski, Tr. (4/27) 954-55; Exs. PB-108; P-3; DRN 32-34; C-1)

42. Because the Township has provided no definitive decision or commitment to utilize the Borough wastewater treatment plant, or to pay for the capacity that would be needed to service portions of the Township, the Borough's Selected Alternative does not provide treatment capacity or sewer lines to serve the Mount Bethel Village area or any other existing development in the Township. (Bucci, Tr. 1251)

43. Such an addition would require the Township to prepare and obtain Department approval of its own sewage facilities plan. Similarly, no part of the capacity in the Industrial Park for lots located in the Township can be used without further approved planning by the Township. (Exs. DRN-32; PB-3A-C; Davis, Tr. (4/27) 1099-1100; Crowley,[13] Tr. 960-61, 64; Brunamonti,[14] Tr. 987; *see also* Horner, Tr. 240; Cahill, Tr. 678)

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[13] Kate Crowley is the Program Manager on the water management program in the Northeast Regional Office of the Department. She was ultimately responsible for approving the Act 537 Plan. (Tr. 954-55; Stip. ¶ 79)

44. The Department's approval is restricted to the description of the Selected Alternative that is stated in the Act 537 Plan Approval. (Crowley, Tr., 959; Davis, Tr. 1108)

45. The Department only approved a wastewater treatment plant with a capacity of 105,000 gpd. (Crowley, Tr. 959; Davis, Tr. 1108-1110; Horner,[15] Tr., 238-239; Cahill,[16] Tr. 677)

46. The collection system specified in the Department's Act 537 Plan Approval letter does not include any sewage lines within the Portland Industrial Park or any sewage collection lines in Upper Mount Bethel Township. (Gralski, Tr. (4/27) 951- 52)

47. The Selected Alternative approved by the Department does not provide for sewage facilities in the Village of Mount Bethel or Upper Mount Bethel Township. (Crowley, Tr. 956; Gralski, Tr. (4/27) 950-51; Bucci, Tr. 138)

48. Michael Brunamonti summarized the scope and limitations of the Act 537 Plan Approval as approved by the Department. It does not require that the Borough and the Township connect their sewage facilities. (Tr. 990)

49. The Department is not requiring anyone in Upper Mount Bethel Township to change the manner or method in which they currently obtain sewage facility services.

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[14] Michael Brunamonti, a planning supervisor in the Department's water quality program, supervised the review of the Act 537 Plan. (Tr. 974-77; Stip. ¶¶ 77, 78)

[15] Wesley R. Horner, an expert witness of the Appellants, is qualified to provide expert testimony on the general issues of population and growth trends, land use and land planning issues, general environmental planning issues, and regional and induced growth impacts or socioeconomic impacts. (Ex. B-3, ¶ 1)

[16] Thomas Cahill testified as an expert on behalf of the Appellants concerning technical issues of wastewater plant design and engineering, the impact of effluent discharge on water quality and secondary and tertiary treatment issues. Educated as a civil engineer, he has 42 years of experience designing sewage facilities. (Exs. B-3 ¶ 2; DRN-A-3; Tr. 515)

The proposed Borough sewage facilities plan would not affect any existing sewage facilities in the Township. (Tr. 990)

50. The Department has not in any way precluded the Township from considering or implementing any alternatives to serve any portion of the Township. (Tr. 990-91)

51. The Act 537 Plan allocates 35,000 gpd of capacity in the wastewater treatment plant for current and future industries to be located in Portland Industrial Park. (Gralski, Tr. (4/27) 898; Exs. PB-108, p. 10; PB-3a, p. 3, 46)

52. The reservation of the capacity that was approved by the Department for Portland Industrial Park is only a reservation of capacity and may not be utilized by Upper Mount Bethel Township until the municipality undertakes the required planning in accordance with Act 537. (Crowley, Tr. 957).

53. In the Department's view, Portland Borough did not undertake any planning for Upper Mount Bethel Township in developing the Act 537 Plan. (Crowley, Tr. 959)

54. The Borough's consideration of its neighboring municipality in the Act 537 planning process in this way – by designing a system that would be capable of expansion to meet the needs of the neighboring community and adopting a Plan that would not preclude a possible future connection – was appropriate and consistent with the standards governing sewage facilities planning in Pennsylvania. (Gralski, Tr. (4/27) 954-55, 957-58; Brunamonti, Tr. 992-94; 1004, 1007)

Needs and Alternatives Analysis

55. The Department's regulatory program under the Sewage Facilities Act requires the applicant for approval of an official sewage facilities plan to develop and evaluate alternatives and to list the sewage facilities alternatives considered. 25 Pa. Code

§§ 71.21(a)(4)-(5); 71.31(a) and (c). The municipality is required to "[s]elect one alternative to solve the need for sewage facilities in each area studied and support this choice with documentation that shows that the alternative is technically, environmentally and administratively acceptable." 25 Pa. Code § 71.21(a)(6)

56. The Department also requires an inventory of "needs" in the municipality, which involves an analysis of current sewage facilities. The purpose of this inventory is to identify funding sources for the selected alternative and to engender citizen support for the alternative sewage facilities that are selected by the municipality. This identification also informs the choice of a selected alternative of sewage facilities. (Davis, Tr. 1072-74; 1146-49; Brunamonti, Tr. 980-82; Cahill, Tr. 550-51; Ex. PB-50; *see also* DRN-47)

57. Accordingly, the Borough performed an assessment of current sewage facilities by conducting a survey of on-lot systems with questionnaires sent to residents and confirmed by a field examination by Michelle Arner. Additionally, the records of the sewage enforcement officers were reviewed.

58. Existing sewage facilities in the Borough are inadequate or malfunctioning, resulting in overflows of untreated sewage within the Borough and discharges of untreated sewage to the Delaware River. (Fisher, Tr. 413-14, 433-36, 437-38; Ex. PB-82)

59. Many systems are very old and/or not consistent with current regulatory standards. (Fisher, Tr. 429-30)

60. If an on-lot disposal system does not meet the current standards embodied in the Department's regulations, it may present a threat to public health, safety and environment. (Stip. ¶ 130)

61. Repair, replacement or relocation of existing on-lot systems is not practicable because existing lot sizes and amount of available land within the Borough are too small and the slopes on available land are too steep to meet the Department's regulatory requirements for an adequate on-lot system. In addition, a majority of the soils in available land within the Borough are not suitable for on-lot systems. (Fisher, Tr. 461-63; Arner, Tr. 596-99; Gralski, Tr. (4/27) 901-29; Exs. PB-87; PB-88. *See also* Davis, Tr. 1120-21, 1189-90)

62. Even though some systems could be repaired or maintained, they are all likely to fail at some point and can not be repaired to current regulatory standards. (Fisher, Tr. 413-14, 437-38, 461-63, 472-73; Gralski, Tr. (4/27) 932)

63. The Borough's Act 537 Plan lists and evaluates numerous alternatives including no action, on-lot management, non-structural comprehensive planning, and collection, conveyance and treatment, including innovative and alternative technologies. It also examines various alternatives in developing a plan for a treatment system, including sludge handling. (Ex. DRN-32, pp. 48-63; Ex. PB-3A, pp. 48-63)

64. An on-lot management program would not meet the needs of the Borough because too many systems are too old and malfunctioning. Such programs are intended for communities with functional septic systems. (Arner, Tr. 507, 599; Gralski, Tr. (4/27) 932-33)

65. A single community on-lot system is not feasible due to the limitations on available land referred to above. (Ex. PB-108)

66. The Appellants' planning expert, Mr. Horner, testified he had made no determination that a community on-lot system was feasible for installation and use in the Borough, just that there was "potential for feasibility." (Horner, Tr. 307).

67. The Appellants' experts did not identify any specific site or sites where a community on-lot system could be installed and meet all of the soil, groundwater area setback and other requirements for such a community on-lot system. (Horner, Tr. 307; Cahill, Tr. 647)

68. A spray or drip irrigation system for disposal of treated waste is not practicable due to the unavailability of sufficient land in the Borough for operation of such a system and because of the markedly increased cost of such a system. (Gralski, Tr. (4/27) 937-47; Tr. (4/28) 1098-1102; Davis, Tr. 1154)

69. The Appellants' experts did not evaluate or reach any conclusion as to specific land areas where a spray irrigation system could be installed meeting all the standards for a spray irrigation system. Further, they did not determine a specific site, did not determine what the storage of effluent requirements would be, and did not determine whether any particular site met the zoning that would allow such a system. (Horner, Tr. 308-09; Cahill, Tr. 646)

70. The alternative of planning for a joint treatment works to serve both the Borough and the Township with the possible use of available land in the Township was not a feasible alternative because the Township did not want to participate in the preparation of a joint sewage facilities plan. (Gralski, Tr. (4/28) 1130-32; Bucci, Tr. 1250-52)

71. While it may be technically feasible to identify on a site-by-site basis where the malfunctioning lots are and to design a system connecting only those lots, that solution is not advisable for the Borough and would not be cost-effective. (Gralski, Tr. (4/28) 1136)

72. Mr. Gralski also testified that even if he did a lot-by-lot evaluation, he would not likely design a smaller system. (Gralski, Tr. (4/28) 1080)

73. Partially sewering the Borough is not a good alternative because it would not resolve likely future sewer problems and would not be cost-effective since the bulk of the cost of the system is the piping, not the plant. (Gralski, Tr. (4/28) 1136-37)

74. The Appellants' experts criticized this conclusion, taking the position that there was an insufficient rate of malfunction in all areas of the Borough to justify sewering the entire Borough. (Horner, Tr. 174-77, 250, 253; Cahill, Tr. 528, 551)

75. Mr. Horner testified that in his opinion, the deficient analysis of malfunctioning systems and overstated flow estimates presented in the Plan lead to an incomplete alternatives analysis and therefore the Plan was incomplete and should be improved. Specifically, he believed the Plan did not adequately consider alternatives other than the complete sewering of Portland Borough. As a consequence the approval of the Plan would lead to an adverse consequence of induced development in Upper Mount Bethel Township. (Tr. 198-200; 236-37)

76. Mr. Horner's opinion that there was not a high rate of sewage facility malfunction did not consider a number of cesspools used in Portland Borough. (Tr. 352-53)

77. Mr. Horner and Mr. Cahill both conceded that there is a need for centralized sewage treatment facilities in the commercial center of Portland Borough. (Horner, Tr. 180; Cahill, Tr. 523-24)

78. Mr. Horner based his opinion on his review of the Act 537 Plan. Although he visited Portland Borough, he characterized his study as a "windshield survey." He did not base his conclusions on his own alternatives analysis of the on-lot systems in Portland Borough, cost estimates for the proposed sewage treatment facility, feasibility studies of other alternatives, or growth and population studies for Upper Mount Bethel Township which supported his view that the proposed sewage facility was larger than necessary and would result in induced development in Upper Mount Bethel Township. (Tr. 160, 179-83)

79. Mr. Cahill's opinion was that the alternatives analysis of the Plan was fundamentally flawed because it only considered totally sewering the Borough rather than considering a system with smaller flows, leaving the remaining trouble-free on-lot systems in place. (Cahill, Tr. 552-53)

80. However, Mr. Cahill did not do any feasibility study for such a system or provide his own alternatives analysis. His opinion was limited to the observation that, in his view, partial sewering was not adequately considered by the Borough. (Cahill, Tr. 624, 637-38, 642)

81. Further, Mr. Cahill never visited the Borough for the purposes of conducting any inspections of the sewage facilities there, or to perform his own analysis of the capability of lands in the Borough to support siting of on-lot disposal systems. (Tr. 647-48)

82. Mr. Horner speculated that a more modest and less expensive treatment facility could be developed to receive industrial flows by gravity, possibly even using some land area for effluent application, in conjunction with trying to remediate existing problems in the Borough on a site-by-site basis, with the possibility of small community groups or other solutions. However, he did not have any specific information about such a system. (Horner, Tr. 308-10; *see also* Cahill, Tr. 678-79; Ex. DRN-A)

83. Harley Davis testified that his review was to determine whether the alternative selected by the municipality would solve the identified problem. In his view, the Borough chose the best alternative to meet the Borough's sewage needs. (Tr. 1153, 1156, 1165-67; 25 Pa. Code § 71.65(a)(1))

Sewage Flow Estimates

84. Brinjac estimated the ten-year need for residential, commercial and institutional sewage facilities in the Borough, outside of Portland Industrial Park, to be 70,000 gpd in accordance with the Department's *Domestic Wastewater Facilities Manual* (#362-0300-001, 10/97) ("*Wastewater Facilities Manual*"). (Exs. PB-53; PB-108, p. 5-8; Gralski, Tr. (4/27) 886)

85. In calculating the Borough's sewage facilities needs, Mr. Gralski reviewed population census data, population projections, and alternatively based calculations on water use data. (Gralski, Tr. (4/28) 1008)

86. Both methods are approved by the Department and consistent with engineering practice. (Stip ¶¶ 92, 95)

87. Based on the per capita water use and sewage generation rate specified in the *Wastewater Facilities Manual*, the residents of Portland Borough are reasonably

estimated to have generated 57,900 gpd of sewage in the year 2000, and reasonably are expected to generate 65,900 gpd of sewage in the year 2010. (Gralski, Tr. (4/27) 887; Ex. PB-108, p.7)

88. The foregoing estimates of sewage facilities needs for residential users do not include sewage generated in commercial, industrial, or institutional establishments. (Ex. PB-108, p. 7)

89. To determine the total projected need for the Borough, a projection of non-residential use needs must be added to the residential use projections. (Gralski, Tr. (4/27) 888; Ex. PB-108, p.7; Horner, Tr. 281-82)

90. Based on these data, Brinjac's estimate of the near-term (ten-year) sewage facilities need for the Borough of 70,000 gpd is reasonable and consistent with accepted sewage facilities engineering and planning principles. (Gralski, Tr. (4/27) 886; Ex. PB-108, p. 9)

91. Mr. Horner thought that the near-term flows from residential, commercial and institutional users in the Borough might be somewhat lower, perhaps in the neighborhood of 60,000-65,000 gpd. (Tr. 206, 233-34, 329)

92. However, Mr. Horner also testified that when the wastewater plant was up and running, the projected value of 65,000 gpd was "reasonably not disputable in terms of actual need." (Tr. 207)

93. The Appellants' expert report goes on to concede the 4,668 gpd included in the plan for future Borough growth, stating: "We do not dispute this number ...." (Ex. DRN-A, p. 11)

94. Mr. Horner further conceded that if one used the population forecasts for Portland Borough provided by the Lehigh Valley Planning Commission, and the per capita flow values from the DEP *Wastewater Facilities Manual*, plus the EDU values for non-residential uses counted in the Act 537 Plan, the sewage flows predicted by 2010 would exceed the 70,000 gpd predicted in the Borough's Act 537 Plan. (Tr. 290-91)

95. The Act 537 Plan recognizes a capacity reservation request by Portland Industrial Park in the amount of 35,000 gpd. (Gralski, Tr. (4/27) 898; Exs. PB-108, p. 10; PB-3a)

96. The size and configuration of those lots will depend upon the industrial and commercial enterprises who decide to purchase land in the Industrial Park. (Reinhart, Tr. 804-05)

97. As of the time of this hearing, none of the potential lots in the Industrial Park has been sold. (Reinhart, Tr. 843)

98. The prospective owners of the lots and specific industrial uses are not yet known, because the industrial lots within the Portland Industrial Park have not yet been marketed and sold. (Gralski, Tr. (4/27) 898; Ex. PB-108, p. 10; Reinhart, Tr. 843)

99. Mr. Gralski, in his expert opinion, used several methods to calculate an estimate of flows which would accommodate the Industrial Park based on standard engineering practices. (Gralski, Tr. (4/27) 898-900)

100. The Department accepted the estimate of 35,000 gpd as reasonable for the Industrial Park. (Brunamonti, Tr. 1003-04; Davis, Tr. 1131)

THE NPDES PERMIT

The Department's Review

101. The Borough's Permit application was prepared by Brinjac Engineering at the primary direction of Mark Pickering.[17] Mr. Pickering also directed the preparation and submission of the Borough's Water Quality Part II Permit application that deals with the design and operation of the treatment plant, collection system and related facilities. (Stip. ¶ 25; Tr. (4/27) 757-58)

102. Following the Borough's approval of the Plan, the required NPDES Permit application was submitted to the Department on March 3, 2003 (Stip. ¶ 196; Exs. DRN-36; PB-44; C-7)

103. The Permit application is based upon an average daily flow for the facility of 105,000 gpd. (Ex. C-10)

104. The Department approved the Permit application and issued the Permit on July 22, 2003. (Stip. ¶¶ 27, 200; Exs. DRN-38; PB-2; C-13)

105. The Permit authorizes the discharge of municipal sewage to the Delaware River under the conditions and limitations contained in the Permit. (Stip. ¶ 51; Exs. PB-2; C-13; DRN-38)

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[17] Mark Pickering is a Professional Engineer employed by Brinjac Engineering. He is the designer of the Portland Borough Wastewater Treatment Plant. He also testified as an expert. (Tr. (4/27) 757; Exs. B-3, ¶ 6; PB-99; PB-106)

106. The Permit is conditioned on technology-based effluent limitations some of which are based on the requirements of the Delaware River Basin Committee (DRBC). (Stip. ¶¶ 202-11; Patel[18], Tr. 1053-54; Agustini, [19] Tr. 1020)

107. The Department's analysis of the Permit application compared these effluent limitations with limits required to in-stream water quality criteria established by the Department's regulations as well as other water quality regulatory requirements. (Stip. ¶ 212; Patel, Tr. 1057-59)

108. The Delaware River is designated "warm water fishery/migratory fishery" at the proposed sewage treatment plant's discharge point. (Stip.¶¶ 46, 218; Agustini, Tr. 1018-19)

109. Downstream of the point of discharge the Delaware River is designated as a "recreational" waterway as part of the National Wild and Scenic Rivers System. However, it is not part of the National Wild and Scenic River Act. (Stip. ¶¶ 221, 222)

110. The Delaware River at the proposed point of wastewater discharge is not designated as a special protection water subject to the special anti-degradation requirements of 25 Pa. Code Chapter 93, 95 or 102, or of the regulations of the Delaware River Basin Commission or the Federal Water Pollution Control Act. (Stip. ¶¶ 170, 220,221; Sharp,[20] Tr. 757; Agustini, Tr. 1020-21)

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[18] Vinod Patel is a sanitary engineer in the Department's water quality management program. He reviewed Portland Borough's NPDES Permit application. (Tr. 1042; Stip. ¶ 197)

[19] Dino Agustini is the Chief of the permit section in the Department's regional water quality program. He supervised review of the NPDES Permit. (Tr. 1014-15; Stip. ¶ 199)

[20] William Sharp is a project manager in the Wild and Scenic River Program of the United States National Park Services. (Tr. 756)

111. The Permit also accounts for future changes in regulatory requirements. Special Condition Seven of the Permit states:

> If the applicable standard or effluent limitation relating to the application for Delaware River Basin Commission (DRBC) is developed by the Department, or by DRBC for this type of discharge, and if such standard or limitation is more stringent than the corresponding conditions of this permit (or if it controls pollutant not covered by this permit), then the Department reserves the right to modify, or revoke and reissue the permit to conform with that standard or limitation.

(Stip. ¶ 47; Exs. PB-2; DEP-13; DRN-38; Patel, Tr. 1050)

112. In issuing the Permit the Department determined that the authorized discharge would not violate any existing regulatory water quality or effluent requirement. (Patel, Tr. 1056-57; Exs. DRN-38; PB-47)

113. Only domestic sewage is permitted to be treated and discharged from the Borough treatment plant. Any industrial discharge would require further application to the Department for approval and could be subject to federal pretreatment requirements. (Patel, Tr. 1045, 1058-59; Agustini, Tr. 1030, 1032; Pickering (4/27) Tr. 758-60)

114. Conditions in the Permit also contain management requirements relating to any future "indirect dischargers" designed to require examination of the quantity and quality of effluent from any future industry located in the Industrial Park that might desire to send wastewater to the Borough's treatment plant. (Stip. ¶¶ 233, 234)

Impact of Discharge on the River

115. The effluent limitations set forth in the Permit comply with all requirements of the regulations of the Department and the DRBC. (Patel, Tr. 1046-47; Exs. PB-47; DRN-38)

116. The modeling study conducted by the Borough's expert, Richard Sands,[21] demonstrates that even under a discharge of 205,000 gpd all relevant water quality requirements would be met and that there would be no measurable impact on the water quality of the Delaware River other than in a 712 foot mixing zone. (Sands, Tr. 1217-18)

117. Mr. Sands stated credible and well-supported opinions that (i) the proposed discharge of up to 105,000 gpd from the proposed wastewater treatment plant will not cause any measurable change in the water quality in the receiving of water in the Delaware River, at or below the point of discharge; (ii) the instream water quality standards of the Department and the DRBC will not be exceeded by the discharge of 105,000 gpd of treated effluent from the proposed wastewater treatment plant; and (iii) the effluent limitations set forth in the NPDES Permit are consistent with technology-based, secondary treatment requirements that are applicable to municipal wastewater treatment facilities. (Exs. PB-105; PB-105A)

118. The plant is designed to treat wastewater so that it meets or exceeds the Permit limits. (Pickering, Tr. (4/27) 797-99, 801)

119. The Appellants' experts did not conduct any independent water quality modeling or other analyses to assess the impact of the discharge from the proposed Borough wastewater treatment plant upon the existing water quality in the Delaware River. (Cahill, Tr. 571)

[21] Richard Sands is managing principal with URS Corp. He is educated as a civil engineer and has earned his Master's Degree in Geotechnical Engineering. He testified as an expert in water discharge permitting . (Tr. 1192; PB-98; Ex. B-3, ¶ 4)

OTHER ISSUES

Wetland Protection

120. The Department's regulatory program dealing with waterway management requires the development of an environmental assessment for any encroachment to a waterway. If the Department determines the encroachment may impact natural, scenic, historic or aesthetic values of the environment after considering mitigation measures proposed by the applicant, the activity will not be permitted by the Department unless the Department finds that the public benefits of the proposed project outweigh the harm to the environment and public natural resources. 25 Pa. Code §§ 105.15, 105.16.

121. The proposed outfall discharge line from the wastewater treatment plant to the Delaware River would cross a wetland area within 200 to 300 feet of the River. (Stip. ¶ 140)

122. The treatment plant is designed with numerous features that enhance the reliability of its operation, such as adequate capacity for peak loads, redundancy of processing units, automatic operation with warning and shut down features and a back-up emergency generator that assure that unintended releases in excess of permit limits are unlikely to occur. (Ex. PB-106; Pickering, Tr. (4/27) 773-805)

123. These design features fully address the risks cited by Mr. Cahill of failure of a treatment system that might lead to releases in excess of permit limits. (Tr. 669-675)

124. This wetland is part of an alluvial floodplain wetland system formed as a result of periodic inundation from the Delaware River and permanent inundation from the groundwater table. (Stip. ¶ 141)

125. The impact to this wetland will be temporary and subject to pre-construction approval by the Department and the Northampton Conservation District to assure that impacts to this wetland from construction will be minimized. (Ex. PB-108; Stip. ¶ 142)

126. Construction of the proposed outfall discharge line will not impact any other wetland area. (Gralski, Tr. (4/27) 968-69)

Endangered Species

127. The bog turtle is listed on the Federal list of threatened species and the state list of endangered species. (Stip. ¶ 147)

128. The only wetland areas that might be affected by the construction and operation of the proposed treatment system are not suitable habitat for bog turtles. Accordingly, bog turtles and their habitat will not be affected by the proposed treatment system. (Gralski, Tr. (4/27) 966-67; Urban,[22] Tr. 184-85; Stip. ¶ 149; Exs. PB-16; PB-35; PB-39)

129. In June 2003, the Pennsylvania Game Commission notified Brinjac of eight osprey nesting sites in Northampton County. (Stip. ¶ 150; Exs. PB-35; PB-39)

130. The osprey is a threatened species under Pennsylvania law and there are six potential osprey nesting sites within one-half mile of expected construction activities. (Stip. ¶¶ 152, 156)

131. The osprey will not be adversely affected by the construction or operation of the wastewater treatment system because they are tolerant of human activity and the

[22] Chris Urban is the Natural Diversity Chief for the Pennsylvania Fish and Boat Commission. He has held similar positions in the U.S. Fish and Wildlife Service and the DRBC. (Tr. 1179)

discharge from the treatment system will have no measurable impact on their food supply. (Kibbe,[23] Tr. (4/27) 855, 862)

132. There are no bald eagle nests in the vicinity of the project or in Northampton County, but there are numerous bald eagles who nest along the Delaware River, particularly in the northern portion of the Delaware Water Gap north of the proposed treatment system. (Kibbe, Tr. (4/27) 863-65; Stip. ¶ 161)

133. Douglas Kibbe testified that he was not surprised that bald eagle were sighted in the vicinity of the project during the winter because they go to water in search of food especially in an area where the water may not be frozen. (Kibbe, Tr. (4/27) 865-66; *see* Ex. DRN-50)

134. The construction and operation of the treatment plant is not expected to have any impact on the bald eagle or its habitat. (Kibbe, Tr. (4/27) 863, 874)

135. The project will not affect the food supply of the bald eagle because of the lack of anticipated impact to the Delaware River from the discharge of treated effluent from the plant to the Delaware River. (Kibbe, Tr. (4/27) 863)

136. Although Mr. Horner provided opinions in his expert report concerning adverse environmental consequences on bald eagles, bog turtles and wetlands, he did no study and has no qualifications in birds, turtles or wetlands upon which to base his opinion. (Ex. DRN-A)

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[23] Douglas Kibbe is a certified wildlife biologist and specializes in avian species. He holds degrees from Virginia Polytechnic Institute, and the University of Massachusetts. He has also studied at Cornell University and the University of Vermont. He testified as an avian expert. (Tr. 852-54; Exs. PB-104; B-3, ¶ 3)

Wild and Scenic Rivers

137. The Delaware River at the point of the proposed discharge from the wastewater treatment plant is not designated as a part of the National Wild and Scenic River System under the Wild and Scenic Rivers Act. (Stip. ¶ 163; Sharp, Tr. 757-58; Exs. DRN-13; PB-40)

138. The Delaware River approximately 13 miles south of the discharge point has been designated as a "recreational" river area as part of the National Wild and Scenic River System. (Sharp, Tr. 757; Stip. ¶¶ 164, 223)

139. The water quality modeling conducted by the Department and by Portland Borough's expert demonstrate that the discharge of treated effluent from the sewage treatment plant will have no measurable impact on any area currently designated as part of the National Wild and Scenic Rivers System or in any area eligible for designation. (Sands, Tr. 1216-18)

140. The selected alternative is consistent with the policies and plans referred to in the Department's regulations at 25 Pa. Code § 71.21(a)(5)(i)(A)-(H).

141. Specifically, the selected alternative is consistent with the Borough's comprehensive plan, water quality requirements, including antidegradation requirements, the state water plan, as well as the Martins/Jacoby Stormwater Management Plan. (Gralski, Tr. (4/27) 959-64; Exs. PB-3(d); PB-108; DRN-34; C-1; PB-58; PB-64)

Comprehensive and Other Plans

142. The proposed pump station will be located within the 100-year flood plain, but there is no practical alternative to locating the pump station in the flood plain. (Stip. ¶ 190; Pickering, Tr. (4/27) 805)

143. The Department's approval of the selected alternative was consistent with the requirements of the Department's regulations at 25 Pa. Code § 71.32(d) as well as the Clean Streams Law and the Sewage Facilities Act.

144. Specifically, the Borough is able to implement this Plan and the Plan provides for continued operation and maintenance of the sewage facilities. (Exs. PB-3; DRN-32; C-1; Stip. ¶ 183)

Environmental Impacts

145. Mr. Horner's speculation that possible excess capacity of the system might lead to undesirable development in the Township because user fees would have to be carried by a smaller user base in the Borough was not supported by significant evidence. (Tr. 197, 322-24)

146. Mr. Horner's opinion was based on what he himself described as a very limited review of the overall situation, and he acknowledged that he did not perform any studies or analyze any environmental impacts associated with possible development in the Township. (Tr. 230, 235)

147. Any such development could take place only if the Township were to revise its Act 537 Plan and construct conveyance facilities to enable sewage from the Township to be conveyed to the Borough's treatment system. There is no evidence of record that indicates whether or not this will occur. (Tr. 325-28)

148. For these reasons Mr. Horner's opinion with respect to indirect environmental impacts in the Township is unsupported, speculative and not credible.

149. Continued use of on-lot systems in the Borough is an on-going risk to the public health and the environment. (Gralski, Tr. 901-02; Ex. PB-108, p. 16) It is not

environmentally sound or consistent with the Department's standards or accepted sanitary engineering principles and practices. (Gralski, Tr. 901-02; Ex. PB-108, p. 19-20)

150. The environmental benefits of the proposed treatment system authorized by the NPDES Permit are substantial and the Appellants have offered no credible evidence as to any significant environmental harm resulting from the construction of the project or the discharge of treated effluent to the Delaware River.

DISCUSSION

Standing

Section 4(c) of the Environmental Hearing Board Act[24] provides that "no action of the department adversely affecting a person shall be final as to that person until that person has had the opportunity to appeal the action to the board. . . ." The Board has interpreted this provision over the years to substantially incorporate the standards of an aggrieved party set forth in the Supreme Court's decision in *William Penn Parking Garage, Inc. v. City of Pittsburgh*[25] to mean that (1) the appellant must have a substantial interest in the subject matter of the particular litigation and (2) the asserted interest must be direct and not a remote consequence. Any such substantial interest also must be an interest that surpasses the common interest of all citizens in seeking obedience to the law.[26] As applied to an organization, the Board has ruled that an organization has

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

[25] 346 A.2d 269 Pa. 1975.

[26] *See also*, *In re Hinkson*, 821 A.2d 676 (Pa. 2003); *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002); *De Fazio v. Civil Service Commission*, 756 A.2d 1103 (Pa. 2000); *South Whitehall Township Police Service v. South Whitehall Township*, 555 A.2d 793 (Pa. 1989); *Coghlan v. Borough of Darby*, 844 A.2d 624 (Pa. Cmwlth. 2004).

standing if at least one of its individual members has been aggrieved by an action of the Department.[27]

We believe the evidence of record compels the conclusion that the Appellants have a substantial, direct interest in the Department's approval of the Plan for a central treatment works and the resulting discharge of treated waste to the Delaware River that surpasses the common interests of all citizens in obedience to the law.

As indicated by our findings of fact and the testimony, Ms. van Rossum's interest in preserving the natural, pure state of the Delaware River is unusually intense as an advocate for the protection and restoration of the ecological, recreational, commercial and aesthetic qualities of the Delaware River. Appellants, the American Littoral Society and the Delaware Riverkeeper Network, share substantially the same mission. Some members of these organizations testified to their enjoyment of the River and their belief that the proposed treatment works would degrade the quality of the River and would discourage them and others from the recreational use of the River. [28]

Earl Ackerman, a member of the Delaware Riverkeeper Network, testified that in his recreational tour business he takes clients on canoe trips from the foot bridge in Portland Borough past the site of the proposed discharge pipe to his establishment four miles down river. He testified that he believes that the approved additional discharge to the River will give the river a reputation for being polluted and his business would be done. [29] His wife, Margaret Ackerman, concurred with that conclusion.[30]

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[27]*See, e.g., Pennsylvania Trout v. DEP*, EHB Docket No. 2002-251-R(Adjudication issued April 27, 2004); *Wurth v. DEP*, 2000 EHB 155.

[28]van Rossum, Tr. 89-92, 106-107, 1172-1173; Fluck 218-222.

[29] Ackerman, Tr. 14-22.

[30] M. Ackerman, Tr. 42, 43.

Leona Fluck also rents canoes and kayaks on the Delaware River and organize tours there. She is also concerned about the impact of how an outfall in the River may affect her business. (Tr. 218-23)

The Borough dismisses this testimony as "amorphous claims of aesthetics and subjective assertions concerning psychological perceptions." (Borough Brief, p. 142) It also attacks the Appellants' claim of standing because they have done no technical studies to show that the River will be adversely affected by the discharge while the technical evidence presented by the Borough proves that the discharge will have no impact on the water quality of the River. This assertion can only be based on the erroneous belief that the Appellants must prove they can succeed on the merits of their claim to have standing.

We find that this credible testimony is enough to demonstrate that the Appellants have interests in protecting their use of the River from pollution that is beyond that of the general public and which is directly, immediately, and substantially affected by the Department's in approving the sewage treatment plant. The Appellants do not have to prove that they will succeed on the merits to have standing. This Board has long held that interference with the enjoyment of environmental resources is a basis for standing.[31] Decisions of other courts concur with that view.[32]

While it may be that the tertiary treatment proposed for this plant will minimize any water quality impact to the River, even the Borough's expert, Richard Sands, testified

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[31] *Pennsylvania Trout v. DEP*, EHB Docket No. 2002-251-R(Adjudication issued April 27, 2004); *Greenfield Good Neighbors v. DEP*, 2002 EHB 861; *O'Reilly v. DEP*, 2000 EHB 723.

[32] *See, e.g., Friends of the Earth, Incorporated v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000).

that there would be mixing zone of 712 feet of treated sewage in the River if capacity were increased to serve the Township's sewage needs as well. [33] While he thought that was a small effect, a mixing zone of treated sewage of more than two football fields in length may well have an adverse effect on the canoe trips sponsored by the Ackermans and the experience of others in their enjoyment of the River.

The Board decisions relied upon by the Borough fail to support the Borough's contentions. In the *Greenfield Good Neighbors* case,[34] we found no standing because two of the three witnesses offered by the appellant said they did not know how they would be affected, and we chose not to believe the testimony of the third that she smelled the odor of human feces at the spray fields. In addition, we held that a challenge to the location of the spray fields was barred by administrative finality. In *O'Reilly v. DEP,*[35] Judge Labuskes said correctly that the Board has repeatedly held that an aesthetic appreciation or enjoyment of an environmental resource, such as using a stream for fishing, can confer standing. In our final adjudication, the Board rejected O'Reilly's claims *on the merits*, because he failed to prove that the site's discharge would harm or threaten the receiving stream as a result of on-site or off-site conditions. The Board's decision in *Wurth v. DEP*[36] is clearly distinguishable. In that case there was no credible testimony that a mere transfer of ownership would create environmental effects adverse to the appellants.

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[33] Sands, Tr. 1217-18.
[34] *Greenfield Good Neighbors v. DEP*, 2002 EHB 555, 569.
[35] 2000 EHB 723, 724.
[36] 2000 EHB 155, 170-71.

Approval of The Borough's Act 537 Plan[37]

The Appellants' primary contentions with respect to the approval of the Act 537 plan are (1) that the Department's approval of the Borough's Plan reserving capacity for areas in the Township was an error of law because the Plan was a regional plan providing for treatment in areas of the Township when the Township had not authorized such a plan and had not made any revision to its Act 537 Plan considering use of such a facility; (2) that a large, central sewage treatment plant is not needed by the Borough; (3) that the Plan's discussion and the Department's analysis of alternatives was inadequate; (4) that the Plan and the Department's approval of it was inconsistent with requirements of the Department's regulations including inadequate consideration of environmental impacts to natural resources as well as undesirable development of areas in the Township. The last three of these contentions are based in part on the testimony of the Appellants' experts, Thomas Cahill and Wesley Horner.

Absence of Joint or Concurrent Planning

The Appellants first argue that the Department's approval of the Act 537 Plan was erroneous as a matter of law because this approval was for a "regional plant" alternative that required the approval of the Township. Implicit in this argument is the assumption that the Department could not approve the alternative the Borough selected to solve existing sewage problems within its borders without the Township giving approval to that

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[37] The Board's review of the propriety of the Department's actions is *de novo.* Accordingly, the Board may consider all evidence presented to it and is not limited to the evidence the Department had before it when it approved the Plan and issued the discharge Permit. *Leatherwood v. Department of Environmental Protection,* 819 A.2d 604, 610-11 (Pa. Cmwlth. 2003). The Appellants bear the burden of proving that these Department actions were unreasonable or inappropriate or otherwise constituted an error of law. 25 Pa. Code § 1021.122(c)(2); *Maddock v. DEP*, 2002 EHB 1.

portion of the Plan that might be utilized by the Township to solve sewage treatment problems within the Township's borders.

We believe this assumption to be erroneous. Nothing in the Sewage Facilities Act required the Department to insist that the Township submit a revision to its sewage facilities plan before approving the Borough's selected alternative. As discussed more fully below, Section 5(a) of the Act requires each municipality to submit a sewage facilities plan for areas within its jurisdiction and to submit such revisions as may be required by the Department's regulations under the Act. The Borough's Plan unquestionably provides for sewage facilities within its jurisdiction. The fact that the Plan also reserves some treatment capacity for a portion of the Industrial Park within the jurisdiction of Upper Mount Bethel Township cannot be viewed as a violation of this mandatory section of the Act.

Section 5(c) of the Act[38] makes it clear that a joint submission of a plan by two or more municipalities is permissible, but not necessarily required.[39] This section provides that the required Plan or any revision thereof *may* be submitted jointly by two or more municipalities. However, Section 71.32(d)(7) of the regulations provides the Department must consider whether the official plan revision proposes sewage facilities to be connected to sewage facilities of another municipality, and "whether or not the other municipalities have submitted necessary revisions to their plans for approval by the

[38] 35 P.S. § 750.5(c).

[39] Multiple municipalities can submit a single plan, but it must be approved by resolution of each individual municipality. 25 Pa. Code § 71.12(b).

Department." Where there is such a connection, the Department *may* order the municipality without an appropriate plan revision to revise its official plan.[40]

We believe the Department properly approved the Borough's selected alternative based on an Act 537 Plan that looked forward to possible use of the planned facility by the Township. First, it is important to understand that the Borough's Plan discusses two amounts of capacity relating to the Township. The Department explicitly viewed these two reservations of capacity differently. One aspect is the 35,000 gpd of capacity relating to the Industrial Park. The second is the reservation of capacity in the amount of 100,000 gpd for the Township.

The 35,000 gpd reserved for the Industrial Park was approved by the Department as a portion of the plant's 105,000 gpd. The Industrial Park straddles the Borough and the Township. Its development, including at least a portion of the preparation of the various sewage planning documents, is financed by the Bangor Area School District Regional Development Authority. However, as stated by Kate Crowley, the approval of the capacity does not constitute planning by the Borough for the Township.[41] The Industrial Park is not even subdivided into lots as of the time of the hearing, therefore it is impossible to determine how much of that flow may be generated outside of the Borough.[42] At the moment, the only occupant is the Ultra-Poly Corporation, located on the Borough portion of the Park.[43] The Department witnesses stated explicitly that no part of that capacity can be used for land in the Township without further planning by the Township. Yet, if the Township does nothing to undertake additional planning, the

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[40] *Montgomery Township v. DEP*, 1995 EHB 483 at 514.
[41] Tr. 959.
[42] Tr. 808.
[43] Tr. 808.

Borough can still use at least a portion of the estimated capacity attributed to the Industrial Park.[44]

The sewage planning situation at the Portland Industrial Park is markedly different from other cases where the Board has required concurrent planning by two municipalities. For example, in *Montgomery Township v. DER*,[45] the Department approved an Act 537 Plan for a borough which would redirect existing flows from its treatment plant in a neighboring township to a spray irrigation facility located elsewhere. The Board held that the Township also had to update its plan at the same time because a portion of those existing flows were generated in the Township and to divert them would immediately cause an inconsistency with the Township's sewage plan. In the case of the Industrial Park there are no existing flows from the Township. Accordingly, the Borough's Plan does not have a direct effect on any existing sewage facilities within the Township.

The Appellants' argument in its Reply Memorandum that the Township was required to approve Portland Borough's Plan before it was submitted to the Department for approval because it might enable sewage service to the Township's portion of the Industrial Park is based on a complete misunderstanding of the Department's regulations and a few lines of the testimony of the Department's reviewer, Harley Davis. Mr. Davis did not testify that the Township had to give such a prior approval to the Borough's Plan. He clearly testified that no part of the capacity in the Industrial Park for lots located in the Township could be used without further approved planning by the Township. (Davis, Tr.

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[44] Sewage planning modules for both the Portland Borough and the Township portion of the Industrial Park are currently under review by the respective municipalities. (Exs. PB-80, PB-81; Gralski (4/28) 1103-09)

[45] 1995 EHB 483.

(4/27) 1099-1100). His testimony at pages 1111-1112 of the transcript, referred to by the Appellants, is no different. In that portion of his testimony he said that while the Industrial Park extends into the Industrial Park in the Township, the approved selected alternative extends only to the treatment plant. For the Township portion of the Park to be developed, he said that further planning would have to be done by the Township. Other witnesses for the Department and the Appellants gave the same testimony. See Finding of Fact No. 43.

We also find no error in the Plan's discussion of the Township's possible future use of 100,000 gpd in the Borough's Plan, even though it was not approved for implementation by the Department. Throughout this proceeding the Appellants have argued both that the Borough and the Township should jointly plan for meeting their sewage needs and that a reservation of a capacity of 100,000 gpd at the Township's request in order to meet its sewage needs means that the Department should have disapproved the Plan. Without acknowledging the inconsistency of these positions, the Appellants' argument appears to be that the reservation of capacity will require a much bigger plant and a greater discharge to the Delaware River than is required to meet the Borough's individual needs.

Witnesses for the Department were very explicit that although the reservation of 100,000 gpd was discussed in the Borough's Plan and that the proposed treatment plant is designed to be expanded to accommodate those flows, *this was not part of the "selected alternative" that was approved by the Department.*[46] The Borough did not choose an alternative which included providing the Township with that capacity, because the

[46] Crowley, Tr. 959; Davis, Tr. 1108.

Township was not prepared to offer a financial commitment for the capacity, nor were they prepared to complete their planning on the same timeline as the Borough.[47] Accordingly, the Borough did not select an option which included the Township.[48] Therefore, the *only* thing approved for implementation by the Department was the capacity for the Borough's present and future needs and the capacity for the Industrial Park.

We see no environmental disadvantages to the Department's approval of the Borough's treatment facility based on the Act 537 Plan that looks forward to a more regional use of the plant's facilities by the Township. The Appellants take issue with the design of the plant which allows for it to be expanded to a larger capacity than the 105,000 gpd currently approved. We find that the "expandability" of the plant does not mandate joint planning. The Appellants claim that this approval somehow limits the Township in its future planning. We see no basis for that claim. If the Township should desire to connect to the Borough's treatment system, the Township would be required to reach an agreement with the Borough, secure the Department's approval of an update to its own sewage facilities plan, developed by the Township, through among other things, a

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[47] Bucci, Tr. 1250.

[48] The Borough prudently accounted for this possible connection in the planning as required by section 5(d)(4) of the Sewage Facilities Act. That subsection authorizes the Borough to:

> Take into consideration all aspects of planning, zoning, population estimates, engineering and economics so as to delineate with all practical precision those portions of the area which community systems may reasonably be expected to serve within ten years, after ten years, and any areas in which the provision of such services is not reasonably foreseeable.

35 P.S. § 705.5(d)(4).

resolution of the Township Supervisors authorizing this connection.[49] If the Township decides not to connect to the system, it is still free to adopt any update to its sewage facilities plan it wants to propose to the Department. It is possible that the existence of the Borough's treatment system may influence the evaluation of alternatives available to the Township in devising any revision it may make to its Act 537 Plan. However, the possibility that the existence of the Borough's treatment system might influence the consideration of alternatives available to the Township at some future date is hardly a reason for denying approval of the Borough's Plan now.[50]

The Appellants do note that if the Township were involved in a joint planning effort alternative consideration of regional alternatives could occur. Yet, the absence of any such consideration is the result of the Township's decision not to participate, not the Department's approval of the Plan for the Borough.

Finally, the decisions of the Township to request the reservation of capacity and Borough to design the plant so that it can be expanded to enable its treatment system to be used by the Township is a matter of municipal judgment. As indicated above, the Township's decision not to revise its sewage facilities plan left the Borough without any capability of engaging in joint planning. Mark Pickering, the designer of the plant, testified that the headworks unit was the smallest commercially available unit that could also accommodate any peak flows that may be generated by additional flows in the event that the plant is expanded. Moreover, if a smaller unit were installed and then the plant

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[49] *E.g.*, Gralski, Tr. (4/27) 956-58.

[50] In any event, any future decision the Department may make with respect to a revision of the Township's Plan must give consideration to additional discharge to the Delaware River. Any decision permitting such a discharge may be appealed so that the Board may consider any harm to the Delaware River under the conditions existing at that time.

thereafter needed to be expanded, it would double the cost of such an expansion.[51] The treatment system itself is "modular" in nature so that it can be expanded with additional "twins" for the existing process units if the Township decides to add capacity to the system.[52] If the Township decides not to connect to the system, the only result will be that the Borough will have to bear a slightly higher cost for these smaller portions of the system's design. Mayor Bucci was well aware of that risk and testified that given the relationship between the Borough and the Township, the Borough was not relying on any funding from the Township in order to finance the construction of the plant. In her view, the resulting user fees were reasonable.[53]

The only "harm" identified by the Appellants was some speculative testimony that building an easily expandable treatment plant is likely to "induce growth" in the area. Mr. Horner had no specific data to support that theory and no evidence of environmental harm. In fact, Mayor Bucci was very clear about her desire to bring new growth to the area in order to improve economic conditions of the Borough.[54] This sort of policy choice is certainly well within her purview as an elected official of the community. In addition, the Township will also be free to consider any economic development issues it chooses to make in considering what revisions, if any, should be made to its Act 537 Plan.

In sum, there are marked advantages to the Department's consideration of the Borough's Plan to deal with its sewage problems in the context of the Township's

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[51] Tr. (4/27) 795-96, 832, 847-48. Similarly, the outfall pipe is sized to accommodate a flow of 205,000 gpd for the same reason. (Tr. (4/27) 848)

[52] Tr. (4/27) 792.

[53] Tr. 1242; 1251-52.

[54] She observed that a large portion of the Borough's citizenry were senior citizens and low-income families. (Tr. 1241) Mr. Reinhart testified that the median income of the Borough was below state and county averages. (Tr. 854-56; Exs. PB-68, PB-70; PB-71)

possible regional needs. This enables the Department and the Borough to make reasonable planning for future needs that could not be accomplished absent joint municipal planning. To ignore the potential sewage needs of the Township might be considered short-sighted on the part of the Borough and potentially create more complicated problems in the future for both communities.[55] While joint planning by the Township and the Borough may have been desirable, joint planning could not take place or be completed because of the unwillingness of the Township to commit to the full plan to date. Certainly the Borough should not be punished for its diligence in planning for likely future needs as the Act authorized it to do because the Township failed to deal promptly with its own apparent need for sewage planning.

Alternatives Analysis and Need for the Selected Alternative

The Appellants contend that the Plan's alternatives analysis is defective in part because the Borough bypassed the alternatives analysis by dismissing the use of on-lot systems within the Borough. The Appellants contend that the dismissal of the alternative of on-lot systems was because the Borough's selection of a central treatment system was driven solely by the funding of the Industrial Park. The Appellants further contend that the Department failed to exercise independent judgment in approving the Plan and failed to apply statutory and regulatory requirements under the Clean Streams Law and the Sewage Facilities Act to protect the Commonwealth's citizens from environmental harm. In support of these claims, the Appellants state that the Borough has no need for a large central treatment facility, and that less expensive and less disruptive alternatives such as improved on-lot systems, a small community treatment system or land application of

[55] *See* Brunamonti, Tr. 992-94, 97-98.

treated sewage to avoid discharge to the Delaware River should be, but were not, fully considered by the Borough or the Department.

The evidence does not support the contention that the Borough's decision in favor of a central treatment system rather than the alternative of dependence on on-lot systems was driven by the availability of financing connected with the Industrial Park. The Borough's Mayor Bucci testified that the Borough's comprehensive plan in 1966 called for construction of a public sewage system by 1970 and that plan provided cost projections for the development of such a system for construction between 1970 to 1975. However, nothing was done at that point because "no one was willing to take the bull by the horns and move forward."[56] In 1981, the Commonwealth's COWAMP Plan recognized the need for such a treatment system in the Borough as an exception to the conclusion that on-lot systems were appropriate for most other areas in Eastern Northampton County.[57] But in 1998 Mayor Bucci learned that financing might be available from Northampton County for some public sewer project as a result of funds made available from landfill closings. As a result, she promptly made a grant application for the development of a feasibility study for a public treatment system.[58] That feasibility study was begun by Brinjac Engineering in Spring or Summer of 1999.[59] The financing for the development of the Act 537 Plan later became available through the efforts of the Development Authority in 2000 in connection with the Industrial Park project. That financing appears to be enough to construct a system thought needed by planners as early as 1966. Accordingly, we reject the testimony of the Appellants' expert, Wesley Horner,

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[56] Bucci, Tr. 1242-1244; Ex. PB-58.
[57] Ex. PB-56.
[58] Bucci, Tr. 128-29, 1242-44.
[59] Bucci, Tr. 1237; Gralski, Tr. 894.

that the selection of the alternative was driven or substantially influenced by the availability of financing in 2000 as being mere speculation.[60]

The Appellants' contentions with respect to the viability of alternatives based on community and on-lot systems relies primarily on the testimony of expert witnesses, Wesley Horner and Thomas Cahill. These witnesses presented an extensive critique of the Act 537 Plan particularly with respect to their belief that the Plan does not adequately consider alternatives that would not result in a discharge of treated sewage to the Delaware River.

Mr. Horner testified that the Plan overstates the number of malfunctioning on-lot systems and overstates the likely sewage flows to the proposed central treatment system with the result that other alternatives were not properly considered.[61] His testimony was based on his review of the Act 537 Plan and a visit to the Borough that he described as a "windshield survey".[62] His testimony that the lack of documentation of more than five malfunctioning systems was not a sufficient basis on which to conclude that a central treatment system was necessary,[63] was badly shaken on cross-examination in which he admitted he had not considered the existence of some 32 boreholes or cesspools in his analysis.[64] Finally, while Mr. Horner, testified that community or on-lot systems could be used as alternatives, he presented no specific plan as to how this could be done given available land limitations in the Borough and the Department's requirements for the

[60] Horner, Tr. 184, 187-189.
[61] Tr. 174-77, 186-89, 205-07.
[62] Tr. 160, 179-83.
[63] Tr. 174-77.
[64] Tr. 352-53.

construction of such systems.[65] Accordingly, his belief that this could be done is not persuasive particularly when contrasted to the detailed consideration given to the lack of available land for replacement and installation of new on-lot systems within the Borough given by Mr. Gralski.[66]

Mr. Cahill testified that while the Borough clearly has sewage problems, the alternatives to a central treatment system were not well considered that would eliminate the need of a discharge of treated sewage to the Delaware River. He acknowledged that there was at least a need for a community treatment system to deal with a cluster of problems in the downtown area of the Borough, but believed that the alternative of on-lot systems for the remainder of the Borough was not properly considered.[67] He said that while land might not be available in the downtown area for such a system, there is available land in other parts of the Borough that could be utilized.[68] This would reduce the volume of wastewater flow that would have to be treated in a community system. In addition, malfunctioning on-lot systems could be rebuilt in outlying areas.[69] Like Mr. Horner, he acknowledged that he was not able to determine what the outcome of a more extensive alternatives analysis would be, but he believed that the "homework had not been done" in analyzing land application alternatives.[70]

We also conclude that the evidence taken as a whole indicates that the alternatives of a small community treatment system to treat sewage needs in limited areas of the Borough and dependence on on-lot systems for the rest of the Borough was properly

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[65] Tr. 198-200.
[66] Tr. (4/27) 930-47.
[67] Tr. 533-35.
[68] Tr. 534-36.
[69] Tr. 692-94.
[70] Tr. 697.

dismissed by the Borough and the Department. We further have no difficulty in concluding that there is a great need for improvement in its existing facilities in Portland Borough for sewage treatment. We particularly credit the testimony of Rick Fischer, the sewage enforcement officer for the Borough, that continued on-lot sewage disposal is no longer a viable option for this community. We also conclude land application alternatives were fully considered and that the Borough has a need for a central, public sewage system. The evidence at the hearing demonstrated that many of the existing on-lot treatment systems are malfunctioning resulting in the discharge of raw sewage to ground surface and, in some cases, to the Delaware River. Many of these facilities are "grandfathered" cesspools that cannot now be lawfully repaired or replaced under the Department's regulations for on-lot disposal, in part because of limited available land space. Other on-lot disposal systems have been repaired in the past in violation of the Department's regulations. While there is some concentration of these problems in the lower elevation "downtown" area, there are significant deficiencies in on-lot disposal facilities in other higher elevation areas indicating a need for a central treatment system. Further, as clearly expressed by other witnesses, for the purposes of planning, sewage systems may be deemed inadequate for meeting future sewage disposal needs even if they are not actively malfunctioning for enforcement purposes. Accordingly, the lack of dye testing or lot-by-lot surveys is not persuasive. .

The content of the Act 537 Plan and the extensive testimony of William Gralski persuades us that land based alternatives were adequately considered. The Plan itself at pages 33-42 considers the failures of existing on-lot systems, the existing discharges of sewage to the Delaware River, the results of a sewage needs survey, an analysis of a field

check of malfunctions and a review of the records of the Borough's sewage enforcement officer. According to the Plan's summary of needs, this information indicated, among other things, the existence of a more than 49 percent malfunction rate for the homes surveyed and that more than half of the on-lot systems in the Borough do not meet the Department's regulatory requirements. Section V of the Plan at pages 48-63 considers many alternatives including on-lot management alternatives, spray irrigation and community systems as well as various alternatives for a central treatment plant.

Mr. Gralski further testified that continued use of on-lot disposal systems was not feasible because of a large number of malfunctions and non-compliant on-lot systems in the Borough and the unavailability of land in the Borough on which compliant systems might be constructed. His judgment on the number of malfunctions and non-compliant on-lot systems was based on the results of the community survey and field inspection testified to by Michelle Arner as well as the records of the Borough's sewage enforcement officer testified to by Rick Fischer. He said that many of the lots in the Borough are half-acre lots and at least that much is required to construct an on-lot system that meets the Department's requirements. He also said that available land is restricted by inappropriate soils and the existence of steep slopes that severely restrict the use of on-lot systems compliant with the Department's regulations. In his expert opinion, the Borough's sewage problem is not localized, but is throughout the Borough.[71] We credit Mr. Gralski's testimony on the rejection of on-lot or community systems because of the extensive study he made of land availability and the likely failure of other existing

[71] Tr. 902-29.

systems in the future. Accordingly, we reject the testimony of the Appellants' experts that this alternative was not considered.

Mr. Gralski also testified that the alternatives of spray or drip irrigation were considered, but were rejected because of the lack of available space and because such a system would be too expensive. This analysis included estimates of the amount of land area that would be required for either system, the need for storage tanks in Winter months, and his estimate that this would drive up the costs by $1.2 to $1.5 million dollars and $250 a year to user costs.[72]

We also conclude that the Plan's wastewater flow projection of 105,000 gpd is a reasonable estimate of flows from the Borough and the Industrial Park over a ten year planning horizon. They are based on likely growth in Portland Borough over the ten year planning horizon. These estimates considered both water use records from the Portland Water Authority, census data and population growth forecasts made by the Lehigh Valley Planning Commission and data from the U.S. Census. The 35,000 gpd estimated flow allocated to the Industrial Park is based on likely development of this project based on information supplied by the developer of the Industrial Park in addition to the known current flow from Ultra Poly Corporation now located in the Portland Borough portion of the Industrial Park.[73]

We reject Mr. Horner's testimony that a 105,000 gpd treatment system for the Borough was unnecessary and would result in overcapacity and unreasonably high costs for the residents of the Borough.[74] He testified that the needs for the Borough residents

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[72] Tr. 936-47.
[73] Tr. 884-900.
[74] Tr. 197.

were not greater than 60,000 gpd and that current usage in the Industrial Park is limited to 800 gpd from Ultra Poly Corporation.[75] He said the estimate of 35,000 gpd for the Industrial Park was a high estimate, but acknowledged that flows from that planned development are hard to predict.[76] While Mr. Horner's testimony said these estimates were unreasonably high, his conclusion that the Borough's needs now for only 60,000 gpd is not that far from Mr. Gralski's estimate of 70,000 gpd for the Borough. Mr. Horner's estimate does not account for non-residential users such as commercial and institutional establishments or for likely growth. Mr. Horner acknowledged that when these items are considered the Plan's projection of wastewater flow of 70,000 gpd might be exceeded. Accordingly, we give greater credit to the estimates made in the Plan and to Mr. Gralski's testimony in part because of his greater expertise in wastewater engineering.

The Department's Approval

The Appellants contend next that the Department did not give any independent consideration to alternatives in approving the Act 537 Plan, including whether the Borough has a need for the treatment plant selected by it as its preferred alternative. We agree with the Appellants that the Department is obligated to give its independent judgment in reviewing and approving plans under Act 537. We disagree with the Appellants apparent contention that the Department was obligated to conduct its own field and engineering study to confirm the analysis presented in this Act 537 Plan before approving such a plan.

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[75] Tr. 193, 205-11.
[76] Tr. 186-87.

The Department independently warned the Borough of the inadequacy of its existing sewage treatment by letter in January 2002 before the Plan was submitted to the Department.[77] Fortunately for the Borough, a feasibility study had already been done. The Department received the Plan Update Revision dated August 2002 with a request for approval on August 28, 2002. The Department determined that the application for approval was administratively complete on September 6, 2002.[78] The Plan was not approved until March 4, 2003.

The Department's initial review of the Plan was initially conducted by Harleth Davis, then a Sanitary Sewage Specialist with the Department, with significant experience in Act 537 planning.[79] In addition to reviewing the Plan, he consulted the current evaluation of needs set forth in the Plan in discussions with others at the Department, and documents developed by the Lehigh Valley Planning Commission.[80] He visited the Borough and reviewed the Borough's tax map to get an idea of individual lot sizes.[81] He reviewed the exhibits to the Plan, including the bog turtle survey, the Uniform Environmental Report over a period of about four weeks.[82] He held discussions with personnel at Brinjac Engineering several times a week to obtain a better understanding of aspects of the Plan.[83] He utilized the Department's "Blue Book" checklist for the review of sewage plans and the Department's guidance on sewage needs identification.[84] He considered soil data, U.S. census information and County population projections in his

[77] Tr. 1244; Ex. PB-78.
[78] Ex. C-2.
[79] Tr. 1066-67.
[80] Tr. 1085.
[81] Tr. 1085-89.
[82] Tr. 1138.
[83] Tr. 1139.
[84] Tr. 1139-42.

analysis of sewage needs.[85] He also considered whether the Plan complied with the Sewage Facilities Act, the Clean Streams Law, and the Department's regulations there under. He found no inconsistencies or conflicts.[86] In his analysis of alternatives he concluded that there was no alternative that required further consideration or that was better than the selected alternative.[87]

The Appellants claim that the Department did not exercise independent judgment or review appears to center on the claim that if PENNVEST funding were involved, its review of documented needs would have been more thorough. However that may be, in our judgment Mr. Davis did an adequate review of the Borough's sewage needs through his consideration of the planning documents, his visit to the Borough, his consideration of soil data and consultation with the Borough's engineers. The Department's independent judgment does not require it to conduct an independent study of sewage need by exhaustive field study when the basic information available points to the Borough's need for a public sewer system.

Even if Mr. Davis incorrectly applied the standard for an analysis of need by concentrating on the absence of need to meet PENNVEST standards, the Appellants in this case presented argument and evidence on every possibility of absence of need or of a better alternative at the hearing almost on a cesspool-by-cesspool basis. All of that evidence in the end persuades us that the Borough has a need for a public sewer system and that the selected alternative is appropriate after considering other alternatives, including a combined, limited community and on-lot system, spray and drip irrigation

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[85] Tr. 1149-51.
[86] Tr. 1142-46.
[87] Tr. 1153-56.

and all other alternatives that the Appellants believe to be preferable to the selected alternative.

Endangered Species

The Appellants failed to meet their burden of proof that the construction of the treatment system or the accompanying discharge would adversely affect endangered species. Mr. Gralski's analysis of the wetland area where the discharge pipe is likely to be located is not an appropriate habitat for bog turtles, the species of concern. While this was his first bog turtle survey, the Appellants presented no contrary evidence. The Appellants did establish that osprey inhabited the area and that bald eagles at least frequented the area. Residents of the area undoubtedly enjoy this wild life. What the Appellants failed to establish is that either of these bird species would be affected by the construction of the treatment system. Mr. Kibbe, an expert in avian species, testified that they would not be affected. The nests of the osprey in the area are in an electrical substation at the nearby power station indicating that they are not affected by human activity. The bald eagles nest in Bucks County and not in Northampton County. In Winter they are sometimes seen near the power plant because it discharges warm water to the Delaware River that keeps ice from covering the fishing area desired by the eagles in Winter time. While eagles are more sensitive to human disturbance, the incremental activity created by the treatment plant is unlikely to affect their visits. The Appellants presented no evidence to contradict Mr. Kibbe's testimony.

Approval of the Discharge Permit

Central to the Appellants' case is the contention that the permitted discharge will degrade the water quality of the Delaware River. The Delaware River at the point of

discharge is designated by the Department's regulations as a warm water fishery but is not now designated as a Wild and Scenic River or subject to more stringent requirements of the DRBC.

The Appellants failed to meet their burden of proof on this issue. They presented no expert testimony on the effect that the permitted discharge would have on the water quality in the River. The effluent limits in the permit comply with all requirements of the Department and of the DRBC. The modeling study performed by the Department indicated that the discharge would not violate any water quality standard. The modeling study conducted by the Borough's expert, Richard Sands, demonstrates that even under a discharge of 205,000 gpd all relevant water quality requirements would be met and that there would be no measurable impact on the water quality of the Delaware River other than in a 712 foot mixing zone.[88] Mark Pickering testified that the plant is designed to meet and will likely exceed the water quality limits of the permit.[89]

The Appellants also contend that the water quality of the River will be impacted by industrial wastewater. There is no evidence to support this claim. The uncontroverted testimony of several witnesses is that the Permit only includes approval for the discharge of sanitary wastewater. Any discharge of industrial wastewater will require a modification of the Permit and possibly federal pre-treatment requirements.[90] Those issues are not before us now. In the event that any tenant of the Industrial Park proposes an industrial waste discharge, such a proposed discharge will be the subject of further Department review.

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[88] Tr. 1217-18.
[89] Tr. (4/27) 797-99.
[90] Patel, Tr. 1045, 1058-59; Agustini, Tr. 1030, 1032; Pickering (4/27) 758-60.

The Claimed Violation of the Constitution

The test for compliance with Section 1, Article 28 of the Constitution as set forth in the Commonwealth Court's opinion in *Payne v. Kassab*,[91] is a three-part test:

(a) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?

(b) Does the record demonstrate a reasonable effort to reduce environmental incursion to a minimum?

(c) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

The Appellants' contentions that this test has not been met turn on the contention that the discharge permit authorizes more discharge than the Borough has a treatment need and that there may be industrial waste from future residents of the Industrial Park that will cause economic injury to persons living downstream of the discharge.

We think this test has been met in this case. As indicated above, a treatment capacity of 105,000 gpd is a reasonable estimate for the needs of the Borough and the projected development of the Industrial Park over the ten-year planning horizon dictated by the Department's regulations. The plant is designed for tertiary treatment even though secondary treatment might be enough to meet discharge and water quality standards. The expert testimony presented by the Borough's expert indicates that the effect of an even larger discharge on the water quality of the Delaware River would not be significant.

The Permit does not authorize the discharge of industrial waste, but only treated municipal sewage. In the event an industrial waste discharger desires to connect to the

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[91] 312 A.2d 86, 94 (Pa. Cmwlth. 1973), *aff'd*, 361 A.2d 263 (Pa. 1976).

system, that discharger will have to meet federal pretreatment standards and the Borough will have to notify the Department of any such change. The Appellants' contention that the discharge from Ultra Poly is a mixture of municipal and industrial waste has no support in the evidence.

Finally, the harms that will result from the challenged decision do not clearly outweigh the benefits of providing Portland Borough and the Industrial Park with sewage treatment. The evidence indicates that some malfunctioning on-lot systems or wild-cat sewers are discharging untreated sewage directly to the Delaware River. On at least one occasion, untreated sewage has been discharged onto the main street of the Borough. The proposed treatment system would stop this pollution with little effect on the quality of the water in the Delaware River. While the existence of a treatment plant and discharge of treated sewage to the Delaware River may have some effect on the use of the Delaware River for recreation, the Clean Streams Law and the Sewage Facilities Act mandate that the sewage problems of the Borough be solved. For all of the reasons set forth in this adjudication, we think the alternative selected by the Borough and approved by the Department is a reasonable and appropriate way of solving those sewage problems now and in the future.

CONCLUSIONS OF LAW

1. The Appellants bear the burden of showing by a preponderance of the evidence that the Department's approval of the Borough's selected alternative described in its Act 537 Plan and issuance of the NPDES Permit to the Borough were unreasonable, inappropriate or contrary to law. 25 Pa. Code § 1021.122; *Smedley v. DEP*, 2001 EHB 131; *Maddock v. DEP*, 2002 EHB 1.

2. The Board's review of the propriety of the Department's actions is *de novo*. We may consider all evidence presented to the Board and our review is not limited to the evidence that was before the Department when it took its action. *Leatherwood v. Department of Environmental Protection*, 819 A.2d 604, 610-611 (Pa. Cmwlth. 2003); *Smedley v. DEP*, 2001 EHB 131.

3. The Appellants have standing to pursue these appeals to the extent their objections are environmental in nature because they are adversely affected by the Department's approval of the Borough's selected alternative under the Act 537 Plan and by the issuance of the related NPDES Permit.

4. The Department's approval of the Act 537 Plan is governed by the provisions of the Sewage Facilities Act[92] and the Department's regulations thereunder; the Department's approval of the NPDES Permit is governed by the provisions of the Clean Streams Law[93] and the Department's regulations thereunder.

5. The Department's approval of the Act 537 Plan was limited to the selected alternative described in the Plan and the Department's letter of approval for the Borough and the Portland Industrial Park.

6. The Department's approval of this selected alternative for the Borough does not authorize service to the Township or otherwise affect sewage facilities in the Township because the Township portion of the Industrial Park and other users in the Township cannot be connected to the Borough treatment and collection system without

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[92] Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1 - 750.20a.

[93] Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001.

the Department's approval of revisions to the Township's Act 537 Plan or authorized land development modules.

7. Neither the Department's approval of capacity for the Portland Industrial Park nor the Plan's reservation of capacity of 100,000 gpd for potential future use by the Township, which was discussed in the Borough's Act 537 Plan, required joint or concurrent planning updates by the Township and the Borough. 35 P.S. § 750.5; 25 Pa. Code §71.32(d)(7).

8. The Department's approval of the selected alternative was consistent with the requirements of the Department's regulations at 25 Pa. Code § 71.21with respect to the examination of alternatives for new or improved sewage facilities for each area of need within the Borough.

9. The Department provided the requisite level of judgment and discretion in reviewing the Act 537 Plan.

10. Although the Department is required to use its independent judgment in reviewing the needs and alternatives analysis in an Act 537 Plan, neither the Sewage Facilities Act nor the Department's regulations thereunder require the Department to perform its own independent study of sewage needs or alternatives analysis.

11. The Appellants failed to prove by a preponderance of the evidence that the Department's approval of the needs analysis for the Borough contained in the Act 537 Plan was unreasonable, inappropriate or otherwise not in accordance with law.

12. The Department's evaluation of the Borough's alternatives analysis in the Plan properly considered those alternatives that are available to provide for new or

improved sewage facilities for each area of need, including technically available alternatives. 25 Pa. Code §§ 71.21(a)(4), 71.61(a)

13. The Appellants failed to meet their burden of proof by a preponderance of the evidence that either the Act 537 Plan or the Department in its review of the Plan failed to consider an available alternative in the sense of being technically and economically practicable or that the Borough's selected alternative is not the best short- and long-term environmentally acceptable alternative that will meet the Borough's current and future needs.

14. The Borough's selected alternative approved by the Department is consistent with the objectives and policies of applicable plans and programs described in the Department's regulations at 25 Pa. Code § 71.21(a)(5), and the Borough has the ability and authority to implement the selected alternative as documented in the Plan.

15. The Department's approval of the Borough's selected alternative under the Plan furthers the policies of sections 4 and 5 of the Clean Streams Law and section 3 of the Sewage Facilities Act.

16. The effluent limitations set forth in the NPDES Permit requiring secondary treatment for the proposed discharge comply with the applicable requirements of the Clean Streams Law and the federal Clean Water Act.

17. The Appellants have failed to prove by a preponderance of the evidence that a discharge within these limits will violate any in stream water quality standard.

18. The Delaware River at and below the proposed point of discharge is not a "high quality" or "exceptional value" water subject to the antidegradation requirements of 25 Pa. Code §§ 93.4a-93.4d; nor is the Delaware River in the area of the discharge

currently subject to designation as a special protection water under the standards of the Delaware River Basin Commission.

19. The Appellants failed to prove by a preponderance of the evidence that the discharge of effluent in accordance with the NPDES Permit will cause any measurable change in water quality in the Delaware River downstream of the point of discharge.

20. The Department acted reasonably in issuing the NPDES Permit for municipal sewage with conditions that would require further review or approvals in the event industrial wastewater was introduced into the treatment system.

21. Neither the Department's approval of the selected alternative under the Act 537 Plan nor the Department's issuance of the NPDES Permit will adversely impact threatened or endangered species.

22. The Department's approval of the Borough's selected alternative under the Act 537 Plan and the issuance of the NPDES Permit do not violate Art. I, § 27 of the Pennsylvania Constitution because (1) the Department complied with all relevant statutes and regulations relative to the protection of the environment, (2) the record demonstrates a reasonable effort to reduce environmental incursion to a minimum, and (3) the environmental harm that may result from the Department's actions does not outweigh the benefits to be provided by a new sewage treatment system meeting the Borough's needs and applicable water quality standards in the Delaware River and that will prevent the ongoing discharge of untreated sewage from the Borough to the Delaware River.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DELAWARE RIVERKEEPER, a/k/a MAYA van ROSSUM, DELAWARE RIVERKEEPER NETWORK AND THE AMERICAN LITTORAL SOCIETY	:	
v.	:	**EHB Docket No. 2003-083-MG (consolidated with 2003-229-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PORTLAND BOROUGH, Permittee	:	

ORDER

AND NOW, this 12th day of August, 2004, the appeal of the Delaware Riverkeeper, *et al.* in the above-captioned matter is hereby **DENIED**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

EHB Docket No. 2003-083-MG
(consolidated with 2003-229-MG)

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **August 12, 2004**

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

LOWER MOUNT BETHEL TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2003-013-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EASTERN INDUSTRIES, INC.	:	**Issued: August 13, 2004**

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Board dismisses an appeal from the Department's issuance of a non-coal mining permit where the Appellant failed to sustain its burden of proof with credible testimony that the Permittee's quarry operation would adversely affect the environment or that the issuance of the permit was inappropriate, unreasonable or not in conformance with law.

BACKGROUND

This appeal by Lower Mount Bethel Township (Appellant) challenges the issuance by the Department of a surface mining permit on December 19, 2002 to Eastern Industries, Inc. (Eastern or Permittee) for the operation of its Riverton Sand Pit operation in Lower Mount Bethel Township, Northampton County.

The notice of appeal filed on January 16, 2003 objected to the issuance of the permit in 23 numbered paragraphs. These objections include, among others, the claim that no hydrologic or geologic study had been performed for protection of surface and

groundwater, no study had been performed of resulting noise, dust or vibrations, the erosion and sedimentation plan was inadequate, and no plan had been submitted for closure. In addition, the Appellant claimed that Eastern held no air quality or highway occupancy permit, there had been no clearance by other agencies, the project did not comply with ordinances of the Township, and the application contained no documentation of Eastern's right to use the property for a quarry. Objection was also made to the claimed failure to study the impact of the operation on the Delaware River or other recreational areas, a failure to deal with safety concerns, and the absence of an NPDES permit for the operation.

In our opinion and order dated January 26, 2004 we granted a partial summary judgment against the Appellant to the extent of its claims that the permit application did not identify the type of equipment involved in the permitted operation and the claimed failure of the Permittee to notify the Lehigh Valley Planning Commission, the Pennsylvania Historical and Museum Commission and the Northampton County Conservation Commission of the application.

A hearing on the merits of the remaining objections was held before the Honorable George J. Miller on June 8, 2004. At this hearing the Appellant stipulated to most of the relevant facts and limited its claims to its contention that rainwater might pond in the quarry, that there might be interference with neighboring wells because no monitoring wells were required and no well survey would be required, and that the operation of the equipment at the quarry might cause subsidence damaging nearby buildings. The parties also stipulated that the reports of expert witnesses would be admitted into evidence and that the contents of the reports could be considered by the

Board as admissible evidence as if the witnesses had testified to the matters set forth in the reports at length. Accordingly, those reports are treated below as if the witnesses had testified at length. Additionally, the Board heard testimony and cross-examination of the Appellant's expert, Phillip Getty, P.G., Eastern's mining engineer and geologist, and a geologist and mining engineer of the Department. The record consists of a stipulation of facts, a transcript of 196 pages and ten exhibits. The parties have submitted proposed findings of fact and conclusions of law and reply memoranda. After consideration of these materials we make the following:

FINDINGS OF FACT

1. Appellant, Lower Mount Bethel Township, is a Township of the Second Class with a mailing address of 6984 S. Delaware Drive, P.O. Box 257, Martins Creek, PA 18063 (Stip. ¶ 2)[1]

2. The Commonwealth of Pennsylvania, Department of Environmental Protection (Department) is the agency with the duty and authority to administer and enforce the Noncoal Surface Mining Conservation and Reclamation Act,[2] the Clean Streams Law,[3] Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17, and the rules and regulations promulgated thereunder. (Stip. ¶ 3)

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[1] This refers to the stipulation of facts marked as Board Exhibit 1. The transcript of testimony is referred to as "Tr. __". The Appellant's Exhibits are referred to as "A-__", the Department's Exhibits as "C-__" and Eastern's Exhibits as "P-__".

[2] Act of December 19, 1984, P.L. 1093, No. 219, *as amended,* 52 P. S. § 3301 *et seq.* (Noncoal Surface Mining Act).

[3] Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 6911, *et seq.* (Clean Streams Law).

3. The Permittee, Eastern Industries, Inc., is a Pennsylvania corporation with its business address at 4401 Camp Meeting Road, Center Valley, PA 18034. (Stip. ¶ 1)

4. On December 19, 2002, the Department issued to Eastern a Noncoal Surface Mining Permit No. 48010302 (Mining Permit) allowing the proposed use and Authorization to Mine Permit No. 1885-48010302-1 for a quarry known as the Riverton Sand Pit Operation. (Stip. ¶ 6)

5. Chester Crane, Betty Jo Crane, Elmer Crane and Stella Crane are the owners of a tract of land of approximately 102 acres on which the quarry is located (the Property) along Martins Creek-Belvidere Highway in Lower Mount Bethel Township, Northampton County, Pennsylvania. (Stip. ¶ 8)

6. By Order of the Court of Common Pleas of Northampton County dated May 16, 1994, the Appellant was granted special exception approval for the operation of a sand and gravel quarry at the Property. (Stip. ¶ 9)

7. Eastern also possesses an interest in the Property by virtue of the Contractual Consent of Landowner (Noncoal/Industrial Minerals) (the Contractual Consent) executed by the Cranes on September 26, 2001, and recorded in the Office of the Recorder of Deeds in and for Northampton County, Pennsylvania. (Stip. ¶ 10)

8. Eastern submitted to the Department a Noncoal Surface Mine Application (Application) dated June 20, 2002, seeking a mining permit to use the Property for a sand and gravel quarry (the Project). (Stip. ¶ 5)

9. The Application contained all information required by Module 4 (Property Interests/Right of Entry), including a copy of the 1994 Court Order granting special exception approval for the Project and a copy of the properly executed Contractual

Consent, which allows the Permittee to enter and use the Property for the purpose of conducting surface mining activities. (Stip. ¶¶ 12, 13)

10. As stated in Module 6 (Geology Information) of the Application, there exists no evidence of sinkhole development within 1,000 feet of the proposed permit area. (Stip. ¶ 13)

11. As part of Module 7 (Hydrology) of the Application, the Permit submitted results from the background water samples from the well on the Property, wells on neighboring properties and from locations in the Delaware River. (Stip. ¶ 14)

12. The Application contained all necessary information relative to the identification and protection of groundwater. Module 6 of the Application contains three geologic drill logs, which indicates that groundwater is not likely to be intercepted as part of the mining activity authorized by the Mining Permit. Module 7 of the Application contains the information upon which the Department relied in issuing the Mining Permit, including information relating to a well located on the same parcel of land for which the Mining Permit was issued. (Stip. ¶ 21)

13. The Mining Permit does not allow the Permittee to mine below groundwater level, and the Permittee does not propose to do so. (Stip. ¶ 15)

14. The Project does not involve any off-site surface water discharge. All runoff water is retained on site and used in the settlement basins for washing the sand and stone products. (Stip.¶ 16)

15. Condition No. 1 of Part B, Special Conditions or Requirements of the Mining Permit, prohibits the ". . . pumping of groundwater to facilitate pit dewatering from the mining operation. . . ." (Stip. ¶ 17)

16. Because the project involves no off-site surface water discharge, no NPDES permit is required. The Mining Permit would require compliance with the conditions of any NPDES Permit that would be issued, if a discharge occurred. (Stip. ¶ 18)

17. Part A of the Mining Permit did not authorize a discharge and as such, there is no NPDES number or approved discharge points, but the Mining Permit did incorporate the requirements set out in Part A of the NPDES permit. Pursuant to Part A, Section D, the discharge of water from any permitted areas disturbed by surface mining and reclamation operations must meet the discharge limitations listed in Part A, Section C (unless an exception under Part A, Schedule D). (Stip. ¶ 19; *see also* Ex. P-2)

18. The Project does not require the drawing of water from, and would not discharge water into, the Delaware River. Special Condition 1 of the Mining Permit specifically provides that the Mining Permit does not authorize pumping of groundwater to facilitate pit dewatering and that, if such activity became necessary, the Permittee must submit an NPDES Permit application to authorize such activity. (Stip. ¶ 20; *see also* Ex. P-2 (Part B))

19. The unconsolidated materials will be removed from the site with a frontend loader. The Project does not involve mining or blasting bedrock. The Mining Permit explicitly does not authorize blasting activity. (Stip. ¶¶ 22, 23; *see also* Ex. P-2 (Part B, Condition 3))

20. The Department sets no specific limit for operational noise levels. The Department assesses operational noise levels during a permittee's operation of its site and possesses enforcement authority to address noise as a public nuisance. Further, if the operation generates vibration that amounts to a public nuisance, the Department could

take appropriate enforcement action at such time. Such conditions do not exist at present given that the site is not yet operational. (Stip. ¶ 23)

21. Module 10 of the Application contains an acceptable Erosion and Sedimentation Plan pursuant to Department standards. (Stip. ¶ 24; Tr. 156)

22. Module 14 addressed the Permittee's plan to control fugitive dust utilizing a water truck to wet the traveled roads as necessary. (Stip. ¶ 25)

23. H.B. Mellott Estate, Inc. (Mellott) obtained the Air Quality Permit for the Project on March 17, 2003. (Stip. ¶ 26)

24. Mellott is the authorized crushing subcontractor for the Permittee and as the crushing subcontractor is the entity responsible for securing the Air Quality Permit. (Stip. ¶ 27)

25. The Air Quality Permit issued to Mellott authorized the operation of a portable nonmetallic mineral processing permit for operation at the Riverton Pit by Mellott. (Stip. ¶ 28)

26. The equipment used in the mining operation includes one crusher, two rubber tire loaders, two rubber tire pans, and a track mounted loader. This equipment does not generate vibration capable of causing subsidence that endangers off-site buildings. As indicated in the uncontroverted report of David N. Zmijewski, the soil is very dense and not prone to subsidence. (Ex. P-10)

27. Module 15 (Land Use and Reclamation Map) of the Application includes a Land Use and Reclamation Map showing the final grading and drainage of the property. Module 15 of the Application meets the Department's regulations. (Stip. ¶ 29)

28. The Application provides a Reclamation Plan described in Module 15 (Land Use and Reclamation Map), Module 16 (Land Use/Vegetation), Module 17 (Postmining Land Use), Module 18 (Topsoil/Subsoil), and Module 19 (Revegetation) of the Application. The Reclamation Plan meets the Department's standards, is on file with the Department and is properly bonded. (Stip. ¶ 30)

29. A Reclamation Plan bond in the amount of $200,000 is posted with the Department. That sum exceeds the minimum requirement of the Department of $90,700. (Stip. ¶ 32; Tr. 55-56)

30. On February 21, 2002, the Pennsylvania Department of Transportation (PennDOT) issued a Highway Occupancy Permit (HOP) to the owners of the Property. PennDOT regulations require that the HOP Application be submitted and issued to a property owner, not a tenant. (Stip. ¶ 33)

31. On January 9, 2004, the Appellant's Board of Supervisors gave final approval to Eastern's land development plan. (Slenker,[4] Tr. 136; Ex. P-7)

Appellant's Expert

32. The Appellant's expert, Philip Getty, based solely on his review of Department records, testified to only three concerns with the issuance of the permit as set forth in his report. (Tr. 19; Ex. A-1) He did no field studies and did not discuss the permit or application with Department personnel. (Tr. 17, 23)

33. Mr. Getty's first concern was that rainwater might pond or accumulate in the pit requiring Eastern to discharge accumulated water. (Tr. 19; Ex. A-1)

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[4] Michael G. Slenker is a geologist employed by Eastern Industries and testified as an expert in geology and quarry technology. (Tr. 84-86; Exs. P-5; P-6)

34. Mr. Getty's second concern was that he could find no evidence as to the location of the water table, whether it would be intercepted and whether neighboring wells would be affected by the operation of the quarry. (Tr. 19-20; Ex. A-1)

35. In this connection, Mr. Getty testified that the Department should have installed monitoring wells and prepared an inventory of neighboring wells to assure that operation of the quarry would not have an adverse effect on the environment. (Tr. 22)

36. Mr. Getty's third concern was that the operation of equipment at the mine might result in subsidence damage to neighboring buildings because he could find no information on this in the application. (Tr. 20-21; Ex. A-1)

37. Mr. Getty acknowledged that these concerns were speculative because his opinion was based on limited information and that he was not aware of any neighboring wells relying on a perched aquifer. (Tr. 24-25)

38. Mr. Getty acknowledged that he was not aware of any violation of law or any regulation in issuing the permit to Eastern nor of any omission or malfeasance in preparing the application. (Tr. 26-27)

39. The Appellant presented no other testimony challenging the propriety of the Department's issuance of the permit. (Tr. 31-32)

Eastern's and the Department's Expert Witnesses

40. The expert testimony presented by the Department and by Eastern demonstrated that Mr. Getty's three concerns were not well founded.

Infiltration/Ponding

41. Joseph Blyler, P.E., a mining engineer, testified on behalf of the Department that Module 10 of the permit application contained all information necessary for permit approval with respect to erosion and sedimentation control measures. (Tr. 158)

42. In the 25-50 sand and gravel permits Mr. Blyler has reviewed, none have demonstrated a lack of infiltration causing water to accumulate in the pit while those operations are being conducted above the groundwater elevation. (Tr. 159)

43. Michael Slenker, P.G., testified on behalf of Eastern that it was very unlikely that Eastern would encounter a perched aquifer at this site and that his experience in similar operations in similar geologic settings is that there will be no drainage problem because the soils are very permeable. (Tr. 98, 102)

44. William Russell Taft, Mining Engineer, P.G., testified on behalf of Eastern as both a geologist and hydrologist (Tr. 46) that ponding has not been an issue on similar mining sites and would not likely be an issue on this site. (Tr. 52-53)

45. Mr. Taft also testified that three test wells drilled in November 2003 demonstrated that the groundwater at the site was well below the depth of anticipated mining. (Tr. 50-51)

46. Mr. Blyler and Mr. Slenker testified that the soils at this site are well drained indicating that there will be no drainage problems. (Tr. 102; Exs. C-4; P-4)

Well Interference

47. Three expert witnesses, Ignacy Nasilowski, P.G., Michael Slenker, P.G., and William Russell Taft, P.G., testified that they did not believe that the operation of the

quarry would interfere with neighboring wells. (Tr. 56-57, 180-181, 188-189; Exs. C-3; P-4)

48. These opinions were based in part on the fact that the quarry will not pump and discharge groundwater and on three well logs that showed no interception of groundwater. (Tr. 50-51, 176, 180-181; Exs. C-3; P-4)

49. Messrs. Slenker and Nasilowski testified that the water supply well referred to in Module 7.6 of the application, that Eastern intends to pump to maintain the water level in the holding ponds, would not have any adverse impact on neighboring wells because the mine is a closed hydrologic system with no water discharge. (Tr. 125, 186, 188-189; Exs. P-1; P-6)

Subsidence

50. Three witnesses for Eastern, David Zmijewski, P.E., Mr. Slenker and Mr. Taft, testified that there would be no subsidence or vibration damage to nearby residents because no blasting is authorized by the permit and the equipment used in the operation does not cause vibration levels sufficient to cause subsidence or damage to nearby properties. (Tr. 63-65, 108-109; Exs. P-4; P-6; P-10)

DISCUSSION

In this third party appeal, the Appellant bears the burden of proving by a preponderance of the evidence that the Department incorrectly approved the surface mining permit.[5] Our review is *de novo*.[6] We will not overturn a decision by the Department unless the Appellant demonstrates that the Department's action was

[5] 25 Pa. Code § 1021.122(c)(2).

[6] 35 P.S. 7514(c); *Birdsboro v. DEP*, 2001 EHB 377, *affirmed*, 795 A.2d 444 (Pa. Cmwlth. 2002).

unreasonable or not in accordance with the law.[7] In this appeal, the Appellant clearly failed to produce sufficient evidence to show that this permit should not have been granted.

The testimony of the Appellant's expert, Philip Getty, was not sufficient to meet the Appellant's burden of proving that the Department's issuance of the permit was unreasonable, inappropriate or contrary to law. While he testified that he was concerned about water ponding in the pit, interference with neighboring wells or possible subsidence damage to neighboring buildings, he acknowledged that these concerns were speculative and that he was unaware of any neighboring wells relying on a perched aquifer. (Tr. 26-27) His testimony was based solely on his examination of the Department's records relating to the permit application. He did no field work or testing in preparation for giving his opinion. The Appellant stipulated that Eastern's application contained all necessary information relative to the identification and protection of groundwater. (Stip. ¶ 21) His concerns regarding subsidence were based on anecdotal stories from other sites and not based upon the soils or conditions at the Riverton site. The Appellant presented no other testimony challenging the propriety of the Department's issuance of the permit.

The credible testimony of the expert witnesses presented by the Department and Eastern persuades us that there is no basis for Mr. Getty's concerns with respect to rainwater ponding, interference with neighboring wells or with damage to nearby buildings due to subsidence. The testimony of Eastern's witnesses was based on field work relating to the soils at the site and their extensive experience in quarry operations in

[7] *Birdsboro.*

these types of soils. This fieldwork included the well logs performed in November 2003 that indicated that the quarry operations would not intercept the groundwater. While the Department's Mr. Blyler relied primarily on his experience and the information contained in the permit application, Mr. Nasilowski visited the site in connection with his review of the permit application. Both Mr. Nasilowski and the Department's experts agreed that subsidence was highly unlikely due to the nature of the soils at the site and because there would be no blasting used or authorized for use in the mining operation. Accordingly, we give greater weight to the testimony of these witnesses for the Department and Eastern than we do to Mr. Getty's speculations based solely on a file review.

CONCLUSIONS OF LAW

1. The Appellant bears the burden of showing by a preponderance of the evidence that the Department's issuance of the mining permit was unreasonable, inappropriate or contrary to law. *Birdsboro v. DEP*, 2001 EHB 377, *aff'd*, 795 A.2d 444 (Pa. Cmwlth. 2002); *Smedley v. DEP*, 2001 EHB 131.

2. The Board's review of the propriety of the Department's actions is *de novo*. We may consider all evidence presented to the Board at the hearing, and our review is not limited to the evidence that was before the Department when it took its action. *Leatherwood v. Department of Environmental Protection*, 819 A.2d 604, 610-611 (Pa. Cmwlth. 2003).

3. The Appellant presented no affirmative evidence of record to establish that the mining activities authorized by the permit would have a significant, adverse effect on ground or surface water or on neighboring properties.

4. The evidence presented by the Department and Eastern demonstrates that the permit was issued in full compliance with applicable law and the Department's regulations after full consideration to the impact of Eastern's quarry operation on the environment.

5. The Department's issuance of the permit was reasonable, appropriate or otherwise contrary to law.

Accordingly, we issue the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LOWER MOUNT BETHEL TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2003-013-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EASTERN INDUSTRIES, INC.	:	

ORDER

AND NOW, this 13th day of August, 2004, the appeal of Appellant, Lower Mount Bethel Township is hereby **DISMISSED**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 2003-013-MG

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **August 13, 2004**

c: **DEP Litigation, Library**
Brenda Houck

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South Central Region

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JOHN P. NIEBAUER, JR. and DIANE A. NIEBAUER	:	
v.	:	**EHB Docket No. 2004-038-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 27, 2004**

OPINION AND ORDER ON
APPELLANTS' MOTION TO STAY
FURTHER PROCEEDINGS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board grants a stay of an Appeal from an Order alleging illegal disposal of solid waste on Appellants' property pending the resolution of a criminal complaint against one of the Appellants. The Board earlier refused to stay the Department's Order holding that the motion was in reality a request for a supersedeas. The Board finds that the Department will not be prejudiced by the stay of proceedings as the Order remains in effect.

Discussion

Presently before the Pennsylvania Environmental Hearing Board (Board) is the Appellants', John P. Niebauer, Jr. and Diane A. Niebauer (Appellants, or Mr. and Mrs. Niebauer, or the Niebauers), Motion to Stay further proceedings pending the resolution of the pending parallel

criminal prosecution of Mr. Niebauer. The Pennsylvania Department of Environmental Protection (Department) vigorously opposes the Motion to Stay.

The Department issued an Order to Appellants on January 6, 2004 which is the subject of this Appeal before the Board. The Order alleges, *inter alia*, that Appellants are responsible for the illegal disposal of solid waste on their property. The Order also requires Appellants to take certain actions including sorting through and separating fill from solid waste allegedly buried on the site and properly disposing of the solid waste.

On March 12, 2004, the Pennsylvania Attorney General filed a criminal complaint against Mr. Neibauer alleging criminal violations of the Solid Waste Management Act. Appellants claim that this proceeding should be stayed so as not to "undermine Mr. Niebauer's privilege against self-incrimination, expose the basis of Mr. Niebauer's defense to the prosecution in advance of criminal trial, and otherwise prejudice the case." Motion to Stay, paragraph 11. Appellants also contend that both the Attorney General's criminal complaint and the Department's Order under Appeal are both based on the Department's inspection of Appellants' property on September 6, 2002.

The Department did not take any enforcement action against the Appellants until sixteen months later when it issued its Order of January 6, 2004. Therefore, if the Department waited sixteen months before acting, Appellants argue it must not be an environmental problem of any urgency. Finally, when each of the factors the Board considers in deciding whether to issue a stay are analyzed, Appellants insist a stay clearly should be issued. There factors are: the Appellants' interests and potential prejudice, the burden of a stay on the Department or other parties, the burden on the Board, and the public interest." *Sechan Limestone Industries, Inc. v. DEP*, EHB Docket No.

The Department points out that a stay of proceedings is an extraordinary measure that should only be granted for compelling reasons. *Ziviello v. DEP*, 1998 EHB 1138. The Department contends that administrative and criminal matters can proceed at the same time. *Sysak v. DER*, 1989 EHB 126, 131. It further argues that there are no compelling reasons to grant a stay. Moreover, the outcome of the case pending before the Pennsylvania Environmental Hearing Board is not dependent on the outcome of the criminal case filed in Clearfield County. The Department correctly points out that Mr. Niebauer may assert his privilege against self-incrimination at the proper time in this case. The Department is also correct in its argument that both the Solid Waste Management Act and the Clean Streams law provide for both criminal and civil remedies.

The Department contends that a stay would conflict with its duty and mission to protect the public pursuant to the Solid Waste Management Act and its implementing regulations. "Curtailing a civil action pending the resolution of the criminal action runs contrary to the statutory mandate bestowed upon the Department." Department's Memorandum of Law, page 12.

Although we certainly acknowledge the merit in the Department's arguments as general statements of the law the specific facts of this case cause us to pause. Indeed, the Department is vague as to how the public and the environment will be harmed if we grant a stay of the Appellants' Appeal.

The Department's Order challenged in this Appeal remains in full force and effect. According to the Department and the Appellants, the Order requires Appellants to take certain actions. We earlier denied the Appellants' Motion to Stay these requirements.

This is thus not a situation where a stay of these proceedings would impact the Department's ability to defend the legality of its Order.

It is important from a due process standpoint that an appeal of the government's action should not place the appellant in a worse position than if no appeal were taken. The parties enjoy much more wide-open discovery in proceedings before the Board than in a state criminal matter.

If no appeal had been taken of the Department's Order, the Department would be in the same position. Our stay of these proceedings does not in any way prevent the Department from protecting the environment. As for the Department's contentions that a delay would impact "the public's interest in knowing that the time frames and requirements set forth in the January 6, 2004 Order will be upheld and are enforceable" the Department fails to point out how this delay will hurt the public. Moreover, it certainly can be argued that the public's greater interest is that justice be done. If justice is done "then the Crown wins."

In this same spirit of fairness we think it best, since there is no harm to the public or environment, to allow Mr. Niebauer and his counsel to focus their resources and energies on defending the criminal complaint filed by the Pennsylvania Attorney General rather than to also have to battle at the same time the formidable forces of the Department of Environmental Protection. This is not a situation such as *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368 [D.C. Circ 1980] where the Securities and Exchange Commission was seeking out documents to conduct a civil investigation while a criminal action was also pending. We, therefore, enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN P. NIEBAUER, JR. and DIANE A. NIEBAUER	:	
v.	:	**EHB Docket No. 2004-038-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 27th day of August, 2004, Appellants' Motion to Stay Further Proceedings is ***granted***. We are only staying the Appeal before the Board and not the provisions of the Department's January 6, 2004 Order which *remain in force*. This Appeal is ***stayed*** pending the resolution of the criminal proceedings against Mr. Niebauer or until further Order of this Board. Counsel for Appellant shall file *status reports* setting forth the status of the criminal proceeding (concentrating on the stage of the action) on or before **September 7, 2004**, **December 8, 2004**, and **February 8, 2005**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: August 27, 2004

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JOSEPH J. BRUNNER, INC.	:	
	:	
v.	:	**EHB Docket No. 2002-304-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BEAVER VALLEY ALLOY FOUNDRY COMPANY, Intervenor	:	**Issued: September 1, 2004**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

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

Synopsis:

Section 6301 of Act 90 of 2002 imposes a $4.00 per ton fee on most of the solid waste that is disposed of at municipal waste landfills. The Board holds that the fee applies to waste used as alternate daily cover unless it is process residue or nonprocessible waste that originates from a resource recovery facility.

OPINION

I. Background

Joseph J. Brunner, Inc. ("Brunner") operates a municipal waste landfill in New Sewickley Township, Beaver County. Brunner is required to cover waste at the end of each day with an approved daily cover material. Daily cover helps prevent vectors, odors, blowing litter, and other nuisances. Although soil is often used by landfills as daily cover, Brunner has obtained permission from the Department of Environmental Protection (the "Department") to use

waste foundry sand generated by the Intervenor, Beaver Valley Alloy Foundry Company ("Beaver Valley") as alternate daily cover ("ADC").

Beaver Valley supplies the Brunner Landfill with in excess of 1,000 tons per year of foundry sand for use as ADC. The foundry sand that Beaver Valley supplies to the Brunner Landfill comes from molds used in Beaver Valley's manufacturing process. The portion of the sand that cannot be reused after the manufacturing process is shipped to the Brunner Landfill. The sand formerly was simply disposed in the landfill, but now Brunner uses the foundry sand as ADC, and does not otherwise dispose of such material.[1]

On June 29, 2002, the Pennsylvania General Assembly passed Act 90 of 2002, 27 Pa.C.S.A. § 6301 *et seq.* Section 6301 of Act 90, 27 Pa.C.S.A. § 6301, imposes a new fee of $4.00 per ton for most solid wastes disposed of at Pennsylvania municipal waste landfills. The portion of Section 6301 that is at issue reads as follows:

> **Disposal Fee For Municipal Waste Landfills**
>
> (a) Imposition. – Except as otherwise provided in subsection (b), each operator of a municipal waste landfill shall pay, in the same manner prescribed in Chapter 7 of the Act of July 27, 1988 (P.L. 566, no. 101) known as the Municipal Waste Planning, Recycling and Waste Reduction Act [, 53 P.S. §§ 4000.101-.1904, "Act 101,"] a disposal fee of $4 per ton for all solid waste disposed of at the municipal waste landfill. The fee established in this section shall apply to process residue and nonprocessible waste from a resource recovery facility that is disposed of at the landfill and is in addition to the fee established in section 701 of [Act 101].
>
> (b) Exceptions. – The fee established under this section shall not apply to the following:

[1] Brunner now also uses waste foundry sand generated by Brighton Electric Steel. The Brighton Electric material was not included in the Notice of Deficiency and is not strictly speaking the subject of this appeal.

> (1) Process residue and nonprocessible waste that is permitted for beneficial use or for use as alternate daily cover at a municipal waste landfill.

27 Pa.C.S.A. § 6301.

Thus, the statutory fee applies to "process residue and nonprocessible waste from a resource recovery facility that is disposed of at the landfill," but it does not apply to "[p]rocess residue and nonprocessible waste that is permitted for beneficial use or for use as alternate daily cover at a municipal waste landfill." 27 Pa.C.S.A. § 6301(a) and (b)(1). When the statute states the general rule that the fee applies to most solid waste, it makes a point of stating that the fee applies to process residue and nonprocessible waste *from a resource recovery facility.*[2] When the statute lists an exception for beneficial use and ADC, however, it merely refers to "process residue and nonprocessible waste." It does not say "process residue and nonprocessible waste *from a resource recovery facility.*"

In a series of letters to Brunner, landfill operators, waste generators, and others, the Department has taken the position that Section 6301 was not intended to exempt ADC originating from sources other than resource recovery facilities. (First Joint Stipulations ("Stip.") ¶¶ 38, 39, 41, 42 (a letter from Secretary of Department), 45, and 47.). Of course, the Department has maintained that position with respect to Brunner in this litigation. Specifically,

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[2] A resource recovery facility is defined elsewhere as follows:

> A processing facility that provides for the extraction and utilization of materials or energy from municipal waste that is generated offsite, including, but not limited to, a facility that mechanically extracts materials from municipal waste, a combustion facility that converts the organic fraction of municipal waste to usable energy, and any chemical and biological process that converts municipal waste into a fuel product. The term also includes any facility for the combustion of municipal waste that is generated offsite, whether or not the facility is operated to recover energy.

53 P.S. § 4000.103 (Act 101). The most common type of resource recovery facility is the incinerator. There is no dispute in this appeal that Beaver Valley is not a resource recovery facility.

the Department maintains that the use of waste as ADC constitutes "disposal" as that term is used in the heading of the statute and subsection (a), except that, pursuant to subsection (b)(1) of the statute, the fee does not apply to process residue and nonprocessible waste used as ADC if it comes from a resource recovery facility. Waste used as ADC from any other source is covered by the fee. Brunner has insisted that the use of waste as ADC does not constitute "disposal," so there is no need to get into a discussion of subsection (b)(1). Brunner adds that, even if using ADC constitutes "disposal" under subsection (a), the new fee was not meant to apply to *any* "process residue and nonprocessible waste" used as ADC. This appeal is taken from the written Notice of Deficiency that the Department sent to Brunner for failing to pay the fee on the foundry sand used as ADC.

Both Brunner and the Department have moved for summary judgment.[3] The parties, including the Intervenor, have entered into extensive stipulations and agree that an evidentiary hearing would be a useless formality and that this case may be resolved one way or the other by way of summary judgment. We agree.[4]

II. Discussion

A. Statutory Interpretation

The resolution of this appeal turns on the construction of a statute. The Department argues that we must defer to its interpretation of a statute, citing *DEP v. North American*

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[3] We decide motions for summary judgment in accordance with the standards set forth at Pa.R.C.P. 1035.1-1035.5. Summary judgment is appropriate when the record demonstrates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Plescha v. DEP*, EHB Docket No. 2003-139-K, slip op. at 7 (July 12, 2004).

[4] We would also note that we have had the benefit of an amicus curiae brief filed by the United States Steel Corporation ("USS") that supports Brunner's position. USS states in its brief that it provides more than 78,000 tons or ten percent of all ADC used in the Commonwealth, and that imposing the Section 6301 fee cost USS an additional $313,069.72 in 2003. We denied USS's petition to intervene in this appeal because it does not send ADC to the Brunner Landfill. *Brunner v. DEP*, 2003 EHB 186. Notwithstanding its lack of connection to the Brunner site, we have allowed USS to participate as amicus curiae because of its keen interest in the underlying issues.

Refractories Company ("NARCO"), 791 A.2d 461 (Pa. Cmwlth. 2002) and *Bethenergy Mines, Inc. v. DEP*, 676 A.2d 711, 715 (Pa. Cmwlth.), *appeal denied*, 685 A.2d 547 (Pa. 1996). Brunner does not argue the point. *NARCO*, however, held that the Court will defer to the Department where its interpretation of *regulations* is reasonable, and the Court did not distinguish between the Department and the Board in *Bethenergy* because they adopted the same interpretation. A recent Supreme Court case raises some doubt about the amount of deference due in case involving *statutory* interpretation. *Commonwealth v. Gilmour Manufacturing Company*, 822 A.2d 676, 679 (Pa. 2003).

It is not necessary for us to resolve this issue here.[5] Even if we assume *arguendo* that some level of deference is called for in some situations, where the Department has failed to adopt a consistent position or it has changed its interpretation over time, the reasons for deferral tend to evaporate. *Tri-State Transfer Company v. DEP*, 722 A.2d 1129, 1134 (Pa. Cmwlth. 1999); *Gibson v. UCBR*, 682 A.2d 422, 424 (Pa. Cmwlth. 1996); *Consol Pennsylvania Coal Company v. DEP*, 2003 EHB 792, 803. After all, to which interpretation are we to defer? There is no basis for simply assuming that the latest interpretation is the best interpretation.

Brunner points out that various Departmental personnel at various times in internal communications appeared to believe that no waste used as ADC was subject to the Act 90 fee. (Stip. ¶¶ 37, 40; Brunner Brief in Opposition Ex.A. *See also* Amicus Brief Ex.G.) In other words, they believed that the exception to the fee was not limited to residue from incinerators. Indeed, Departmental employees have testified at depositions that the fee did not appear to apply to any waste used as ADC. (Amicus Brief Ex.G.) We are not surprised that there has been internal debate and, perhaps, some confusion about this difficult issue, and by themselves, these internal communications would not cause us to hesitate to defer to the Department's

[5] Nor has the issue been contested in this case.

interpretation. But in *external* expressions of its position, the Department has also not been entirely consistent.

In June 2002, when the Department was considering proposed Act 90, Gregory M. Mahon was the Director of Legislative Affairs for the Department. Among Mahon's responsibilities were reviewing proposed legislation and working with the Governor's Office, the legislative staff, and occasionally, legislators, regarding the Department's comments or suggestions for amendments to proposed legislation. In making a forecast of the total revenue projected from the proposed $4 per ton fee, Mahon, for the Department, took the total waste going to landfills, backed out the amount of waste going to incinerators, backed out the amount of ADC, and came up with a grand total of 22,778,006 tons of waste based on 2001 disposal figures. The number that Mahon calculated for waste used as ADC, 750,000 tons per year, includes all ADC, and in fact included all of the waste upon which the Department excused payment of the Act 101 recycling fee. It was not limited to waste used as ADC that comes to a landfill from a resource recovery facility. In June 2002, Mahon sent his calculations to the Governor's Budget Office and to the legislative staff as projected revenue from the new $4.00/ton disposal fee. Mahon calculated that the Department would receive almost $92 million annually from the fee. (Stip. ¶¶ 26-31.)

The Department attempts to discount these communications because they are nothing more than the opinion of one individual, they were made before passage of the law, and they are not otherwise very meaningful. These contentions are not particularly persuasive. We believe that the Department must accept some responsibility for its external communications of its high-placed official, particularly when those communications are made to the General Assembly as it was considering the legislation. If Mahon was out of line with the official position, the

Department should have taken appropriate steps to correct any misapprehension on his part. In truth, we believe that the Department did not formulate its current position until well after Mahon presented his calculations to the legislature.

Furthermore, the Department has not been consistent in interpreting whether the use of waste as ADC constitutes "disposal." For example, in responding to a letter from United States Steel Corporation, then Secretary David E. Hess said, "Furthermore, many wastes approved as ADC may not actually be used as ADC on a given day and are instead directly disposed." (Stip. ¶ 42 and Ex.O.) This statement suggests a distinction between "use as ADC" and "direct disposal." It could be read to mean that material that is actually used as ADC should not be considered to have been "disposed of." The statement is made in a letter that otherwise firmly reasserts the Department's position that Act 90 was not intended to exempt ADC originating from sources other than resource recovery facilities. Secretary Hess spoke of "direct disposal" as opposed to "disposal." We would not ordinarily attribute much weight to this statement except for the fact that it is actually consistent with a mindset that the Department has revealed in other contexts.

The Department has imposed a permit condition on two municipal waste landfills (not Brunner) that requires any ADC applied in excess of the amount that is needed to meet the performance and design requirements of the regulations to be considered disposal and subject to all fees associated with the routine disposal of waste at the landfill. (Stip. ¶ 10.) Again, this permit language tends to treat the use of waste as ADC and the disposal of waste as distinct concepts. Along the same lines, Brunner's quarterly operational reports identify the type and amount of material that has been received at the facility and excluded as constituting ADC. (Stip. ¶ 17.) The parties have stipulated that the Department has the authority to impose a permit

condition on landfill operators to require that waste used as ADC be used only for its intended purpose and not directly disposed of in the landfill. (Stip. ¶ 9.)

Act 101 and Act 90 are closely related statutes, both of which impose fees on solid waste handling. Indeed, Act 90 cross-references Act 101. Statutes that relate to the same things or same class of things are *in pari materia* and should be construed together. 1 Pa.C.S.A. § 1932; *County of Schuylkill v. E & J Dismantling Company*, 731 A.2d 223, 226-27 (Pa. Cmwlth. 1999) (Act 101 and Solid Waste Management Act to be construed *in pari materia*). In the context of Act 101, the Department has specifically interpreted the use of waste as ADC to *not* constitute "disposal." (Stip. Ex.C, D.) The Department continues to take this position to this day.

The Department repeatedly characterizes its determination not to charge Act 101's $2 recycling fee for waste used as ADC as a "policy decision." (*See, e.g.*, Brief p. 5.) It does not explain the legal significance of characterizing its action as a policy decision. It seems to be suggesting that it has waived a fee that the statute requires, yet it never specifically contends that it has waiver authority. Act 101 certainly does not on its face provide for any waiver of the recycling fee by the Department. There is no indication that the Department was granted any discretion in this regard. Of course, the Department's disagreement with the General Assembly's "policy decision" to impose a fee does not entitle the Department to simply waive the fee. We are not anxious to assume that the Department has acted without authority or otherwise illegally.

What the Department was really doing was interpreting Act 101. In explaining its decision not to assess the $2 fee for ADC, the Department relied upon the fact that Act 101 imposes the $2 fee on all waste *disposed* at the landfill. (Stip. Ex.C, citing 53 P.S. § 4000.701.) In contrast, the $1 host municipality fee imposed by Section 1301 of Act 101 and the $.25 post-

closure fund fee imposed by Section 1108 of Act 101 are imposed on all waste *received* at the landfill. (Stip. Ex.C, citing 53 P.S. §§ 4000.1108 and .1301.) (See also Stip. Ex. D. (average daily volume refers to waste "received," so ADC must be included)). The Department latched onto the distinction in the statutory language between "disposed" and "received" as the pivotal rationale for deciding not to charge the $2 fee.[6] This is an interpretation, not a waiver of a fee that a statute clearly requires.

Thus, in closely related contexts, the Department has acted as if the use of waste for ADC does not constitute "disposal." It has essentially advised the legislature that Section 6301 would not apply to any ADC. Yet the Department in this appeal is arguing that the use of ADC does constitute "disposal" and Section 6301(b)(1) only excepts certain materials coming from a resource recovery facility. Although we do not go as far as Brunner in characterizing the Department's various positions as "disingenuous," we must agree with Brunner that the Department has not acted consistently.

Act 101 and Act 90 are so similar that it is difficult to comprehend how the Department can explain that the use of waste ADC can constitute disposal under one but not the other. In short, our review of the record has revealed that there is no credible, consistent position to which we can defer. Since we are not in a position in this case to defer to the Department, we are required to employ a more traditional approach to ascertaining the General Assembly's intent in enacting Section 6301.

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[6] It is worth noting that, like Act 101, Section 6301 uses different words to describe the action involved. Section 6301 speaks of *disposal* of waste, including process residue, in subsection (a), but *use* of process residue and nonprocessible waste in subsection (b)(1). Under the Department's current logic, Section 6301(b)(1) could have said that the fee does not apply to "process residue and nonprocessible waste that is permitted for beneficial use or for [disposal] as alternate daily cover at a municipal waste landfill."

B. Board Interpretation of Act 90

The object of all statutory construction is to ascertain and effectuate the intention of the General Assembly. 1 Pa.C.S.A. §§ 1901 and 1921(a); *Commonwealth v. Gilmour Manufacturing Company*, 822 A.2d 676, 679 (Pa. 2003); *Adams Sanitation Company v. DEP*, 715 A.2d 390, 393-394 (Pa. 1998). When a statute is clear and unambiguous on its face, there is no need to engage in statutory interpretation and the plain meaning of the statute must prevail. 1 Pa.C.S.A. § 1921(b); *Commonwealth v. Packer*, 798 A.2d 192, 196 (Pa. 2002); *Eagle Environmental,* 833 A.2d at 808; *RAG Cumberland Resources LP v. DEP*, EHB Docket No. 2003-067-L slip op. at 10 (January 27, 2004); *Dauphin Meadows v. DEP*, 2003 EHB 163, 171.

Statutes must be construed as a whole. "Every statute shall be construed, if possible, to give effect to all of its provisions." 1 Pa. C.S.A. § 1921(a) (emphasis added). In ascertaining the General Assembly's intention, it is to be presumed that it intended the entire statute to be effective and certain. 1 Pa. C.S.A. § 1922(2). *See Galloway v. W.C.A.B. (Pa. State Police)*, 756 A.2d 1209, 1213 (Pa. Cmwlth. 2000) (when construing one section of a statute, courts must read that section not by itself, but with reference to, and in light of, the other sections).

The controversy in this appeal regarding the word "disposal" arises because the fee only applies to waste that is "disposed of" at a landfill pursuant to 27 Pa.C.S.A. § 6301(a). Indeed, the heading of the section is "Disposal Fee For Municipal Waste Landfills." Act 90 does not define "disposal." It does not expressly adopt or incorporate a definition for disposal from another statute or regulation.

We start with the word's common usage. Statutory words and phrases are to be construed according to their common and approved usage. 1 Pa.C.S.A. § 1903(a); *City of Philadelphia v. Fraternal Order of Police, Lodge No. 5*, 723 A.2d 747, 751 (Pa. Cmwlth. 1999).

Brunner points out that ADC serves an important function and substitutes for materials that would have otherwise cost the landfill operator money and/or raw materials. The material is not being thrown away; it is being used. It has a purpose. The ADC is not treated like other waste received at the facility, but instead is segregated and used for landfill construction and operation. (Stip. Ex. D.) It is regulated differently than other wastes at the facility. (Stip. Ex. 41 and Ex. L (Ex. 4).) Brunner's permit was specifically modified to allow for its productive use. (Stip. Ex. A.)

The Department counters that the fact that the foundry sand serves a valuable function does not change the fact that, fundamentally, it is being disposed of. It may serve a purpose, but it is still taking up space in the landfill. Serving a final purpose and disposal are not necessarily mutually exclusive concepts. Although it is segregated for special handling in some respects, it is still being placed with other waste in lined cells, it ends up below final cover when the cell is closed, and once in the ground and covered it is regulated like the rest of the waste in the ground. In other words, it may be approved to serve a certain function, but the approval assumes that the material will be managed as a waste in the end. Beaver Valley cannot reuse the material and must get rid of it. Although the material is placed in a separate layer, at the end of the day it is being landfilled just like all of the other waste at the site.

While people may quibble about the common meaning of "disposal," the Department argues that the term has taken on an accepted, specialized meaning, at least in the broad sense, in the regulation of solid waste management. It is true that technical words and phrases and such others as have acquired a peculiar and appropriate meaning in a particular context are to be construed according to such peculiar and appropriate meaning. 1 Pa. C.S.A. § 1903(a); *Adams Electric Cooperative, Inc. v. Commonwealth*, No. 54 F.R. 2000, slip op. at 12 (Pa. Cmwlth. July

16, 2004). And as previously noted, statutes relating to the same things should be construed together. 1 Pa. C.S.A. § 1932.

According to the Department, there was no need to define disposal in Act 90 because it has been repeatedly defined in such statutes as Act 101 and the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.*, as well as in the regulations promulgated under the waste management statutes. Act 101, for example, defines disposal as follows:

> The deposition, injection, dumping, spilling, leaking or placing of solid waste into or on the land or water in a manner that the solid waste enters the environment, is emitted into the air, or is discharged to the waters of this Commonwealth.

53 P.S. § 4000.103.

There is no dispute in this appeal that the foundry sand is a solid waste. Nor is there any dispute that it is placed into or on the land. The day after it is used, waste is piled on top of it and it obviously enters the environment. "Disposal" is not generally tied strictly to concepts of value. There is no reason to suspect that the legislature intended "disposal" to have a different meaning in Act 90 than it has in the other statutes that regulate solid waste in Pennsylvania.

In further support of its interpretation, the Department asks what we find to be a very persuasive rhetorical question; namely, if the use of ADC does not constitute "disposal," then why did the General Assembly take the trouble to put an express exception into subsection (b)(1) of the statute for at least some materials used as ADC? In other words, if the use of ADC does not constitute disposal, then there would be no need to specifically exclude at least some of it by name in Section 6301(b)(1).

We find ourselves in agreement with the Department. To accept Brunner's argument that the use of waste as ADC does not constitute "disposal" would render the exception redundant: There would be no need to except ADC by name if its use did not constitute disposal in the first

place. Furthermore, the concept of "disposal" in the regulation of solid waste has taken on a broad meaning, and we are not anxious to think the legislature viewed putting waste into a landfill--even if it serves one last function--as something other than disposal. The Department's approach maintains the greatest consistency with the regulation of solid waste management as a whole in the Commonwealth. We conclude that, at least for purposes of interpreting Section 6301(a), the use of ADC constitutes "disposal" as the term is used in that statute.

Had we accepted Brunner's argument that the use of ADC does not constitute disposal, there would have been no need to address the exception to the fee in Section 6301(b)(1) for "process residue and nonprocessible waste that is permitted for...use as alternate daily cover." But because we find that "disposal" as used in Section 6301(a) includes the use of ADC, we must address the exception. The central problem in interpreting this exception in Section 6301(b)(1) boils down to the fact that the general rule in the second sentence of Section 6301(a) specifically refers to process residue "from a resource recovery facility," but the exception in subsection (b)(1) does not. The Department says it must be implied or inferred. Brunner says it would be inappropriate to do that.

The problem with the Department's interpretation is that it tends to add words that simply are not there. The statute says that the new fee shall not apply to process residue and nonprocessible waste that is used in defined ways. It does *not* say process residue and nonprocessible waste "from a resource recovery facility." As Brunner correctly points out, the legislature has demonstrated that it is fully capable of defining the source of process residue and nonprocessible waste to be a resource recovery facility when it chooses to do so. Indeed, the body of Section 6301 itself specifically refers to a resource recovery facility. *See also* Section

701 of Act 101, 53 P.S. § 4000.701 (creating $2 per ton fee on "all solid waste except process residue and nonprocessible waste *from a resource recovery facility*....").

While the Department's proposed interpretation effectively adds words to the statute, the difficulty with Brunner's interpretation is that it essentially takes words out of the statute. Brunner contends that "process residue and nonprocessible waste" is not limited to material coming from resource recovery facilities. If that is the case, there is really no reason to say "process residue and nonprocessible." It does not add anything. There is little difference between Brunner's proposal and simply referring to "waste that is permitted for beneficial use or for use as [ADC] at a municipal waste landfill." Brunner certainly offers no explanation of how or why Section 6301(b)(1)'s reference to "process residue and nonprocessible waste" was meant to create a distinct subset of waste within the ambit of Section 6301. Instead, Brunner's interpretation turns almost entirely on the use put to the waste (e.g. daily cover), not the nature or origin of the waste itself. Yet, the exception clearly contains two elements: the material must (1) be process residue or nonprocessible waste, and (2) it must be beneficially used or used as ADC. Writing words out of a statute or treating them as surplusage violates the rules of statutory construction. 1 Pa.C.S.A. § 1921(a) and 1922(2); *Gilmour Manufacturing*, 822 A.2d at 679.

To be fair, Brunner does not entirely disregard the phrase "process residue and nonprocessible waste." It suggests that used foundry sand is "residue" from Beaver Valley's manufacturing "process."[7] But Brunner has not pointed to any known or workable definition of the phrase within the context of Act 90. The legislature must have had some reason to specify "process residue and nonprocessible waste" in the exception. We are loathe to think the

[7] Similarly, USS argues that the basic oxygen process (BOP) sludge produced as a result of its air pollution controls is a process waste because it is matter that remains after the conversion of molten iron to steel that has no value, and it is nonprocessible waste because attempts to recycle BOP sludge have been unsuccessful.

legislature, in Section 6301, has deliberately created yet another new subclassification in the already complicated regulatory universe of "waste." If "process residue and nonprocessible waste" does *not* refer to resource recovery facility materials, we have no idea what it does refer to. We have difficulty accepting the idea that the legislature meant to include absolutely any "residue" (whatever that means in the context of Act 90) from absolutely any "process" (whatever that means in the context of Act 90) and "nonprocessible (whatever that means in the context of Act 90) waste" in the exception. If the legislature intended to refer to *residual* waste, which is a defined, well-established term,[8] it could have said so. If it intended to create a new subclass of regulatory waste beyond resource recovery material, we hesitate to think it would do so without defining the class, or that it would do so in a somewhat obscure subsection of a part of a statute creating disposal fees. In short, if "process residue and nonprocessible waste" are defined without any reference to resource recovery facilities, the words have either no meaning or potentially unlimited meaning, depending upon how one looks at it. On the other hand, if the words relate to resource recovery facilities, as the Department suggests, they make perfect sense. Resource recovery facilities process municipal waste, and from that processing, there is a residue and some material that simply cannot be processed.

The Department also contends that Section 6301(b)(1) is merely an exception to the general rule expressed in Section 6301(a). Therefore, there is no need to articulate an exception that goes beyond what is expressed in the general rule. The general rule is clearly related to "process residue and nonprocessible waste from a resource recovery facility." Thus, there was simply no need to weigh down the statute with excess verbage and repeat the entire phrase in the exception. The last sentence of subsection (a) and subsection (b)(1) should be read together as

[8] 53 P.S. § 4000.103, 35 P.S. § 6018.103, 25 Pa. Code §§ 271.1 and 287.1.

one unit, and when they are, it is clear that both sentences must refer to resource recovery facility materials.

We agree. We think that the two subsections must be viewed together and that the reference in the exception to "process residue and nonprocessible waste" is meant to refer to material "from a resource recovery facility" as specified in the main subsection imposing the fee. It would not be appropriate for us to interpret each subsection without reference to the other as if they had nothing to do with each other. Brunner's interpretation separates the two as if they had no relationship to each other, which does violence to the Section as a whole.

We would add that it apparent from the face of the statute that the only reason that the General Assembly got into a discussion of process residue and nonprocessible waste in the first place was to distinguish the $4 fee in Section 6301 from the $2 recycling fee imposed by Act 101. The first sentence of subsection (a) of Section 6301 states that the new fee is to be paid "in the same manner prescribed" in Act 101. However, subsection (a) makes it clear that, although the manner of payment might generally be the same, there is a key difference. The $2 fee in Act 101 is imposed on resource recovery facilities *and* landfills. Act 101 does not require the landfill to pay the fee on waste derived from waste originally sent to a resource recovery facility when the waste is later disposed at a landfill because the resource recovery facility would have already paid the $2 fee on waste received at its facility. In contrast, the $4 fee in Section 6301 only applies to landfills. There is no need to avoid a double charge. Resource recovery facilities were not charged the fee when they received the waste. The point of this discussion is that Section 6301 may not have needed to mention "process residue and nonprocessible waste" were it not for Act 101, and Act 101 only addresses "process residue and nonprocessible waste" from resource recovery facilities. Therefore, the phrase "process residue and nonprocessible waste" in 6301

should also be interpreted to be limited to material coming from a resource recovery facility. The Department accurately points out that this reading maintains consistency between not only the general rule and the exception in Section 6301, but between all of Section 6301 and Act 101 as well. *See also* 25 Pa. Code §§ 273.315(b), 273.316(b), and 283.264(b) (all referring to residue from resource recovery facilities).

In conclusion, we find that the Department's interpretation of both subsections of Section 6301 makes the greatest possible syntactical sense out of what is unquestionably a difficult statute. The Department's construction also creates the greatest possible consistency between Section 6301 and other statutes relating to solid waste management in the Commonwealth. We conclude that the use of ADC is "disposal" as that term is used in Section 6301(a), and that only process residue or nonprocessible waste originating from a resource recovery facility is excepted under Section 6301(b)(1).

It follows that the Department did not err in imposing the Section 6301 fee on Beaver Valley Alloy's waste foundry sand utilized as ADC at the Brunner Landfill. The Notice of Deficiency was appropriate. The Department is entitled to judgment in its favor as a matter of law. Brunner's appeal is dismissed.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOSEPH J. BRUNNER, INC.	:	
	:	
v.	:	**EHB Docket No. 2002-304-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BEAVER VALLEY ALLOY FOUNDRY COMPANY, Intervenor	:	

ORDER

AND NOW, this 1st day of September, 2004, the Department's motion for summary judgment is granted. Brunner's motion for summary judgment is denied. This appeal is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Member

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

Bernard A. Labuskes, Jr.

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: September 1, 2004

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOSEPH J. BRUNNER, INC.	:	
	:	
v.	:	EHB Docket No. 2002-304-L
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BEAVER VALLEY ALLOY FOUNDRY COMPANY, Intervenor	:	

DISSENTING OPINION OF CHIEF JUDGE KRANCER IN WHICH JUDGE RENWAND JOINS

By: Michael L. Krancer, Chief Judge and Chairman

We respectfully dissent. The essential problem with the majority's analysis, and the reason we choose to differ, is that it adds words to the exception which the Legislature did not put there. Actually, we could probably not improve on the majority's own recitation of this seminal point so we borrow it:

> The problem with the Department's interpretation is that it tends to add words that simply are not there. The statute says that the new fee shall not apply to process residue and nonprocessible waste that is used in defined ways. It does *not* say process residue and nonprocessible waste "from a resource recovery facility."

Ante at 13 (emphasis in original). From there, the majority then admits,

> As Brunner correctly points out, the legislature has demonstrated that it is fully capable of defining the source of process residue and nonprocessible waste to be a resource recovery facility when it chooses to do so. Indeed, the body of Section 6301 itself specifically refers to a resource recovery facility. *See also* Section 701 of Act 101, 53 P.S. § 4000.701 (creating $2 per ton fee on "all solid waste except process residue and nonprocessible waste *from a resource recovery facility*....").

Id. at 13-14 (emphasis in original).

When any party comes to court and asks the court to add words to a particular statute which were not put in the statute by the Legislature, that is a matter of no small import in our constitutional scheme of assignment of and division of powers and roles between legislative and judicial branches. The Legislature drafts the laws, courts and administrative law courts do not. Courts interpret the laws. It is problematic to that structure and that balance when courts, however well intentioned, write in words to the Legislature's statutes calling it an exercise of "interpretation."

It is well established, and for very good reason, that it is not allowable for courts to write in supposedly missing words to statutes. The Commonwealth Court has so held and so held emphatically, repeatedly and very recently just a month ago. As the Court noted in *Presock v. Dept. of Military and Veterans Affairs*, No. 1527 C.D. 2003 (Pa. Cmwlth. Aug. 3, 2004), even though courts are encouraged to liberally construe statutes to effect their objects and promote justice under the provision of Section 1928(b) and (c) of the Statutory Construction Act of 1972, 1 Pa. C.S. 1928 (b) and (c), "any omitted words may not be supplied in interpreting provisions of a statute." *Id.* slip op. at 6 (emphasis added). In *Latella v. Unemployment Compensation Bd. of Review*, 459 A.2d 464 (Pa. Cmwlth. 1983), the Court said,

> [a]lthough the Board claims that the Legislature's omission of any reference to the Part E column in Section 404(d) results in an "ambiguity in application," this Court cannot supply an apparent omission in a statute even though it appears that the omission resulted from the Legislature's mere inadvertence or failure to foresee or contemplate a case in question.

Id. at 473. (emphasis added). Also, in *In Re: Change of Boundaries and/or Election Districts of the Five (5) Wards in the Township of Upper Chichester*, 415 A.2d 1250 (Pa. Cmwlth. 1980), the Court said, "[a] court, however, has no power to insert words into statutory provisions where the legislature has failed to supply them." *Id.* at 1252 (emphasis added).

So it is clear that however well intentioned the majority's work in this case, and however it is couched in terms of "interpretation", the majority has run afoul of a very basic canon and of upper court direction regarding that canon. It has run afoul in a particularly egregious manner here because, even the majority recognizes, as is clear from our quote of opinion set forth above, that there is some evidence that the Legislature knew exactly what it was doing when it omitted the words "from a resource recovery facility" from the subsection (b)(1) exception. Moreover, it is very clear from the Mahon calculations, which became part of Act 90's legislative history, that the Department was well aware when the bill was still pending before the Legislature that the subsection (b)(1) exception applied to all ADC and not merely ADC comprised of material which had come from a resource recovery facility. The Mahon calculations are particularly important. It is the Department's contemporaneous interpretation of the bill before passage. Also, qualitatively, it is not a tangential or casual interpretation. It is an interpretation in a most important and focused context—it is a budget projection. As such it is a matter of "bread and butter" import to the Department and must be attributed as being deliberately and carefully composed before released to the Legislature. In spite of this, the majority insists upon adding the words to the subsection (b)(1) exception saying it is "interpreting" that subsection.

The decision by the majority is even more problematic because the Legislature is considering in this Session whether to add the very words to the Section 6301(b)(1) exception which the majority takes it upon itself to add today. House Bill 2010 of 2004, (Printer's No. 3857), was introduced by Representatives Surra, Levdansky, Veon, Staback, DeWeese, Horsey, LaGrotta and Rooney. House Bill 2010 outlines various amendments to the statutory program in question here. One of the proposed amendments is to change the Section 6301(b)(1) exception to add the phrase "from a resource recovery facility" as a qualifier to the phrase "process residue

and nonprocessible waste". House Bill 2010 was referred to the House Committee on Environmental Resources and Energy on May 12, 2004. Of course either side of the interpretation battle could claim that this supports their view of what the present Section 6301(b)(1) means. One could say that this is consistent with the extant evidence that shows that the Legislature knew what it was doing in 2002 when it left those words out of the current law. One could also say that this shows that the absence of the qualifying words must be significant since the Legislature is considering adding them. If the words "from a resource recovery facility" were unnecessary in the first place and the statue was to be read as though they were really there, then what would be the purpose of proposing that they be added. On the other side of the coin, one could say that the Legislature is simply clarifying what they meant in the first place. Who really knows who is right? But the latter position shows the crux of the problem from the constitutional standpoint. It seems to us that this Board ought not to infringe on the province of the Legislature by adding words to a statute at the very time that the Legislature is considering whether to add those words to its statute. We ought not to be short-circuiting the Legislature or the Legislature's function.

Besides the bigger problem of judicial-legislative roles and relationships, and the majority's declination to follow the command which prohibits courts from engaging in statutory eisegesis, the majority's "interpretation" does not hold up either. First, the issue of what constitutes "disposal" is irrelevant. Section 6301(a) establishes a fee for disposal. Then, Section 6301(b) establishes exceptions to the fee for disposal. Thus, it matters not whether the ADC is considered as being disposed of or not. Either way, the ADC is exempt from being subject to a fee. If it is not being disposed of then there is no disposal fee. If it is being disposed of then it is exempt from the disposal fee.

A centerpiece of the majority's argument actually cuts against its conclusion. The majority says that to interpret Section 6301 as a unit so that Section 6301(a) and (b)(1) make sense together the phrase missing from Section 6301(b)(1), which is present just above in Section 6301(a), has to be added into Section 6301(b)(1). Actually, the opposite conclusion is equally or perhaps more warranted by those facts. As the Legislature put in the words in Section 6301(a) but did not put in the words in the very next section, it is equally if not more likely that the omission in the very next section was by design. At the very least, we ought to give effect to that omission unless there is compelling reason not to do so.

Another foundation of the majority's conclusion is its dependent assumption that the phrase "process residue and nonprocessible waste" is meaningless within the context of Section 6301 as a whole (or a unit) unless the additional words that the Legislature did not place next to it, *i.e.*, "from a resource recovery facility" are placed there in the Section 6301(b)(1) exception for the Legislature by us. In other words, the words "process residue and nonprocessible waste" have to have no intelligible meaning within the context of Section 6301(a) taken together with Section 6301(b)(1) without being linked in section 6301(b)(1) to the phrase "from a resource recovery facility." Hence its conclusion that it must finish the Legislature's job by adding the words which were left out. The basic assumption, though, is demonstrably wrong. In fact, the evidence which the majority recognizes and talks about shows that the Legislature understood the terms "process residue and unprocessed waste" in Section 6301(b)(1) to have meaning independent of the qualifying phrase "from a resource recovery facility" which appear in the Section 6301(a) general fee imposition. So did the Department as evidenced in the Mahon calculations. The Mahon calculations are proof positive that the Department knew full well that the phrase "process residue and unprocessible waste" has a separate, distinct and intelligible

meaning in the Section 6301(b)(1) exception without being tailed by the phrase "from a resource recovery facility" which is written in the Section 6301(a) general fee imposition.

So we go into our interpretation exercise with the background that both the Department and the Legislature, at the time the Subsection (b)(1) exception was being drafted and passed, were fully conversant and comfortable with the use of the phrase "process residue and unprocessible waste" and both used the phrase. That is compelling in its own right and should signal any court to question whether it ought to be adding words on the theory that the words the Legislature did use are meaningless without the court's addition of qualifying words. Are we to assume that the Legislature and the Department both did not know what they were doing or saying?

On still another level, as the majority points out, "[t]o be fair, Brunner does not entirely disregard the phrase "process residue and nonprocessible waste." *Ante* at 14. It suggests that used foundry sand is "residue" from Beaver Valley's manufacturing "process." Also, with respect to amicus USS, as the majority recognizes, it argues that the basic oxygen process (BOP) sludge produced as a result of its air pollution controls is a process waste because it is matter that remains after the conversion of molten iron to steel that has no value, and it is nonprocessible waste because attempts to recycle BOP sludge have been unsuccessful.

We find that the dictionary defines "residue" as, "[t]he remainder of something after removal of parts or a part.... Matter remaining after completion of an abstractive chemical or physical process such as evaporation, combustion, distillation, or filtration...." The American Heritage Dictionary, 1535 (3rd ed. 1996). A "process" is defined as "a series of changes, or functions bringing about a result or a series of operations performed in the making or treatment of a product." *Id.* at 1444. "Processible" is the word "process" with the common suffix "ible" or

"able" which forms the adjectival form of "process" meaning something which is able to be processed or be subject to a process. "Nonprocessible" would be the contrary of processible.[9] We also see that the Department has defined the word "processing" in its municipal waste regulations. 25 Pa. Code § 271.1.

The Department's own General Permitting program applicable to reuse of a myriad of different kinds of wastes has copious references in the texts of numerous of these general permits to "process residue," "residue from process" and "residue" not with reference to resource recovery waste.[10] The same can be said for federal waste regulations.[11]

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[9] Both suffixes, "able" and "ible" are derived from the Latin *habilis,* meaning "able."

[10] See WMGR039 (Processing prior to beneficial use of the operation of a transfer facility and rail transloading facility for the processing of waste oil, waste oil/water mixtures, and asphalt condensate), ¶¶ 23, 24 (residue from processing); WMGR040 (Processing of waste oil (including waste oil mixed with hazardous waste), spent antifreeze and waste oil/water mixtures from motor vehicles to rail cars for transport (rail transloading)), ¶¶ 23, 28 (residue from processing); WMGR045 (Processing of paper and pulp mill sludge, coal ash, and tannery sludge for use as a manufactured soil), ¶¶ 22 (residues from processing); WMGR046 (Processing and beneficial use of drinking water treatment sludges, yard waste, bark ash, coal ash, agricultural residues, waste cardboard and paper, sludge generated by paper of pulp mills, waste from vegetable food processing, unused sands and spent mushroom substrate use as manufactured soil or soil amendments), ¶¶ 1, 6, 7, 31, App. A (agricultural residues, residue from processing); WMGR053 (Processing prior to beneficial use of recyclable containers from off-specification or out-of-date consumer commodity-type materials for use as raw material), ¶¶ 25 (residue from processing); WMGR061 (Processing prior to beneficial use of food processing waste, rendering waste, offal, animal parts, animal feed waste, potato and grain mill processing waste and materials used to pack the waste (cardboard and polyethylene) and spent mushroom substrate for use as fuel, fuel feedstock or as an ingredient in fertilizer), ¶¶ 22, 23, 27, 29 (residue, residues from processing, process residue); WMGR062 (Processing prior to beneficial use of silver bearing films and sludge through granulation, film washing using sodium hydroxide or enzymes and surfactants, flocculation, and calcining for use as feedstock for further silver reclamation and plastic recycling), ¶¶ 21, 22, 24, 26 (residue from processing and process residue); WMGR063 (Processing combustion and metallurgical residues, sludges and scales, chemical wastes, generic manufacturing wastes, spent catalysts, batteries and non-hazardous residue from treatment of hazardous waste prior to use as a feedstock by various industries), ¶¶ 21, 22, 24, 26 (residue from processing and process residue); WMGR066 (Processing of waste oil, virgin fuel oil tank bottoms, spent antifreeze and waste oil/water mixture via operation of a transfer facility); WMGR082 (Processing and beneficial use of steel and iron slag and refractory bricks mined from an existing slag pile for use as a construction material), ¶¶ 23, 24 (residues from processing); WMGR085 (Processing and beneficial use of freshwater, brackish and marine dredge material, cement kiln dust, lime kiln dust, coal ash, and cogeneration ash by screening, mechanical blending and compaction in mine reclamation), ¶¶ 33, 37, 39 (residue from processing, waste residue).

[11] See 40 C.F.R. § 261.1 (definition of "by-product" refers to "process residues such as slags or distillation column bottom" as examples of by-products); 40 C.F.R § 261.32 identifying hazardous waste from certain specific sources non of which are resource recovery facilities as follows: K103 process residues from aniline extraction from the production of aniline; K141 process residues from the recovery of coal tar, including, but not limited to, collecting sump residues from the production of coke from coal or the recovery of coke by-products produced from coal. This listing does not include K087 (decanter tank tar sludges from coking operations; K143 process residues

Thus, the terminology to which the majority cannot ascribe a meaning without tacking on "from a resource recovery facility" is commonly and copiously used without that epithet in a host of contexts. It would seem that the terminology in question is virtually part of the Lingua Franca. Can it be said that nobody knows what they are saying or meaning? Of course not. Brunner and USS have presented logical potential examples thereof. It is simply not appropriate to tell them that no such thing exists because it is not known what these terms could possibly mean.

The majority misses the point when it demurs on the theory that "we are loathe to think the legislature has deliberately created yet another new subclassification in the already complicated regulatory universe of "waste." *Ante* at 14-15. That is not what Section 6301 is about. What the Legislature has done is establish a disposal fee and then exempt from the fee a qualitative nature of material, not created a new regulated waste or subclassification of waste.

The majority also says that it has difficulty accepting the idea that the legislature meant to include absolutely any "residue" (whatever that means in the context of Act 90) from absolutely any "process" (whatever that means in the context of Act 90) and "nonprocessible (whatever that means in the context of Act 90) waste" in the exception. Well that is what the plain words—without their being added to—in the subsection (b)(1) exception do. Words which even the majority admits some evidence shows were understood by the Legislature and by the Department. The majority seems to not take into account that the use of ADC is a highly regulated process; the Department is the "gatekeeper" of what qualifies for use as ADC in the first place. The parties' stipulations here reveal that the Department has to approve the use of any material as ADC and that the regulations impose a heavy regulatory leash on the use of any

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from the recovery of light oil, including, but not limited to, those generated in stills, decanters, and wash oil recovery units from the recovery of coke by-products produced from coal.

material for ADC. Joint Stipulations, ¶¶ 7-10; 25 Pa. Code § 271.231. The bottom line is that for any material to be used as ADC, a party has file a request with the Department and the Department must conclude that it will do the job of daily cover and it will not cause pollution. 25 Pa. Code § 271.231(b)(2), (3). All the Act 90 Section 6301, subsection (b)(1) exception does is exempt Department approved ADC material which fits the description of being "process residue or unprocessible waste" from the $4.00 per ton disposal fee.

At the end of the day we return to our opening and fundamental objection to what the majority has done. It has added words to a statutory subsection. For this Board, or any court, to add words to the Legislature's statute, calling it "interpretation," is wrong.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: September 1, 2004

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WILLIAM T. PHILLIPY IV
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DON NOLL AND STEPHANIE CLARK	:	
	:	
v.	:	**EHB Docket No. 2003-131-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SCOTT TOWNSHIP BOARD OF SUPERVISORS	:	**Issued: September 1, 2004**

OPINION AND ORDER ON
MOTION FOR PARTIAL SUMMARY JUDGMENT

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

In this appeal of a 2002 revision to an extant Act 537 Sewage Facilities Act Plan, The Board grants in part and denies in part the Department's Motion for Partial Summary Judgment. Administrative finality applies to preclude a collateral attack of an Act 537 Plan approved in 1993 and not appealed then. The intervening change in law exception to administrative finality does not apply to this particular case. The Appellants may, however, challenge the changes made to the extant 1993 Plan by a 2002 revision. The Board does not preclude challenges relating to the costs associated with the alternative selected in the 2002 revision.

I. Factual and Procedural Background.

This is a *pro se* appeal of the Department of Environmental Protection's (DEP or Department) approval of the 2002 revision to the extant Act 537 Sewage Facilities Act Plan of Scott Township.[1] Currently before the Board is the Department's Motion for Partial Summary

[1] The Pennsylvania Sewage Facilities Act (SFA), Act of January 24, 1966, P.L. (1965) 1535, *as amended*,

Judgment (Motion). Appellants have filed a Response to the Motion (Response) opposing it.[2] The Department filed a Reply Brief on May 17, 2004.

The roots of this dispute date all the way back to the Department's approval on July 28, 1993 of Scott Township's Sewage Facilities Plan Update Revision (1993 Plan). The 1993 Plan called for central sewerage to be implemented in Scott Township. No appeal from the 1993 Plan approval was filed. Nevertheless, the 1993 Plan has spawned three previous litigations and three resultant Board opinions. *Scott Township Environmental Preservation Alliance v. DEP*, 2001 EHB 90 (*Scott Township III*); *Scott Township Environmental Preservation Alliance v. DEP*, 2000 EHB 110 (*Scott Township II*); *Scott Township Environmental Preservation Alliance v. DEP*, 1999 EHB 425 (*Scott Township I*). It would be fair to say that the essence of each of these appeals, with only slight variations on the theme, was an attempt to challenge and overturn the 1993 Plan. None of the attacks succeeded, the Board holding that the underlying 1993 Plan was not subject to collateral attack due to administrative finality in that the underlying 1993 Plan had not been appealed. Appellants in this case, Mr. Noll and Ms. Clark, are members of the executive committee of the Scott Township Environmental Preservation Alliance (STEPA) so they have been involved with the various challenges to the 1993 Plan from the beginning.

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35 P.S. §§ 750.1 – 750.20(a), "assigns every Pennsylvania municipality the responsibility for developing and implementing a current and comprehensive sewage facilities plan in conformance with the requirements enumerated at Section 5(d), 35 P.S. § 750.5(d)." *Scott Township Environmental Preservation Alliance v.* DEP, 1999 EHB 425, 429.

[2] In their Memorandum of Law in Opposition to the Motion (Memo in Opposition) Appellants note that the Department's Motion and Memorandum of Law in Support of the Motion (Memo in Support) did not include a concise statement of the requested relief as required by the Board's rule at 25 Pa. Code § 1021.94. On May 10, 2004 the Board issued an Order requiring that the Department file a proposed order which "delineates precisely the relief the Department is seeking in its Motion." In response to the May 10th Order, the Department submitted a draft order with its Reply Brief, which set forth the following statement of the relief it requests: "Appellants' objections to the Department's approval of Scott Township's 1993 Official Sewage Facilities Plan, including those objections to the sewage needs survey that was part of the 1993 Plan, are hereby dismissed. Appellants' objection that the sewage treatment alternative chosen in the 2002 Plan Revision is too expensive is dismissed."

Scott Township I was an appeal challenging a letter dated September 28, 1998 sent by counsel for the Department to STEPA responding to inquiries from counsel for STEPA regarding the status of Scott Township's official plan. *Scott Township I*, 1999 EHB 425. The Department's letter stated "that 'at this time the Department does not intent to take any additional action regarding Scott Township's existing Act 537 Plan....'" *Id.* at 427. The Board granted the Department's Motion to Dismiss the appeal because the September 28, 1998 letter was not an appealable action. *Id.* at 430. Seeing also that the essence of the *Scott Township I* appeal was an attempt to revisit the choice made by the 1993 Plan, the Board held directly that such a challenge was barred by administrative finality. The Board said in that regard that,

> this Board does not have jurisdiction to re-open, by way of an untimely appeal, a previously adopted sewage facilities plan which was approved by the Department. If an objection is being made by a property owner who contends that the official sewage facilities plan is inadequate to meet that property owner's sewage disposal needs, the owner's remedy is to submit a private request to revise the plan in accordance with Section 5(b) of the Sewage Facilities Act, 35 P.S. 750.5(b). *See Carroll Township v. Department of Environmental Resources*, 409 A.2d 1378 (Pa. Cmwlth. 1980); *Force v. DEP*, 1998 EHB 179, *aff'd*, 977 C.D. 1998 (Pa. Cmwlth. filed December 30, 1998). Similarly, since [STEPA] is attempting to attack the previously approved 1993 Sewage Plan by arguing that it is more expensive than is required to cure Scott Township's sewage disposal problems, it must follow the remedies prescribed by the Act. This might include persuading the Township to submit a plan revision to the Department for approval. If that effort is unsuccessful, the Appellant might pursue a private request. Because [STEPA] did not appeal the Department's approval of the 1993 Sewage Plan, the Board has no jurisdiction over this appeal.

Scott Township I at 433-34 (footnotes omitted).

Scott Township II involved another approach to challenging the 1993 Plan. Scott Township II, *2000 EHB 110.* On October 22, 1998, just one day before STEPA had filed its initial NOA in *Scott Township I*, STEPA had sent a one- page letter to the Department requesting that the Department order Scott Township to revise its official plan. STEPA claimed its one

page letter constituted a private request under the SFA.[3] The Department did not respond to STEPA's letter and on March 5, 1999 STEPA filed a Notice of Appeal/Petition for Mandamus with the Board regarding the Department's failure to respond to STEPA's letter. The Board granted the Department's Motion for Summary Judgment and dismissed the appeal because STEPA's letter failed to comply with the statutory and regulatory procedural and content requirements for a private request. *Id.* at 117.

Scott Township III was the follow-up to *Scott Township II*. *Scott Township III* was an appeal filed on November 23, 1999 challenging an October 18, 1999 decision by the Department not to act on a September 17, 1999 so-called private request letter from STEPA. *Scott Township III,* 2001 EHB 90. In the private request STEPA asked the Department to order Scott Township to adopt a different alternative for sewage collection and treatment than the alternative adopted under the 1993 Plan. The Board granted the Department's motion for summary judgment and dismissed the appeal because STEPA's private request was in actuality a wholesale attempt to challenge the basic sewerage choice made in the unappealed 1993 Plan. The Board stated that:

> [STEPA's] challenge to the environmental impact associated with the adopted sewage treatment alternative is effectively an appeal of the Department's approval of the Township's chosen sewage treatment alternative adopted in the municipality's 1993 Plan.
>
> As such this appeal is beyond the scope authorized by the Act and the Department's regulations because it requests a wholesale revision to the Township's 1993 Plan and it was not made in a timely manner. Allowing a party to use a private request to reopen Scott Township's sewage facilities planning process at this point in time would have the effect of an appeal of the municipality's original official plan. Neither the Act nor the private request regulations provide a means to challenge a previous Department approval of an official sewage facilities plan.

2001 EHB at 96.

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[3] Section 5 of the SFA provides a mechanism for a resident or landowner to file a private request that the Department order a municipality to revise its sewage plan if the sewage plan is not being implemented or is inadequate to meet the resident's or landowner's sewage disposal needs. 35 P.S. § 750.5(b).

The factual background of this now epochal dispute is set forth in detail in those earlier opinions and we will restate it briefly here. The 1993 Plan provided for construction of a centralized sewage collection system to serve portions of Scott Township. Sewage would be collected and conveyed to a treatment facility to be located within Scott Township. No appeal of the 1993 Plan was filed. After receiving approval of the 1993 Plan, Scott Township did not immediately proceed with its implementation. In February 1996 the Township informed the Department that implementation would be delayed while the Township assessed the costs of implementing the 1993 Plan against potential alternatives. The Department monitored Scott Township's progress in that evaluative process but took no action. In May 1998, the Department was informed by the Township that implementation of the 1993 Plan would move forward. The three litigations described earlier then appeared and, as described, disappeared.

In October 2002 Scott Township submitted to the Department an Act 537 Sewage Facilities Plan Update Revision (2002 Plan Revision). It is this 2002 Plan Revision which paved the way for this, the fourth litigation emanating from the decision in 1993 by Scott Township, as approved by the Department, to provide central sewerage. According to DEP, the 2002 Plan Revision was limited in scope in that it did not revisit the concept of central sewage as Scott Township's chosen sewage treatment alternative. Memo in Support at 4. The purpose of the 2002 Plan Revision was to evaluate the most cost effective method of central sewage treatment. *Id.* From what we glean from the record at this point, of importance to the issues presented by the Motion, the 2002 Plan Revision effectuated two changes to the underlying 1993 Plan. First, the area to be covered by the sewerage was modified to include additional area. Second, the 2002 Plan Revision called for the collected wastewater to be conveyed to the Lackawana River Basin Sewer Authority Archbald Wastewater Treatment Plant (LRBSA Archbald WWTP) for

treatment instead of a treatment facility to be located within Scott Township. On April 24, 2003 the Department approved the 2002 Plan Revision and this appeal followed.

Strictly speaking, the appeal is from the approval of the 2002 Plan Revision. The NOA, as drafted, does refer to the 2002 Plan Revision. However, it also catalogs the historical complaints about the underlying decision embodied in the 1993 Plan. Specifically, a major complaint is about the alleged inadequacy of a "needs analysis" performed in 1989 (1989 Needs Analysis) which was used to develop the 1993 Plan and appears to have been relied upon again for the 2002 Plan Revision. Also, Appellants complain about the cost of implementing the 1993 Plan. This complaint about the cost of implementing central sewerage, the choice for sewerage made in the 1993 Plan, has been a consistent complaint of STEPA and now Mr. Noll and Ms. Clark in each of the previous litigations involving sewerage in Scott Township.

In our case today, the NOA states:

> 4. The Scott Township revised Act 537 Plan update approved by DEP is the second most expensive plan per capita in the Commonwealth. The Plan calls for connection to the LRBSA sewage collection system, that, because of its antiquated, combined sewer overflow problems, discharges raw, untreated sewage into the Lackawanna and Susquehanna Rivers during moderate and severe rain events. To pay all this money to transport sewage to be inadequately treated and discharged into the Lackawanna River will contribute to the pollution of the River and is intolerable. We believe this to be a violation of the Clean Streams Act.
>
> 5. The Act 537 Revised Plan estimates the capital cost of the project to be $13,912,000, requiring tapping fees for the 1350 EDU's of $2,500 and annual fees of $633.00 each.
>
> a. The published costs to the Township residents are grossly understated, in that failed to be taken into account are the costs the homeowner must bear to hook up to the system. For instance, omitted in the Act 537 revision are: 1) installation of the lateral connection pipe from the dwelling unit to the main line; 2) costs to change interior piping and penetration of the foundation wall; 3) cost of certified electricians; 4) costs of decommissioning the on-lot system, septic tank and the drain field.
>
> b. The additional cost to the homeowner to actually and physically hook up to the system will be approximately $5,000.00 to $7,000.00. By taking the low

end of the estimate and multiplying it by 1350 EDU's the accurate projected cost of the project will be an additional $ 6,750,000.00 for a total cost of $20, 662,000.00 and not the $13,912,000.00 as represented in the Plan. Further, there is no individual notice to the homeowners of these additional costs and no consideration in the Plan for socio-economic impact.

c. Estimates of average income in the township as a measure of affordability of the central sewer system should be rejected for several reasons, namely: 1) Averages present an inaccurate assessment because large incomes can skew the results 2) No assessment has been made to determine the number of those on fixed or limited incomes that have no way to absorb these additional costs 3) No assessment has been made to determine the economic impact on renters and particularly trailer parks. Having to pay a pro-rata share of capital costs and a monthly service charge could make renting in Scott Township unaffordable for many and even lead to the closing of the trailer park altogether.

d. The revised plan does not provide for a delinquency rate, customarily 5 to 10 percent, with some local communities (Covington Township) experiencing a 30 percent delinquency problem Delinquencies jeopardize the ability of the sewer authority to repay its loans, requiring the township as guarantor to cover the shortfall. These potential delinquencies make it essential that the Township undertake a more specific assessment of affordability of the central sewer and, lacking that, demonstrate its financial capability to cover sewer authority shortfalls should a high rate of delinquencies occur.

6. The updated Plan relies on an undocumented, (no dye testing, no video, no lab testing) out of date needs (1989) analysis. The 13 yr. old study did not consider costs of remedial repairs or alternative land applications systems as required under the Pennsylvania Code and the policy changes implemented by DEP in 1997. There was no testing of domestic water supplies (wells), ground water or open streams and lakes (Chapman Lake) in particular.

(emphasis in original).

The Department argues that to the extent paragraph 6 of the NOA challenges the 1989 Needs Analysis used to develop the 1993 Plan, that challenge is barred by the doctrine of administrative finality, or, alternatively, the scope of Appellants' appeal should be limited to only the changes effectuated by the 2002 Plan Revision as against the 1993 Plan. The Motion also seeks to remove from the scope of this appeal objections concerning the expense of the chosen alternative under the 2002 Plan Revision arguing that decisions and considerations regarding the cost of the chosen alternative are solely issues for the municipality and are not part

of the Department's review.[4] Appellants argue that they are not barred from challenging the adequacy of the 1989 Needs Analysis even though they did not appeal the 1993 Plan because there have been changes to Act 537 regulations since 1993 and the Department's policy and guidelines regarding Act 537 Plans have changed as well.[5] Further the mere passage of time since the 1989 Needs Analysis render the 1989 Needs Analysis inadequate. Thus, according to Appellants, the Department erred by approving the 2002 Plan Revision which they claim included the 1993 Plan, without requiring the 1993 Plan to meet the supposed new requirements in the revised regulations and policy documents.

II. Discussion

A. Standard of Review

The Board's standard of review of a summary judgment motion is well established.

> Our standard for review of motions for summary judgment has been set forth many times before. We will only grant summary judgment when the record, which is defined as the pleadings, depositions, answers to interrogatories, admissions, affidavits, and certain expert reports, show that there is no genuine issue of material fact *and* the moving party is entitled to judgment as a matter of law. *Holbert v. DEP*, 2000 EHB 796, 807-09 *citing County of Adams v. DEP*, 687 A.2d 1222, 1224 n. 4. (Pa. Cmwlth. 1997). *See* Pa. R.C.P. 1035.1. Also, when evaluating a motion for summary judgment, the Board views the record in a light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Holbert*, 2000 EHB at 808 (citations omitted).

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[4] The opening paragraph of the Department's Reply Brief states that Appellants failed to respond to the Motion within 30 days after the April 2, 2004 date of service of the Motion as required by the Board's rules. The Reply Brief does not request any relief with regard to this issue and even if relief was requested it would be denied. Under 25 Pa. Code § 1021.35, because the Motion was served by mail, "3 days [are] added to the time required by this chapter for responding to the document." *Id.* Thus, Appellants' Response and Memo in Opposition filed on May 5, 2004 is a timely response to the Motion filed on April 2, 2004.

[5] The parties appear to disagree on the nature of at least one of the documents issued by the Department after 1993. Appellants allege the document titled "Act 537 Sewage Disposal Needs Identification" is a technical guidance document, Memo in Opposition at 4, ¶ 8, while the Department argues that the document is an external guideline not a technical guidance. Reply Brief at 3 n. 2. We will refer generically to the documents issued by the Department at policy documents.

Hankin v. DEP, Docket No. 2003-186-K, *slip op.* at 4-5 (opinion issued July 9, 2004) (and cases cited therein).

B. Administrative Finality

Our analysis of this matter is guided by the principle of our recent case of *Winegardner v. DEP*, 2002 EHB 790. In that case we held that an appeal of a plan revision, where the underlying plan or previous revisions thereof were unappealed, is limited in scope to the subject matter of the revision under appeal. *Winegardner* applied here means, as a general proposition, the underlying 1993 Plan is not subject to attack here but the changes wrought to the 1993 Plan by the 2002 Plan Revision are subject to the Noll/Clark appeal. Not even the Department contests that Mr. Noll and Ms. Clark are able, in this appeal, to challenge the changes wrought to the 1993 Plan by the 2002 Plan Revision.

As we have noted before, a determination of the scope of an appeal and application of administrative finality to issues raised in an appeal "is heavily dependent upon its procedural posture, its specific factual and legal background and the nature of the arguments made by the parties." *Perkasie Borough Authority v. DEP*, 2002 EHB 764, 773. The Department argues that under the doctrine of administrative finality, Appellants cannot challenge now the adequacy of the 1989 Needs Analysis which was used to develop the 1993 Plan because Appellants did not appeal the 1993 Plan at the time it was approved by DEP.

Appellants are lay-people proceeding *pro se* and they are doing a commendable job in trying to state their arguments on the administrative finality point. As we understand it, they are arguing two basic points with regard to administrative finality. First, they claim that the mere passage of time renders the 1989 Needs Analysis unreliable at this time. Second, and here we may be polishing a point for them, that the intervening change in law exception to the doctrine of administrative finality applies. *See Tinicum Township v. DEP*, 1996 EHB 816. They seem to be

arguing that administrative finality is trumped here because the regulations governing official plan content and policies of the Department regarding conducting a needs analysis have changed since 1993. We assume that means they are saying that challenges they are raising now could not have been propounded at the time the 1993 Plan was approved.

The Departmental act at issue in this appeal is the approval of the 2002 Plan Revision. The 2002 Plan Revision made limited changes to the 1993 Plan, including changing the alternative selected in the 1993 Plan by adding additional areas to the proposed area to be sewered and changing the ultimate destination of the sewage from a proposed sewage treatment facility to be built and located within Scott Township to the existing LRBSA Archbald WWTP. Paragraph 6 of the NOA alleges that the 2002 Plan Revision relies on the 1989 Needs Analysis and identifies claimed deficiencies of the 1989 Needs Analysis under regulations and policy changes implemented in 1997. The changes relied upon by Appellants are alleged revisions to 25 Pa. Code § 71.21, relating to the content of official plans, Memo in Opposition at 8, as well as changes to DEP's policy regarding how to conduct a sewage needs analyses as evidenced by the publication in 1996 and update in 2002 of a document entitled "Act 537 Sewage Disposal Needs Identification." *Id.* at 4.

Appellants are correct that 25 Pa. Code § 71.21 was revised in 1997. However, an examination of the changes to 25 Pa. Code § 71.21 reveals that the revisions are not of the nature as would avoid an application of administrative finality in this case as to the 1993 Plan or unappealed actions which relied, in part, on the 1989 Needs Analysis. Section 71.21(a) was changed to require municipalities submit a Task/Activity Report to the Department. 27 Pa. Bull. 5877, 5880.[6] Section 71.21(a)(6) also was revised at that time in a manner that removed the

[6] The changes to this provision were summarized by the Environmental Quality Board (EQB) as follows:

requirement that the municipality support the alternative for solving sewage needs selected in the official plan as "the best alternative technically, environmentally and administratively." 27 Pa. Bull. at 5880 (quoting 25 Pa. Code § 71.21(a)(6) prior to the revision). After the revision, the municipality was required to document that the alternative selected "is technically, environmentally and administratively acceptable." *Id.* (quoting revised 25 Pa. Code § 71.21(a)(6)). This change actually liberalized the criteria for making a sewage disposal choice because before the change the choice had to be the "best" alternative technically, environmentally and administratively whereas the 1997 revision removed the requirement that the alternative be the "best" one from those perspectives. Under the revised, and now extant regulations, the alternative selected need not be the "best" one but need only be an "acceptable" one from a technical, environmental and administrative standpoint. The EQB stated that the deletion of the word "best" was "intended to eliminate subjective judgments among equally acceptable alternatives". 27 Pa. Bull. at 5880. So, ironically, in this respect, the 1997 revisions to Section 71.21(a)(6), instead of providing a ground for challenge that did not exist before actually removed one that had existed before.

These regulatory changes did not and do not relate in any way to Appellants' attempted challenge of the 1993 Plan or the 1989 Needs Analysis which formed a basis of the 1993 Plan and a basis for the 2002 Plan Revision. Thus, these changes in the regulations cannot be the

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> In relevant part, this section currently provides that, prior to preparation of an official plan, a municipality should either meet with the Department prior to completion of a Task/Activity Report or submit a Task/Activity Report or other forms to the Department. The purpose of this Report is to determine which of the planning elements outlined in Chapter 71 are necessary to meet the specific needs of the municipality. This section has been slightly revised to require that a municipality submit a Task/Activity Report to the Department and to encourage the municipality to meet with the Department prior to submitting the Report to the Department.

27 Pa. Bull. 5877, 5880.

basis to permit today a challenge to the 1993 Plan or the 1989 Needs Analysis upon which it was at least partially based.

Appellants likewise cannot successfully flank administrative finality on the basis of supposedly newly published or newly updated Department policy documents. The Department documents cited by Appellants are not regulations; thus, their application is not a matter of legal mandate. *Highridge Water Authority v. DEP*, 1999 EHB 27 (specifically addressing technical guidance documents). Further, Appellants' position here is untenable. The Act 537 planning process would turn into utter chaos if upon the updating or amending of DEP guidance on how to review Act 537 Plans, all previously reviewed and approved plans would be rendered subject to challenge. Administrative finality would be consumed into nothing but, more importantly, Act 537, which is intended at its heart to provide for logical and coherent planning, would collapse into bedlam.

Finally, turning to Appellants' other point on administrative finality, we know of no case law, and Appellants identify none, that recognizes an exception to the doctrine of administrative finality based on the mere passage of time since the original action.

As for administrative finality then, Appellants are precluded in this case from collaterally attacking the 1993 Plan or the 1989 Needs Analysis which was a component of the 1993 Plan. They, of course, are not barred from challenging the changes that were effectuated in the 2002 Plan Revision. As we understand it, that would include: (1) the increased or expanded sewer service area enacted by the 2002 Plan Revision; and (2) the decision in the 2002 Plan Revision that the collected wastewater be conveyed to the LRBSA Archbald WWTP for treatment instead of a treatment facility to be located within Scott Township.

C. **Challenges to the Cost of the Selected Alternative**

Appellants spend considerable space in the NOA and their papers filed in response to the Motion presenting facts regarding the cost of the alternative selected under both the 2002 Plan Revision and the 1993 Plan. The Department requests we dismiss objections to the cost of the alternative selected because "the expense associated with the project is beyond the scope of the Department's review [.]" Motion at 2.

The Department's point with respect to costs of the 1993 Plan is well taken for the reasons we have discussed in connection with administrative finality and for the reasons discussed in *Scott Township I, II,* and *III.* Appellants will not be allowed in this case to bring in complaints about the costs associated with the 1993 Plan.

However, we cannot now preclude from this case consideration of the costs associated with the 2002 Plan Revision relative to other options considered and rejected in connection with what ended up being the 2002 Plan Revision.

We note that the Department in its brief has told us that the essence of the 2002 Plan Revision process was to "evaluate the most cost effective method of sewage treatment." Memo in Support at 4. We have no record at this point of whether the Department considered costs in its approval of the 2002 Plan Revision and, if it did, how and to what extent it did so.

Moreover, we cannot say that, as a matter of law, consideration of costs and economics is off-limits in an Act 537 Plan appeal. Section 5 of the Clean Steams Law identifies "[t]he immediate and long-range economic impact upon the Commonwealth and its citizens" as an issue the Department must consider when taking action pursuant to the Clean Streams Law. 35 P.S. § 6915(a).[7] Regulations promulgated under the SFA and the Clean Streams Law set forth the

[7] 35 P.S. § 691.5(a) states in full:

Department's responsibility to review and act upon official plans and official plan revisions. 25 Pa. Code § 71.32. Subsection (d) of Section 71.32, outlines issues the Department "will consider" when reviewing an official plan or an official plan revision, and requires, in part, that the Department consider:

> (2) Whether the municipality has adequately considered questions raised in comments, if any, of the appropriate areawide planning agency, the county or joint county department of health, and the general public.
>
> ...
>
> (4) Whether the official plan or official plan revision is able to be implemented.

25 Pa. Code § 71.32(d)(2) & (d)(4). We cannot conclusively determine now whether the Department properly determined that Scott Township adequately considered questions from the general public which may have related to cost issues. Nor can we conclusively determine now whether the 2002 Plan Revision is able to be implemented from a fiscal standpoint.

The Department's review of the municipality's evaluation and selection of an alternative in an official plan or plan revision is guided also by the regulations on alternative evaluations in Subchapter D of Chapter 71. Specifically, 25 Pa. Code § 71.61(d) provides that:

> (d) Approval of official plans and revisions shall be based on:
>
> (1) The technical feasibility of the selected alternative in relation to applicable regulations and standards.
>
> (2) The feasibility for implementation of the selected alternative in relation to applicable administrative and institutional requirements.

(a) The department, in adopting rules and regulation, in establishing policy and priorities, in issuing orders or permits, and in taking any other action pursuant to this act, shall, in the exercise of sound judgment and discretion, and for the purpose of implementing the declaration of policy set forth in section 4 of this act, consider, where applicable, the following:

(1) Water quality management and pollution control in the watershed as a whole;

(2) The present and possible future uses of particular waters;

(3) The feasibility of combined or joint treatment facilities;

(4) The state of scientific and technological knowledge;

(5) The immediate and long-range economic impact upon the Commonwealth and its citizens.

25 Pa. Code § 71.61(d). We cannot hold now on the basis of this record in this case, either as a matter of fact or a matter of law, that economic or cost considerations cannot be a part of the consideration mandated by subsection (d)(2).

Also, precisely what the Department did as part of its review of the 2002 Plan Revision is important to determining what issues are subject to appeal. *Hankin v. DEP,* Docket No. 2003-186-K (Opinion issued July 7, 2004), *slip op.* at 7, (citing *Wheatland Tube Co. v. DEP*, Docket No. 2003-221-L (Opinion issued March 16, 2004) *slip op.* at 7). Unresolved factual questions exist at this stage of the appeal about what consideration, if any, the Department gave to cost issues during its review of the 2002 Plan Revision and if it did give such consideration, how it did so. In addition, if the Department did not consider economics or costs related to the alternative selected in the 2002 Plan Revision, the question remains whether it should have and whether we need to do so and if so, by what criteria.

We think that the Department's reliance on *Community College of Delaware County v. Fox*, 342 A.2d 468 (Pa. Cmwlth. 1975) as authority to bar completely any aspect of costs or economics from this case is overdrawn. The statute and regulation, as already discussed, do not bar consideration of costs in terms of feasibility in the review of an Act 537 Plan selection. Also, we have discussed recently the precise and discreet point that the *Fox* case was about in *Ruddy and Morrow v. DEP*, Docket No. 2003-032-K (Opinion issued April 16, 2004), slip op. at 5-6. Finally, the Department makes the point that "allocation of costs for connection of public sewers is an issue for local government." Memo in Support at 8. We see Mr. Noll and Ms. Clark making a broader challenge than that regarding costs. We view their challenge as not limited particularly to connection fees but relating to the overall cost of the alternative selected in the

2002 Plan Revision versus other alternatives considered and rejected with reference to the feasibility of implementation of the alternative selected in the 2002 Plan Revision.

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

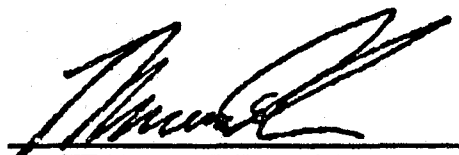
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

ORDER

AND NOW this 1st day of September, 2004 it is hereby **ORDERED THAT** The Motion of the Department for Summary Judgment is **GRANTED** to the extent the Notice of Appeal seeks to revisit the 1993 Plan or the 1989 Needs Analysis which was a component of the 1993 Plan. The Motion is also **GRANTED** to the extent that Appellants are seeking to challenge the costs associated with the selection of central sewerage embodied in the 1993 Plan. The Motion is **DENIED** to the extent it seeks to dismiss or preclude Appellants' objections regarding the costs of the sewage treatment alternative chosen in the 2002 Plan Revision. A trial order will be issued by the Board shortly.

ENVIRONMENTAL HEARING BOARD



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Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: September 1, 2004

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

GREGG CARIGNAN	:	
	:	
v.	:	**EHB Docket No. 2003-113-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 3, 2004**

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis

The Board dismisses an appeal from a compliance order requiring the appellant to dispose of solid waste stored on his property. The Department sustained its burden of demonstrating that its order was justified, and the appellant offered insufficient evidence to rebut the presumption that the items on the ground on his property constituted solid waste stored for more than one year.

BACKGROUND

This appeal was commenced with the filing of a notice of appeal by Gregg Carignan (Appellant). His appeal challenges the Department's issuance of a compliance order which requires him to remove solid waste materials which have been deposited and stored on his property for more than one year. The Appellant's basic position is that the items on his property are not all waste and that he lacks sufficient financial means to comply with the Department's order.

The Appellant has appeared *pro se* in these proceedings. A hearing was held before The Honorable George J. Miller on March 14, 2004. The record consists of five exhibits and a transcript of 110 pages.

The Department and the Appellant both filed post-hearing briefs. On June 18, 2004, the Department filed a motion to strike the Appellant's brief because it did not conform to the Board's rules and was a month late. In order to simply address the merits of the Appellant's appeal, we denied the Department's motion. However, we do note that the Appellant's brief does not provide any citations to the transcript or any reference to any statutes or regulations that may support his position, as required by the Board's rules of procedure. We have warned appellants who choose to represent themselves that they do so at their own peril. Moreover, as Judge Labuskes recently observed when faced with a similarly deficient brief: "Putting aside the procedural violation, such unsupported materials are not particularly helpful."[1] Nevertheless, we have done our best to discern the Appellant's argument and after full consideration of the record and filings in this appeal, we make the following:

FINDINGS OF FACT

1. The Department is the executive agency with the duty and authority to administer and enforce the Solid Waste Management Act[2], Section 1917-A of the Administrative Code[3] and the

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[1] *Baehler v. DEP*, EHB Docket No. 2002-105-L (Adjudication issued May 5, 2004), slip op at 3 n.4.

[2] Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018.1003. (Solid Waste Management Act).

[3] Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17.

rules and regulations promulgated thereunder.

2. The Appellant, Gregg Carignan, is an adult individual. He is the owner of a property in Silver Spring Township, Cumberland County.

3. On February 15, 2002, Kim Hoover, then a solid waste specialist with the Department, inspected the Appellant's property in response to a complaint lodged with the Department. (Hoover, Tr. 5-6)

4. During that inspection Ms. Hoover observed what appeared to be piles of assorted household items, food waste, wood, metal and household debris, items she characterized as demolition waste, and various electronics including 144 desktop computers that the Appellant purchased from the Cumberland Valley School District at auction. (Hoover, Tr. 8-10; Ex. C-3)

5. Thereafter, the Department issued a notice of violation dated March 18, 2002 informing the Appellant that he was in violation of the Solid Waste Management Act because he was storing solid waste on his property without a permit. The Appellant did not receive the first notice, so the Department sent a second to a different mailing address which he received on or about May 7, 2002. (Exs. C-1; C-2; Hoover, Tr. 6-7)

6. The notice of violation told the Appellant that he would have to immediately cease disposal activities on this property, remove the solid waste to an approved disposal site and submit disposal receipts to the Department. (Ex. C-2)

7. Approximately one year later, the Department determined that there was little improvement of the condition of the Appellant's property. Ms. Hoover observed that additional

items had been added including boxes of food products and boxes of produce that were no longer saleable that had been deposited on a large compost pile, including the boxes. (Hoover, Tr. 16-17; Ex. C-5)

8. Compost piles are not a violation of the Department's regulations, but the pile on the Appellant's property included more than waste that had been generated by the Appellant's own use and also included items such as intact boxes which Ms. Hoover felt were inappropriate for composting. (Hoover, Tr. 13, 17-18, 56-57)

9. On April 10, 2003, the Department issued a compliance order which set forth specific charges of violations of the Solid Waste Act and its regulations. Specifically the Department found that the Appellant was in violation of Section 610(1)[4] of the Solid Waste Act, for allowing the dumping or depositing of solid waste on this property; operating a solid waste facility without a permit in violation of Section 610(2)[5]; creating a public nuisance or adversely affecting public health in violation of Section 610(4)[6]; and storing municipal and residual waste for more than one year in violation of Sections 285.113(a) and 299.113(a)[7]. (Ex. C-4)

10. Accordingly, the Appellant was ordered to cease further deposit of items on the property, submit a written disposal for the proper removal and disposal of the waste on his property, remove and properly dispose of half the waste in 30 days and the remainder within 60 days. The Department also required the Appellant to submit disposal receipts to Ms. Hoover.

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[4] 35 P.S. § 6018.610(1).
[5] 35 P.S. § 6018.610(2).
[6] 35 P.S. § 6018.610(4).
[7] 25 Pa. Code §§ 285.113(a) and 299.113(a).

(Ex. C-4)

11. As of the date of the hearing, the Department had not received any disposal receipts, nor has the Appellant submitted an acceptable plan for removal of the items on his property. (Hoover, Tr. 20-21)

12. The Appellant stores used items outside at his property. (*See* Exs. C-3, C-6, C-7; Hoover, Tr. 8, 12-14)

13. Many of the items located on the Appellant's property have been stored outdoors for well in excess of one year; some items have been stored for more than two years. (Hoover, Tr. 15-16, 20)

14. Kim Hoover testified that the Department considers items that are no longer used for their original purpose which have been stored on the ground for more than a year are solid waste and a permit is required to store them. (Hoover, Tr. 28-30)

15. Both the Department and the Appellant agree that there are thousands of items located outside at the property and that it would be almost impossible to inventory those items. (Hoover, Tr. 8, 12; Carignan, Tr. 87, 102-03)

16. The Appellant claims that many of the items on his property can be sold at flea markets. (*See generally* testimony of Gregg Carignan).

17. The Appellant has never produced any sort of list to the Department indicating the items he intends to sell or re-use. (Hoover, Tr. 38-39)

18. However, he admits that many items are used and marketed by him for purposes other than their original use. For example, ceramic pots which are on the ground on his property are used as decorative items. Similarly, a wringer washer can be sold as a decorative item. Other items, such as doors are recycled for use as tabletops for his flea market display. (Carignan, Tr. 79, 81)

19. The Appellant also admitted that some of the items showed in the Department's photographs are waste. (Carignan, Tr. 76)

20. He further admits that ten to twenty percent of the items on the property have been damaged by winter weather. (Carignan, Tr. 105)

21. He has culled things that are no longer useable, but did not produce any disposal receipts. He admits that he used his neighbor's dumpster, or a dumpster at the flea market to dispose of some things. (Carignan, Tr. 77, 82-84)

22. In order to comply with the Department's compliance order, the Appellant must produce disposal receipts to prove that waste items are disposed of at a licensed and permitted disposal site. (Hoover, Tr. 39-40)

DISCUSSION

The Board's review is *de novo*.[8] That means that we may consider not only evidence that was before the Department at the time that it issued the compliance order, but additional relevant

[8] 35 P.S. § 7514.

evidence as well.[9] In this case, it is the Department that bears the burden of proof.[10] Specifically the Department must prove (1) the existence of facts supporting the compliance order; (2) demonstrate that the order was authorized by applicable law;[11] and (3) that the order was a reasonable and appropriate exercise of the agency's discretion.[12]

The Department's position is that the condition of the Appellant's property constitutes a nuisance and pursuant to the Solid Waste Act, the materials are "waste" and must be removed. The Act authorizes the Department to require the Appellant to remove waste materials from his property and the timeframe and conditions of the removal are reasonable based on the Department's past practice in the region.

The Department's regulations generally define "waste" as "a material whose original purpose has been completed and which is directed to a disposal or processing facility or is otherwise disposed of."[13] Storage of waste for more than one year requires a permit.[14] The Department will presume that a person storing waste for more than one year is operating a waste

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[9] *Leatherwood v. Department of Environmental Protection*, 819 A.2d 604 (Pa. Cmwlth. 2003).

[10] 25 Pa. Code § 1021.101(c).

[11] The Appellant does not dispute that the Department had the legal authority to issue the compliance order. Indeed, the Solid Waste Management Act explicitly provides that the Department "may issue orders" to persons "as it deems necessary to aid in the enforcement of the provisions" of the Act. 35 P.S. § 6018.602(a). Similarly, the Department has authority under the Administrative Code to order the abatement of nuisances, including statutory nuisances. Section 1917-A of the Administrative Code, 71 P.S. § 510-17. *See also Starr v. DEP*, 2003 EHB 360.

[12] *Starr,* 2003 EHB 360.

[13] 25 Pa. Code § 271.1.

[14] 25 Pa. Code §§ 285.113; 299.113. These are virtually identical regulations; one applies to municipal waste and the other applies to residual waste.

disposal facility and is subject to the applicable provisions of the Solid Waste Act and regulations.[15]

Kim Hoover of the Department testified at great length concerning the condition of the Appellant's property. Photographs taken during her inspections in the last two years show a property in disarray, cluttered with disorganized piles of a variety of items, including food waste, electronics, building materials, and appliances, among other things. All of these items are stored outside, either completely exposed to the elements or at best, covered with tarps. The condition of the property has remained virtually unchanged since her first inspection in 2002. Accordingly, she testified, that the condition of the property constitutes a nuisance and is an environmental hazard because the food waste attracts vectors and may constitute a hazard to children.[16]

The Appellant does not seriously dispute the basic facts adduced at hearing concerning the condition of his property. He admits that at least a portion of the materials on the property are "waste" as he understands the term. He admits that although many items are still useable for a

---

[15] Section 103 of the Act defines "storage" as

> The containment of any waste on a temporary basis in such a manner as not to constitute disposal of such waste. It shall be presumed that the containment of any waste in excess of one year constitutes disposal. This presumption can be overcome by clear and convincing evidence to the contrary.

35 P.S. § 6018.103. The Department's regulations supply similar definitions including the one-year presumption.

[16] The Appellant disagrees that the property is a hazard to children because he says no children live in the area. Neither the Appellant nor the Department presented any evidence to prove or disprove the presence of children in the area and the extent to which the property might be hazardous to them.

variety of purposes, many are no longer usable for their original purpose. However, he further contends that the items on his property form an inventory of useable items that he claims to sell at flea markets. There are some building materials on his property that he says he intends to use to build sheds, but time has simply not permitted him to do so. Therefore, his position seems to be that it is the Department's responsibility to tell him what he can keep because it is not waste.

First, both the statute and the regulations clearly place the burden on the Appellant to demonstrate by "clear and convincing evidence"[17] that items stored on his property are either not waste or are not disposed of. Although not explicitly told to do so, the Appellant certainly had plenty of opportunity to present the Department with an inventory of items that are not waste.

Second, none of the testimony offered by the Appellant at the hearing convincingly demonstrates that the items on his property are not waste and have not been disposed of in contravention to the Department's regulations. He never supplied the Department with a list of items that had demonstrable value or were being used for their original purpose as a first step in receiving permission to store those items or to negotiate an agreement to exclude them from the Department's order. Although he claims that he sells certain items at flea markets, he failed to adduce any records that he has successfully sold anything nor did he convincingly demonstrate that items left outside in the elements have any marketable use or value for their intended purpose. Specific examples include the computers stored outside under tarps since 2001. Doors used as tables and freezers used as display cases constitute items no longer used for their original

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[17] 35 P.S. § 6018.103.

intended purpose. The Commonwealth Court has specifically held that regardless of the intent of the property owner, these items are considered waste. In *Starr v. Department of Environmental Resources,*[18] the appellant claimed that tires stored on his property were not waste because they were "a marketable commodity capable of being profitably recycled for various further uses. . . ." However, construing the Solid Waste Act, the court concluded that "the fact that the discarded tires may have value to Starr does not mean that they are not 'waste'."[19] Similarly, the fact that the items on the Appellant's property may be usable or saleable does not mean that they are not waste within the meaning of the Act.

We also find that the Department's enforcement action in this matter was a reasonable exercise of discretion.[20] Kim Hoover testified that her initial action after inspecting the Appellant's property was to issue a notice of violation. That notice explained the requirements of the Solid Waste Act and provided the Appellant with an opportunity to make arrangements to remediate the condition of the property. The compliance order was not issued until nearly one year later when the Department again inspected the property and found the conditions unchanged. The Appellant was given 30 days to remove half of the waste and an additional 60 to remove the remainder. Kim Hoover testified that these provisions are typical of similar orders issued in the

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[18] 607 A.2d 321 (Pa. Cmwlth. 1992).

[19] 607 A.2d at 323.

[20] The Solid Waste Act explicitly gives the Department the authority to issue any orders that "aid in the enforcement of the act." The Department's position is that the Appellant's property constitutes a nuisance, which the Appellant disputes. Whether it is or not, the Department is authorized to enforce the permitting requirement of the Act and order the Appellant to stop storing waste.

region. Although the Appellant complained that he did not have enough money to arrange for removal of the waste, he did not put forth any other argument that the order presented an unreasonable timeframe. Moreover, we have held that: "While [an a]ppellant's financial inability to comply with an order ... may become relevant in an assessment of an appropriate civil penalty, it has no bearing on the validity of the order at the time it was issued by the Department." [21]

In sum, we conclude that the Department's order requiring the Appellant to clean up his property was lawful and appropriate. We therefore make the following:

CONCLUSIONS OF LAW

1. The Board's review is *de novo*. 35 P.S. § 7514.

2. The Department bears the burden of proving that the April 10, 2003 Compliance Order was properly issued. 25 Pa. Code § 1021.122(b)(4).

3. Specifically the Department must prove (1) the existence of facts supporting the compliance order; (2) demonstrate that the order was authorized by applicable law; and (3) that the order was a reasonable and appropriate exercise of the agency's discretion. *Starr v. DEP*, 2003 EHB 360.

4. It is unlawful for any person to dump or deposit solid waste onto the surface of the ground without a permit from the Department. It is further unlawful to store solid waste for more than one year. 35 P.S. §§ 6108.610(1); 6018.610(2).

---

[21] *Wagner v. DEP*, 1999 EHB 681, 688; *see also, Ramey Borough v, Department of Environmental Resources,* 351 A.2d 613 (Pa. 1976).

5. The items on the Appellant's property constitute solid waste and he therefore stored solid waste on his property for more than one year in violation of the Solid Waste Management Act.

6. The timeframe and requirements for removal and proper disposal of the waste material on the Appellant's property was reasonable.

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GREGG CARIGNAN	:	
	:	
v.	:	**EHB Docket No. 2003-113-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 3rd day of September, 2004, the appeal of Gregg Carignan in the above-captioned matter is hereby **DISMISSED**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 2003-113-MG

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **September 3, 2004**

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2003-297-CP-R**
NEVILLE CHEMICAL COMPANY	:	**Issued: September 27, 2004**

OPINION AND ORDER ON MOTIONS FOR PROTECITIVE ORDERS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board grants the Department's Motion for a Protective Order barring the Appellant from deposing the Secretary of the Department of Environmental Protection. The Secretary filed a verification to the Motion with the Board stating that she had no personal involvement in the matter, never visited the site, and had no role in calculating the requested civil penalties. The Board, after reviewing the briefs and oral argument, found that the deposition of the Secretary would neither lead to relevant nor admissible evidence. The Board denies the Department's Motion for a Protective Order to bar the Appellant from taking the deposition of the Department of Environmental Protection's Director of the Office of Land Recycling and Community Revitalization. The Board finds that such a deposition may lead to the discovery of relevant evidence.

OPINION

Presently before the Board are two Motions for Protective Orders. Both seek to prevent the Appellant Neville Chemical Company (Neville Chemical) from deposing high Department of Environmental Protection (Department) officials on the basis of relevancy, the deliberative process privilege, that the information is readily available through other means, and the taking of the depositions would cause unreasonable annoyance, oppression and burden and amount to harassment. Neville Chemical seeks to depose the Secretary of the Department of Environmental Protection, the Honorable Kathleen A. McGinty, and the Director of the Department's Office of Land Recycling and Community Revitalization, Mr. Thomas Fidler. The Board held oral argument on the Motions and the parties have prepared extensive and comprehensive legal memoranda setting forth their respective legal positions.

Neville Chemical contends that the testimony of these two officials is important to the development of its defenses to the Department's Complaint and Amended Complaint seeking civil penalties of over seventeen and a half million dollars. Neville Chemical argues actions of the Department itself resulted in the pollution to the Ohio River for which the Department seeks to hold Neville Chemical financially responsible. It contends that Secretary McGinty was significantly involved "with respect to the question of [civil] penalties that should be assessed against Neville Chemical. We want to explore Secretary McGinty's actual participation in the events leading to the filing of this Complaint for Civil Penalties and to discover statements made to her by Southwest Regional Department of Environmental Protection Staff concerning historical events concerning Neville Chemical." Memorandum of Neville Chemical in Opposition To The Department's Motion for Protective Order, page 2.

Discovery before the Environmental Hearing Board is generally governed by the

Pennsylvania Rules of Civil Procedure. 25 Pa. Code Section 1021.102(a). The scope of discovery is very broad.

> a) ...[A] party may obtain discovery regarding any matter, not privileged, which is related to the subject matter involved in the pending action, ...
>
> b) It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
>
> Rule 4003.2(a) and (b) of the Pennsylvania Rules of Civil Procedure

The purpose of discovery is so both sides can accumulate information and evidence, plan trial strategy, and discover the strengths and weaknesses of their respective positions. *George v. Schirra*, 814 A.2d 202 (Pa. Super. 2002). Moreover, the relevancy standard during discovery is necessarily broader than that allowed by the Pennsylvania Rules of Evidence at trial. *Id.* The Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required. *Stern v. Vic Snyder, Inc.*, 473 A.2d 139 (Pa. Super 1984). Nevertheless, neither the Board's Rules of Practice and Procedure nor the Pennsylvania Rules of Civil Procedure authorize broad "fishing expeditions." See Pennsylvania Rules of Civil Procedure 4001(c), 4007.1, 4011(c) and *McNeil v. Jordan*, 814 A.2d 234 (Pa. Super 2002).

Both parties direct our attention to *New Hanover Township v. DER*, 1989 EHB 138, in which New Hanover Township sought to depose then Department Secretary Arthur Davis and a Deputy Secretary. This appeal involved the issuance of permits authorizing the construction and operation of a municipal waste landfill. In that case, Secretary Davis and the Deputy Secretary personally visited the landfill site and toured the proposed facility. Shortly thereafter, the permits were issued with several permit additions added at the instruction of the Department's

Central Office in Harrisburg. New Hanover Township suspected that these permit conditions were added as a direct result of the Secretary's and Deputy Secretary's inspection and wished to depose both officials accordingly.

Judge Woelfling, although holding that the information related to the site visit of the Secretary and Deputy Secretary was both relevant to New Hanover and unavailable through other witnesses, granted the Department's Motion for a Protective Order precluding their depositions on the basis that "given the responsibilities of these Department officials, that a less intrusive means of acquiring this information exists, and that is to propound written interrogatories upon Secretary Davis and [the] Deputy Secretary." 1989 EHB at 140.

In *Lower Paxton Township v. DEP*, 2001 EHB 256, Chief Judge Krancer denied the Department's Motion for a Protective Order finding that Department Deputy Secretary Larry Tropea was personally and directly involved in the decision to deny Lower Paxton Township's Act 537 plan. In *Lower Paxton*, the Department's decision itself was the appealable action. As Chief Judge Krancer succinctly summarized:

> It is this very decision which is now under review before the Board. Under the Environmental Hearing Board Act, the Appellant has a right to a full *de novo* hearing on that decision before it becomes final.

Id. at 260. Thus, the Department's decision–making process was extremely relevant to the issues raised in the Appeal.

Neville Chemical readily concedes that the Secretary of the Department should not be deposed in the average case. It contends, and we believe all involved would agree, that this is not the "average case." In fact, the Department is requesting the Board to order Neville Chemical to pay the largest civil penalty for environmental harm in the history of the Commonwealth of Pennsylvania. Nevertheless, we fail to see how deposing Secretary McGinty

would lead to admissible evidence let alone be relevant. This is because this action concerns a civil penalty. The Board will evaluate the evidence at the hearing and reach an independent decision regarding civil penalties.

Thus, this case is also different from the usual appeal that often involves a Department action such as a decision on a permit application. It is thus distinguishable from the situation of granting a permit in *New Hanover Township* and denying a permit in *Lower Paxton Township*. The Board conducts a *de novo* review of these actions to determine if the Department acted reasonably and in accordance with the law in making its decision. Therefore, when the Department issues or denies a permit, the "why it did it" is relevant because the Department has taken an action that is reviewed by the Board. The very decision is what is appealed. In the filing of a complaint seeking civil penalties the Department is asking the Board to take an action. We will not be looking at the Department's decision in the same way but rather independently hearing and weighing the evidence presented by both sides and making our own decision regarding a civil penalty.

We are also persuaded by the Secretary's verification in which she states her only involvement with the civil penalty action was to receive a draft complaint, be briefed on the matter, and to ultimately authorize its filing. She advises that she had no direct, personal involvement in the drafting of the complaint or in the calculation of the requested civil penalties. Although we do not believe the taking of Secretary McGinty's deposition in this case would in any way harass, annoy or embarrass her we also do not believe it would lead to the discovery of relevant evidence.[1] We will therefore issue an Order granting the Department's Motion for a

[1] As we said at the oral argument and as we include here so that all parties are clear, the granting of a protective order prohibiting the deposition testimony of a Department witness will also prohibit the Department from calling that witness to testify at the hearing. To allow a

Protective Order prohibiting Neville Chemical from deposing Secretary McGinty.[2]

However, we are not convinced that the deposition of Mr. Fidler would not lead to the discovery of relevant evidence. Although Mr. Fidler's involvement with Neville Chemical over the years may not be extensive, there evidently was some contact and a deposition may uncover relevant information. We will thus allow Neville Chemical to depose Mr. Fidler but will limit the duration of the examination.

Department witness to be shielded from being questioned at a deposition and then permit the same witness to testify on behalf of the Department would be a violation of the Appellant's due process rights.

[2] In light of our decision, we do not address the deliberative process privilege argument advanced by the Department to prohibit the deposition of Secretary McGinty.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2002-297-CP-R**
NEVILLE CHEMICAL COMPANY	:	

ORDER

AND NOW, this 27th day of September, 2004, after review of the Department's Motions for Protective Orders, Neville Chemical's Response and Memorandum, the Department's Reply, and following oral argument, it is ordered as follows:

1) The Motion for Protective Order prohibiting the deposition of the Honorable Kathleen A. McGinty, Secretary of the Department of Environmental Protection, is ***granted***.
2) The Motion for Protective Order prohibiting the deposition of Thomas Fidler, Director of the Office of Land Recycling and Community Revitalization of the Department of Environmental Protection, is ***denied***. Mr. Fidler's deposition may be taken in Harrisburg, Pennsylvania at a mutually agreeable date and time. However, the direct and/or redirect parts of his deposition shall not last more than ***two*** hours.

ENVIRONMENTAL HEARING BOARD

Thomas W. Renwand

THOMAS W. RENWAND
Administration Law Judge
Member

EHB Docket No. 2003-297-CP-R

DATE: September 27, 2004

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

ROBERT SHUEY, ROBERT VELTRI, STANLEY M. STEIN, WILLIAM KEANE, SLIPPERY ROCK STREAM KEEPERS, THE LEAGUE OF WOMEN VOTERS OF LAWRENCE COUNTY, BARTRAMIAN AUDUBON SOCIETY and FRIENDS OF MCCONNELL'S MILL STATE PARK	:	
v.	:	**EHB Docket No. 2002-269-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and QUALITY AGGREGATES, INC., Permittee	:	**Issued: September 28, 2004**

OPINION AND ORDER
DENYING MOTION FOR AN INJUNCTION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Environmental Hearing Board will not grant an Order for an injunction to prohibit the Department of Environmental Protection from rendering a decision on a permit application. The Board's jurisdiction attaches to appeals of Department actions.

OPINION

Presently before the Board is the Appellants' Motion requesting an "Order of Injunction" prohibiting the Department of Environmental Protection from acting on Permittee Quality Aggregates' Phase II permit application. The Department has not yet rendered a decision on the

permit application but Appellants are concerned the Department will grant the permit prior to the Board issuing its adjudication in the present Appeal. The Motion is vigorously opposed.

The Permittee filed an Answer which included a Motion to Strike Appellants' Motion because a Memorandum of Law did not accompany the Motion. 25 Pa. Code Section 1021.95(d). The Department joined in the Motion to Strike. Thereafter, the Appellants filed a Memorandum of Law which also replied to arguments raised in the Permittee's Motion and Memorandum of Law. The Department then filed a Motion to Strike the Memorandum of Law on the basis that it was not filed with the Motion and that it was really a Reply to Permittee's Motion and therefore required the Board's permission prior to filing. Appellants have now filed a Motion to Accept Memorandum in Support of Motion for Injunction Nunc Pro Tunc.

Regarding the correct procedure, the Appellants' Memorandum of Law should have been filed with its original Motion. The Department is also correct that the Memorandum of Law is also a Reply to Permittee's Answer and required Board approval prior to filing

Turning to the merits of the Appellants' original Motion, the Environmental Hearing Board hears appeals of final actions of the Department. *Borough of Ford City v. DER*, 1991 EHB 169; 35 P.S. Section 7514. Although the Appellants raise an interesting argument, the fact remains that administratively the Department has not yet rendered a decision on the Phase II permit application. Therefore, there is no final action of the Department. The Appellants' Motion is premature. We will enter an appropriate Order.

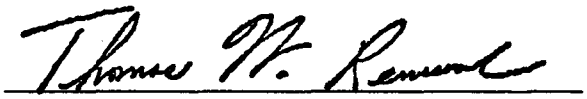
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT SHUEY, ROBERT VELTRI, STANLEY M. STEIN, WILLIAM KEANE, SLIPPERY ROCK STREAM KEEPERS, THE LEAGUE OF WOMEN VOTERS OF LAWRENCE COUNTY, BARTRAMIAN AUDUBON SOCIETY and FRIENDS OF MCCONNELL'S MILL STATE PARK	:	
v.	:	**EHB Docket No. 2002-269-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and QUALITY AGGREGATES, INC., Permittee	:	

ORDER

AND NOW, this 28th day of September, 2004, Appellants' Motion for Order Enjoining Grant by Department to Permittee to Begin Mining Operations is ***denied***.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administration Law Judge
Member

DATE: September 28, 2004

See service listing on the following page.

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

WALTER J. ZLOMSOWITCH, Appellant; EAST PENN CONCERNED CITIZENS, Intervenor	:	
v.	:	**EHB Docket No. 2002-131-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LEHIGH ASPHALT PAVING & CONSTRUCTION COMPANY, Permittee	:	**Issued: November 15, 2004**

ADJUDICATION

By: Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board sustains an appeal challenging issuance of a noncoal surface mining permit for a proposed siltstone/sandstone mining operation traversed by an exceptional value stream. The permit allows for a direct point source discharge into the stream of runoff from the disturbed mining area in the event of a rainfall occurrence exceeding the volume from a 10-year/24-hour storm. Water quality regulations for exceptional value waters required the permittee to first evaluate nondischarge alternatives to its proposed discharge and to demonstrate that no cost-effective, environmentally-sound nondischarge alternative was available before being permitted to employ a discharge alternative. The regulations also required the permittee to demonstrate that its proposed combination of pollution controls are the best available for the site and will maintain and protect the existing quality of the stream. The Department did not require the permittee to engage in the alternatives analysis prior to issuing the permit, thus violating 25 Pa. § 93.4c(b)(1)(i). The Board therefore revokes the permit and remands the matter to the Department for compliance with § 93.4c(b)(1)(i). The appellants' remaining objections are dismissed.

BACKGROUND

In May 2002, the Department of Environmental Protection (DEP) issued Noncoal Surface Mining Permit No. 13990301 to Lehigh Asphalt Paving & Construction Company (Lehigh). As is typical, the mining permit incorporates a National Pollution Discharge Elimination System

permit, (NPDES Permit No. PA0224014). The permit authorizes Lehigh to conduct a siltstone/sandstone mining operation in East Penn Township, Carbon County pursuant to the Noncoal Surface Mining and Reclamation Act[1] and the Clean Streams Law.[2] The permitted area consists of about 104 acres, sixty-two of which will be bonded for mining and eventual reclamation, including remnants of a small, unreclaimed, quarry dating back to the 1970s. To the south of the site are a state road and Lizard Creek, a designated trout stocking fishery. Hollow Road, a local roadway, divides the proposed mining area and alongside Hollow Road runs a perennial stream—an unnamed tributary to Lizard Creek. The quality of the water in this unnamed tributary is excellent; the perennial stream's existing use has been classified as exceptional value. This appeal arises from a dispute over whether Lehigh's permitted mining operation will have a detrimental impact on the water quality of the stream.

Third-party appellant Walter J. Zlomsowitch appealed Lehigh's mining permit by filing a notice of appeal in June 2002. East Penn Concerned Citizens (East Penn) filed a petition to intervene which was granted in September 2002. The Board has issued a prior opinion in this matter denying a motion for summary judgment. *Zlomsowitch v. DEP*, 2003 EHB 636. Administrative Law Judge Michelle A. Coleman presided over a hearing conducted on March 16-17, 2004. Post-hearing briefing was completed in August 2004, and the matter is now ripe for adjudication. The record consists of two stipulations of fact admitted as Board exhibits, a 273-page transcript, and 18 exhibits. After careful review, we make the following findings of fact.

FINDINGS OF FACT

1. DEP is the agency with the authority and duty to administer and enforce the Noncoal Surface Mining and Reclamation Act, the Clean Streams Law, and the regulations

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[1] Act of December 19, 1984, P.L. 1093, No. 219, as amended, 52 P.S. § 3301 *et seq.*

[2] Act of June 22, 1937, P.L. 1987 No. 394, as amended, 35 P.S. § 691.1 *et seq.*

implementing these statutes. (Exhibit LA-2).

2. Permittee Lehigh Asphalt Paving & Construction Co. is a corporation with a business address at P.O. Box 549, Tamaqua, PA 18252. Lehigh is the recipient of the mining permit which forms the subject of this appeal. (Exhs. LA-1, LA-2, B-1 at ¶¶ 1-2).

3. Appellant Walter J. Zlomsowitch, an individual, is the owner of property located in Andreas, Pennsylvania. The parties stipulated that Mr. Zlomsowitch has standing to challenge the permit which is the subject of this appeal. (Notice of Appeal, at 1; Exh. B-2 at ¶¶ 3-4).

4. Intervenor East Penn is an *ad hoc* not-for-profit association that seeks to protect the environmental quality of East Penn Township; its members own property in the vicinity of Lizard Creek or reside near the mining site and recreate by the stream. The parties stipulated that East Penn has standing in this appeal. (Petit. to Intervene, at ¶¶ 1-8; Exh. B-2 at ¶¶ 1-2).

A. Permit Application and Review

5. After conducting some mineral reserve examinations, Lehigh filed an application with DEP for a noncoal surface mining permit in July 1999. The company proposed to conduct a siltstone/sandstone mining operation in East Penn Township, Carbon County. (Hearing Transcript (Tr.) at pages 95-96; Exh. LA-1).

6. The site of the proposed quarry consists of approximately 104 total acres of which 62 acres will be used for mineral removal. The site—basically shaped in rectangular form—lies to the north of State Route 895 which runs in an east-west direction. South of the state road is Lizard Creek, a designated trout stocking fishery. (Exhs. LA-1, LA-3, 25 Pa. Code § 93.9d).

7. The quarry site is divided more or less down the middle by Hollow Road, a local road connected to S.R. 895 that winds its way through the site and continues northward. Alongside Hollow Road runs a perennial stream, an unnamed tributary to Lizard Creek (UNT Lizard Creek), which empties into the creek at a point some distance from the site on the other

side of S.R. 895. Within the site boundaries, UNT Lizard Creek runs to the east of Hollow Road for about 1200 feet, then crosses under the road through an existing culvert and runs generally parallel to the roadway for another 600 feet. Like Hollow Road, the stream exits the site to the north and then curves its way through an area of cultivated fields. (Tr. 108-09; Exh. LA-3).

8. The proposed mining area is essentially divided in half by Hollow Road and UNT Lizard Creek. Mineral removal is proposed to occur in two phases, with the mining area to the west of Hollow Road (the West Pit) to be completed first, and mining to the east of the road (the East Pit) being the second phase. (Tr. 100; Exhs. LA-2, LA-3, LA-4).

9. Lehigh's mining permit application initially contemplated a sporadic pumped discharge into UNT Lizard Creek from each of two sumps used for collecting stormwater runoff at the site. Consequently, the application included a request for a NPDES permit in conjunction with the mining permit. DEP published notice of its receipt of Lehigh's complete NPDES permit application in the Pennsylvania Bulletin in late July 1999. (Exhs. LA-1, B-1 at ¶¶ 12-13).[3]

10. Public notice of the application was given by Lehigh in the *Lehighton Times News* on July 14th, 21st and 28th, and August 4, 1999. (Exhs. B-1 at ¶ 12, B-3).[4]

11. DEP commenced its review of Lehigh's permit application shortly after receiving it in early July 1999. Joseph S. Blyler, a mining engineer with DEP's Pottsville District Mining Office, was responsible for reviewing all erosion and sediment pollution control plans, impoundment designs, and NPDES permit application materials submitted with Lehigh's application. He performed an initial review of these materials and gave comments to the lead

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[3] The notice in the *Pennsylvania Bulletin* reads: "133990301. Lehigh Asphalt Paving & Construction Co. (P.O. Box 549, Tamaqua, PA 18252), commencement, operation and restoration of a quarry operation in East Penn Township, Carbon County affecting 104.4 acres. Receiving stream-unnamed tributary to Lizard Creek. Application received July 12, 1999." *See* 29 Pa. Bull. 4096 (July 31, 1999).

[4] The newspaper notice states, in part, that the permit "application includes a variance request to conduct support activities within 100 feet of an unnamed tributary to Lizard Creek. There are two proposed erosion and sediment control discharges from the new [surface mining permit] area." (Exh. B-3).

permit reviewer in late July 1999. (Tr. 170-74, 177; Exh. C-1).

12. On account of the topography of the quarry site, Mr. Blyler recommended what he described as a "complete containment of runoff" approach to the erosion and sediment pollution control plan for the proposed quarry. Stormwater runoff from outside the boundaries of the East and West Pits would be prevented from contacting the mining area by a perimeter berm. Water runoff within the mining area would be collected and infiltrated using an impoundment system located inside each pit. Mr. Blyler recommended enlarging the proposed sumps (*i.e.*, infiltration basins) to a size sufficient to contain the entire runoff expected from a 10-year/24-hour storm event. (Tr. 174-77; Exhs. C-1, LA-1).

13. As a means of further enhancing containment of all runoff from the mining area, he advised placement of a berm downgrade of each sump in order to contain sump overflow resulting from a severe storm occurrence. Overflow would then collect on the pit floor behind the berm rather than flowing downgrade to the stream. (Tr. 177-79; Exhs. C-1, LA-1).

14. Following the initial comments from DEP, Lehigh revised its permit application materials. (Tr. 208).

15. A public hearing on Lehigh's mining permit application was held on October 21, 1999 after notice of the hearing was advertised in the *Allentown Morning Call* and *Lehighton Times News* on October 7, 1999 and October 14, 1999. (Exh. B-1 at ¶ 14).

16. At the time Lehigh's permit application was submitted to DEP in mid-1999, the designated water use of UNT Lizard Creek was Trout Stocking Fishery—not an exceptional value water. *See* 25 Pa. Code § 93.9d (1999).[5]

17. In response to the submission of Lehigh's permit application, several field surveys

[5] UNT Lizard Creek continues to be formally designated in the Pennsylvania Code as a Trout Stocking Fishery, see 25 Pa. Code § 93.9d (2004), although as discussed below, DEP has determined that the *existing* use of UNT Lizard Creek is classified as Exceptional Value.

of the proposed quarry site were conducted by DEP and the Pennsylvania Fish and Boat Commission (PFBC). In early January 2000, PFBC performed a stream survey on UNT Lizard Creek; the survey results indicated a naturally reproducing trout population. Based on the data collected during field and stream surveys at the site, Steven Kepler, a PFBC fisheries biologist, concluded in January 2000 that the tributary stream system "would be classified as exceptional value and need to be protected accordingly." (Tr. 245-48; Exhs. B-1, B-4).

18. DEP personnel conducted an existing use survey in April 2001 during which they collected and evaluated data relative to the existing water quality of UNT Lizard Creek. Based on the survey findings, DEP's Division of Water Quality Assessment and Standards concluded that the existing use of UNT Lizard Creek should be classified as "Exceptional Value." Recognizing that the Chapter 93 designated use of the stream was different from its conclusion on existing use, the Division formally recommended that its existing use classification for UNT Lizard Creek be adopted by the DEP Bureau of Water Supply and Waste Management. The Bureau Director concurred in the recommendation on May 16, 2001. (Exhs. B-1, B-5).[6]

19. As of May 2001, Lehigh was aware that the existing use classification of UNT Lizard Creek had been changed by DEP to an Exceptional Value water. (Exh. B-1).

20. DEP held a pre-issuance meeting in March 2002 with members of the public and interested stakeholders to discuss the permit application and proposed environmental controls for the quarry prior to reaching a final decision on Lehigh's permit application. (Exh. B-2).

21. East Penn's members were aware that the existing use classification of UNT

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[6] *See also* http://www.dep.state.pa.us/dep/deputate/watermgt/wqp/wqstandards/existuse/co13.htm (DEP list of "Statewide Existing Use Classifications" which includes listing for UNT Lizard Creek showing designated use as TSF and existing use as EV). According to the Bureau's recommendation document: "Concurrence [in the recommended existing use classification] by the Director of the Bureau of Water Supply and Wastewater Management means that the recommended existing use will be considered in official actions by the Department of Environmental Protection and County Conservation Districts as appropriate." (Exh. B-5).

Lizard Creek had been changed by DEP to exceptional value as of May 2001, well in advance of the March 2002 pre-issuance meeting. East Penn members attended the March 2002 meeting and had an opportunity to provide comments to DEP during the meeting. (Exh. B-2).

22. DEP issued to Lehigh Noncoal Surface Mining Permit No. 13990301 on May 10, 2002. The mining permit incorporates NPDES Permit No. PA0224014. (Exhs. B-1, LA-2).

B. Relevant Pollution Controls Required by the Mining Permit

23. Discharges of water from mining operations can occur in several ways: (i) precipitation-induced runoff from undisturbed areas may contact disturbed areas of the mining operation and pick up sediment or other solids before running off into a receiving water such as a stream; (ii) rainfall on the disturbed areas may run off carrying sediment or other matter into a receiving water; (iii) rainwater ponding in mining pits or accumulating in sumps may need to be intermittently pumped and conveyed outside the mining area to enable further mineral extraction; (iv) groundwater accumulating in the quarry may necessitate dewatering through pumping and conveyance off-site into a receiving water. (Exh. LA-12, at Appendix D).

24. Diversions are used to control surface water runoff from undisturbed areas by intercepting the water and diverting it away from areas disturbed by mining. (Exh. LA-12, at Appendix D).

25. To control the off-site stormwater runoff, Lehigh's permit requires construction of a berm on the northern perimeter of the mining area using overburden and topsoil stabilized with vegetation. A channel lined with geotextile and riprap stone will be constructed on the upslope side of the berm. Stormwater runoff flowing from outside the permitted area downslope toward the quarry will be directed by the berm-and-channel construction around the mining area and ultimately into UNT Lizard Creek. Such stormwater will not make contact with the disturbed areas of the mining operation. (Tr. 101-02, 148-49, 186-87, 231-33; Exhs. LA-2; LA-3, LA-5).

26. Rainwater falling on the disturbed areas, *i.e.*, the mineral extraction areas, will be contained within those areas. For the West Pit, the permit requires that the berm on the northern upslope extend around the western and southern perimeters. The placement of the perimeter berm combined with the topographic contour of the site will prevent runoff from exiting the disturbed area in an uncontrolled manner. (Tr. 100-04, 187, Exhs. LA-2, LA-3, LA-5).[7]

27. Some rainwater falling on the mining area will naturally infiltrate into the ground. The precipitation-induced runoff from the mining area will be addressed with an impoundment system. (Tr. 100-03, 112-20, 185-89; Exhs. LA-5, LA-8).

28. Groundwater encountered as mineral extraction progresses within the mining area will also be controlled primarily with the impoundment system. Based on data obtained from a series of groundwater monitoring wells placed at the site, Lehigh does not expect to encounter substantial amounts of groundwater as mining proceeds on account of the geology of the site and the mining plan. (Tr. 99-100, 104-06, 125-27; Exhs. LA-1, LA-6).[8]

29. In the West Pit section, the land slopes upward away from UNT Lizard Creek toward the west, rising from about 700 feet mean sea level (MSL) to a little over 900 feet MSL. A natural valley is formed by slopes extending upward to the northern and southern boundaries. The groundwater flow replicates this natural topography, flowing down the slopes of the valley and ultimately into UNT Lizard Creek. (Tr. 104-06, 120-24; Exhs. LA-1, LA-3, LA-4, LA-6).

30. Mining will follow the existing natural contours starting at the lowest point of the valley on the east—where remnants of a former quarry are located—and then working up the slopes toward the west, north and south. The permit prohibits Lehigh from mining below 650

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[7] Because Appellant and East Penn focused their objections at the hearing on the water pollution controls designed for the West Pit, we will limit further discussion to proposed operations for that portion of the site.

[8] In those areas of the West Pit where mineral extraction will occur and groundwater will ultimately be encountered, the underlying rock has a low permeability with few fractures, thereby limiting groundwater flow in this section of the site. (Tr. 104-05, 125-27, 153-55; Exhs. LA-1, LA-6).

MSL, the level of UNT Lizard Creek, in order to prevent a reversal of groundwater flow into the mining area. Groundwater will only be encountered as mining moves up the western slope; the mining will not disrupt the natural flow of the groundwater nor will groundwater be transferred from one watershed to another. (Tr. 104-06, 120-24; Exhs. LA-1, LA-2, LA-3, LA-4, LA-6).

31. Consequently, pumping of groundwater will not be necessary at the site, and the permit accounts for this anticipated operating condition. The permit prohibits any *pumped* discharge from the mining operation. To the extent that groundwater encountered in the mining area does not percolate into the quarry floor, it will be directed into the impoundment system. (Tr. 104-06, 109, 120-24, 198; Exh. LA-2).

32. The groundwater and stormwater runoff within the mining area will be addressed with an impoundment system. The runoff will be captured with a network of collection channels following the valley contours; these run into a single channel which leads to a sediment basin and, finally, an infiltration basin. (Tr. 112-20, 156-57, 185-87; Exhs. LA-5, LA-8).

33. Prior to flowing into the sediment basin, the collected runoff water will be directed over a flocculent log—a device which precipitates some of the sediment from the water into the log. The active agents in the flocculent logs can be replenished periodically and the logs replaced when necessary. The runoff water will then flow into a sediment basin, ten by fifty by three feet deep at the bottom, where a large percentage of the solids remaining in the runoff will settle out. The sediment basin will be cleaned as necessary and the sediment stored on the inside of the perimeter berms. (Tr. 112-20, 156-57, 185-87; Exhs. LA-5, LA-8).

34. Runoff water that does not seep back into the ground through the channel bottom or sediment basin will flow over another flocculent log before entering an infiltration basin. The infiltration basin will be located at the eastern boundary of the mining area—effectively at the

mouth of the valley formed by the West Pit topography. This basin will be approximately 250 by 180 by 23 feet deep. The bottom will rest at 632 feet MSL; at this level, the basin will contain static ground water at depths fluctuating seasonally. Elevation of the west side will be slightly higher. The infiltration basin will pass the runoff flowing from the sediment basin back into the ground through its downgrade east wall, further filtering settleable solids before the runoff reaches the groundwater system and ultimately flows into UNT Lizard Creek further downgrade from the basin. (Tr. 112-20, 156-57, 185-87; Exhs. LA-5, LA-7, LA-8).

35. The impoundment system was designed by Lehigh to contain the entire volume of runoff from the mining area which would result from a 10-year/24-hour storm event—that is, an event of more than four inches of rainfall within a 24-hour period. Lehigh proposes to contain this volume of runoff in the infiltration basin through a combination of percolation rate and basin design. (Tr. 109-20, 156-57, 188-89; Exhs. LA-5, LA-7, LA-8).

36. Lehigh performed slug testing in the area where the infiltration basin will be located. The tests showed that the underlying rock is highly permeable in this particular area, probably as a result of fracturing caused by blasting done by the former quarry operator years ago. Because of this high permeability, groundwater below the basin area flows more quickly, and water accumulating in the infiltration basin will percolate into the ground at a faster rate. (Tr. 109-12; Exhs. LA-7, LA-8).

37. According to Lehigh's calculations of percolation rates, water in the infiltration basin will seep out quickly enough that, when coupled with the parameters of size and depth, there is little risk of the infiltration basin overflowing—except in the case of runoff volume exceeding a 10-year/24-hour storm event. (Tr. 109-12; Exhs. LA-7, LA-8).

38. To provide protection from a potential overflow occurrence, the permit requires

Lehigh to construct a five-foot high berm located 25 feet to the east and slightly downgrade of the infiltration basin near the edge of the permitted mining area. Functioning as a dam, the embanked berm will be used to help contain—within the limits of the mining area—overflow from the infiltration basin that may occur either during a rainfall greater than a 10-year/24-hour storm event or from a series of rainfalls occurring in rapid succession that exceed the runoff volume from a 10-year/24-hour storm event. (Tr. 109-14, 131-33, 188-90; Exhs. LA-7, LA-8).

39. A spillway will be used to address a severe rainfall event which exceeds the capacity of both the infiltration basin and the overflow containment berm. Runoff water that would otherwise flood over the length of the berm would instead flow into the spillway located at the top of the berm. (Tr. 117, Exhs. LA-4, LA-7, LA-8).

40. The spillway would channel the flooding water ultimately into UNT Lizard Creek at a point labeled Outfall Number 001. (Tr. 117; Exhs. LA-2, LA-3, LA-4).

41. The NPDES Permit accounts for the possibility of direct point source discharges into UNT Lizard Creek as follows:

> [T]here shall be no direct discharge from the above outfalls, except in response to precipitation events and only occurring during and up to 24 hours after the precipitation event. . . . Discharges of surface runoff (not subject to mechanical control), from major erosion and sediment pollution controls (i.e. sediment basins), that are a result of a precipitation event and occur within 24 hours of said precipitation event shall not be subject to the total suspended solids limitations listed in Part A, Section 1.C above. Discharges described by this condition shall meet a maximum total settleable solids limit of 0.5 ml/l. . . . Any discharges resulting from a precipitation event exceeding the expected [volume from a] 10-year, 24-hour precipitation shall not be subject to the limitations of Part A, Section 1.C.

(Exh. LA-2).

42. The permit imposes several additional controls for the protection of UNT Lizard Creek including: a detailed work sequence; a regimen of monitoring and reporting; and, maintenance of a 100-foot buffer zone adjacent to both sides of the stream along with substantial

additional buffers extending out from the stream segment in the southern half of the permitted area. (Tr. 190-94, 203-04; Exhs. LA-2, LA-3).

43. The work sequence mandates construction of all erosion and sediment pollution controls, and prior inspection by DEP of the efficacy of those controls, before any mineral extraction activity may commence. As part of the monitoring regimen, Lehigh must monitor the flow and quality of UNT Lizard Creek at an upstream and downstream point on a monthly basis and report the results to DEP. (Tr. 101-04, 190-94, 203-04; Exh. LA-2).

44. With respect to the buffer zone, noncoal surface mining activities are not generally permitted within 100 feet of the banks of a perennial or intermittent stream. However, where circumstances warrant and regulatory conditions are met, DEP may grant a variance to a permittee to conduct support activities, *i.e.*, "surface mining activities other than opening or expansion of pits," within the 100-foot setback area. *See* 25 Pa. Code § 77.126(a)(4)(iii), § 77.504(a)(6), and § 77.504(b)(2).

45. DEP granted Lehigh a § 77.504(b)(2) variance in the permit to conduct certain specific support activities within the 100-foot setback area adjacent to UNT Lizard Creek. There is an existing haul road at the site left over from the former quarry; Lehigh will use this haul road to access the permitted mining area. The haul road extends from Hollow Road into the mining area and crosses through the buffer zone. The variance allows Lehigh to improve the haul road by widening it several feet and by placing geotextile and a layer of packed stone on the road surface. (Tr. 107-08, 127-30, 148-50, 181-85; Exhs. LA-2, LA-3).

46. Lehigh is also granted permission to construct inside the buffer zone the final segment of the diversion channel running along the upslope side of the northern perimeter berm. The channel will be about fifteen feet wide and run through the buffer zone down to the stream.

Construction of this channel segment will require the channel path to be cleared of existing vegetation. (Tr. 127-30, 148-50, 181-85; Exhs. LA-2, LA-3).

47. No other activities are permitted within the setback area. In particular, no mineral extraction, storage, stockpiling or parking of equipment are permitted by the variance. (Tr. 127-30, 148-50, 181-85; Exh. LA-2).

C. Expert Testimony at the Hearing

48. Appellant and East Penn presented testimony from only two witnesses, Nancy Butler, Ph.D. and Michele Adams, P.E., both of which were proffered as experts. (Tr. 17-88).

49. Nancy Butler is an assistant professor in the biology department of Kutztown University where she teaches limnology, ecology and invertebrate zoology. She earned a Ph.D. in aquatic and plankton ecology from British Columbia University, and has completed substantial post-doctoral research. Her relevant research has been limited to the logging context where she studied the effects of clear cutting on stream quality and particle transfer. She has not previously testified as an expert witness. (Tr. 18-21).

50. Ms. Butler was accepted as an expert in the field of aquatic biology. (Tr. 22).

51. In preparation for her testimony, Ms. Butler reviewed certain documents provided to her by East Penn, but she did not precisely identify the documents reviewed. She did not review DEP files associated with the site or the permit application. She consulted scientific literature concerning brook trout biology and the need to maintain high water quality for the species' success. (Tr. 23-24, 45-46).

52. Ms. Butler made one visit to the quarry site during which she walked along a portion of UNT Lizard Creek located within the permitted area. She only visually surveyed the stream; she conducted no biological or chemical sampling, merely examining the stream's appearance. She stated that she was not prepared to testify on any specific biological or chemical

characteristics of the stream's water. (Tr. 25, 46-48, 50-52).

53. Ms. Butler's testimony was proffered to support an objection to the permit's variance for support activities in the 100-foot buffer zone adjacent to UNT Lizard Creek. She expressed a concern that devegetation in the stream side area would have a negative impact on the stream's water quality and its trout population. She did not describe the amount of vegetation removal in the buffer zone she expected to occur as part of the mining operation. Ms. Butler appeared to assume a clear cutting of all the streamside canopy. (Tr. 27-35, 38-40, 55-56).

54. She did not testify with respect to causal links between specific permitted mining activities and effects on biological or chemical characteristics of UNT Lizard Creek. Much of her testimony consisted of generalities regarding: the importance of stream side vegetation for preventing sediment transport, reducing erosion, and maintaining water temperature; the nature of spawning sites; and, potential effects of stream flow on fisheries' quality. (Tr. 27-35, 38-40).

55. In sum, Ms. Butler opined that the overall mining operation would cause the collapse of the brook trout fishery in UNT Lizard Creek due to degrading of the stream as a spawning site. (Tr. 32-33).

56. On cross examination, Ms. Butler admitted she had no clear understanding of the permit application materials, and that she had not reviewed any site plans for the operation. She conceded that she did not know the precise nature of the activities which are in fact permitted to take place in the 100-foot buffer zone, and that she had no clear concept of the actual quantity of devegetation that will occur. Rather, she assumed that the permitted activities will be similar to a logging operation. (Tr. 40-45, 48-49, 53-54; *see also* Tr. 134-40, Exh. LA-15).

57. With respect to methodology, Ms. Butler admitted that she would never rely solely on visual surveys when performing her own scientific research in aquatic biology. She

stated that in forming the opinions expressed in her testimony she did not use the research protocols she would typically use in conducting her own scientific research. Finally, she conceded that her testimony was based on a literature survey rather than on data or facts specific to this site and this permitted mining operation. (Tr. 53-56).

58. We did not find Ms. Butler's expert opinion credible. She based her testimony on assumptions that sharply conflict with the actual facts of this case, the methodology she used in reaching her opinion was unreliable by her own admission, and the conclusions reached were not in accord with accepted scientific principles of evidence, method and reason. (F.F. # 58).

59. In response to Ms. Butler, DEP presented testimony from Steven Kepler. Mr. Kepler has a B.S. in environmental science and has had professional training in fisheries, effects of sediment pollution and related topics. He has been employed as a fishery biologist with PFBC for the past 24 years. (Tr. 241-44, 256-57).

60. His duties at PFBC involve reviewing all mining permit applications submitted to DEP with respect to the operation's potential impacts on fisheries. He has been reviewing mining permit applications since 1980 and he reviews several hundred applications every year. Upon completing his review, Mr. Kepler discusses his concerns and recommendations with the responsible DEP engineers and hydrogeologists. Where a sensitive watershed is involved, he performs a field study and produces an analytical report for DEP. He has testified as an expert witness previously before the Board. (Tr. 241-44, 256-57; *see supra* F.F. # 17; Exhs. B-4, B-5).

61. Mr. Kepler was accepted as an expert in the field of aquatic biology. (Tr. 244).

62. Mr. Kepler was responsible for reviewing Lehigh's permit application with respect to potential impacts on fisheries. He specifically reviewed the erosion and sediment pollution control and impoundment design modules submitted with the application. In December

1999, he conducted an initial site view, and in January 2000 he performed a second site view during which he took samples from UNT Lizard Creek, examining the stream for trout and other fish species using an electrofisher. (Tr. 245-47, 249; *see supra* F.F. # 17; Exhs. B-4, B-5).

63. Upon completing his review of Lehigh's application, based on the sensitivity of the stream system at the site Mr. Kepler recommended that DEP require an impoundment system designed at a minimum to contain 8,600 cubic feet per acre and incorporating a manual dewatering device. He also recommended that DEP maintain the 100-foot buffer zone to protect the stream side area from devegetation and erosion. (Tr. 245-48; Exh. B-4).

64. Mr. Kepler stated that the impoundment system was actually designed to contain in excess of 8,600 cubic feet per acre, and that the pollution controls required by the final permit exceed the recommendations for controls he believed are adequate to protect UNT Lizard Creek's fishery. (Tr. 247-52, 253-54).

65. With respect to the variance for support activities in the buffer zone, Mr. Kepler testified that the activities are limited; the riparian vegetation and canopy cover will be maintained throughout the 100-foot buffer zone with the exception of a loss of streamside canopy in the area of the diversion ditch. In his view, the upgrade of the existing haul road will improve the current erosion and sediment pollution control situation at the site. Mr. Kepler disagreed with the ultimate opinion expressed by Ms. Butler because it was based on a misunderstanding of the facts, particularly with respect to the types of activities and quantity of devegetation that will actually occur in the buffer zone. (Tr. 251-56, 261-62).

66. Mr. Kepler opined that mining can be conducted at the site without negative impact on the aquatic life of UNT Lizard Creek and without negative impact on the trout habitat provided by UNT Lizard Creek, so long as Lehigh adheres to the requirements set forth in the

mining permit. (Tr. 253-54, 264-65).

67. We credited Mr. Kepler's expert testimony concerning the potential impact of the mining operation on the fishery of UNT Lizard Creek. His testimony was grounded in the relevant facts of this case and was supported by extensive relevant experience with protection of fisheries associated with mining operations. (F.F. # 67).

68. East Penn presented testimony from Michele Adams, P.E. in support of its challenge to the ability of the site's water pollution control system to protect the existing water quality of UNT Lizard Creek. Ms. Adams obtained a degree in civil engineering in 1984 specializing in water resources; since then she has completed the coursework for a master's degree in water resources. She is currently employed as a principal engineer at Cahill Associates where she specializes in development of storm water management practices. She has testified numerous times as an expert witness in court and at municipal hearings. (Tr. 59-62).

69. Ms. Adams was accepted as an expert in the field of storm water management. (Tr. 62-63).

70. There was some lack of clarity regarding the specific site-related materials Ms. Adams reviewed in preparation for her testimony. She reviewed: Lehigh's mining permit; a set of unidentified diagrams, photographs and data (not offered into evidence) prepared for an unspecified special exception hearing before an unidentified zoning board; an unrevised operations/environmental resources map dating from March 2000—also not offered into evidence but apparently an earlier version of exhibit LA-3; some unidentified erosion and sediment pollution control materials; Exhibit LA-8 (the July 2003 West Pit infiltration and sediment basin plan); some water quality sampling and flow monitoring data; and, a memo prepared by Lehigh's expert (apparently Exhibit LA-11). (Tr. 63-64, 67-68, 76-83).

71. She did not review any DEP files pertaining to Lehigh's permit application, and she did not personally view the site. (Tr. 63-64, 67-68, 76-83).

72. Ms. Adams' testimony focused almost exclusively on the design and construction of the infiltration basin, as to which she expressed three concerns. First, she testified that the high permeability of the rock underlying the infiltration basin may result in a reduced level of filtering of the runoff water as it seeps into the ground below the basin and flows ultimately downslope to UNT Lizard Creek. She opined that a reduced level of filtering will adversely affect the quality of the water in the stream. (Tr. 66-69, 73-74).

73. Second, she stated that the quarry runoff water may clog the infiltration basin with filtered sediment, causing a reduced rate of infiltration and increased potential for an overflow. She asserted the basin would overflow during "large storm events." (Tr. 68-69).

74. Third, she believed that the work of constructing the infiltration basin approximately 200 feet from the stream, though limited in duration, will cause a significant discharge of runoff water with high levels of total suspended solids into UNT Lizard Creek during the construction period. She did not clarify whether she was referring to a nonpoint source, or to a point source, discharge resulting from the construction work.

75. She ultimately opined, generally, that the required erosion and sediment pollution controls cannot maintain the existing water quality of UNT Lizard Creek. (Tr. 70-74).

76. On cross examination, Ms. Adams admitted that she had not reviewed updated maps and plans for the proposed operation, and that she was not aware of current topographic conditions at the site (particularly the existing former quarry pit where the infiltration basin will be constructed). She conceded that she has no experience with water pollution controls in the surface mining context or the review of surface mining permit applications. (Tr. 75-83).

77. She was unable to articulate a basis for her opinion that runoff water would not be adequately filtered by the infiltration basin, and she did not address the effect of the impoundment system as a whole—including the sediment basin, the flocculent logs, the infiltration basin, and return of the filtered water to the groundwater system at a point two hundred feet from the stream—on the runoff water collected from the quarry face. (Tr. 68, 81-85; *see also* Tr. 133-34, 140-45; Exh. LA-11).

78. With respect to a potential (presumably nonpoint source) discharge from construction of the infiltration basin, Ms. Adams admitted she is not familiar with current topographic conditions at the site and did not account for those conditions when reaching her conclusion regarding negative impacts from basin construction. Ms. Adams also stated she was not aware of the permit's work sequencing plan—especially the use of the downgrade overflow-containment berm as a runoff containment device during construction. (Tr. 79-80, 81-85, 87).

79. In response to Ms. Adams, Lehigh presented expert testimony from Philip Getty in addition to Mr. Getty's factual testimony concerning mechanics of the mining operation and the relevant pollution controls for the site. (Tr. 90-158; Exh. LA-16).

80. Mr. Getty, an environmental hydrogeologist since 1981, has a masters degree in geology and is a licensed professional geologist in Pennsylvania. He has extensive experience in the design of quarries, the review and preparation of quarry permit applications, and the analysis of environmental impacts on water resources from quarrying operations. He has testified previously as an expert witness before the Board. (Tr. 90-95; Exh. LA-16).

81. Mr. Getty was accepted as an expert in environmental hydrogeology. (Tr. 95).

82. Mr. Getty was retained by Lehigh beginning in 1998 to work on geological and hydrogeological aspects of the quarry project. He assisted with preparation of the permit

application materials, including site plans, design of pollution controls, groundwater monitoring and mapping, and hydrogeological testing at the site. (Tr. 95-98; Exh. LA-7).

83. Mr. Getty's testimony included explanations of site topography and geology, the hydrogeological characteristics of the permitted area, the mining plan, the erosion and sediment pollution controls, the design details and functioning of the impoundment system, groundwater monitoring performed at the site, and specific permit conditions applicable to the water pollution controls. (Tr. 99-133; Exhs. LA-3, LA-4, LA-5, LA-6, LA-7, LA-8).

84. Mr. Getty was specifically involved with the design of the impoundment system and the capacity of that system to contain the entire volume of runoff from a 10-year/24-hour storm event. He conducted hydrogeological testing on percolation rates in the area of the infiltration basin, and prepared a report analyzing the data and calculating the appropriate design parameters for the system. (Tr. 109-10; Exh. LA-7).

85. Mr. Getty disagreed with Ms. Adams' concern that the impoundment system would result in a reduced level of filtering such that the runoff water returning to the groundwater system and ultimately to UNT Lizard Creek would lower the water quality of the stream. In his view, the combined action of the flocculent logs, the sediment basin, and the infiltration basin will effectively remove total suspended solids from the runoff water. (Tr. 140-41, 144, 156-58; Exh. LA-11).

86. Mr. Getty noted that the runoff water seeping through the basin would reenter the groundwater system at a significant distance from the stream. He opined that the runoff water will recover its naturally cool temperature by passing through the fractured bedrock, and the runoff water will recover more of the natural chemistry of groundwater at the site as it flows the distance to the stream and percolates up into the stream channel. (Tr. 156-58).

87. On cross-examination, Mr. Getty conceded however that surface water naturally infiltrating the soil at the site would be of much better quality than the runoff water that will be infiltrated back into the groundwater system (and ultimately into the stream) through the sediment basins used for the mining operation. (Tr. 156-58).

88. With respect to Ms. Adams' concern that the infiltration basin could clog with sediment, Mr. Getty did not disagree with the potential for clogging but asserted that Lehigh would be able to unclog the basin by pumping the basin water sufficiently to reverse the flow and clear the fractures of sediment, similar to what is done with drinking water wells. He did not explain the mechanism for such pumping or where the pumped basin water would be contained or conveyed in such circumstances. He offered no opinion on whether such pumping and reversal of flow would have any negative impact on the stream. (Tr. 143-44; Exh. LA-11).

89. Mr. Getty opined that the impoundment system will function properly and will contain the entire volume of runoff from a 10-year/24-hour storm event. He opined that the impoundment system will have no adverse impact on the water quality of UNT Lizard Creek. In sum, he opined that the proposed mining activity will have no significant adverse impact on the water quality of UNT Lizard Creek. (Tr. 140-46, 155-60; Exh. LA-7).

90. In response to Ms. Adams, DEP presented expert testimony from Joseph Blyler, P.E. in addition to Mr. Blyler's factual testimony regarding his review of Lehigh's permit application and various aspects of the permitted mining operation. (Tr. 170-235).

91. Mr. Blyler has been employed by DEP as a mining engineer for approximately nineteen years; during that time he has been responsible for reviewing various aspects of mining permit applications, including erosion and sediment pollution controls, discharges to receiving waters, and protecting streams in the mining context. He has reviewed over one thousand permits

during his tenure at DEP. Mr. Blyler has a B.S. in environmental engineering, and has been a licensed professional engineer in Pennsylvania since 1986. He has testified previously as an expert witness in Board proceedings. (Tr. 170-73).

92. Mr. Blyler was accepted as an expert witness in the fields of mining engineering and erosion and sedimentation control. (Tr. 173).

93. Mr. Blyler testified with respect to his review of Lehigh's permit application and his recommendations concerning pollution controls at the site. He then described the basics of the permitted mining operation, the details of the pollution controls required by DEP for the operation, and the relevant permit conditions imposed by DEP to assure protection of UNT Lizard Creek and prevent degradation of its water quality. (Tr. 174-88, 190-94; Exh. C-1).

94. Based on his experience at other sites, Mr. Blyler believes that the impoundment system designed for Lehigh's operation will contain the entire volume of runoff from a 10-year/24-hour storm event. (Tr. 185-90).

95. Mr. Blyler disagreed with Ms. Adams' concern that the infiltration basin will clog and potentially overflow as a result. In his view, the pretreatment sediment basin and the flocculent logs will prevent clogging in the infiltration basin because most of the sediment will be captured by the flocculent logs or settle out in the sediment basin before the runoff water reaches the infiltration basin. (Tr. 206-07).

96. Mr. Blyler further opined that the construction of the infiltration basin will not negatively impact the stream on account of the required work sequence, the placement of the overflow berm, the topography of the site, and the limited work that will be necessary to construct the basin at the site. (Tr. 190-96; Exh. LA-3).

97. In sum, Mr. Blyler opined that the individual pollution controls required for

Lehigh's mining operation will adequately protect the existing water quality of UNT Lizard Creek. (Tr. 204-05, 207).

D. Characterization of the Required Pollution Controls as a Nondischarge Alternative

98. Mr. Blyler testified that he applied DEP regulations applicable to exceptional value waters when reviewing Lehigh's permit application. He also consulted DEP's Water Quality Antidegradation Implementation Guidance Manual when determining whether the pollution controls at the site met the antidegradation requirements for exceptional value waters. Mr. Blyler concluded that the pollution controls designed for this site are consistent with pertinent recommendations in the Guidance Manual for protecting exceptional value waters in the surface mining context. (Tr. 198-99, 208, 229-31; Exh. LA-12).[9]

99. Mr. Blyler characterized Lehigh's permit as a "nondischarge" permit, meaning that he believes a "nondischarge alternative" was selected as the means for treating the potential sources of water pollution from the mining operation and preventing degradation of the existing water quality of UNT Lizard Creek. He noted that the water quality regulations do not define the term "nondischarge alternative." However, according to Mr. Blyler, in the surface mining context DEP interprets the term to mean: (i) no pumped discharge of any kind is permitted; (ii) a complete containment approach to runoff is utilized; and, (iii) the containment/impoundment system utilized must be capable of containing the entire volume of runoff from at least a 10-

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[9] The Guidance Manual, which describes antidegradation technologies for mining activities, envisions the possibility of a "nondischarge state" in a surface mining operation:

> Because precipitation is inevitable, only a few small mining operations can easily achieve a nondischarge state. These operations are usually small sand and gravel mines where all water within the confines of the mine boundary drains to one or more internal sumps and then percolates into the groundwater. A few larger industrial minerals operations may achieve this through the use of specially designed infiltration beds if geologic conditions are conducive to a high percolation rate.

Exh. LA-12, at page 112.

year/24-hour storm event. He stated that he relied on his experience and the Guidance Manual in reaching this conclusion. (Tr. 197-98, 218-19; Exh. LA-12).

100. On cross-examination, Mr. Blyler conceded that a direct discharge of untreated runoff from the disturbed mining area into UNT Lizard Creek is possible at the Lehigh site. He agreed that a rainfall in excess of a 10-year/24-storm event, or a rapid succession of storms approaching the 10-year/24-hour event level, could overwhelm the infiltration basin and the overflow berm, thereby resulting in a direct point source discharge from the site into UNT Lizard Creek. (Tr. 217-21).

101. Mr. Blyler also conceded on cross-examination that, in the event of a rainfall occurrence exceeding the volume from a 10-year/24-hour storm, Lehigh's NPDES permit allows a point source discharge into UNT Lizard Creek. (Tr. 217-21).

102. Mr. Blyler testified that, in his view, the existence of this unlikely possibility of a *point source* discharge did not prevent the system of water pollution controls designed for this site from being considered a "nondischarge alternative" under the antidegradation regulations. He stated that (unspecified) DEP regulations only require surface mining permittees to prevent *point source* discharges up to the 10-year/24-hour storm threshold because practical limits on the design of water pollution control methods rendered events beyond that threshold "catastrophic" and therefore unmanageable. He asserted that DEP regulations do not impose a responsibility upon a surface mining permittee to prevent *point source* discharges from such "catastrophic" events. (Tr. 217-21, Exh. LA-12).

103. Finally, Mr. Blyler testified that the runoff from the diversion channel placed upslope of the northern perimeter berm—which channel ultimately leads to UNT Lizard Creek—was not considered a point source discharge under DEP regulations. He explained that he

reached this conclusion because the diverted water will flow from undisturbed areas outside the mining area and will not come into contact with areas disturbed by mining. Mr. Blyler did not specify the regulations on which he based this determination. (Tr. 231-33).

DISCUSSION

The Board reviews all DEP final actions *de novo*. *See, e.g.*, *Pequea Township v. Herr*, 716 A.2d 678, 686-87 (Pa. Cmwlth. 1998); *Smedley v. DEP*, 2001 EHB 131, 155-60. We review DEP's issuance of the permit to determine, based on the evidence presented to the Board, whether DEP's action conformed with applicable law and was reasonable. *Jefferson County Commissioners v. DEP*, 2002 EHB 132, 179, *aff'd* 819 A.2d 604 (Pa. Cmwlth. 2003); *O'Reilly v. DEP*, 2001 EHB 19, 32. Appellant and Intervenor bear the burden of proving that the permit was issued contrary to law or is otherwise unreasonable. 25 Pa. Code § 1021.122(c)(2).

A noncoal surface mining permit may be approved only if the proposed mining operation will comply with the Noncoal Surface Mining and Reclamation Act, 52 P.S. § 3301 *et seq.*, other applicable environmental laws, and the noncoal mining regulations in Chapter 77 of the Pennsylvania Code. *See* 25 Pa. Code § 77.126(a)(1). East Penn and Appellant raised three main objections. They argue that the permitted mining operation does not comply with certain water quality regulations designed to protect Pennsylvania's exceptional value waters. They challenge the variance for support activities in the 100-foot setback area adjacent to UNT Lizard Creek because it allegedly violates noncoal mining regulations. Finally, they argue that proper notice of Lehigh's application for a NPDES permit was not given. We address each objection in turn.

A. Consistency with Antidegradation Regulations for EV Waters

The water quality regulations in Chapters 92 and 93 are applicable to noncoal surface mining operations. *See* 25 Pa. Code § 77.522(b) ("the discharge of water from areas disturbed by mining activities shall comply with this title"); 25 Pa. Code § 92.3 ("A person may not

discharge pollutants from a point source into surface waters except as authorized under an NPDES permit."); *see also* 25 Pa. Code § 77.457. Chapter 93 specifies that "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 25 Pa. Code § 93.4a(b). The existing use classification of UNT Lizard Creek was changed by DEP to "exceptional value," thus placing the tributary within the compass of regulatory protections afforded to waters so classified.[10] Appellants' first challenge to Lehigh's permit focuses on the antidegradation requirements for exceptional value waters set forth in § 93.4c(b)(1)(i); the regulation states in pertinent part:

> *Point source discharges*. The following applies to point source discharges to High Quality or Exceptional Value Waters.
>
> (i) *Nondischarge alternatives/use of best technologies.*
>
> (A) A person proposing a new, additional or increased discharge to . . . Exceptional Value Waters shall evaluate nondischarge alternatives to the proposed discharge and use an alternative that is environmentally sound and cost-effective when compared with the cost of the proposed discharge. If a nondischarge alternative is not environmentally sound and cost-effective, a new, additional or increased discharge shall use the best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies.
>
> (B) A person proposing a new, additional or increased discharge to . . . Exceptional Value Waters, who has demonstrated that no environmentally sound and cost-effective nondischarge alternative exists under clause (A), shall demonstrate that the discharge will maintain and protect the existing quality of receiving surface waters . . . .

25 Pa. Code § 93.4c(b)(1)(i).[11]

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[10] *See* 25 Pa. Code § 93.4c(a)(1)(i) ("Existing use protection shall be provided when [DEP's] evaluation of information . . . indicates that a surface water has attained an existing use"); 25 Pa. Code § 92.8a(a) (whenever DEP "makes a determination which would change existing or impose additional water quality criteria or treatment requirements, it shall be the duty of the permittee of facilities affected thereby . . . to promptly take steps necessary to plan, obtain a permit or other approval and construct facilities that are required to comply with the new water quality standards or treatment requirements").

[11] Though not defined in Chapter 93, state regulations for the NPDES permit program in Chapter 92 define "discharge" as: "An addition of any pollutant to surface waters of this Commonwealth from a point source . . . ." 25 Pa. Code § 92.1.

The scheme devised in § 93.4c(b)(1)(i) to prevent degradation is to require all those who propose to discharge into an exceptional value water to engage in an alternatives-analysis process before obtaining a NPDES permit. Section 93.4c(b)(1)(i) creates a hierarchical structure which prefers no new point source discharges into the highest quality waters. The preference for no new discharges is not absolute however. The regulation takes into account the economics of devising a system which eliminates all discharges into an exceptional value receiving water. The regulation also contemplates the possibility that the only nondischarge alternatives available to a discharge proponent may ultimately prove more harmful to the environment overall. But a "nondischarge alternative" *must* be used by the discharge proponent when such an alternative is both environmentally sound and cost effective. Thus, when applying § 93.4c(b)(1)(i) the agency must compel the discharge proponent to first evaluate whether an environmentally sound "nondischarge alternative" is available under the circumstances, and if so, to compare the cost of such an alternative with the cost of the method proposed to discharge into the exceptional value water. 25 Pa. Code § 93.4.c(b)(1)(i)(A).

If an environmentally-sound, cost-effective, nondischarge alternative is not available, the proponent of the discharge shall instead use the best available combination of pollution control methods under the circumstances. 25 Pa. Code § 93.4c(b)(1)(i)(A). The regulation lists "cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies" as possible methods; the surface mining context has its own set of suitable methods. *See* DEP Water Quality Antidegradation Implementation Guidance Manual, at Appendix D (titled "Antidegradation Best Available Combination of Technologies for Mining Activities"). Finally, § 93.4c(b)(1)(i)(B) places a condition on the discharger's use of control methods: before a point source discharge into an exceptional value water is permitted, the proposed discharger must

demonstrate that its selected combination of control methods "will maintain and protect the existing quality" of the receiving water. 25 Pa. Code § 93.4c(b)(1)(i)(B).

Lehigh's original mining permit application, submitted in July 1999, proposed a new point source discharge to UNT Lizard Creek in the form of runoff water sporadically pumped from sediment basins. Lehigh consequently sought a NPDES permit with its surface mining permit pursuant to 25 Pa. Code § 92.3. Lehigh's permit application triggered an investigation of the water quality of the proposed receiving stream which resulted in a finding by PFBC that the stream's existing water quality was actually much better than its designated use indicated. PFBC recommended the stream's existing use be classified as "exceptional value," and DEP concurred in May 2001. Classification of UNT Lizard Creek's existing use as exceptional value triggered the application of § 93.4c(b)(1)(i) to Lehigh's pending permit application.

Having proposed a new point source discharge into an exceptional value water, Lehigh was required by § 93.4c(b)(1)(i) to "evaluate nondischarge alternatives to the proposed discharge" and to use an environmentally-sound, cost-effective, nondischarge alternative if one existed in these circumstances. If Lehigh was able to demonstrate to DEP that a viable nondischarge alternative does not exist for the proposed quarry, then Lehigh was required to use the best available combination of water pollution control methods, and, to demonstrate that its selected combination would "maintain and protect the existing quality" of UNT Lizard Creek. The appellants argue that DEP failed to require Lehigh's compliance with the obligations imposed by § 93.4c(b)(1)(i).

DEP and Lehigh counter that the requirements of § 93.4c(b)(1)(i) were met because a "nondischarge alternative" will be implemented for this surface mining operation. They argue that the water pollution controls prescribed by the permit can legitimately be characterized as a

"nondischarge alternative" under § 93.4c(b)(1)(i)(A)—as the regulation is applied in the noncoal surface mining context. Accepting this premise would mean such an alternative was evaluated as well because Mr. Blyler rejected Lehigh's proposal for a sporadically pumped discharge and recommended a "complete containment" approach. Lehigh then revised its permit application materials and ultimately a mining permit was issued requiring the water pollution controls described above. Insisting that these controls constitute a "nondischarge alternative," and that DEP's interpretation of this regulatory term is entitled to deference, DEP and Lehigh contend that a "nondischarge alternative" was both evaluated and implemented here, thus satisfying the obligations of § 93.4c(b)(1)(i)(A).

East Penn and Appellant respond that the prescribed controls should not be considered a "nondischarge alternative" because the impoundment system may overflow during a severe rainfall occurrence and runoff water escaping the containment berm would be conveyed by a spillway directly into UNT Lizard Creek. There is no dispute that such untreated runoff water would contain pollutants in the form of suspended solids. *See* 25 Pa. Code §§ 93.6, 93.7. Appellants argue that a "point source discharge into the exceptional value stream" is the only rational way to describe this potential overflow occurrence. They also refer to Mr. Blyler's admission that the NPDES permit incorporated in Lehigh's mining permit allows for a point source discharge into UNT Lizard Creek at specifically labeled outfalls in the event of a rainfall occurrence exceeding the volume from a 10-year/24-hour storm. They then argue that it is irrational for DEP to assert that a nondischarge alternative is being implemented when the NPDES permit expressly allows for a point source discharge—even if the permission given Lehigh to discharge is structured as an unlikely exception for "catastrophic" rainfall events.

We agree with appellants that DEP's position is illogical and untenable. The facts of this

case fly in the face of DEP's argument. DEP issued a NPDES permit to Lehigh as part of the surface mining permit. That NPDES permit specifies UNT Lizard Creek as the receiving water at two designated outfalls.[12] Pursuant to the NPDES permit program regulations, a "person may not discharge pollutants from a point source into surface waters except as authorized under an NPDES permit." 25 Pa. Code § 92.3. Thus, by its act of issuing a NPDES permit specifying UNT Lizard Creek as the receiving water, DEP necessarily determined that the mining operation will discharge from a point source into the exceptional value water. If DEP believed that the mining operation was not going to discharge from a point source, then the agency had no legal authority to require, or to issue, a NPDES permit to Lehigh. DEP's attempt here to characterize the mining permit as a "nondischarge permit" simply makes no sense. The purpose of a NPDES permit is to regulate point source discharges; it defies logic to label the mining permit as "nondischarge" when that permit incorporates a NPDES permit for point source discharges. DEP cannot simultaneously maintain contrary positions; *i.e.*, the mining permit cannot be rationally labeled as a "nondischarge" permit to discharge.

DEP argues that, because the term "nondischarge alternative" in § 93.4c(b)(1)(i) is not defined by the regulations, the application of § 93.4c(b)(1)(i) to Lehigh's operation consequently necessitated an interpretation of that term by the agency. DEP insists that its interpretation of "nondischarge alternative" as allowing exceptions for severe rainfall occurrences in the surface mining context is reasonable and should receive deference from the Board. *See DEP v. North American Refractories Company*, 791 A.2d 461, 426-67 (Pa. Cmwlth. 2002) (EHB must defer to

[12] The text of the NPDES permit actually establishes a two-tier graduated approach to point source discharges from the site. The permit prohibits discharges from the designated outfalls, "except in response to precipitation events." Discharges that are "a result of a precipitation event" are subject to an effluent limitation for maximum total settleable solids of 0.5 ml/l. A second condition provides that "[a]ny discharges resulting from a precipitation event exceeding" a 10-year/24-hour storm are exempted from all effluent limitations stated in the NPDES permit. *See* Exh. LA-2, Part A, pp. 1-2.

DEP's interpretation of environmental regulations when the EHB determines that DEP's interpretation is reasonable); *Frank Plescha v. DEP*, No. 2003-139-K, 2004 Pa. Envirn. LEXIS 43, at *14 (EHB, July 12, 2004).

DEP's interpretation of § 93.4c(b)(1)(i) was clearly not reasonable. First, as discussed above, DEP is trying to maintain logically contrary positions by issuing a NPDES permit for point source discharges into UNT Lizard Creek and simultaneously describing the controls being implemented at the site as a nondischarge alternative vis-à-vis the exceptional value water. Second, the text of the regulation is clear on its face. A "nondischarge alternative" is a method in which *no* point source discharge into the exceptional value water is permitted. Linguistically, there is simply no other reasonable way of understanding "nondischarge." Third, the structure of § 93.4c(b)(1)(i) supports the same conclusion. The regulation sets up a dichotomy between "nondischarge" alternatives and control methods that will result in a discharge into an exceptional value water. In accordance with the policy of protecting the Commonwealth's highest quality waters, the most stringent alternative (no discharge) must first be considered and implemented. It is only after this type of alternative has been demonstrated to be not cost effective or environmentally sound that the discharge proponent may receive permission to discharge into an exceptional value waterway.[13] Finally, the individualized approach DEP used here to interpret "nondischarge alternative" will lead to arbitrary applications of § 93.4c(b)(1)(i) because there is no principled means of deciding on the kinds of exceptions that could be permitted.[14]

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[13] The establishment in § 93.4c(b)(1)(i)(B) of an underlying prophylactic threshold *only* for the best available control methods further undermines DEP's interpretation. Section 93.4c(b)(1)(i)(B) is premised on an assumption that no purpose will be served by compelling a permit applicant who has identified an acceptable nondischarge alternative to a proposed point source discharge into an exceptional value water to also demonstrate that this nondischarge alternative will maintain existing water quality.

[14] The point is illustrated by this case. Mr. Blyler testified that when applying § 93.4c(b)(1)(i) he considers a

DEP reminds us that when applying § 93.4c(b)(1)(i) the permit reviewer must account for the practical realities of water pollution control in the surface mining context. *See Birdsboro and Birdsboro Municipal Authority v. DEP*, 2001 EHB 377, 398-403, *aff'd*, 795 A.2d 444 (Pa. Cmwlth. 2002) (rejecting argument that DEP must deny a noncoal mining permit application unless applicant proves there is no potential whatsoever for pollution of an exceptional value stream resulting from proposed mining operation); *cf.* 25 Pa. Code §§ 87.102, 87.103 (setting graduated effluent limitations correlated with intensity of precipitation event for coal surface mining). DEP then argues that an exception for a direct discharge in the event of a "catastrophic" rainfall occurrence should not convert the permitted system into a discharge alternative because, to adopt a more stringent approach, would unfairly penalize Lehigh for being unable to control the effects of weather catastrophes. This argument proves too much. Section 93.4c(b)(1)(i) does not prohibit all point source discharges into exceptional value waters; it requires that an alternatives analysis be performed by a discharge proponent and expresses a preference for using nondischarge alternatives. It is conceivable that the system of water pollution controls prescribed for the site by Lehigh's mining permit could have been approved as the "best available combination" of pollution prevention technologies that "will maintain and protect the existing quality" of UNT Lizard Creek. 25 Pa. Code § 93.4c(b)(1)(i)(B). We make no finding on this point at this stage but rather leave that determination for DEP to make on remand.

Having determined that the water pollution controls prescribed for the mining operation do not constitute a "nondischarge alternative" we turn to DEP's application of § 93.4c(b)(1)(i) to Lehigh's proposed mining operation. By labeling the water pollution control system for the site

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surface mine to be employing a "nondischarge alternative" where no pumped discharge is permitted and the operation uses a system capable of containing all the runoff from a 10-year/24-hour storm event without a point source discharge. It was not clear, however, why the 10-year/24-hour storm event was selected as the basis for his demarcation between nondischarge and discharge alternatives. Nor is it apparent that a rational basis could be devised for deciding on this line of demarcation.

as a "nondischarge alternative" DEP short-circuited the alternatives-analysis process prescribed by § 93.4c(b)(1)(i). The evidence at hearing did not show that alternatives in which no point source discharge into UNT Lizard Creek would be permitted were evaluated by either Lehigh or DEP. For example, there was no evidence that DEP required Lehigh to consider conveying accumulated surface water runoff into Lizard Creek, a designated warm water fishery, rather than discharging into UNT Lizard Creek, the exceptional value water. There was also no substantial evidence presented: (1) that DEP made an express finding that a cost-effective environmentally-sound nondischarge alternative does not exist for the proposed mining operation; (2) that Lehigh demonstrated, and DEP found, that Lehigh would employ the best available combination of water pollution control methods for this site; and, (3) that Lehigh properly demonstrated—with water quality monitoring data and scientific analysis of the effects on the stream from the addition of identified and quantified pollutants in a permitted discharge—that the selected control methods will maintain and protect the existing quality of UNT Lizard Creek. In short, the evidence did not show that the alternatives analysis required by the antidegradation regulation was performed here. Process, however, is the critical means of accomplishing the antidegradation regulation's fundamental purpose of maintaining and protecting the existing quality of the exceptional value water. 25 Pa. Code § 93.4c(b)(1)(i)(B). *Cf. Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974) (the history of environmental protection may prove to largely be the "history of observance of procedural safeguards").

Finally, the appellants raised a question concerning the exclusion of the diversion channel from consideration in the analysis obligated by § 93.4c(b)(1)(i). Although the surface water runoff collected in the diversion channel will debouch to UNT Lizard Creek, Mr. Blyler asserted that conveyance of this runoff into the stream is not deemed a point source discharge under the

regulations because the runoff water would not come into contact with areas disturbed by mineral extraction activities. Presumably, he was relying on § 77.522(b) for this assertion, see 25 Pa. Code § 77.522(b) ("the discharge of water from areas disturbed by mining activities shall comply with this title"); *But see* 25 Pa. Code § 92.3 (a person "may not discharge pollutants from a point source into surface waters except as authorized under an NPDES permit"). Although we need not resolve the characterization question now, we believe DEP should reconsider its conclusion on the diversion channel as part of a remand. The diversion channel will be created by the mining activities proposed for the site, and it will collect and convey surface water runoff into an exceptional value stream. There was no evidence presented at the hearing that DEP required Lehigh to evaluate whether the diversion channel runoff will contain pollutants. Nor was there evidence that DEP required Lehigh to demonstrate that the existing water quality of UNT Lizard Creek will be will maintained and protected despite the addition to the stream of the surface water expected to be issuing from the diversion channel. 25 Pa. Code § 93.4c(b)(1)(i)(B).

In sum, by failing to properly apply § 93.4c(b)(1)(i), DEP acted contrary to law when reviewing the permit application and issuing the mining (and incorporated NPDES) permit to Lehigh. *See, e.g., Teledyne Columbia-Summerhill Carnegie v. Unemployment Compensation Board of Review*, 634 A.2d 665, 668 (Pa. Cmwlth. 1993) ("A duly promulgated regulation has the force and effect of law and it is improper for the [agency] to ignore or fail to apply its own regulation."); *Oley Township v. DEP*, 1996 EHB 1098, 1119 (where DEP "does not review an application as required by the statutes and regulations, it abuses its discretion."). Lehigh's mining permit must therefore be considered unlawful. 25 Pa. Code § 77.126(a)(1). Consequently, we will revoke the permit and remand this matter to DEP for a proper application of the water

quality antidegradation regulations to Lehigh's proposed mining operation.[15]

B. Variance for Support Activities in 100-Foot Setback Area

To clarify the scope of the remand and assure this litigation is not further protracted in light of any future appellate review, we will briefly address and resolve the remaining objections raised by the appellants. East Penn objected to the permit condition granting Lehigh a variance for support activities within the 100-foot setback area adjacent to UNT Lizard Creek.

The applicable general rule is stated in § 77.504(a): "Except as provided in subsection (b), a person may not conduct noncoal surface mining activities . . . [w]ithin 100 feet (30.48 meters) of the bank of a perennial or intermittent stream." 25 Pa. Code § 77.504(a)(6). Subsection (b) provides the following pertinent exception to the general rule:

> The Department may allow operators to operate within the distance limitations of subsection (a) if the operator demonstrates: . . .
>
> (2) *Support areas*. For parts of surface mining activities other than opening or expansion of pits, that special circumstances warrant activities within the distance limitations, that the public health and safety will not be endangered, that the environment and the interests of the public and the landowners affected thereby will be adequately protected and that there are no feasible or prudent alternatives to conducting those aspects of the activity within the distance limitations.

25 Pa. Code § 77.504(b)(2).

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[15] The appellants also generally contended that the impoundment system permitted for Lehigh's mining operation will not adequately protect the existing quality of UNT Lizard Creek, presumably in violation of the noncoal surface mining regulations. *See* 25 Pa. Code § 77.457(a) (an application shall contain a description of the "measures to be taken during and after the proposed noncoal mining activities . . . to ensure the protection of the quality and quantity of surface water and groundwater, both within the proposed permit and adjacent areas, from the adverse effects of the proposed noncoal mining activities"); 25 Pa. Code § 77.521(a) ("Noncoal mining activities shall be planned and conducted to minimize disturbances to the prevailing hydrologic balance in the permit and adjacent areas."); 25 Pa. Code § 77.521(c) (the "operator shall conduct the noncoal mining activities to prevent water pollution").

Whether the system of water pollution controls required by the permit will ensure protection of the existing water quality of the unnamed tributary is primarily a question of fact and expert opinion. Given our disposition on DEP's application of § 93.4c(b)(1)(i) we need not resolve this question. We note however that no expert addressed the relevant issues with precision. *See supra* F.F. # 68 to F.F. # 97. For example: water quality monitoring data for UNT Lizard Creek (though referred to) was not presented or discussed by either party; there was little or no discussion of the types or quantities of pollutants expected to be found in runoff water issuing from the site; and, no data or analyses of comparable controls used at other sites was offered. *Cf. Lower Mount Bethel Tp. v. DEP*, No. 2003-013-MG, 2004 Pa. Envirn. LEXIS 49 (EHB Aug. 13, 2004); *Borough of Roaring Spring v. DEP*, 2003 EHB 825, 841; *O'Reilly*, 2001 EHB at 38-43; *Plumstead Township v. DEP*, 1995 EHB 741, 775-85.

The permit grants a § 77.504(b)(2) variance for two activities: improvement of the existing haul road; and, construction of part of the diversion channel.[16] Leaving aside the other criteria established by § 77.504(b)(2), East Penn argued that allowing Lehigh to operate within the 100-foot setback area will not adequately protect the environment. Specifically, East Penn asserts that the support activities Lehigh is permitted to conduct in the setback area will adversely affect the existing water quality of UNT Lizard Creek.

East Penn failed to carry its burden of proof on this issue. The testimony of Ms. Butler displayed a basic misunderstanding of the nature of the activities that are actually permitted in the setback area, and her conclusions assumed a degree of vegetation clearing that will not occur. Neither of East Penn's experts accounted for existing topography and conditions, nor were they aware of the mandated work sequence and its impact. After carefully reviewing the evidence presented, we are satisfied that the appellants did not prove that the support activities allowed by the variance will adversely impact the existing water quality of UNT Lizard Creek. We consequently reject their objection that the § 77.504(b)(2) variance violated the law or was otherwise inappropriate under these circumstances.

C. Public Notice of Lehigh's NPDES Permit Application

The final objection concerns the adequacy of the public notice of Lehigh's application for a NPDES permit. *See* 25 Pa. Code § 92.61(a) ("Public notice of every complete application for an NPDES permit will be published by the Department in the *Pennsylvania Bulletin.*"). East Penn and Appellant do not challenge the sufficiency of the 1999 notices regarding Lehigh's permit application. They assert that a separate public notice requirement was imposed on Lehigh

[16] Although there was some dispute regarding their characterization, these are clearly support activities, that is, "surface mining activities other than opening or expansion of pits." 25 Pa. Code § 77.504(b)(2). The evidence showed that Lehigh's variance does not allow for mineral extraction activities within the setback area. *See* F.F. # 43 to F.F. # 46.

by virtue of the 2001 classification of UNT Lizard Creek's existing use as exceptional value. They insist a subsequent notice in the *Pennsylvania Bulletin*, containing a statement that Lehigh was proposing to discharge into an exceptional value water, was the only proper means of satisfying this alleged separate requirement. *See* 25 Pa. Code § 93.4c(b)(1)(ii)(B); § 92.61(a)(9).

DEP and Lehigh respond that the regulations do not require a second notice to be given. Moreover, the appellants have no cause to complain here. Pointing to the Board's decision in *Hopewell Township v. DEP*, 1996 EHB 956, DEP argues that without a showing of harm from lack of proper notice the objection amounts to no more than *damnum absque injuria.*

We agree; East Penn and Appellant failed to prove that public notice was deficient. They admit receiving notice of Lehigh's permit application and attending relevant DEP public meetings, including a pre-issuance meeting held after the stream's existing use was classified. With respect to harm, neither presented any testimony alleging they were unaware of the permit application, and no witness testified that she was harmed from a lack of notice regarding the proposed mining operation or its potential effect on UNT Lizard Creek. As we stated in *Hopewell Township*:

> The public notice issue (whether the filing of the application was published in the proper newspaper) is disposed of quickly because both [third-party appellants] had *actual* knowledge of the application before the Permit and Authorization were issued . . . . Thus, they have not shown that they were harmed by this alleged violation of the regulations.

Hopewell Township, 1996 EHB at 970. *See Throop Property Owner's Association v. DEP*, 1998 EHB 618, 626-627 (party "who had actual knowledge of the filing of an application in sufficient time to protect his interest" has no cause to challenge alleged deficiencies in the notice).

Moreover, we are not convinced the regulations required Lehigh to give a second notice of its pending permit application following the existing use determination in May 2001. East

Penn relies on § 92.8a(a) for creation of this alleged second notice requirement.[17] But this regulation compels facilities to physically upgrade their water pollution control measures to meet new water quality standards or treatment requirements. By contrast, notice rules are intended to provide interested stakeholders with adequate information regarding the proposed conduct of a permit applicant so those stakeholders have an opportunity to protect their own interests through comment, objection or appeal. East Penn has not explained how § 92.8a(a) relates to the policies expressed in notice requirements, and we find nothing in the text of this regulation to support the position that a second notice of Lehigh's pending NPDES permit application was required to be published in the *Pennsylvania Bulletin* after the existing use determination. Considering these difficulties, East Penn's argument that § 92.8a(a) worked to impose an additional notice requirement under these circumstances was unpersuasive.

CONCLUSIONS OF LAW

1. The Board reviews DEP's issuance of the permit to determine, based on the evidence presented to the Board, whether DEP's action conformed with applicable law and was reasonable. *Jefferson County*, 2002 EHB at 179, *aff'd* 819 A.2d 604 (Pa. Cmwlth. 2003).

2. Appellant and Intervenor bear the burden of proving that the permit was issued contrary to law or is otherwise unreasonable. 25 Pa. Code § 1021.122(c)(2).

3. In reviewing the application and issuing the permit, DEP failed to properly apply

---

[17] According to § 92.8a(a):

> whenever the Department . . . makes a determination which would change existing or impose additional water quality criteria or treatment requirements, it shall be the duty of the permittee of facilities affected thereby, upon notice from the Department, to promptly take steps necessary to plan, obtain a permit or other approval and construct facilities that are required to comply with the new water quality standards or treatment requirements.

25 Pa. Code § 92.8a(a).

25 Pa. Code § 93.4c(b)(1)(i) when the agency failed to compel Lehigh to undertake the alternatives analysis required by the water quality antidegradation regulation for exceptional value waters.

4. The permit condition granting a variance pursuant to § 77.504(b)(2) did not violate the law and was not otherwise inappropriate under these circumstances.

5. East Penn and Appellant did not prove that public notice of the permit application was deficient or that they were harmed by a failure to provide adequate notice. *Hopewell Township*, 1996 EHB at 970.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WALTER J. ZLOMSOWITCH, Appellant;	:	
EAST PENN CONCERNED CITIZENS,	:	
Intervenor	:	
v.	:	**EHB Docket No. 2002-131-C**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and	:	
LEHIGH ASPHALT PAVING &	:	
CONSTRUCTION COMPANY, Permittee	:	

O R D E R

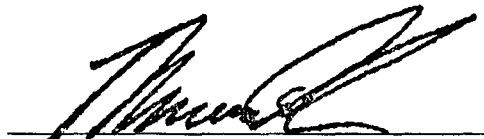
And now this 15th day of November 2004 it is hereby ordered as follows:

1. The appeal of Appellant Walter J. Zlomsowitch and Intervenor East Penn Concerned Citizens docketed at EHB Docket. No. 2002-131-C is sustained;

2. Noncoal Surface Mining Permit No. 13990301 and the incorporated National Pollution Discharge Elimination System Permit No. PA0224014 issued by DEP to Lehigh Asphalt Paving & Construction Company on May 10, 2002 are hereby revoked; and

3. This matter is remanded to DEP for compliance with the obligations imposed by 25 Pa. Code § 93.4c(b)(1)(i) and a proper application of 25 Pa. Code § 93.4c(b)(1)(i) to Lehigh's proposed siltstone/sandstone mining operation in East Penn Township, Carbon County, in accordance with the foregoing opinion. Jurisdiction is relinquished.

ENVIRONMENTAL HEARING BOARD



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THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

Dated: November 15, 2004

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

UMCO ENERGY, INC., Appellant, and UNITED MINE WORKERS OF AMERICA, Intervenor	:	
v.	:	**EHB Docket No. 2004-245-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CITIZENS FOR PENNSYLVANIA'S FUTURE, Intervenor	:	**Issued: November 30, 2004**

OPINION AND ORDER ON
PETITION FOR SUPERSEDEAS

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

Synopsis:

The Board denies an underground mining company's petition for supersedeas. There would be an immediate threat of harm to the environment if a supersedeas were issued. The petitioner is suffering irreparable harm in the absence of a supersedeas, but that harm is resulting in significant part from the petitioner's business decisions and course of conduct. The existing record shows that the petitioner has a very low likelihood of prevailing on the merits because it does not appear that the petitioner will be able to establish the facts necessary to support to its legal theories.

OPINION

UMCO Energy, Inc. operates the High Quality (a.k.a. Maple Creek) Mine, an underground coal mine in Fallowfield Township, Washington County. UMCO mines the

Pittsburgh Coal Seam. UMCO employs more than 400 people, more than 300 of whom are represented by the United Mine Workers of America ("UMW"). (UMW Exhibit ("Ex."1.) UMW has intervened in this appeal in support of UMCO's position.

The Department of Environmental Protection (the "Department") issued Coal Mining Activity Permit No. 63921301 to UMCO. The permit envisioned an operation that would be part room-and-pillar mining and part longwall (a.k.a. full extraction) mining. UMCO for the most part has decided not to mine the room-and-pillar sections, instead concentrating its efforts on longwall mining, which is significantly more profitable. Longwall mining also happens to be safer for the employees working in the mine.

The longwall mining takes place in a series of panels. (Petitioner's Exhibit ("Pet. Ex.") B; Department ("Dep.") Ex. 12.) The three contiguous panels most directly implicated in this appeal are Panels 4E, 5E, and 6E. UMCO's planned but yet to be realized mining of Panel 6E is the immediate subject of this appeal. Panels 4E and 5E are not at issue themselves, but the impact of the previous mining of those panels has significant evidentiary value in this case.

Overlying Panels 4E, 5E, and 6E are two separate branches of an unnamed tributary of Maple Creek. Historically, there have been numerous springs, seeps, and ephemeral streams that feed the two streams. The stream flowing generally north to south over the 4E and 5E panels shall be referred to as the 5E stream. The stream flowing generally west to east starting in Panel 4E and flowing over most of the length of Panel 6E shall be referred to as the 6E stream. Shallow groundwater also contributes to the flow of the streams.

Underground mining results in subsidence. Depending upon a number of factors, the subsidence can manifest itself on the surface. One subsidence impact is a diminution or elimination of the flow of water on the surface in the form of springs, seeps, wetlands, and

streams. One of the most significant factors in predicting whether there will be adverse surface impacts is the depth of cover, which is the amount of rock between the coal seam and the surface. UMCO's operation is a highly unusual, indeed unique, mine because the depth of cover is particularly shallow. Most of the ten or so longwall mining operations in southwestern Pennsylvania may have certain exceptional points where the depth of cover is about 350 feet, but the majority of all of the mines have cover of least 400 feet and up to 1,200 feet. In stark contrast, the relevant panels at UMCO's mine have as little as 210 feet of cover.

Another factor that can determine whether subsidence will manifest adverse effects on the surface is the relative percentage of soft rock and hard rock in the overburden. Soft rock is more pliable, which means that the cracks formed by subsidence fill up faster. That tendency in turn can reduce the amount of long-term damage. The ratio of the overburden above the 6E Panel is 33 percent soft/67 percent hard. That ratio is not particularly favorable.

Another factor in predicting whether there will be adverse subsidence impacts from mining is whether the springs, and therefore the streams fed by those springs, are the result of surface breakouts of perched aquifers. A perched aquifer is a layer of strata that holds and transports water at a certain level in part because of a relatively impermeable layer of rock below it. The impermeable layer does not let the water filter down, so it instead moves sideways and either feeds springs or seeps or goes directly into a stream. Such perched flow is vulnerable to subsidence because the subsidence cracks the confining layer, which allows the groundwater to percolate down instead of out. The springs, seeps, and streams in the pertinent area of the UMCO mine appear to be fed by perched aquifers.

A lineament is a zone of densely spaced fractures. Such fracture zones are conducive to groundwater transport. Such a zone in combination with mining-induced subsidence can result

in greater surface effects than might otherwise have occurred. Based upon the Department's field investigation, including evidence of roof falls, and credible expert testimony, there appears to be a significant lineament running almost the entire length of Panel 6E and into Panel 5E.

The more serious and longer lasting surface effects of subsidence often occur along the edges of a longwall panel. A stream that crosses that tensional zone is more vulnerable in that zone. A stream that flows along the length of such a zone is even more vulnerable. The stream crossing Panels 4E and 5E crosses multiple tensional zones. The stream over Panel 6E not only crosses such zones, a significant length of the stream runs directly over such a zone.

The amount of mining in the watershed is another factor used in determining whether there will be surface impacts. UMCO has already undermined much of the watershed feeding the 6E stream by its mining of Panels 3E, 4E, and 5E. Indeed, the only part of the watershed that remains unmined is almost entirely coincident with Panel 6E.

When UMCO mined in Panels 4E and 5E, *every* spring and seep, as well as the 5E stream itself, went dry. (See, e.g., Dep. Ex. 15, 16.) When the remnants of a hurricane that caused devastating flooding in much of Pennsylvania this past autumn passed through the area, remarkably, the 5E stream stayed dry. (Dep. Ex. 9.) There is conflicting testimony regarding the extent to which some of the springs in the 5E stream's watershed may have shown some signs of recovery, but the recovery must be relatively limited if it has occurred at all because the 5E stream is being fed exclusively by a public water supply line. There was no disagreement among all of the experts who submitted permit reports to the Department and/or who testified at the supersedeas hearing that the impacts upon the 5E stream watershed are the best indicator--by far--of what is likely to occur in 6E.

In short, there is very little doubt at this point that, if UMCO longwall mines the 6E Panel, the 6E springs and stream will either lose flow or dry up completely. Indeed, there was very little dispute about that. UMCO has all but admitted that the loss will occur, at least temporarily.

In the face of these considerations, the Department issued an order to UMCO on November 12 prohibiting UMCO from longwall mining Panel 6E. UMCO filed an appeal that day, and followed it up with a petition for supersedeas immediately thereafter. UMCO laid off almost all of its workforce. Citizens for Pennsylvania's Future ("PennFuture") intervened in support of the Department's position, and as previously noted, UMW intervened in support of UMCO's position. We held a hearing on the petition for supersedeas on November 19, 22, and 23. We also conducted a site view on Saturday, November 20. The site view itself does not constitute evidence, but it was very helpful as a demonstrative aid. Due to the urgency of the situation, UMCO asked (and the other parties agreed) that we rule upon the petition for supersedeas without waiting for a transcript, based upon the record generated and closing arguments made at the hearing.

Supersedeas

The circumstances affecting the grant or denial of a supersedeas petition are described at 25 Pa. Code § 1021.63, as follows:

> (a) The Board, in granting or denying a supersedeas, will be guided by relevant judicial precedent and the Board's own precedent. Among the factors to be considered:
>
> > (1) Irreparable harm to the petitioner.
> > (2) The likelihood of the petitioner prevailing on the merits.
> > (3) The likelihood of injury to the public or other parties, such as the permittee in third party appeals.

> (b) A supersedeas will not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect.

See also 35 P.S. § 7514, to the same effect.

A supersedeas is an extraordinary remedy which will not be granted absent a clear demonstration of appropriate need. *Tinicum Township v. DEP*, 2002 EHB 822, 827; *Global Eco-Logical Services v. DEP*, 1999 EHB 649, 651; *Oley Township v. DEP*, 1996 EHB 1359, 1361-1362. Where the mandatory prohibition against issuance of a supersedeas does not apply, the Board ordinarily requires that all three statutory criteria be satisfied. *Global Eco-Logical Services*, 1999 EHB at 651; *Svonavec, Inc.*, 1998 EHB at 420; *Pennsylvania Mines Corporation v. DEP*, 1996 EHB 808, 810. *See also Chambers Development Company, Inc. v. Department of Environmental Resources*, 545 A.2d 404, 407-409 (Pa. Cmwlth. 1988). Although there have been exceptions, in the final analysis, the issuance of a supersedeas is committed to the Board's discretion based upon a balancing of all of the statutory criteria. *Global Eco-Logical Services, supra*; *Svonavec, Inc.*, 1998 EHB at 420. *See also Pennsylvania PUC v. Process Gas Consumers Group*, 467 A.2d 805, 809 (Pa. 1983).

Likelihood of Success on the Merits

Perennial v. Intermittent Stream

UMCO has put forth a number of related arguments that all have one thing in common: each argument depends in part upon the premise that the Department erred by treating the 6E stream as if it were perennial when it is, in fact, intermittent. For example, UMCO vigorously contends that the Department erred by relying upon the arguably broader definition of a perennial stream found at 25 Pa. Code § 89.5 instead of the definition of such a stream that is averred to be specific to the regulation of subsidence impacts found at 25 Pa. Code §

89.141(b)(2). UMCO also argues that the Department engaged in improper rulemaking by failing to follow past practices generally and its 1997 technical guidance document (#563-2000-655) entitled "Perennial Stream Protection" (Pet. Ex. FF) in particular.

There is no need to get into a detailed analysis of UMCO's legal theories in the context of this supersedeas proceeding because the facts simply did not support UMCO's legal theories. The overwhelming weight of the evidence contained in the existing record supports the Department's conclusion that the 6E stream is perennial under any conceivable combination of the pertinent statutes, regulations, and policies. In other words, even under the reading of the pertinent provisions that are most favorable to UMCO in the way that is most favorable to UMCO, the 6E stream is clearly perennial.

The Department demonstrated based upon a careful, deliberative analysis of the facts and circumstances that the stream or a substantial majority of the 6E stream flows continuously throughout the calendar year. UMCO fell well short of showing that a substantial portion of the stream experiences periods of no flow.

The Department first pointed to the physical characteristics of the stream. An analysis of the rocks, gravel, and silt deposits that make up the stream's substrate supports the conclusion that the stream has continuous flow. The banks of the stream are distinct and well defined and show erosional effects consistent with constant flow. The types of vegetation in and around the stream would not be likely to be present without continual flow. The macroinvertebrates present in the stream include species that would not be present without uninterrupted flow over multiple years. (Dep. Ex. 11.) There is plenty of eyewitness testimony that the stream is running now and runs on a consistent basis. (See, e.g., Dep. Ex. 17.) The stream even has fish in it. It clearly

appears that the preponderance of characteristics relied upon by experts supports a finding of continual flow.

UMCO presented no scientific evidence or expert testimony to refute the Department's conclusions. It presented no response, for example, to the Department biological assessment. It did not comment on the vegetation in and around the stream. Instead, it has made a number of disparaging remarks characterizing the stream as insignificant and unworthy of protection, frequently referring to it throughout the proceedings as a "ditch."

Our first response to UMCO's approach is that, under even the most favorable acceptance of UMCO's theories, a stream is either perennial or it is not. There is no *de minimus* exception under the law for small perennial streams. There is no reduced standard of legal protection for first-order, or feeder, perennial streams.

Secondly, UMCO has attempted to create equities in its favor by characterizing this appeal as dealing with one small stream. That characterization is at once technically true and very misleading. The so-called "ditch" is an integral part of a larger hydrologic system that includes springs, seeps, groundwater flow, and a nearby branch of the same tributary to Maple Creek. When one considers the overall effect of all of the mining on all parts of the system, rather than an artificially isolated view, the effect is not nearly as trivial as UMCO would have us believe. PennFuture's expert witness, who we found to be highly qualified and very persuasive, criticized UMCO's approach (and the Department's historic practice of accepting that approach) of analyzing parts of the same hydrologic system in a highly segmented manner. It should not be surprising to anyone if watersheds appear less and less significant if one looks at smaller and smaller parts as if they are isolated. Neither UMCO nor the Department attempted to rebut this expert testimony.

UMCO has focused the brunt of its case on one section of the 6E stream toward its mouth and argued that *that* particular section goes dry. The evidence indeed supports that contention. But UMCO has not shown us that all of the stream goes dry. Indeed, it never convincingly disputed the point that water continuously flows through most of the length of the stream. The regulation and policy statements upon which UMCO heavily relies characterize a stream as perennial if any "part" of that stream is perennial.[1] Department witnesses testified that it is not rare for a small perennial stream to flow underground for a short stretch at its mouth due to, e.g., alluvial deposits, and that such a feature does not itself stand in the way of classifying the stream as a whole as perennial.

UMCO presented the testimony of the owner of the land through which the 6E stream flows. That witness exhibited a strong, argumentative bias in favor of UMCO. Putting that aside, that landowner never clearly testified that the entire reach of the stream went dry. Rather, he testified that the portion of the stream to the west of Route 481 historically went dry, although even the majority of that section has not dried up for the last three years. The very uppermost sections of the stream in the vicinity of the railroad tracks appear to be intermittent, but those sections overlie Panels 4E and 5E.

UMCO takes offense with the Department's reliance upon a biological assessment. UMCO equates that reliance to the Department's mistaken reliance on the wrong regulatory definition of "perennial." Again, we will not quibble with UMCO's legal position. But even if the presence of certain species in the stream cannot be used as a litmus test or as the operative regulatory criterion, it is perfectly proper to rely upon such biological information as

[1] There is no need to decide here what percentage of a stream must flow perennially in order to consider the entire stream perennial. We can easily conclude, however, that it is just as inappropriate to focus on one small section of interrupted flow in arguing that a stream is intermittent as it is to focus on one small section of continuous flow to argue that flow is continuous. It is most appropriate to look at the stream as a whole. Here, the substantial majority of the length of the stream exhibits perennial characteristics.

circumstantial evidence of continuous flow. The fact that certain macroinvertebrates would not be present absent perennial flow may not be conclusive, but it is certainly relevant evidence.

UMCO pointed to designations on various maps (e.g. the USGS map) and demonstrative exhibits based on those maps depicting the 6E stream as "intermittent." We accept as credible the testimony, expert and otherwise, that it is necessary to "ground truth" such maps, particularly for small headwater streams such as the 6E stream. The potential inaccuracy of such maps was verified by the fact that all parties agreed that the maps did not accurately depict the actual location of the 6E stream channel. If the map cannot get the location of the stream right, there is no reason for us to consider the map as somehow binding and beyond dispute on whether the stream is "intermittent." The map designations fall well short of overcoming the overwhelming field evidence of continuous flow.

UMCO showed that the Department historically accepted one photograph of one part of a stream on one day to show that an entire stream is intermittent. Expert testimony that we find credible was presented to suggest that this practice was scientifically invalid and subject to abuse. In this very appeal, almost all of UMCO's photographs focused in on the one part of the 6E stream where everyone agreed that flow occasionally goes underground. In any event, this Board is certainly not bound by the Department's historical practices, and UMCO did not allege that the practice was ever documented in even as much as a policy statement, let alone a statute or a regulation.

In sum, we have little hesitation in finding that the Department's finding of continuous flow is well supported in the record. UMCO's arguments founded upon the notion that the Department applied a "new" standard or changed the rules in midstream lack a *factual*

foundation. Even under the "old" standard, the stream is perennial, and therefore, entitled to some level of protection from the surface impacts of subsidence.

Degree of Protection

In truth, UMCO has not relied heavily upon either the contention that the 6E stream will remain unaffected or that the stream is intermittent. Indeed, in seeking approval from the Department to mine the 6E Panel, UMCO agreed to treat the stream as if it were perennial. Although our review is *de novo*, the fact that UMCO itself dealt with the Department as if the stream were perennial does not escape attention.

UMCO instead contends as follows: (1) the damage to the 6E stream will be minimal, and any damage will certainly not be enough to materially affect the stream's limited value and reasonably foreseeable uses; (2) the stream (and springs?) will recover in two years or so; and (3) in the interim, mitigation measures including flow augmentation will be adequate to protect the stream's value and its uses. UMCO passionately argues that the law does not prohibit all pollution, and that UMCO's proposals are more than adequate to satisfy all applicable statutory and regulatory requirements.

We will take the same approach with this group of issues as we did with the group of issues regarding the perennial/intermittent dichotomy. We accept UMCO's legal theories as true for purposes of addressing the petition for supersedeas. Once again, however, UMCO is not likely to succeed on the merits because the facts necessary to support its theories simply are not there.

Thus, we accept for current purposes UMCO's contention that the various applicable statutes and regulations acting in combination do not prohibit all adverse effects upon the waters of the Commonwealth from subsidence, but instead, only require that a stream's value and

reasonably foreseeable uses be preserved. UMCO is nevertheless unlikely to prevail because the Department and PennFuture have presented a convincing case that the damage to the 6E stream is likely to be severe. As discussed above, the feeder springs and the 5E stream have largely disappeared, and the experts credibly predict that the same thing is likely to occur to the 6E springs and stream. We find these predictions to be credible in light of the factors discussed above, such as the shallow cover, the large percentage of the watershed mined or to be mined, etc. There was no debate that the geological and other characteristics of the two contiguous areas are essentially the same. The nearly complete elimination of springs, seeps, wetlands, and a stream does not preserve the stream's value or protect its reasonably foreseeable uses, whatever they may be.

UMCO presented evidence that the springs and seeps that feed the 6E stream do not cumulatively amount to much flow, the implication being that eliminating the springs and seeps will have limited impact on the stream itself. The Department presented expert and other testimony to the effect that UMCO's measuring techniques were flawed. We think that this debate, perhaps, misses the point. The weight of the evidence shows that the mine subsidence will adversely affect shallow groundwater flow, which is in part manifesting itself at the surface as springs and seeps. There did not appear to be any dispute that the 6E stream is both directly and indirectly, largely if not completely, the product of shallow groundwater flow. The percentage of that flow coming from springs as opposed to base flow is not particularly relevant. If UMCO is arguing that the flow will still end up in the stream even if the springs all disappear, the evidence is inconsistent with that supposition. Among other data, there has been no such effect in the 5E watershed. To the extent UMCO asserts that lowered groundwater will continue to feed lower streams, we cannot disagree, but that does not help the 6E stream. Even if we put

groundwater issues aside and focus exclusively on surface flow, distinguishing between the flow in seeps and springs and the flow in a first-order, headwaters stream is a rather artificial exercise.

We do not wish to leave the impression that UMCO presented *no* evidence in support of its claim that mining will only cause minimal damage. UMCO presented the expert testimony of its chief engineer, whose testimony we found to be helpful and sincere. However, he only testified to a limited extent regarding hydrogeological issues. Much of that testimony went to the likelihood of pooling. He also pointed out such factors as the relatively small size of the watershed, the portion of the 6E stream in the compressional (as opposed to tensional) zone, the orientation of the panel, and the direction of mining as factors that typically reduce adverse subsidence impacts to surface waters. These factors and the testimony in general, however, do not overcome the overwhelming weight of credible expert opinion and other evidence showing that the impacts to surface water in the watershed are likely to be extensive. (Pet. Ex. AA; P.F. Ex. B-H.)

UMCO next argues that any damage that occurs will be temporary, and it is legally acceptable to cause damage, even to reduce a stream's value and fail to protect its foreseeable uses, so long as the company repairs the stream to the extent technologically and economically feasible. We will again accept UMCO's legal position. Yet again, even when we do so, UMCO's *factual* case fails to support its legal theories.

The Department and PennFuture presented strong and convincing technical evidence and expert opinion that the damage to surface waters above the 6E Panel is likely to be permanent. Among other things, they point to the location of the stream in relation to tensional zones and the perched nature of the aquifers that are supplying the surface waters. Despite the high rainfall amounts over the last year (Dep. Ex. 10), the springs in the 5E watershed have failed for the most

part to show any promise of a full recovery. It is true that mining did not occur that long ago, but according to the credible testimony, one would have expected more than a nominal recovery at this point.

UMCO put on very little evidence to counter the Department's position that the damage is likely to be long-lived. UMCO assumed in its bonding calculations that the stream would need to be augmented for two years, but that number was not endorsed by the Department and it otherwise appears to us to be an arbitrary number based upon little more than conjecture. UMCO certainly did not present any evidence to support that particular amount of time.

The truth is that no one knows if or when the watershed will recover. The potential for a long-term, complete elimination of all surface waters (beyond ephemeral flow) in the watershed, with no end in sight, combined with similar effects and uncertainty in the neighboring watershed, is simply not the sort of damage permitted under even the most permissive reading of the pertinent legal provisions once it is established, as it was here, that the stream is perennial.

UMCO pointed to the fact that limited data from piezometers has arguably shown some recovery in groundwater levels in the 4E/5E area. Whether the data shows true recovery was disputed, but taking recovery as a given, that fact is in no way inconsistent with the Department and PennFuture's claims. The Department and PennFuture's theory is not that the subsidence will eliminate all groundwater in the watershed, or send all of the groundwater into the mined-out levels. Rather, the subsidence will lower shallow groundwater levels to the point that there is a marked impact to surface water features. This case is all about surface water. The groundwater data does not disprove the basic theme of the Department's case.

UMCO points out that there has been no added inflow to the mine as a result of mining in Panels 4E and 5E. This contention is not backed up by any data, such as flow data at the NPDES

discharge. But even accepting it as true, again, the Department does not contend that all groundwater will percolate down to the 200-foot level.

Faced with the absence of any technical evidence to support its claim of temporary damage, UMCO was forced to rely on anecdotal evidence, evidence that some springs do appear to flow in the watershed, and alleged admissions of Departmental personnel that the 5E watershed is "healing." There was reference at the hearing to the fact that many damaged surface waters recover after mining. There was also reference that many do not. This approach is not particularly valuable in assessing the impact in this particular watershed. We accept as credible the testimony of multiple Department witnesses that the springs that appear to have recovered in the 4E and 5E areas are likely exhibiting the ephemeral effects of precipitation events. There is no convincing evidence that the overwhelming majority of the headwaters have recovered. Certainly, the stream itself appears completely dependent on life-support provided by city water. Finally, the alleged admissions of Department personnel were denied. Even if made, they do not detract from the hearing testimony of hydrogeologists and the field personnel with direct knowledge to the contrary.

UMCO's final fallback is that it should be permitted to mine because it has committed to preserve the value and reasonably foreseeable uses of the stream through mitigation measures, including stream flow augmentation, until the stream recovers to its natural state. We will put aside any concerns that this argument is inconsistent with the black-letter environmental principle that mitigation is normally only allowed to make up for *unintended* consequences, and cannot normally be used to excuse irreparable damage in advance. *See* 25 Pa. Code § 89.142a(h)(2). UMCO's position must nevertheless fail for a number of reasons. First and most obviously, there has been no showing that the damage to surface waters is likely to be temporary.

UMCO has never suggested that permanent augmentation would be acceptable. Thus, the basic foundation of UMCO's argument fails.

Secondly, even if we assume that the damage will only last, say, two years, UMCO has failed to prove that the mitigation measures that it has proposed will *in fact* be adequate to protect the stream's uses, or that they together will repair the stream to the extent technologically and economically feasible. The Department's expert in stream biology testified that the evidence is inconclusive at this point on whether augmentation of the 5E stream has been adequate to preserve its use as a warm water fishery. We find this conclusion to be credible. It would be inappropriate to simply *assume* that pumping millions of gallons of city water into a preexisting stream channel over a period of years (11 million gallons so far) is sufficient to preserve a healthy warm water fishery. There is no evidence to support such an assumption. There was no evidence of what impact the augmentation would have on the second and third order streams, which is emblematic of the highly piecemeal evaluations that have occurred at this mine. As previously noted, PennFuture's expert testified quite convincingly that it is scientifically inappropriate to evaluate the various portions of the watersheds as if they were isolated features.

The Department never actually approved the mitigation measures proposed by UMCO for the 6E stream.[2] The weight of the evidence at this point does not provide any comfort that the measures will work. Of course, they do nothing to repair the springs and seeps, which are essential to return the watershed to a natural state. Furthermore, other than the hydrant flow, they have not worked in the 5E stream basin. It is very difficult to repair a crack in a stream, and even a very tiny crack can dewater a stream. In any event, repairing cracks in a stream is like

[2] Those measures include flow augmentation by wells and possibly city water. (The wells drilled to augment the 5E stream have not been reliable.) They include a bond to ensure that augmentation is implemented, the repair of cracks in the stream channel, 24-hour monitoring during mining, and other measures.

creating an impermeable pencil-width strip across the surface of a sponge. Subsidence will cause cracks over many areas of the panel, not just in the stream channel. The cracks also extend to depth. Those crack will compromise the confining layers that enabled shallow flow to create surface features and facilitate groundwater flow down and away from the stream channel regardless of what measures are taken in the channel itself. The hope that all of the cracks will eventually fill in, if you will, to the point that none of them will affect groundwater flow has not been shown to be anything other than wishful thinking at this point.

Consistent with its position on other issues, in the absence of credible technical support for its claim that the mitigation measures will be adequate, UMCO is left to make nontechnical arguments. Here, it argues that the Department approved similar mitigation measures on 5E, so the Department must do so on the 6E Panel. It is worth noting that the 4E and 5E Panels are the subject of other appeals before this Board.[3] Suffice it to say at this juncture that it is not clear that the Department's approval of the mitigation measures to be implemented at the 5E panel constituted a technical endorsement of the measures, particularly with regard to any future panels. In any event, the measures, aside from city-water augmentation, have not worked, and the jury is still out on the effect of long-term augmentation on the warm water fishery. The Department is not somehow estopped from considering the 6E panel on its own merits by any decision it made on the 5E panel.

UMCO's submissions to the Department demonstrate that undermining panel 6E is likely to cause pooling in the 6E stream if there is flow. That pooling could be remedied by in-stream measures, but those measures might require a Chapter 105 permit, which UMCO does not have. If the evidence suggests dewatering, which we believe it does, the potential for pooling has less

[3] It is also worth noting as a curiosity if nothing else that UMCO did not identify the appeal relating to the 5E panel as a "related appeal" in its notice of appeal in this case, and it specifically averred that the issues raised in this case are unrelated to the appeal concerning the 4E panel.

relevance. It does however, suggest that UMCO's proposed augmentation measures fall short of technologically and economically feasible repairs in the absence of approval--neither sought nor obtained--to work in the stream channel itself.

In sum, UMCO has failed to prove as a factual matter that it will be able to protect the value and reasonably foreseeable uses of the 6E stream, or that it has proposed to repair any damage that does occur to the extent technologically and economically feasible. Therefore, UMCO's argument that those standards govern its actions here and circumscribe the Department's authority fail on factual grounds. We leave the resolution of the underlying legal questions for the hearing on the merits.[4]

Miscellaneous

UMCO devoted considerable attention during the hearing to establishing the chronology of meetings, telephone calls, and other events leading up to the Department's order. We repeatedly asked at the hearing why this history was relevant. Although we never received a completely satisfactory answer, it appears that UMCO was attempting to show that the Department's order was motivated by pure politics, personal vendetta, or some other nefarious motive. UMCO might also have been suggesting some sort of estoppel theory, or that the Department should be penalized because it was not more forthcoming in the weeks leading up to the final review of UMCO's hydrologic study of the 6E stream and the issuance of the order. UMCO will certainly have the opportunity to develop these theories more as the case progresses, but at this point, we see no basis for granting a supersedeas based on these somewhat nebulous claims. There is every indication at this point that the decision to issue the order was grounded upon a careful, scientific review of the available data, the vast majority of which was generated

[4] At the risk of stating the obvious, UMCO's prospects would be further reduced if the Department and/or PennFuture's more stringent interpretations of applicable law prevail.

by UMCO itself. Our observation of the Departmental employees' testimony and demeanor is that the issuance of the order was a painful decision that they took very seriously, and we see no evidence at this point of any improper bias or motive, a lack of proper notice, any grounds for estoppel, or a likelihood of success on any other chronology-based theory.

UMCO has asserted a takings claim. That claim is premature because a taking cannot occur until the administrative process, including a hearing on the merits before the Board, winds its course. *Agins v. City of Tiburon*, 447 U.S. 255, 263 (1980); *Gardner v. DER*, 603 A.2d 279 (Pa. Cmwlth. 1992); *Sedat v. DEP*, 2000 EHB 927. Further, the remedy for a successful claim of taking without just compensation is an award of that compensation. The claim does not strike us as a valid basis for supersedeas relief. To the extent it is necessary to predict the success of the claim, based upon such recent holdings as *Machipongo Land & Coal Co. v. DEP,* 799 A.2d 751 (Pa.), *cert. denied*, 123 S.Ct. 486 (2002) and *Davailus v. DEP,* 2003 EHB 101, UMCO is not likely to prevail in showing that the Department's reasonable efforts to protect the watershed will eventually be determined to be an unconstitutional regulatory taking without just compensation.

UMCO has also posited that it has been deprived of property without due process, a claim which is difficult to accept after an intensive, multiday hearing based upon *de novo* review a few days after the issuance of the Department's order. UMCO is not likely to prevail on this, or any other claim that it has made, on the merits.

Likelihood of Public Injury/Threat of Pollution

It is important to understand that the practical effect of a supersedeas in this appeal is that the mining of Panel 6E would be almost certain to start immediately. The Department must still approve the six-month mining map, but there does not appear to be any impediment to mining other than the stream issue. If this Board removes that roadblock, there does not appear to be

any reason why UMCO could not begin mining. The longwall equipment is set up and ready to go. The mining will immediately extend under the mouth of the 6E stream. Whatever damage does occur will begin to occur quite literally within days or perhaps even hours of the mining. (There was no dispute that the subsidence effects of longwall mining are witnessed almost immediately.) The mining of Panel 6E would be completed within 45 days or so, rendering the hearing on the merits all but moot.[5] This reality weighs heavily on our mind.

Given UMCO's condition, as well as the length and intensity of the proceedings, it is easy to forget that our sole immediate task is to determine whether a supersedeas should issue while the litigation goes forward. A supersedeas is a temporary remedy designed to preserve the current situation until the full Board has an opportunity to consider the matter based upon a thorough record. *Global Eco-Logical, supra.* Yet, here, the practical effect of what is intended to be a temporary measure will indisputedly have immediate and potentially irreversible effects.

As discussed at length above, the Department has put on a strong case in support of its finding that there will be extensive, permanent damage to the watershed in general and the 6E stream in particular. UMCO in our view has not succeeded in rebutting that conclusion. We believe, based on what is admittedly a limited record, that there is a strong possibility, in fact, a probability, that the mining will cause a substantial, long-lived loss of value and use, and it has not been shown that loss can be adequately repaired under the measures proposed by UMCO. But even if we thought the issue was a closer call, we are compelled by principles of supersedeas jurisprudence to err on the side of caution. *See Tinicum Township*, 2002 EHB at 829 (deepening of mine superseded in part because of threatened damage to wells); *Indian Lake Borough v. DEP*, 1996 EHB 1372, 1373-74 (mining that would have dewatered lake, if shown, would have been superseded). *Compare Roaring Spring v. DEP,* 2003 EHB 825 (no supersedeas issued

[5] Indeed, we note that UMCO has filed a motion to dismiss the appeal regarding the 5E panel as moot.

because no showing of any hydrologic connection between quarry and a water-supply spring; no threat of environmental harm). Whether as a factor in the balancing analysis or as an outright prohibition, the threat of harm here clearly weighs in favor of denying the supersedeas.

UMCO has argued that, in balancing the harm to the environment and the harm to the petitioner, we should take the small size and limited uses of the 6E stream into consideration. Although the small size and limited uses of the stream has little relevance in assessing UMCO's likelihood of success on the merits of its legal claims, we agree that such information may have some relevance in weighing the equities in a supersedeas proceeding. Although it is used for livestock, the 6E stream does not serve as a public water supply. It is on private land. It is a small, first-order stream. We agree with UMCO that the somewhat humble nature of the headwater stream at issue here is one factor that militates in favor of UMCO in our review of its supersedeas petition. *See Tinicum Township*, *supra* (noting mine pumping was having an effect on water supply wells); *Indian Lake Borough*, 1996 EHB at 1373-74 (discussing value of lake allegedly threatened by mining).

We cannot overemphasize, however, that this discussion of balancing equities in the context of a supersedeas has no relevance to the *legal* status of the stream. We also repeat that it is inappropriate to segment watersheds down to components that may appear inconsequential when improperly viewed in isolation. We nevertheless give credence under the circumstances to UMCO's argument that the value of the resource at issue is relevant in this particular supersedeas proceeding. On that note, we acknowledge the important point that the coal in Panel 6E is a valuable, high quality resource.

Harm to the Petitioner

The facts and the law on the merits at this juncture appear to be squarely against UMCO. The immediate probability of irreparable harm to the environment in the event a supersedeas is issued also weighs against UMCO, although not as heavily as it would have if particularly valuable surface waters were at stake. In the face of these considerations, UMCO has, not surprisingly, placed its greatest emphasis on the harm that it is suffering in the absence of a supersedeas.

UMCO presented little in the way of documentary evidence to substantiate its claim of irreparable harm. (Pet. Ex. X.) In fact, the level of information that it supplied would probably not have sufficed to support a claim of inability to prepay a civil penalty under the Board's rules. *See* 25 Pa. Code § 1021.55; *Goetz v. DEP*, 1998 EHB 955. UMCO's financial data was sketchy at best, and omitted key information, such as revenues and profits. Nevertheless, for current purposes we will accept UMCO's testimony at face value that it is in dire financial straights. To some extent, this situation weighs in favor of UMCO in this proceeding.

We have no hesitation whatsoever in concluding that employees represented by the Intervenor, UMW, are suffering horribly as a result of UMCO's decision to lay them off, repeatedly and perhaps indefinitely. The Intervenor bears no fault for what has occurred here, and its members have been caught in the middle of bad situation not of their own making. The harm being suffered by the Intervenor's members is a relevant factor and weighs in favor of UMCO's petition. We reject PennFuture's contention that the harm could be ameliorated because the miners might be able to find work in mines elsewhere in the country.

While irreparable harm is unquestionably being suffered, the Department and PennFuture argue that the harm should be discounted in the Board's analysis because the Department's order

is, at most, a contributing factor. The point is well taken. Where, as here, the irreparable harm to the petitioner that is being suffered is being caused in substantial part by the petitioner itself, it becomes a factor that is less compelling than it otherwise might have been in favor of granting a supersedeas. *Tire Jockey Services, Inc. v. DEP*, 2001 EHB 1141, 1160; *Nicholas v. DEP*, 1992 EHB 219, 224. The evidence shows that this latest Departmental order may be little more than the proverbial straw that imperils the camel's back. UMCO is at least partly responsible for where it finds itself due to its (1) aggressive business plan and (2) questionable course of conduct leading up to the current state of its operation.

With regard to the business plan, it would not be too far from the truth to characterize the High Quality Mine as a high risk operation from the perspective of *environmental* risk. The cover is the shallowest by far of any longwall operation in the southwestern Pennsylvania. The area above the mine is relatively crowded, with plenty of homes, roads, gas lines, power lines, water lines, not to mention the streams.

UMCO has entered into contractual commitments that it would not be able to satisfy even if it were able to mine Panel 6E. It has almost no coal stockpiled. It has a very optimistic operations schedule that it would not have been able to keep up with even without difficulties associated with Panel 6E. It claims to have a very high level of debt. (Pet. Ex. LL.) Its cash flow is such that it alleges that it cannot mine one panel without generating cash from the previous panel. It has pushed the Department at every step of the way to complete its environmental reviews for one part of the site while it rapidly mines in other parts. UMCO's increasingly acrimonious relationship with the agency responsible for regulating it on a daily basis does not portend well, with or without Panel 6E. *See Global Eco-Logical Services*, 1999

EHB at 658 (in a highly regulated industry, a good working relationship with the regulators is absolutely essential to the long-term success of the business).

We have no intention of telling UMCO how to run its business, and we are not being critical in any way of its business approach. Indeed, it might be viewed as courageously entrepreneurial. Our only point is that such an approach creates increased exposure that makes a company more vulnerable when something goes wrong. There is and should be no reduced level of environmental protection for operations that consciously expose themselves to these heightened risks.

UMCO's claim that it is in dire financial straights cuts both ways. The claim bolsters its case that a supersedeas is critical to its survival, but it also makes us wonder whether a supersedeas would merely delay where this operation was headed anyway. If we could have been assured that UMCO could be restored to good health with a supersedeas, that the miners would thereafter have a steady source of *long-term* employment (a point very much in dispute), that there would be no similar environmental concerns at future panels (again, very questionable according to the record at this point given the mine's shallow cover), we might have been more inclined to remove the roadblock to Panel 6E mining.

To further illustrate this point, when UMCO was initially denied permission to mine Panel 5E, it laid off all of its workers. UMCO eventually obtained permission to mine, and the workers obtained a few more weeks of work. We now find ourselves in the exact same position, and we are left to wonder how long this unacceptable cycle will continue. UMCO has not obtained all of the necessary approvals to mine Panel 9E, the next panel after Panel 6E. UMCO will not be ready to longwall mine there for months, even though mining Panel 6E would only take 45 days or so. Given this ongoing state of affairs, we are certainly less anxious than we

otherwise might have been to risk irreparable environmental damage by issuance of a supersedeas.

With regard to course of conduct, the credible evidence shows that the Department warned UMCO that it was concerned with mining in 6E as early as February 2004. Since February, the Department has consistently put UMCO on notice that it might have difficulty obtaining approval to mine Panel 6E. (Dep. Ex. 7, 8.) The Department, of course, had an obligation to give UMCO every opportunity to prove its case, but we do not agree that it encouraged UMCO or gave it hope in any way. Very much the contrary.

Not only did Department witnesses testify to this effect, objective events confirm that UMCO was assuming considerable risk by moving full speed ahead as if no impediments could possibly stand in its way. After UMCO mined Panel 4E, the Department issued an order to UMCO because of damage to surface waters. Then, the Department actually denied UMCO permission to mine Panel 5E. That decision was reversed only after a series of meetings in Harrisburg.

In the face of these developments and these warnings, UMCO proceeded to prepare to mine Panel 6E as if authorization were a *fait accompli*. It developed the panel, installed the longwall equipment in place, and readied the stream mitigation measures. It is somewhat disingenuous to now suggest that the Department abruptly and unfairly surprised UMCO with its order based upon exactly the same reasons that it forecast as long ago as February.

This situation is analogous to a manufacturer with air and water emissions building a major expansion of its factory that will increase those air and water emissions without first obtaining the permit amendments necessary to do so. It may or may not be a reasonable *business* decision for the company to build the expansion before obtaining the permit amendments,

particularly in the face of Department warnings, but if the approvals are thereafter denied, the company should not be said to have enhanced its equitable position before a reviewing tribunal because it took that risk. The analogy is far from perfect, but it illustrates the point that environmental protection standards should not be relaxed simply because a business makes certain decisions that put it in harm's way.

We repeat that it is not our intent to criticize UMCO for, say, completely installing the longwall equipment in Panel 6E while the Department was telling it for months that it could very well be prohibited from longwalling in that area. If the Department had approved the mining, the risk would have paid off well. We simply point out that, when we consider irreparable harm to the petitioner, these sorts of considerations must factor into our analysis.

Conclusion

UMCO, joined by UMW, has suggested that a supersedeas with a bond and/or other conditions might be acceptable. They point out that we issued such a conditional supersedeas in *Global Eco-Logical Services,* 1999 EHB at 659-60. However, in *Global*, there was no showing of a threat to the environment so long as the company operated in accordance with its permit. The conditions in the *Global* supersedeas order were designed to ensure that the company complied with the permit. Here, whether mining in accordance with the permit threatens the environment is the very essence of the dispute. Imposing conditions to ensure compliance with the permit would not address the basic dispute about whether admittedly full compliance with that permit (and subsidence plan) will result in harm.

At the hearing, we suggested the possibility of a supersedeas with a bond that included a component for potentially long-term natural resource damages (i.e. over and above the cost of augmentation), but that suggestion, admittedly novel, went nowhere. We doubt that such an

approach would have been acceptable in any event where, as here, irreparable damage is predicted in advance.

In conclusion, the petitioner is suffering irreparable harm without a supersedeas, but the harm is partly of its own making. The surface waters in question are likely to suffer irreparable harm if a supersedeas is issued, but the watershed cannot be said to be a uniquely valuable resource. The threat to the environment appears at this time to be immediate and real. The long-term benefits of a supersedeas are dubious. As to the likelihood of success on the merits, even if we adopt UMCO's legal theories for our current purposes, the facts simply do not support UMCO's position. Given the factual record that we have before us, UMCO has a low likelihood of success on the merits on any of its claims. The Department has a high likelihood of being able to prove that it had the authority to issue the order, and that the order is otherwise lawful and reasonable. Considering all of these factors in light of the totality of the circumstances, we conclude that the issuance of a supersedeas is not warranted.

Accordingly, we enter the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UMCO ENERGY, INC., Appellant, and UNITED MINE WORKERS OF AMERICA, Intervenor	:	
v.	:	**EHB Docket No. 2004-245-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CITIZENS FOR PENNSYLVANIA'S FUTURE, Intervenor	:	

ORDER

AND NOW, this 30th day of November, 2004, following a hearing, it is hereby ordered that the petition for supersedeas is denied. The Board is amenable to an expedited consideration of this appeal on the merits.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: November 30, 2004

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

TRI-COUNTY INDUSTRIES, INC. and TRI-COUNTY RECYCLING, INC.	:	
v.	:	**EHB Docket No. 2004-085-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CRAWFORD COUNTY SOLID WASTE AUTHORITY and MERCER COUNTY SOLID WASTE AUTHORITY	:	**Issued: December 9, 2004**

OPINION AND ORDER ON MOTION FOR PROTECTIVE ORDER

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Where the appellants have agreed to conduct depositions at the location requested by the Crawford County Solid Waste Authority in its Motion for Protective Order, we need not address this issue. That portion of the motion seeking to delay depositions until after the appellants have responded to Crawford County's request for production of documents is denied since under the Pennsylvania Rules of Civil Procedure, discovery may be conducted in any sequence. Although the appellants' response to the request for production may be late, the proper method of dealing with that is by filing a motion to compel. That portion of the motion contending that the depositions are unnecessary since Crawford County has turned over all relevant documentation also is denied since the appellants are free to request document production as well as take

depositions. Finally, Crawford County's request to stay further discovery pending a decision on a motion to strike that it intends to file in accordance with the deadlines established in the amended joint proposed case management order is denied as untimely. If and when any party files a dispositive motion in this matter, the Board may at that time entertain a motion to stay discovery.

OPINION

The appellants in this matter are Tri-County Industries, Inc. and Tri-County Recycling, Inc. Tri-County Recycling, Inc. is wholly owned by Tri-County Industries, Inc. Both companies will be collectively referred to in this Opinion as "Tri-County." Tri-County owns and operates a materials receiving facility that processes recyclable materials. Tri-County has appealed from the issuance by the Department of Environmental Protection (Department) of two Recycling Development and Implementation Grants awarded from the Recycling Fund established by the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, *as amended,* 53 P.S. §§ 4000.101 – 4000.1904. The grants were awarded to the Crawford County Solid Waste Authority (Crawford County) and the Mercer County Solid Waste Authority.

On November 18, 2004, Crawford County filed a Motion for Protective Order regarding Tri-County's notice to depose Crawford County and Etienne Ozorak on November 22, 2004 in Pittsburgh. Crawford County sought to prevent the depositions on the grounds they were scheduled at an improper location and were untimely and unnecessary.

Location

Crawford County believes that any deposition in this matter should be conducted in Meadville, Pennsylvania since both its office and that of the Northwest Region of the Department are located in Meadville. Although Tri-County does not believe that all depositions in this appeal should be scheduled in Meadville since neither its office nor that of the Mercer

County Solid Waste Authority are located there, it has agreed to conduct the deposition of all representatives of Crawford County in Meadville. Therefore, we need not address this issue.

Timing

Crawford County asserts that the depositions are untimely since Tri-County has not responded to its request for production of documents that was sent to Tri-County on September 1, 2004. However, as correctly noted by Tri-County in its response, Pa.R.C.P. 4007.3 allows discovery to be conducted in any sequence, and the fact that one party is conducting discovery shall not operate to delay another party's discovery. If Crawford County is seeking to require that Tri-County respond to its request for production, the proper means for doing so is by filing with the Board a motion to compel, and then if Tri-County again fails to respond, a motion for sanctions.

Necessity for Further Discovery

Crawford County asserts that it has produced all of its documentation in connection with the grant application; in addition, all of the records connected to the grant application are public records and subject to inspection. Based on this, Crawford County appears to argue that the deposition of its representatives is unnecessary. Pa.R.C.P. 4001(d) allows a party to obtain discovery "by one *or more*" of the methods listed therein. (Emphasis added) These methods include depositions and a request for the production of documents. Tri-County is free to conduct discovery in whatever manner it sees fit so long as it complies with the Board's rules and the Pennsylvania Rules of Civil Procedure pertaining to discovery. Simply because Crawford County may have provided documents to Tri-County either in response to a request for production or as public records does not limit Tri-County from also taking the deposition of Crawford County's representatives.

Stay of Discovery

Finally, Crawford County has requested a stay of discovery pending a decision on a motion to strike Tri-County's appeal that Crawford County apparently intends to file in accordance with the deadlines established in the amended joint proposed case management order recently issued by the Board. If and when such a motion is filed, the Board may entertain a motion to stay discovery at that time. However, the Board is not inclined to grant a stay pending a decision on a motion that has not, and may never, be filed.

In conclusion, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TRI-COUNTY INDUSTRIES, INC. and TRI-COUNTY RECYCLING, INC.	:	
v.	:	**EHB DOCKET NO. 2004-018-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 9th day of December 2004, Crawford County's Motion for Protective Order is granted in part and denied in part as follows:

1. Because Tri-County has agreed to conduct the depositions of Crawford County's representatives in Meadville, should Tri-County wish to reschedule the depositions of Crawford County and Etienne Ozorak, said depositions shall be conducted in Meadville, Pennsylvania.

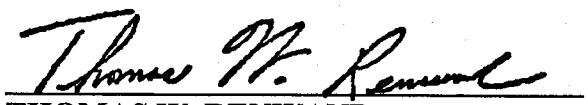
2. Crawford County's motion to delay the depositions of its representatives until after Tri-County has responded to its request for production of documents is **denied.**

3. Crawford County's motion to prohibit the deposition of its representatives on the basis that it has produced all documentation in accordance with the grant application is **denied.**

4. Crawford County's motion to stay further discovery pending a decision on a motion to strike Tri-County's appeal, which Crawford County states it intends to file in accordance with the amended joint proposed case management order, is **denied.**

EHB Docket No. 2004-085-R

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administration Law Judge
Member

DATE: December 9, 2004

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

UMCO ENERGY, INC., Appellant, and UNITED MINE WORKERS OF AMERICA, Intervenor	:	
v.	:	**EHB Docket No. 2004-245-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CITIZENS FOR PENNSYLVANIA'S FUTURE, Intervenor	:	**Issued: December 13, 2004**

OPINION AND ORDER ON PETITION TO AMEND ORDER

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

Synopsis:

The Board denies a motion to certify an order for interlocutory appeal. The order, which denied a supersedeas petition, did not involve a controlling question of law, and an immediate appeal from the order would hinder, not advance, the ultimate termination of the matter.

OPINION

Background

The Department of Environmental Protection (the "Department") issued an order to UMCO Energy, Inc. ("UMCO") on November 12, 2004, which effectively prohibited UMCO from longwall mining Panel 6E of its High Quality Mine in Fallowfield Township, Washington County. UMCO is still permitted to mine by the room and pillar method in the 6E area. UMCO

immediately laid off most of its workforce following receipt of the Department's order and filed an appeal from the order with this Board.

On November 15, 2004, UMCO filed a petition for a temporary supersedeas and a petition for a supersedeas. The practical effect of a supersedeas in this case would have been to allow UMCO to begin and complete all longwall mining of Panel 6E. If a supersedeas had been issued, the mining would have started and finished long before the Board would have had an opportunity to adjudicate the appeal on the merits.

In consideration of the furloughed workers and UMCO's representation that it faced serious financial circumstances in the absence of a supersedeas, we held a conference call on November 16, the day after the petitions were filed. At the strong urging of UMCO, we scheduled a supersedeas hearing to begin that Friday, November 19. We postponed a previously scheduled hearing in another matter to allow UMCO's supersedeas hearing to continue on November 22 and 23. Due to the fact that we scheduled the hearing on the supersedeas petition to begin on the fourth day after the petition was filed, UMCO withdrew its request for a temporary supersedeas.

We held three days of hearings on November 19, 22, and 23. We also conducted a site view on Saturday, November 20. At the urgent request of UMCO, we agreed to issue our decision on the supersedeas petition without the benefit of hearing transcripts or post-hearing briefs.

Under the intense circumstances leading up to the issuance of our order, the parties and their counsel performed with great skill and professionalism. Despite their Herculean efforts, however, no party was able to put on a complete case on the merits. There was no opportunity for discovery or proper trial preparation. No party was able to call all of the witnesses that it had

hoped to call. There has been almost no briefing of the legal issues. Much work remains to be done in this case.

Following the hearing, we deliberated over the Thanksgiving holiday and issued our Opinion and Order on Tuesday, November 30. We denied the petition for supersedeas based upon a balancing of all the pertinent supersedeas criteria. We did not find any one factor to be dispositive. Although it would not be efficient to attempt to summarize here the myriad of considerations that we outlined in our 27-page opinion, it might be convenient to repeat our concluding paragraph for ease of reference:

> In conclusion, the petitioner is suffering irreparable harm without a supersedeas, but the harm is partly of its own making. The surface waters in question are likely to suffer irreparable harm if a supersedeas is issued, but the watershed cannot be said to be a uniquely valuable resource. The threat to the environment appears at this time to be immediate and real. The long-term benefits of a supersedeas are dubious. As to the likelihood of success on the merits, even if we adopt UMCO's legal theories for our current purposes, the facts simply do not support UMCO's position. Given the factual record that we have before us, UMCO has a low likelihood of success on the merits on any of its claims. The Department has a high likelihood of being able to prove that it had the authority to issue the order, and that the order is otherwise lawful and reasonable. Considering all of these factors in light of the totality of the circumstances, we conclude that the issuance of a supersedeas is not warranted.

UMCO, slip op. at 27.

Given the hurried circumstances leading up to our decision, as well as the importance and complexity of the underlying legal issues, we took great pains in our opinion to avoid definitively deciding any of the underlying legal issues presented in UMCO's notice of appeal. Of course, a supersedeas ruling at best only offers a *prediction* of what future holdings might be. Beyond that, we repeatedly stated in our opinion that we were simply accepting UMCO's legal theories as argued in the supersedeas proceedings as correct. We nevertheless found that UMCO

was unlikely to prevail on those theories, not necessarily because the theories are wrong, but because the *facts* are simply not there to support them. We expressly stated that "[w]e leave the resolution of the underlying legal questions for the hearing on the merits." *Id.*, slip op. at 18.

Notwithstanding our most provisional of rulings, UMCO has now filed a petition asking us to amend our November 30 order denying its supersedeas petition. It acknowledges that the order is interlocutory (at best), but it is disappointed with the result and would like to pursue an immediate appeal to the Commonwealth Court. It argues that an immediate appeal would materially advance the ultimate termination of this matter. It has again urged us to act upon its petition as expeditiously as possible. The Department and Citizens for Pennsylvania's Future ("PennFuture") have filed responses in opposition to UMCO's petition. The United Mine Workers of America ("UMWA") has neither endorsed nor opposed the petition.[1]

Certification of an Interlocutory Appeal

Section 702(b) of the Judicial Code provides for the certification of interlocutory orders in certain cases:

> When a court or other government unit, in making an interlocutory order in a matter which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order.

42 Pa.C.S. § 702(b). The Pennsylvania Rules of Appellate Procedure provide that, where the governmental unit (in this case, the Board) does not expressly state that there is a controlling question of law at issue, an application may be made to the governmental unit for an amendment of the order, and an order may be amended to include the prescribed statement at any time.

[1] Although UMCO argued at the supersedeas hearing that the Department's action could result in massive, permanent job losses, the Department has informed us that a substantial portion of UMCO's workforce was called back to work following our order. (DEP Response, page 2.)

Pa.R.A.P. 1311(b). An application for an amendment of an interlocutory order to set forth expressly the statement specified in 42 Pa.C.S. § 702(b) must be filed with the government unit within 30 days after the entry of such interlocutory order, and permission to appeal may be sought within 30 days after entry of the order as amended. Unless the governmental unit acts on the application within 30 days after it is filed, the governmental unit shall no longer consider the application and it shall be deemed denied. *See* Pa.R.A.P. 1311 Official Note.

These provisions essentially create a duty on our part that we owe to the Commonwealth Court to give an honest appraisal of whether we think an immediate appeal would be worthwhile. There are three pertinent criteria that inform our appraisal: (1) whether our order involves (a) a controlling (b) question of law; (2) whether there is substantial ground for difference of opinion on that controlling question of law; and (3) whether an immediate appeal from the interlocutory order may materially advance the ultimate termination of the matter.

In this case, our order does not involve a question of law, controlling or otherwise. Because there is no controlling question of law, the second criterion (substantial ground for difference of opinion) does not come into play. Finally, we believe that an immediate appeal would hinder and delay ultimate termination of the matter, not advance it. Accordingly, it is our opinion that an interlocutory appeal is not warranted.

Discussion of Factors

A party seeking certification for interlocutory appeal of a controlling question of law typically sets the question apart to avoid any confusion about the precise question at issue. UMCO has not done that, and it is not exactly clear what UMCO believes that question to be. It variously frames the issue as "whether [several statutes] prohibit the activity that UMCO has proposed," (Motion, p. 4), or "what 'sort of damage [is] permitted under even the most

permissive reading of the pertinent legal provisions' of the Subsidence Act and the Clean Streams Law in the underground mining scenario," (p. 4), or "whether mining may proceed even if damage to uses may result," (p. 5), or "the conflict between the Subsidence Act and the Clean Streams Law," (p. 6), or "whether the expected subsidence effects from longwall mining are precluded by law" (p. 8).

We are somewhat hard pressed to understand precisely what controlling legal determination is posited for interlocutory consideration. Instead of framing a concise issue or issues, UMCO seems to be asking the Commonwealth Court to step into the shoes of the Board and conduct fact finding, decide legal issues of first impression with no record or decision below, and fashion an appropriate remedy regarding the Departmental order under review. Not surprisingly, we are unwilling to certify that such an approach is appropriate. *See Pennsylvania Trout et al. v. DEP*, 1033 C.D. 2004 (Pa. Cmwlth. December 7, 2004) (describing relative roles of EHB and the Court in the administrative review process); *Leatherwood, Inc. v. DEP*, 819 A.2d 604 (Pa. Cmwlth. 2003) (same). An interlocutory appeal is primarily designed to allow the Court to consider a pure question of law. UMCO's failure to clearly enunciate such a question tends to suggest that there really is no such a question here, which is certainly consistent with our view.

UMCO never argued during the supersedeas hearing that there are absolutely *no* legal restrictions of any kind or nature whatsoever on the subsidence impacts from longwall mining on surface waters. We have carefully reviewed the filings to date and UMCO's various bench briefs and there is no indication that UMCO meant to assert that there are absolutely *no* restrictions on its activities vis-à-vis surface waters. We are admittedly working without the benefit of a transcript, and if this is truly UMCO's position, it will certainly have the opportunity to develop

it as this litigation moves forward. But for current purposes, we never understood UMCO to make such an assertion. Therefore, we have yet to opine in this appeal on that issue one way or the other. We did not even predict how the Board might ultimately decide that issue. *See Carbon/Graphite Group, Inc., v. DER*, 1991 EHB 461 (an issue of law is not "controlling" for purposes of certification for interlocutory appeal where the petition for supersedeas never raised the issue on which certification is now sought).

With regard to the arguments that UMCO did make at the supersedeas hearing, again, we did not actually decide any of them. We made no prediction on UMCO's likelihood of success on its legal theories themselves. We simply assumed *arguendo* that UMCO's positions regarding statutory and regulatory interpretations were correct. We took that approach because UMCO failed to meet its burden of proof on the facts that were necessary to support its theories.

UMCO argued, for example, that unlimited damage to *intermittent* streams from subsidence is allowed. There was no need to resolve that question in the context of the supersedeas petition, however, because the stream in question appears to be *perennial.* As another example, UMCO argued that some "pollution" is acceptable so long as a stream's *uses* are protected. It would have been a waste of time to ponder whether it is really acceptable to pollute a stream so long as uses are preserved for the simple reason that we found *as a factual matter* that UMCO's activities will not preserve the uses of the stream. As yet another example, UMCO argued that long-term damage to a stream's uses is acceptable so long as the company commits to repair the damage to the extent technologically and economically feasible. Here, we found as a factual matter that UMCO's commitments have not been shown to promise repair to the extent technologically and economically feasible. We are at a loss as to what more we could

have said in our opinion to make it clear that these issues remain open for the further presentation of evidence and ordered legal argument.[2]

We understand the importance and complexity of the legal issues regarding the impacts of mine subsidence on waters of the Commonwealth. Perhaps the most difficult of those is the interplay between the Clean Streams Law, 35 P.S. § 691.1 *et seq.*, and the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. § 1406.1 *et seq.*, and to a lesser extent, the Dam Safety and Encroachments Act, 35 P.S. § 693.1 *et seq.*, as well as the regulations promulgated under those statutes. Partly for that reason, we refused to resolve the issues in the context of summary judgment motions in another Board case. *Consol Pennsylvania Coal Company v. DEP*, 2003 EHB 792. In that case, we insisted that the parties develop a full record that would serve as a proper foundation for a Board *adjudication*. That appeal was subsequently resolved, so the questions that we outlined in that decision were not answered. If we thought that it was premature to decide those issues in the summary-judgment context in that case, it should not be surprising that we are even less inclined to try and decide them in the instant supersedeas context.

A supersedeas order is a singularly inappropriate vehicle for an interlocutory appeal. By definition, a supersedeas order does not actually establish any law or precedent on the merits. The Board merely makes a *prediction* about who is likely to eventually prevail. It is a foretoken based on an incomplete record made under rushed circumstances by one judge of what the full

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[2] UMCO argues that our supersedeas order is important to the mining industry as a whole. We are not entirely sure that such a consideration is relevant to UMCO's petition. If it is, it is difficult to understand why a decision regarding emergency relief that did not actually resolve any legal issues would be important to the industry as a whole. Furthermore, we pointed out in our opinion that the UMCO mine and the way that operations have been carried on at that mine do not appear to be representative of other deep mines in southwestern Pennsylvania, at least according to witnesses at the supersedeas hearing. Putting that aside, we cannot imagine why "the industry as a whole" would want to see important issues decided on the basis of a supersedeas record.

Board might do. Indeed, as discussed above, the circumstances and pace of the proceedings in this particular case were more pressing than usual. The Commonwealth Court has chastised the Board for certifying an appeal from a supersedeas order because of the very nature of such an order:

> Although one of the criteria to be considered when ruling upon a supersedeas is the petitioner's likelihood of success on the merits, that fact alone does not qualify an order denying supersedeas as such an "interlocutory" order that it would qualify the underlying substantive issues as controlling issues of law the disposition of which would materially advance the ultimate termination of the matter. It was this rationale which prompted this Court in its order...to state that the EHB has at no time issued any *orders* taking a position with regard to the *issues* it purports to certify. The extensive opinion and order of EHB issued February 16, 1988 is most instructive and admirable, but nevertheless was not an interlocutory order which decides these issues.

Chambers Development Company, Inc. v. DER, 545 A.2d 404, 407 (Pa. Cmwlth. 1988). *See also Clever v. DEP*, 1998 EHB 1259 (no certification for appeal of order denying supersedeas); *Empire Sanitary Landfill v. DER*, 1994 EHB 1419 (refusing to certify order denying a supersedeas; "[W]here the Board decides that a petitioner has or has not met [the likelihood of success] element of the supersedeas test, it does not necessarily follow that the Board will ultimately hold in favor of the petitioner."). In short, because of its intrinsic nature, a supersedeas ruling will rarely, if ever, involve a controlling question of law.

UMCO's questions are as much factual as they are legal. One cannot decide whether "the activity that UMCO has proposed" is legally "prohibited" without a great deal of factual development about "what is proposed." For example, UMCO has proposed that various mitigation measures constitute a legally acceptable response to any damage to the waters of the Commonwealth that may occur as a result of its mining. Determining whether mining in combination with those measures is prohibited, however, requires a full understanding of those

measures. Similarly, determining "what sort of damage is permitted" requires a factual understanding of the damage at issue. Certification is inappropriate where, as here, factual rather than legal disputes predominate or at least play an important part. *Clever v. DEP*, 1998 EHB 1259, 1260-61; *CNG Transmission Corp. v. DEP*, 1998 EHB 548, 551-52; *Chemical Waste Management, Inc. v. DER*, 1982 EHB 512.

For all of these reasons, we do not find that our order[3] involved a question of law. Furthermore, in order to certify an interlocutory appeal, we must find that the question of law is "controlling." Pa.R.A.P. 1311; *Empire, supra; Concord Resources Group v. DER,* 1993 EHB 156. If we assume *arguendo* that there is a reviewable question here, we do not see that there is a *controlling* question. Our prediction regarding success on the merits was only one of a myriad of considerations integral to our analysis. Ultimately, the decision that we were called upon to make was whether to temporarily overturn the Department's order. That decision is the only thing that this Board has been asked to do to date. The decision was based in part on likelihood of success, but it was also based on criteria such as harm to the petitioner and harm to the environment. Indeed, we noted our deep concern that any harm to the environment that did result from our decision would be immediate and irreparable. Supersedeas jurisprudence compels us to err on the side of caution. We did not go so far as to say that this threat of pollution categorically prohibited the issuance of a supersedeas as a matter of law, *see* 35 P.S. § 7514(d)(2) and 25 Pa. Code § 1021.63(b), but it weighed quite heavily in our analysis. Therefore, even if it were decided that our prediction of success on the merits was wrong, it would not follow that a supersedeas would have been issued.

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[3] Arguably, under *Chambers*, a supersedeas order does not even rise to the level of an "interlocutory order."

Even if we focus exclusively, as inappropriate as that may be, on the likelihood-of-success component of our supersedeas ruling, we are unable to conclude that any one issue or one formulation of the issue that UMCO appears to have posed would be controlling. Regardless of what legal conclusions the Court would make on UMCO's questions, there would almost certainly be other issues to be resolved in order to come to a final resolution regarding the propriety of the Department's order. In such cases, interlocutory review is generally not warranted. *PUSH v. DEP*, 2000 EHB 23, 26 (certification denied where there are multiple potentially dispositive issues); *Throop Property Owners' Association v. DEP*, 1998 EHB 701, 708-09 (no certification where question of law at issue only one of many requiring resolution).

We will not be surprised if there proves to be substantial disagreement regarding the issues of law that we will need to decide as this appeal moves forward, but that eventuality does not change our opinion that no such decisions have yet been made, or that our supersedeas ruling is a wholly inappropriate vehicle for bringing issues before the Commonwealth Court.

Finally, we do not believe that an interlocutory appeal from our supersedeas ruling would in any way advance the ultimate termination of this dispute. We simply do not see how immediate appellate review of anything that we decided regarding likelihood of success on the merits in deciding whether to issue an emergency supersedeas would aid UMCO's ultimate cause. All of the work that remains to be done for us to decide this appeal on the merits would be put on indefinite hold. Further, we do not understand what practical relief UMCO hopes to obtain from interlocutory review. Unless the court exercises its discretion to take over the EHB appeal in its entirety, we will *ultimately* be called upon to make factual determinations, give our view of the law, and decide upon an appropriate course of action with respect to the Department's order. *Pennsylvania Trout, supra; Leatherwood, supra.* UMCO's attempt to

circumvent or interrupt that due process administrative review in favor of interlocutory appellate proceedings will only delay the ultimate resolution of this dispute. *See CNG*, 1998 EHB at 551-52 (Board refuses to certify interlocutory appeal where Court would in all likelihood remand in any event for fact finding: "For the sake of judicial economy, we believe that the Board should hear the evidence and resolve the factual disputes before appellate review is sought.")

We stated in our supersedeas order that we are amenable to the parties' suggestions on expediting this appeal. The best and most obvious way to advance the ultimate termination of this dispute is to proceed with all deliberate speed toward a Board adjudication on the merits.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UMCO ENERGY, INC., Appellant, and UNITED MINE WORKERS OF AMERICA, Intervenor	:	
v.	:	**EHB Docket No. 2004-245-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CITIZENS FOR PENNSYLVANIA'S FUTURE, Intervenor	:	

ORDER

AND NOW, this 13th day of December, 2004, UMCO's petition to amend our supersedeas order to certify it for interlocutory appeal is denied.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: December 13, 2004

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

BRIAN E. STEINMAN HAULING	:	
	:	
v.	:	**EHB Docket No. 2003-170-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 14, 2004**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Based on the appellant's failure to respond to the Department's motion for summary judgment, his failure to comply with three orders of the Board, and an apparent lack of willingness to seriously prosecute this appeal, summary judgment is entered against the appellant and his appeal is dismissed.

OPINION

This matter involves the July 3, 2003 assessment of a civil penalty by the Department of Environmental Protection (Department) against Brian E. Steinman for allegedly transporting municipal waste in two vehicles that were not leak proof, in violation of 25 Pa. Code § 285.213(a)(2)(i). Mr. Steinman appealed the assessment on July 28, 2003.

Because Mr. Steinman failed to provide the necessary information with his notice of

appeal, as required by the Board's rules, the Board issued an order to perfect on August 4, 2003. Mr. Steinman provided only some of the requested information and, therefore, the Board issued a second order to perfect on September 4, 2003. This time, Mr. Steinman's response provided the requested information except that it failed to indicate that a copy of the notice of appeal had been sent to the appropriate personnel at the Department. Additionally, the Board ordered the parties to file separate status reports on or before December 9, 2003. The Department complied with the order; however, Mr. Steinman filed no status report.

At the time it submitted its status report, the Department also filed a motion to dismiss Mr. Steinman's appeal on the basis that he had failed to properly serve his notice of appeal on the Department's Office of Chief Counsel and the Department officer who took the action being appealed and failed to abide by two Board orders to perfect his appeal. Mr. Steinman filed no response to the motion. The Board denied the Department's motion on the basis that dismissal was too harsh a sanction to impose under the circumstances,[1] but by separate order extended discovery and required each party to file status reports on March 4, 2004 and June 10, 2004. Again, the Department filed its status reports, but Mr. Steinman failed to do so.

On February 20, 2004, the Department served its first set of interrogatories, first request for production of documents and first request for admissions. Mr. Steinman failed to respond to the discovery request. Based on Mr. Steinman's failure to answer the discovery request and to file a status report, the Department filed a second motion to dismiss, or in the alternative a motion to compel. Mr. Steinman filed no response to the motion.

On July 7, 2004, the Board granted the Department's motion to compel and ordered Mr. Steinman to answer the Department's discovery request by July 26, 2004. To date, Mr. Steinman

[1] *Brian E. Steinman Hauling v. DEP*, EHB Docket No. 2003-170-R (Opinion and Order on

has provided no answers to the Department's discovery request.

On August 12, 2004, the Department filed a motion for summary judgment on the grounds that Mr. Steinman's failure to answer the request for admissions causes them to be deemed admitted. Once again, Mr. Steinman failed to file a response to the Department's motion.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, admissions of record and affidavits show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.2(2); *County of Adams v. DEP*, 687 A.2d 1222, 1224, n. 4 (Pa. Cmwlth. 1997); *Burnside Borough v. DEP*, 2003 EHB 305, 311; *Holbert v. DEP*, 2000 EHB 796, 807-08. In ruling on motions for summary judgment, the Board views the record in the light most favorable to the non-moving party. *Burnside Borough, supra* at 311-12.

Because the Board's record does not contain a copy of the admissions relied upon by the Department in its motion, we are unable to rely upon them in ruling thereon. However, summary judgment may be entered against Mr. Steinman for failing to respond to the Department's motion pursuant to Pa.R.C.P. 1035.3(d). *Kochems v. DEP*, 1997 EHB 428.

Entering summary judgment is entirely appropriate here since Mr. Steinman has shown a complete lack of interest in prosecuting his appeal. He has failed to comply with not one but three of the Board's orders: the order requiring a status report on December 9, 3003, the order requiring status reports on March 4, 2004 and June 10, 2004 and, finally, the order requiring Mr. Steinman to answer the Department's discovery request. Mr. Steinman has also chosen not to file responses to all three of the Department's motions in this matter. His inaction indicates an unwillingness to seriously prosecute his appeal. Each time he has been given an opportunity to

---

Motion to Dismiss issued January 6, 2004.)

comply with a Board order or rule of practice and procedure, he has failed to do so. In fact, the only document Mr. Steinman has filed in this matter is his notice of appeal.

Moreover, the Board's rules provide for sanctions to be issued against a party who fails to comply with the Board's orders or rules. Rule 1021.161 provides in relevant part as follows:

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

25 Pa. Code § 1021.161.

As noted earlier, Mr. Steinman has consistently failed to abide by the Board's orders and rules in this matter. Based on Mr. Steinman's failure to comply with the Board's orders to provide status reports and answers to the Department's discovery request, and further based on his failure to respond to the Department's summary judgment motion, we find that it is appropriate to dismiss this appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRIAN E. STEINMAN HAULING	:	
	:	
v.	:	**EHB Docket No. 2003-170-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 14th day of December, 2004, the Department's motion for summary judgment is granted, and the appeal of Brian E. Steinman Hauling docketed at 2003-170-R is **dismissed.**

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATE: December 14, 2004

c: **DEP Bureau of Litigation:**
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Northwest Region

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CATHERINE L. PEDLER	:	
	:	
v.	:	**EHB Docket No. 2004-191-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BAY HARBOR MARINA LIMITED PARTNERSHIP, Permittee	:	**Issued: December 15, 2004**

OPINION AND ORDER ON
PERMITTEE'S MOTION TO DISMISS AND
APPELLANT'S MOTION TO FILE APPEAL NUNC PRO TUNC

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Pennsylvania Environmental Hearing Board dismisses an untimely filed appeal and denies a petition for allowance of appeal *nunc pro tunc*. The jurisdiction of the Board does not attach unless an appellant files her appeal within thirty days after notice of the Pennsylvania Department of Environmental Protection's action. In this case, Appellant filed her appeal one day late. There was no fraud or any breakdown of the administrative process, nor the presence of non-negligent circumstances which would warrant the allowance of an appeal *nunc pro tunc*.

Opinion

Presently before the Environmental Hearing Board (Board) is the Permittee Bay

Harbor Marina Limited Partnership's (Bay Harbor or Permittee) Motion to Dismiss Appellant Catherine L. Pedler's (Ms. Pedler or Appellant) Appeal. Also before the Board is Ms. Pedler's Motion to File Appeal *nunc pro tunc*.

The Pennsylvania Department of Environmental Protection (Department) issued a Water Obstruction and Encroachment Permit (Permit) to Bay Harbor on June 16, 2004. Notice of the permit issuance was published in the *Pennsylvania Bulletin* on July 17, 2004. Ms. Pedler filed her appeal on August 17, 2004.

As we have explained numerous times, the jurisdiction of the Board does not attach unless an appeal is filed within thirty days after notice of the Department's action is received. *Rostosky v. Department of Environmental Protection,* 364 A.2d 761 (Pa. Cmwlth. 1976); *Simons v. DEP*, 1998 EHB 1131, 1133. Specifically, the Board's rules provide that any person aggrieved by an action of the Department, other than a person to whom the Department action is directed or issued, shall file her appeal with the Board within one of the following timeframes:

> 1) Thirty days after the notice of the action has been published in the *Pennsylvania Bulletin.*
>
> 2) Thirty days after actual notice of the action if a notice of the action is not published in the *Pennsylvania Bulletin.*

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

Since notice of the Department's issuance of the Bay Harbor permit was published in the *Pennsylvania Bulletin* on July 17, 2004, the last day an appeal could be filed timely was August 16, 2004. Ms. Pedler filed her appeal on August 17, 2004. Therefore, Ms.

Pedler filed her appeal one day late.

The untimeliness of the filing, although only by a single day, deprives the Board of jurisdiction over the appeal. Accordingly, we lack jurisdiction over this appeal unless Ms. Pedler meets the Board's standards for filing an appeal *nunc pro tunc* as set forth in 25 Pa. Code Section 1021.53. *See Pennsylvania Game Commission v. Department of Environmental Resources*, 509 A.2d 877, 886 (Pa. Cmwlth. 1986) *aff'd.,* 555 A.2d 812 (Pa. 1989).

Board Rule 1021.53(f) provides: "The Board upon written request and for good cause shown may grant leave for the filing of an appeal *nunc pro tunc*, the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth." In *Bass v. Commonwealth*, 401 A.2d 1133 (Pa. 1979), the Pennsylvania Supreme Court explained that an appeal *nunc pro tunc* is appropriate only in cases "where there is fraud or some breakdown in the court's operation" or when there is "a non-negligent failure to file a timely appeal." *Id.* At 1135.

In this case, there was no fraud or breakdown in the administrative process. Instead, Ms. Pedler contends she should be permitted to file her appeal *nunc pro tunc* because: 1) she had recently started a new job, 2) during the thirty day appeal period she was out of state serving as a birth partner to her sister, 3) she is proceeding *pro se*, and 4) her appeal raises important environmental issues. None of the reasons advanced by Ms. Pedler are legally sufficient to allow us to relax the thirty day jurisdictional requirement and allow her to file her appeal *nunc pro tunc.*

The fact that she started a new job or was absent from the state during part of the thirty day appeal period are not legally sufficient excuses for not filing her appeal in a timely manner. In fact, if she had also simply faxed her appeal to the Board on August 16, 2004 rather than just sending it to the Board by overnight delivery it would have been timely filed. 25 Pa. Code Section 1021.32 (c) provides that : "Documents may be filed by personal delivery, by mail or by facsimile...When a document is filed by facsimile, the original shall be deposited in the mail on the same day." Subsection (b) provides that "The date of filing shall be the date the document is received by the Board."

We have often warned parties of the pitfalls in proceeding before the Board without the benefit of being represented by counsel. As Chief Judge Krancer stated in *Dellinger v. DEP, 2000* EHB 976, "The Board is a legal forum which follows legal procedure and precedent. [Practice before] the Board is governed by legal doctrines and proscriptions which can be difficult for persons not trained in the law. [Therefore], competent and experienced legal counsel is highly recommended." 2000 EHB at 977, n. 1. Although individuals may certainly proceed *pro se*, actually doing so is often the legal equivalent of performing a medical operation on yourself.

Finally, the fact that an appeal raises important environmental concerns does not excuse the untimely filing of the appeal. This is even more reason to obtain competent legal help at the outset so that important legal rights are not lost because of legal missteps.

We shall issue an Order in accordance with this Opinion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CATHERINE L. PEDLER	:	
	:	
v.	:	**EHB Docket No. 2004-191-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BAY HARBOR MARINA LIMITED PARTNERSHIP, Permittee	:	

ORDER

AND NOW, this 15th day of December, 2004, Appellant's Motion to Appeal *Nunc Pro Tunc* is ***denied.*** Permittee's Motion to Dismiss is ***granted.***

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: December 15, 2004

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ATTAWHEED FOUNDATION, INC.	:	
	:	
v.	:	**EHB Docket No. 2002-018-R**
	:	**(consolidated with 2002-060-R)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOROUGH OF GREEN TREE, Intervenor	:	**Issued: December 21, 2004**

ADJUDICATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board upholds the Department's revocation of a general permit for the continued operation of a box culvert that serves as a driveway to property purchased by the appellant. Although the Department had previously issued the general permit for the construction and continued operation of the box culvert, this issuance was based on the prior property owner/applicant's failure to identify the location of the box culvert as being in a FEMA floodway. Although one may hold a vested right in a permit, the appellant does not since the culvert's location in a FEMA floodway poses a risk to the public health, safety and welfare. In addition, although equitable estoppel may be applied to actions of the Department, the Department may not be estopped from performing its statutory duties or responsibilities. Finally, the municipality in which the culvert is located is not barred from intervening in the appellant's appeal of the

Department's revocation of the permit.

BACKGROUND

This matter involves a box culvert[1] located on property currently owned by the Attawheed Foundation (Attawheed) in the Borough of Green Tree, Allegheny County. The box culvert is located over a stream known as Whiskey Run and provides the sole means of ingress to and egress from the Attawheed property.

Attawheed acquired the subject property from its prior owners, Jeffrey C. and Joan R. Hrynda. In September 1995, the Hryndas submitted to the Department a Notification to Use BDWM-GP-7 Minor Road Crossing to install the box culvert for a driveway over Whiskey Run. In October 1995, the Department registered and acknowledged the application, authorizing the Hryndas to construct the box culvert (the 1995 General Permit). The Hryndas submitted various construction plans, site plans, subdivision plans and a grading permit application to Green Tree. A subdivision plan was approved by Green Tree, and the culvert was constructed.

When Attawheed obtained the property, it intended to change the use of the structure on the property from a single family residence to a community center. To accomplish this, it was required to extend or increase the width of the box culvert. Accordingly, Attawheed submitted to the Department a general permit registration to extend or increase the culvert's width. The Department acknowledged and registered the request on November 2, 2001 (the 2001 General Permit).

Shortly thereafter, the Code Enforcement Officer/Engineer for Green Tree notified Attawheed that the subject property was located in a Federal Emergency Management Agency

[1] A "culvert" is defined in the regulations as "[a] structure with appurtenant works which carries a stream under or through an embankment or fill." 25 Pa. Code § 105.1. Drawing no. 3 to the parties' Joint Exhibit 1 portrays the box culvert as a four-sided square-shaped figure allowing

(FEMA) floodway.[2] It appears that Green Tree first became aware of the floodway situation after submitting a Conditional Letter of Map Revision request for the extension of the culvert at the request of Attawheed. Green Tree was informed by FEMA that the existing culvert was in violation of the National Flood Insurance Program requirements on floodplains.[3] Green Tree was further advised that a failure to enforce the floodplain regulations would jeopardize its participation in the National Flood Insurance Program. (Stipulated Exhibits 6 and 7) Green Tree then filed an appeal with the Environmental Hearing Board (Board), challenging the Department's acknowledgement and registration of the 2001 General Permit. This appeal was docketed at EHB Docket No. 2002-018-R.

Thereafter, the Department declared both the 1995 General Permit and the 2001 General Permit invalid. Attawheed appealed the determination that the 1995 GP-7 was invalid, and the appeal was docketed at EHB Docket No. 2002-060-R. By Order dated April 26, 2002, both Attawheed's and Green Tree's appeals were consolidated at the earlier docket number.

Attawheed did not appeal the determination that the 2001 General Permit was invalid; therefore, the parties have stipulated that Green Tree's appeal of the 2001 General Permit is moot. The only appeal remaining is Attawheed's challenge to the Department's declaration of

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water to pass underneath the roadway.

[2] A "floodway" is defined in 25 Pa. Code § 105.1 as the following:

> The channel of the watercourse and portions of the adjoining floodplains which are reasonably required to carry and discharge the 100-year frequency flood. Unless otherwise specified, the boundary of the floodway is as indicated on maps and flood insurance studies provided by FEMA. In an area where no FEMA maps or studies have defined the boundary of the 100-year frequency floodway, it is assumed, absent evidence to the contrary, that the floodway extends from the stream to 50 feet from the top of the bank of the stream.

[3] A "floodplain" consists of "[t]he lands adjoining a reiver or stream that have been or may expected to be inundated by flood waters in a 100-year frequency flood." *Id.*

the 1995 General Permit as invalid.[4]

No hearing was held in this matter since all of the parties agreed to submit the case to the Board on stipulated facts. The parties have filed a Stipulation of Facts and Joint Exhibits, on which our findings of fact in this adjudication are based. Each party filed a post hearing brief, and Attawheed and the Department also filed reply briefs. The stipulated facts are as follows:

FINDINGS OF FACT

1. The Commonwealth of Pennsylvania, Department of Environmental Protection (hereinafter the Department), is the agency with the duty and authority to administer and enforce the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1 – 693.27; The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 – 691.1001; the Flood Plain Management Act, the Act of October 4, 1979, P.L. 581, *as amended*, 35 P.S. §§ 679.101 – 679.601; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §§ 510-17; and the rules and regulations promulgated thereunder.[5] See Joint Stipulation at 1.

2. The Attawheed Foundation, Inc., (hereinafter Attawheed) is a non-profit corporation with Chapter 501(c)(3) federal taxation status, with an address of P.O. Box 16031, Pittsburgh, PA 15242-0031, Allegheny County, Pennsylvania. See Joint Stipulation at 2.

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[4] Although Green Tree's appeal of the 2001 General Permit is moot, nonetheless, it is still a party to this matter. Green Tree had petitioned to intervene in Attawheed's appeal of the 1995 General Permit. Because the two appeals were consolidated prior to the petition being ruled on, the petition was deemed to be moot. Had the matters not been consolidated, Green Tree would have been permitted to intervene in Attawheed's appeal. So that there is no question that Green Tree is a party to this matter, we hereby grant its petition to intervene in the appeal at EHB Docket No. 2002-060-R

[5] All of the Findings of Fact are taken from the parties' Stipulations of Fact filed with the Board on May 10, 2004.

3. The Borough of Green Tree (hereinafter Green Tree) is a Home Rule municipality, with offices at 10 West Manilla Avenue, Pittsburgh, PA 15220-3310, in Allegheny County, Pennsylvania. See Joint Stipulation at 3.

4. The Department administers and issues Water Obstruction and Encroachment Permits. See Joint Stipulation at 4.

5. The Department acknowledges and registers General Permits. See Joint Stipulation at 5.

6. The property which is the subject of this matter is located in the Borough of Green Tree, County of Allegheny, Commonwealth of Pennsylvania and is known and numbered as 1397 Glencoe Avenue, Block and Lot 37-F-130, (Subject Property). See Joint Stipulation at 6.

7. By deed dated August 30, 1990 and recorded October 2, 1990 in the Recorder of Deeds Office of Allegheny County at Deed Book Volume 8346, Page 496, Jeffrey C. Hrynda and Joan R. Hrynda, husband and wife (hereinafter collectively Hrynda), acquired title to a tract of land consisting of 18.1292 acres (hereinafter the Larger Tract) which included the Subject Property. See Joint Stipulation at 7.

8. In September of 1995, Jeffrey Hrynda, submitted to the Department a Notification of Use BDWM-GP-7 Minor Road Crossing (hereinafter GP-7 Notification) to install a box culvert for a driveway over the stream known as Whiskey Run. See Joint Stipulation at 8.

9. On September 2, 1995, Green Tree received a copy of the GP-7 Notification filed by Hrynda with the Department. See Joint Stipulation at 9.

10. On October 3, 1995, the Department registered and acknowledged the GP-7 Notification as General Permit Number GP070295217 (hereinafter the 1995 General Permit).

No appeals were filed by any party following the issuance of the 1995 General Permit. See Joint Stipulation at 10.

11. The instructions for the GP-7 Notification (the GP-7 Instructions) provide in paragraph 1 as follows:

> 1. **GENERAL DESCRIPTION AND AUTHORITY** - The Department of Environmental Protection hereby authorizes by General Permit, (1) the construction, operation and maintenance of a minor road crossing across wetlands which disturb less than 0.1 acre of wetlands, (2) the construction, operation, and maintenance of a minor road crossing across a stream where the watershed drainage area is 1.0 square mile or less and (3) the removal of an existing minor road crossing across a stream where the drainage area is 1.0 square mile or less. This authorization is pursuant to Section 7(b) of the Dam Safety and Encroachments Act, 32 P.S. § 693.7(b) and the rules and regulations promulgated thereunder at 25 Pennsylvania Code §§105.441-105.449 (relating to General Permits). This General Permit is subject to the terms and conditions set forth below.

See Joint Stipulation at 11.

12. The GP-7 Instructions provide in paragraph 2 as follows:

> 2. **DENIAL OF AUTHORIZATION** - The Department shall have the discretion, on a case-by-case basis, to deny, revoke or suspend the authorization to use this General Permit for any project which the Department determines to present a risk to life, property or the environment or otherwise would not be adequately regulated by the provisions of this General Permit.

See Joint Stipulation at 12.

13. In October of 1995, Hrynda submitted an Application for Grading Permit to Green Tree to construct the box culvert and related driveway. In connection with this application, Hrynda submitted plans, specifications, information, and drawings for the box culvert. On October 28, 1996, the Borough of Green Tree issued a grading permit to Hrynda. See Joint

Stipulation at 13.

14. Between 1995 and September 8, 1997, Hrynda submitted a number of proposed subdivision plans and revisions to Green Tree in an effort to subdivide the Larger Tract. See Joint Stipulation at 14.

15. On September 8, 1997, Green Tree approved the Hrynda Plan of Lots which was recorded on March 30, 1998 at Plan Book Volume 207, Page 196 (hereinafter the Hrynda Plan of Lots) and which subdivided the Larger Tract into four (4) separate lots (identified as Lots 1, 2, 3, and 4). See Joint Stipulation at 15.

16. Lot 3 and 4 of the Hrynda Plan of Lots now comprise the Subject Property. See Joint Stipulation at 16.

17. Pursuant to the Hrynda Plan of Lots, the sole means of ingress, egress and regress to lot numbers 3 and 4 is from Glencoe Avenue over the box culvert. See Joint Stipulation at 17.

18. In November of 1999, Hrynda entered into an Agreement of Sale to sell lots 3 and 4 to Attawheed. The sale was contingent upon, *inter alia*, Attawheed being able to obtain the necessary zoning approval to use the Subject Property for its community center. See Joint Stipulation at 18.

19. On December 13, 1999, Attawheed filed an Application with Green Tree for an Occupancy Permit to use the Subject Property as a community center. On January 10, 2000, the Borough Manager of Green Tree denied the application and Attawheed filed an Appeal to the Borough of Green Tree Zoning Hearing Board. After a public hearing on March 23, 2000, the Zoning Hearing Board denied the Application for the Occupancy Permit. On April 24, 2000, Attawheed filed an Appeal of the decision of the Zoning Hearing Board to the Court of Common Pleas of Allegheny County at Number SA 496 of 2000. See Joint Stipulation at 19.

20. By Memorandum and Order of Court dated February 14, 2001, as modified by the Order of Court dated March 6, 2001, the Court of Common Pleas of Allegheny County, reversed the decision of the Zoning Hearing Board and approved the use of the Subject Property as a community center subject to full and complete compliance with the Borough's building and fire code and requirements under the Borough's planning and zoning code. No appeal was filed. See Joint Stipulation at 20.

21. On May 23, 2001, Attawheed closed on the purchase of the Subject Property and paid the purchase price of $880,000.00, plus related closing costs of approximately $15,000.00. See Joint Stipulation at 24.

22. Prior to Attawheed purchasing the Subject Property, legal counsel for Attawheed informed representatives of Attawheed and Attawheed's real estate agent that access to the Subject Property was over a stream and that inquiries should be made to determine if all required permits had been obtained. Attawheed was told by Hrynda that the 1995 General Permit existed for the box culvert. See Joint Stipulation at 25.

23. At the time the 1995 General Permit for the box culvert was issued to Hrynda, the box culvert, as then proposed and as ultimately built, was located within a detailed FEMA floodway as shown on the original FEMA floodway map for Green Tree Borough dated July 16, 1981. On October 4, 1996, the FEMA Study was later reprinted. See Joint Stipulation at 27.

24. On November 2, 2001, Attawheed submitted to the Department a notification to extend or increase the width of the box culvert (hereinafter the 2001 GP-7 Notification). See Joint Stipulation at 28.

25. On November 15, 2001, the Department registered and acknowledged the 2001 GP-7 Notification as General Permit Number GP-070201224 (hereinafter the 2001 General

Permit). See Joint Stipulation at 29.

26. The Department first became aware that the box culvert was located in a FEMA flood study when the Borough's engineer so advised the Department's permit reviewing engineer, Chris Kriley, in a phone conversation on January 22, 2002. The Borough's engineer referenced this phone conversation in a letter to the Department which was dated January 23, 2002. See Joint Stipulation at 30.

27. Paragraph 5 of the GP-7 Instructions states as follows:

> SPECIFIC AREAS AND ACTIVITIES WHERE PERMIT DOES NOT APPLY – This General Permit does not apply in and is not valid in the following situation:
>
> i. A stream channel and the adjoining floodplain which is delineated as a floodway on Flood Insurance Maps that are part of a Flood Insurance Study prepared by FEMA. These maps are available from the local municipality.

See Joint Stipulation at 31 and Joint Exhibit 1.

28. Paragraph 15 of the GP-7 Instructions states as follows:

> 15. ACTIVITIES NOT IN ACCORDANCE WITH THE TERMS OR CONDITIONS - If the Department determines, upon inspection, that the construction, operation or maintenance of a project has violated the terms or conditions of this General Permit or the Chapter 105 Rules and Regulations, the Department may take such actions, legal or administrative, that it may deem to be appropriate, including revocation of the General Permit with regard to the violation.

See Joint Stipulation at 32 and Joint Exhibit 1.

29. In 2003, the Department's Southwest Region received approximately 120 Joint Water Obstruction and Encroachment Permit applications. See Joint Stipulation at 33.

30. In 2003, the Department's Southwest Region registered and acknowledged approximately 600 General Permits, including General Permit 1 - Fish Habitat Enhancement Structures, General Permit 2 - Small Dock and Boat Launching Ramps; General Permit 3 - Bank Rehabilitation, Bank Protection and Gravel Bar Removal; General Permit 4 - Intake and Outfall Structures; General Permit 5 - Utility Line Stream Crossings; General Permit 6 - Agricultural Crossings; General Permit 7 - Minor Road Crossings; General Permit 8 - Temporary Roadway Crossings; General Permit 9 - Agricultural Activities. See Joint Stipulation at 34.

31. Chris Kriley holds the position of Senior Civil Hydraulic Engineer for the Southwest Region's Soils and Waterways Section. Mr. Kriley is a licensed professional engineer ("P.E.") in the Commonwealth of Pennsylvania. See Joint Stipulation at 35.

32. For the past ten years, Mr. Kriley has evaluated the hydrology and hydraulics associated with approximately 300 Joint Water Obstruction and Encroachment Permits and acknowledged more than 600 General Permits, along with his other engineering responsibilities. See Joint Stipulation at 36.

33. Mr. Kriley's involvement with both the 1995 General Permit and the 2001 General Permit was typical of his and the Department's engineering review for general permits. Mr. Kriley performs a brief inspection of the documents. If these documents are factually in order, he registers the General Permit, and sends an "acknowledgment" to the registrant. No engineering review or site visits are conducted unless Mr. Kriley has reason to suspect a problem with the application or that the General Permit identified does not apply. See Joint Stipulation at 37.

34. The Department relies upon the permittee to provide accurate information and to comply with the conditions of the permit. The Department's General Permitting Program

is predicated on applicants' accurate representations and compliance with the permit conditions. See Joint Stipulation at 39.

35. Upon Mr. Kriley's becoming aware in 2002 that the box culvert was located in a detailed FEMA floodway, he began an investigation into the matter including an investigation of the 1995 General Permit for the box culvert installed by Hrynda. After conducting the investigation, Mr. Kriley concluded that both the 1995 General Permit and the 2001 General Permit were improperly registered based upon the box culvert's location within the FEMA designated floodway, as depicted on the 1981 FEMA map. See Joint Stipulation at 38.

36. By letter dated February 4, 2002, the Department informed Attawheed that the 1995 General Permit and the 2001 General Permit were not valid permits for either the existing structure or the proposed extension. See Joint Stipulation at 40.

37. On March 1, 2002, Attawheed filed a Notice of Appeal to the Environmental Hearing Board at Docket Number 2002-060-R from the determination that the 1995 General Permit is not a valid permit. See Joint Stipulation at 41.

38. Attawheed has not filed an appeal from the determination that the 2001 General Permit was not a valid permit. See Joint Stipulation at 42.

39. On or about January 31, 2002, Green Tree filed a Notice of Appeal to the Environmental Hearing Board at Docket Number 2002-018-R from the issuance of the 2001 General Permit. See Joint Stipulation at 43.

40. Since Attawheed has not filed an appeal from the determination that the 2001 General Permit is not valid, the parties have stipulated that the appeal filed by Green Tree at Docket Number 2002-018-R is moot and may be withdrawn. See Joint Stipulation at 44.

41. An increase in the extent and area of flooding along Glencoe Avenue between Section Station 22.10 and Section Station 22.50 is shown on the Civil Design Solution HEC-RAS Review Pre- and Post-Culvert 100-year flood plain plan with an issue date of April 26, 2004, revision 1.2. See Joint Stipulation at 45.

42. For each relevant Section Station, the pre-culvert and post-culvert water surface elevations at Glencoe Avenue and difference in flooding due to the box culvert are set forth on the following table:

Station	Approx Elevation of Glencoe Ave (ft)	Difference in Flooding of Glencoe due to Culvert (ft)
23.00	921.9	0
22.50	920.7	0
22.40	920.2	1.39
22.30	920.1	1.49
22.20	919.8	No flooding
22.10	918.3	No flooding

See Joint Stipulation at 46.

43. Since the 1995 General Permit has been revoked for the box culvert, if the box culvert is ordered to be removed, there currently exists no other means of ingress, egress and regress to the Subject Property. See Joint Stipulation at 47.

44. Any culvert crossing to be constructed in the location of the box culvert would need to satisfy the Department's regulatory requirements and applicable statutory law for a water obstruction and encroachment permit and the Borough's Flood Plain Management Ordinance, Chapter 1448 and/or other Borough approval. See Joint Stipulation at 48.

45. The box culvert can be removed and replaced or modified so that there is a culvert crossing that is in compliance with the rules and regulations of the Department and applicable law. None of the parties possess any current contractor estimates for the cost of removing the existing box culvert and replacing it with a compliant crossing or modification. See Joint Stipulation at 49.

46. On September 23, 2002, Attawheed applied for a Joint Water Obstruction and Encroachment Permit to authorize the original box culvert structure, and to construct and maintain an extension to it. See Joint Stipulation at 50.

47. The box culvert does not and cannot satisfy Green Tree's existing Flood Plain Management Ordinance and the Ordinance does not allow for any variance where there is an increase in the 100 year flood elevation. Green Tree has declined to submit a FEMA map revision or to allow an increase in the 100 year flood elevation, and Attawheed is unable to obtain a flood plain consistency letter from Green Tree. See Joint Stipulation at 51.

48. At this time, the Department cannot approve a Joint Water Obstruction and Encroachment Application for the existing box culvert until either of the following occurs:

(a) Green Tree applies for and receives a FEMA map revision; or

(b) Attawheed provides all the following:

(i) a floodplain consistency letter from the Borough;

(ii) flowage easements from the properties where there is an increase in the 100 year water surface elevation; and

(iii) a risk assessment.

In addition, the Department asserts that property lines need to be shown on the applicant's revised flood plain site plans, and Attawheed must submit corrected pre- and post-flood plain delineation on the site plans. See Joint Stipulation at 52.

49. The road clearance of Green Tree ambulances, police vehicles, and fire vehicles are as follows:

a. As measured from the rocker panel to the top of the road surface:

(1) Ambulance – 12"

(2) Fire and Police Vehicles – 10"

b. As measured from the top of the road surface to the lowest point of the vehicle, the bottom of the differential of all vehicles, except the fire trucks, where the gas tank is the lowest point:

(1) Police Car - 7¼"

(2) Ambulance – 6"

(3) Fire Engines –

	Engine Number	Clearance
(i)	4	9"
(ii)	53	8½"
(iii)	6	7½"
(iv)	2	10"
(v)	1	10¾"

(vi) 5 11½"

See Joint Stipulation at 53.

50. In pursuit of developing and using the Subject Property, Attawheed has incurred $25,000.00 in engineering design services. Approximately one-half of this amount was expended on land development/subdivision matters and one-half was spent on environmental permitting which includes erosion and sedimentation pollution control plans and the Department General and Joint Permits. In pursuit of obtaining the necessary zoning approval and with regard to purchasing the Subject Property, Attawheed has expended legal fees incurred through the end of May, 2002 in the approximate amount of $18,392.00. In pursuit of obtaining land development approval, and to address Department permitting issues, Attawheed has expended legal fees for the period June, 2002 through and including March, 2004 in the sum of $14,401.00. See Joint Stipulation at 54.

51. At no time did Attawheed continue to move forward toward the purchase of the Subject Property with the actual knowledge that the 1995 General Permit was invalid or improper. At all times relevant to this matter, Attawheed and its representatives made it known to officials of Green Tree and the Department that it intended to use the Subject Property as a community center. At no time did Attawheed expend money for the purchase of the Subject Property and on engineering fees and legal fees associated with obtaining zoning approval and land development approval with the actual knowledge that the 1995 General Permit was in any way invalid or improper. Joint Stipulation at 55.

52. Prior to closing on the purchase of the Subject Property, Attawheed and its representatives relied upon the issuance and existence of the 1995 General Permit. Joint Stipulation at 56.

DISCUSSION

Standard of Review and Burden of Proof

The Board's role in this matter is to make a *de novo* determination of whether the Department abused its discretion in declaring the 1995 General Permit invalid. *Pennsylvania Trout v. DEP*, No. 1033 C.D. 2004, slip op. at 18-19 (Pa. Cmwlth. Dec. 7, 2004); *Warren Sand & Gravel Co. v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975); *Gonsalves v. DEP*, 2003 EHB 340, 344-45. Whether the Department abused its discretion depends on whether its action was reasonable, appropriate and otherwise in conformance with law. *Smedley v. DEP*, 2001 EHB 131, 160. Because the Department carries the burden of proof in an appeal of a revocation or suspension of a license, permit or approval, 25 Pa. Code § 1021.122(b)(3), it must demonstrate by a preponderance of the evidence that it did not violate the law or abuse its discretion in declaring the 1995 General Permit invalid.

General Permits

General permits are a special category of permits that may be issued for certain activities that the Department may regulate without the need for individual permit reviews. General permits are authorized under Section 7 of the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1 – 693.27, at § 693.7. That section provides in relevant part as follows:

* * * * *

> (b) The department may, in accordance with the rules adopted by the Environmental Quality Board, issue general permits on a regional or Statewide basis for any category of dam, water obstruction or encroachment if the department determines that the projects in such category are similar in nature, and can be adequately regulated utilizing standardized specifications and conditions.

> (c) General permits shall specify such design, operating and monitoring conditions as are necessary to adequately protect life, health, property and the environment, under which such projects may be constructed and maintained without applying for and obtaining individual permits. The department may require the registration of any project constructed pursuant to a general permit.
>
> * * * * *

Once a general permit has been issued by the Department, it is available for use by anyone with a project that satisfies the terms and conditions of the general permit. 25 Pa. Code § 105.443. A person seeking to use a general permit for a specific project must first register the project with the Department. 25 Pa. Code § 105.447. This act is simply ministerial and does not involve a technical review by the Department. 25 Pa. Code §§ 105.443 and 105.447. The obligation to ensure that the use applied for is in compliance with the terms and conditions of the general permit falls on the registrant. 25 Pa. Code § 105.443(b).

Condition 5.i. of the General Permit under which the box culvert in question was registered states that it is invalid in a stream channel and adjoining floodplain that is delineated as a floodway on flood insurance maps that are part of a flood insurance study prepared by FEMA. There is no question that the box culvert is located within a detailed FEMA floodway as shown on the original FEMA floodway map. The parties have stipulated to that fact.

Section 105.449 of the regulations requires that anyone who operates, maintains, or enlarges a water obstruction or encroachment under a General Permit shall comply with the terms and conditions thereof. 25 Pa. Code § 105.44. Section 20 of the Dam Safety and Encroachments Act authorizes the Department to revoke a permit for failure to comply with the act or the regulations thereunder. 32 P.S. § 693.20. In addition, paragraph 11 of the General Permit says it may be revoked at any time by the Department. (Joint Exhibit 1)

Attawheed argues that the Department should be precluded from invalidating the 1995 General Permit on the following grounds: 1) Attawheed has acquired a vested right in the permit; 2) the Department is equitably estopped from invalidating the permit; and 3) Green Tree is precluded from challenging the permit at this stage because it failed to appeal the issuance of the permit in the first instance.

Vested Right

The general rule, as set forth in *Department of Environmental Resources v. Flynn*, 344 A.2d 720, 723 (Pa. Cmwlth. 1975), is that a permit "issued illegally or in violation of the law, or under a mistake of fact, confers no vested right or privilege on the person to whom the permit has been issued and it may be revoked notwithstanding that he may have acted upon the permit; any expenditures made in reliance upon such permit are made at his peril."

However, the *Flynn* court carved out an exception to that general rule, known as the vested rights doctrine, which allows the courts to overturn the right of the government to rescind a permit where certain conditions are met even though the permit was improperly issued. This doctrine is designed to accomplish fairness when a landowner has relied upon a permit that is subsequently found to be invalid. *Petrosky v. Zoning Hearing Board of the Township of Upper Chichester, Delaware County*, 402 A.2d 1385, 1388 (Pa. 1979); *Rudolph v. Zoning Hearing Board of Cambria Township*, 839 A.2d 475, 478 (Pa. Cmlwth. 2003). Courts have applied the vested rights doctrine to

In evaluating a claim of vested rights, courts are to consider the following factors:

(1) due diligence in attempting to comply with the law;

(2) good faith throughout the proceedings;

(3) expenditure of substantial unrecoverable funds;

(4) expiration without appeal of the period during which an appeal could have been taken from the issuance of the permit;

(5) insufficiency of evidence to prove that individual property rights or the public health, safety or welfare would be adversely affected by the use of the permit.

Baehler v. Department of Environmental Protection, No. 1142 C.D. 2004, slip op. at 5-6 (Pa. Cmwlth. December 6, 2004); *Rudolph*, 839 A.2d at 478-79, n. 7; *Flynn*, 344 A.2d at 725.

The Department asserts that its General Permits convey no property rights and, therefore, Attawheed's argument that it has a vested right in the permit is incorrect. It is true that both the Board and the Commonwealth Court have held that permits do not constitute a property right. *See Tri-State Transfer Co., Inc. v. Department of Environmental Protection*, 722 A.2d 1129, 1132, n. 3 (Pa. Cmwlth. 1999) ("[P]ermits and licenses are a mere privilege, and do not constitute a property right of the holder."); *Bernie Enterprises, Inc. v. DEP*, 1996 EHB 239, 242 (Permits do not confer property rights upon the permittee.) However, the vested rights doctrine does not convey property rights in a permit but is simply a means of allowing a permittee to rely on an otherwise invalid permit where certain criteria are met. In *Tri-State Transfer*, the court held that a permit did not rise to the level of property interest that could not be subject to a regulatory taking claim; nonetheless, the court went on to consider whether the permittee had a vested right in the solid waste permit that would shield it from having to comply with regulations promulgated after the permit's issuance. The court concluded the permittee did not have a vested right in the permit since it had never been used nor the facility in question constructed. *Tri-State Transfer,* 722 A.2d at 1132, n. 3. In *Bernie Enterprises*, the question was not whether the permittee held a property right in the permit but whether the issuance of the permit conveyed any property interest in the appellant's land.

In order to determine whether Attawheed has a vested right in the 1995 General Permit, we must consider the factors set forth by the court in *Flynn.* Both Green Tree and the Department assert that at least one of the conditions has not been met. Both assert that individual property rights or public health, safety and welfare will be adversely affected by the continuation of the box culvert. Attawheed contends that Green Tree and the Department have not demonstrated a risk to any specific property and simply rely on a claim of unsubstantiated speculative harm. However, based on the fact that the culvert is in violation of FEMA's National Flood Insurance Program requirements, we cannot find, as Attawheed would have us do, that there is no risk to public health, safety or welfare. The fact that the culvert causes Green Tree to be in violation of FEMA's floodplain regulations is compelling evidence that the existence of the culvert poses a threat to the safety and welfare of area residents.

In further support of their contention that the culvert poses a safety hazard, the Department and Green Tree point to Stipulated Fact No. 46 which contains a chart showing the pre-culvert and post-culvert difference in flooding of Glencoe Avenue in a 100 year flood. Prior to installation of the culvert, the chart shows no flooding occurring at stations 22.30 and 22.40 on Glencoe Avenue. Following installation of the culvert, flooding occurs at stations 22.30 and 22.40 at a level of 1.49 feet and 1.39 feet, respectively. At stations 22.50 and 23.00, there is no increase in flooding. At stations 22.10 and 22.20, there is no flooding at all, both pre- and post-culvert. (F.F. 46) Due to the increase in flooding at stations 22.30 and 22.40, the Department and Green Tree contend that the culvert adversely affects the public health, safety and welfare in the vicinity of the culvert.

Attawheed argues that the increase in flooding at stations 22.30 and 22.40 due to the culvert does not prove there is a greater risk to the public health, safety and welfare. Attawheed

points out that even with the increase in flow at these two stations, the total depth of flow is still less than the area receiving the deepest flow along Glencoe Avenue even prior to installation of the culvert. At station 23.00, the depth of flow was 1.68 feet prior to installation of the culvert. Thus, argues Attawheed, the existence of the box culvert does not increase the depth of flow on Glencoe Avenue in the event of a 100 year flood in an amount higher than the deepest flow that existed prior to the box culvert. However, as Green Tree points out in its brief, and as shown on stipulated exhibit 27 (a drawing of the pre- and post-culvert 100 year floodplain), with the increase in flooding at stations 22.30 and 22.40 a much larger area of Glencoe Avenue becomes flooded due to the existence of the culvert.

In addition, the parties have stipulated to the road clearance heights of various emergency vehicles owned by the Borough. Based on the stipulated road clearances, it is questionable as to whether the Borough's emergency vehicles could pass through the flooded areas of Glencoe Avenue. For example, the distance from the road surface to the lowest point of various emergency vehicles is as follows: ambulance – 6 inches; police vehicle – 7 ¼ inches; fire engines – ranging from 7 ½ to 11 ½ inches. Given that the flooding at stations 22.30 and 22.40 is 1.49 feet and 1.39 feet, the water levels would rise above the lowest points of the emergency vehicles by several inches.

Based on the fact that the culvert is located in a FEMA floodway and has a potential for causing flooding and risk to area residents, we cannot find that Attawheed has a vested right in the permit.

Equitable Estoppel

Attawheed next argues that the Department should be equitably estopped from invalidating the general permit. Equitable estoppel is a doctrine of fundamental fairness designed

to preclude a party of "depriving another of the fruits of a reasonable expectation when the party inducing the expectation knew, or should have known, that the other would rely." *Department of Commerce v. Casey*, 624 A.2d 247, 254 (Pa. Cmwlth. 1993). The Department correctly points out that a governmental agency may not be estopped from performing its statutory duties and responsibilities. *Altoona City Authority v. DER*, 1992 EHB 779, 783. However, the doctrine of equitable estoppel may be applied against a governmental agency under certain circumstances. *Id.; Casey*, 624 A.2d at 254.

To invoke the doctrine of equitable estoppel, the appellant must establish by clear, precise and unequivocal evidence that the Department did the following:

(1) intentionally or negligently misrepresented some material fact;

(2) knew or had reason to know that the other party would justifiably rely on the misrepresentation; and

(3) induced the party to act to its detriment because of a justifiable reliance upon the misrepresented facts.

Reinert v. DEP, 1997 EHB 401, 414 – 415; *Kane Gas Light and Heating Co. v. DEP*, 1997 EHB 451; *Ambler Borough Water Department v. Department of Environmental Resources*, 1995 EHB 11, 26. Stated another way, Attawheed must be able to show misleading words, conduct or silence on the part of the Department; clear proof that it reasonably relied on the misrepresentation; and a lack of duty to inquire as to the correct facts. *Baehler*, *supra*, slip op. at 5.

With regard to the first element of equitable estoppel, Attawheed contends that the Department negligently misrepresented that the 1995 General Permit was valid when it issued it without confirming that the box culvert was not located in a FEMA floodplain. With regard to the second element, Attawheed asserts that the Department had reason to know that the Hryndas

and any subsequent purchaser of the property would justifiably rely on the alleged misrepresentation that the General Permit was valid since the sole means of access to the property is over the box culvert. Finally, with regard to the third element, Attawheed contends that it was induced to act to its detriment by relying on the existence of the 1995 General Permit when it expended substantial sums of money to purchase the property and to pay engineering and legal fees related to the use of the property.

In support of its assertion that a government entity has an affirmative duty to verify the accuracy of information in an application, Attawheed cites the Commonwealth Court's decision in *City of Pittsburgh v. Elman Associates, Inc.*, 291 A.2d 813 (1972). In that case, the City of Pittsburgh sought to enjoin a developer from continuing construction of an apartment building on the basis that the height of the building would be 15 feet higher than what the city planning commission had understood it to be. The Commonwealth Court affirmed the ruling of the lower court denying the injunction, holding as follows:

> It is understandable, with the great burdens placed upon the various zoning and planning agencies of a city the size of Pittsburgh, that City officials will accept on face value, statements, drawings, statistics and other vital information from licensed and duly certified architects, engineers and developers. It must also be recognized that with the vast amount of detailed drawings, specifications and other material submitted for a project, such as is involved in this case, the possibilities increase for human error somewhere in the application data. It is because of such possibility that we must hold such City employees as its engineers, architects and planners to a duty to investigate, check and verify as much of the submitted detail as may be necessary for the City to properly carry out its duties. This is especially true in a case, such as the instant one, wherein a specific detail, such as the elevation of a building above a desired elevation, is in question.

Id. at 819.

We disagree that the first element of equitable estoppel, i.e. that the Department intentionally or negligently misrepresented some material fact, has been met. Rather, it was the original property owners, the Hryndas, who misrepresented to the Department that the culvert was not located in a floodplain. Paragraph 5.i of the General Permit specifically states that it is not valid in a "stream channel and the adjoining floodplain which is delineated as a floodway on Flood Insurance Maps that are part of a Flood Insurance Study prepared by FEMA. These maps are available from the local municipality." (Joint Exhibit 1) The Hryndas appear to have made no effort to ensure that the culvert for which they required the General Permit was not in a FEMA-designated floodway.

We understand Attawheed's reliance on *Elman Associates.* However, the Department's general permitting system makes *Elman* inapplicable. The Dam Safety and Encroachments Act authorizes the use of general permits. Under this system, the Department may issue a general permit for category of water obstruction on a statewide or regional basis. Applicants may register to use a general permit if their proposed project falls within the terms and conditions thereof. No individual permit review is conducted. The obligation to ensure that one's project qualifies for registration under a general permit falls on the registrant. In a system that registers over 600 general permits a year, requiring that the Department conduct an individual review in order to verify the accuracy of the data submitted with the registration would be impractical and would likely result in a significant backlog. The system that is in place allows the Department to authorize hundreds of general permit registrations a year in a more timely and efficient manner. The trade-off is that the Department cannot check the accuracy of each and every registration that is submitted, and if a project is subsequently found not to be in compliance with the terms of the general permit, it is subject to revocation. Here, whether by omission or commission, the

Hryndas registered to construct a box culvert that did not meet the requirements of a general permit for minor road crossings. The fact that Attawheed relied on this permit when purchasing the property cannot be the basis for preventing the Department from revoking this permit which, in fact, was never valid in the first place.

We further find that the third element of estoppel also has not been met since Attawheed was not justified in relying on the General Permit to its detriment. The terms of the General Permit clearly put applicants and permittees on notice that if an activity is found to be in violation of the terms of the General Permit, the Department has the right to suspend or revoke the permit. For instance, paragraph 2 gives the Department "the discretion, on a case-by-case basis, to deny, revoke or suspend the authorization to use this General Permit for any project which the Department determines to present a risk to life, property or the environmental or otherwise would not be adequately regulated by the provisions of this General Permit." (Joint Exhibit 1) Additionally, paragraph 15 of the General Permit states that if the Department determines "that the construction, operation or maintenance of a project has violated the terms or conditions of this General Permit or the Chapter 105 Rules and Regulations, the Department may take such actions, legal or administrative, that it may deem to be appropriate, including revocation of the General Permit with regard to the violation." (Joint Exhibit 1)

Finally, as noted earlier, a government agency may not be estopped from carrying out its statutory duties and responsibilities. *Altoona City Authority,* 1992 EHB at 783. Here, the Department has a duty to ensure that projects permitted under the Dam Safety and Encroachments Act do not pose a risk to the public health, safety and welfare. Allowing the culvert to remain in place or to be expanded, in violation of the terms of the General Permit, would present a risk to the surrounding area.

Therefore, we find that the Department is not estopped from revoking the 1995 General Permit for the box culvert on the Attawheed property.

Green Tree's Right to Challenge the 1995 General Permit

Attawheed argues that Green Tree is barred from challenging the validity of the 1995 General Permit at this time since it failed to appeal the issuance of the permit for the box culvert in 1995. Attawheed also argues that Green Tree should be barred from challenging the permit's validity since it had ample opportunity to do so during the Hryndas' application process and the sale of the property to Attawheed, at which time various documents were submitted to Green Tree for its approval. Attawheed contends that Green Tree worked with the Hryndas to allow their property to be subdivided with the box culvert being the sole means of ingress and egress to the property. Finally, Attawheed contends that Green Tree had a duty to review all of the building permit applications submitted to it to ensure that all necessary government approval had been obtained.

As to Attawheed's contention that Green Tree is administratively barred from challenging the issuance of the 1995 General Permit, that is not the action involved here. Rather, this matter involves Attawheed's appeal of the Department's revocation of the permit, in which Green Tree has been granted the opportunity to intervene on the side of the Department.

Finally, Attawheed contends that Green Tree had an obligation to verify that the box culvert was not in a floodplain when the Hryndas first applied for it. Whatever the borough's duty may or may not have been, that cannot act to estop the Department from revoking a permit where there is a threat of harm to the public health, safety and welfare. For that reason the revocation of the permit authorizing the culvert is appropriate.

Conclusion

We conclude that the Department acted in accordance with the law when it revoked the 1995 General Permit for the box culvert. There is no dispute that the culvert is located within a FEMA floodway identified on a FEMA flood insurance study map, in violation of paragraph 5.i of the General Permit. The parties have stipulated to this fact. (Joint Stipulation 27) Based on this violation and the safety risk it posed, the Department acted properly in revoking the permit.

We are not unsympathetic to the position of Attawheed. The Department's decision to revoke the 1995 General Permit leaves the organization without a means of entering or leaving their property. Accordingly to the parties' Stipulation of Facts, there are three courses of action that may be taken: 1) Green Tree can apply for and receive a FEMA map revision; 2) Attawheed can obtain and supply to the Department a flood plain consistency letter from Green Tree, flowage easements from the properties where there is an increase in the 100 year water surface elevation, and a risk assessment; or 3) the box culvert can be removed and replaced or modified so that it is in compliance with the Department's regulations and applicable law. (Joint Stipulation 49 and 52) Green Tree has refused to submit a FEMA map revision, allow an increase in the 100 year flood elevation, or provide a flood plain consistency letter to Attawheed. (Joint Stipulation 51) The parties have not determined the cost of replacing or modifying the culvert; however, they have stipulated to the fact that replacement or modification to meet Department standards is possible. Therefore, Attawheed does have the option of building a new culvert or modifying the existing one in order to be in compliance with the Dam Safety regulations and the terms of the general permit for such structures.

We make the following conclusions of law:

CONCLUSIONS OF LAW

1. The Department has the burden of proving by a preponderance of the evidence that it acted in accordance with the law when it revoked the 1995 General Permit for the box culvert on the Attawheed property. 25 Pa. Code § 1021.122(b)(3).

2. Attawheed does not have a vested right in the permit since the box culvert is located in a FEMA floodway and poses a risk to the public health, safety and welfare. *Rudolph v. Zoning Hearing Board of Cambria Township*, 839 A.2d 475, 478 – 479, n. 7 (Pa. Cmlwth. 2003)

3. The Department may not be estopped from performing its statutory duties or responsibilities. *Altoona City Authority v. DER*, 1992 EHB 779, 783.

4. The Department did not intentionally or negligently misrepresent that the 1995 General Permit was valid; the permit's issuance was based on the misrepresentation by the prior property owners, either by omission or commission, that the proposed location of the box culvert was not in a FEMA-designated floodway.

5. Attawheed was not substantially justified in relying on the continued validity of the 1995 General Permit since it says it can be revoked at any time by the Department if an action is found to be in violation of the terms of the permit.

6. Green Tree is not barred from intervening in Attawheed's appeal of the Department's revocation of the 1995 General Permit.

7. The Department met its burden of proving that it acted reasonably and in accordance with the law in revoking the 1995 General Permit.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ATTAWHEED FOUNDATION, INC.	:	
	:	
v.	:	**EHB Docket No. 2002-018-R**
	:	**(consolidated with 2002-060-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOROUGH OF GREEN TREE, Intervenor	:	

ORDER

AND NOW, this 21st day of December 2004, the appeal of Attawheed Foundation, Inc. is dismissed.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

EHB Docket No. 2002-018-R
(consolidated with 2002-060-R)

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: December 21, 2004

Service List see next page

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SECRETARY TO THE BOARD

BOROUGH OF ROARING SPRING and ROARING SPRING MUNICIPAL AUTHORITY; APPLETON PAPERS, INC.; and ROARING SPRING AREA CITIZENS COALITION	:	**EHB Docket No. 2003-106-C (Consolidated with EHB Dkt. No. 2003-111-C and EHB Dkt. No. 2003-121-C)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW ENTERPRISE STONE & LIME COMPANY, INC., Permittee	:	**Issued: December 21, 2004**

OPINION AND ORDER ON PERMITTEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST APPELLANT ROARING SPRING AREA CITIZENS COALITION

By: Michelle A. Coleman, Administrative Law Judge

Synopsis:

In this consolidated appeal of a noncoal surface mining permit amendment which allows the permittee to mine a section of its limestone and dolomite quarry to a lower depth, the permittee moved for partial summary judgment against appellant Roaring Spring Area Citizens Coalition. The permittee sought dismissal of the objections in the association's notice of appeal alleging harm from the quarry operation to the water quality of Halter and Plum Creeks, arguing that the association lacked standing to raise any such objections. Viewing the record in the light most favorable to appellant, the evidence is sufficient to demonstrate the association's standing as a representative of its members to raise objections related to alleged pollution of the two streams. The motion is therefore denied.

BACKGROUND

These consolidated appeals concern the most recent revision to Noncoal Surface Mining Permit No. 4274SM11 and its incorporated National Pollutant Discharge Elimination System (NPDES) Permit No. PA212512 issued by the Department of Environmental Protection (DEP) to

New Enterprise Stone & Lime Company, Inc. (New Enterprise) in April 2003. New Enterprise operates a limestone and dolomite quarry located in Taylor Township, Blair County, Pennsylvania. These appeals challenge DEP's April 2003 approval of the permittee's application to mine an approximately 60-acre section of limestone and dolomite reserves on the northern side of the quarry down to an elevation of 950 feet mean sea level (msl). The four appellants have a common concern that the pumping of groundwater associated with lowering the depth of the quarry to 950 ft msl will have a detrimental impact on an exceptional spring (the Roaring Spring) located about a mile south of the quarry. The Roaring Spring issues over 6,500,000 gallons of water a day; it is relied upon by the Borough for public water supply, used by Appleton Papers in a manufacturing process, and offers a variety of uses for individual residents ranging from aesthetic and recreational enjoyment to drinking water. The Board has issued one prior opinion in this matter denying the appellants' petitions for a supersedeas of the permit revision. *Borough of Roaring Spring v. DEP*, 2003 EHB 825.

Following the close of discovery, New Enterprise filed a motion for partial summary judgment against appellant Roaring Spring Area Citizens Coalition (RSACC) in which the permittee seeks dismissal of certain specific objections raised in RSACC's notice of appeal. RSACC is an unincorporated association of individual area residents whose common purpose appears to be resisting the quarry's further expansion on account of detrimental impacts these residents allegedly suffer from quarry operations and a shared concern over negative consequences to community resources and the surrounding natural environment they believe will result from the permitted lowering of the quarry's depth. RSACC's notice of appeal states a series of objections including allegations that the permit revision: (i) fails to adequately regulate quarry blasting operations which cause property damage; (ii) fails to properly address fugitive

dust which causes damage to property, diminishes air quality and has potential negative health impacts; (iii) does not sufficiently protect area water resources from pollution resulting from the mining operation; and, (iv) will not resolve issues concerning contamination of water wells from an overburden pile at the site.

New Enterprise's motion for partial summary judgment asks us to examine the subset of RSACC objections related to protection of area water resources from pollution, and further refines its challenge to only two such resources—Plum Creek and Halter Creek—which flow near the boundaries of the quarry. New Enterprise contends that RSACC is not entitled to raise any objections related to alleged pollution of Plum and Halter Creeks from the permitted mining operation. This is because, in its view, the organization does not have standing to pursue such objections either in its own right or as a representative of its members. The permittee's motion is supported by RSACC responses to interrogatories and deposition transcripts of three individuals, Paul Claar, Jeryl Green and John Biddle, designated as representatives of the organization in response to a notice of deposition directed to RSACC pursuant to Pa. R. Civ. P. 4007.1(e).

New Enterprise asserts the record contains no evidence showing that RSACC has standing in its own right to raise objections related to the two streams. With respect to the organization's standing as a representative of its individual members, New Enterprise attempts to demonstrate that no RSACC member has standing to raise the Plum and Halter Creek objections. RSACC's responses to interrogatories list fourteen current members of RSACC; the notice of appeal was verified by eleven "founding members." New Enterprise insists the record shows that only two RSACC members, Steve Beach and Jeryl Green, make use of Plum and Halter Creeks for any purpose, and the permittee argues that, accordingly, only those two members could have standing with respect to objections related to the streams. According to the permittee, Steve

Beach should be excluded from consideration because he resides along Plum Creek upstream of the quarry and he purportedly fishes in Plum Creek only within the confines of his upstream property; New Enterprise asks us to conclude that Mr. Beach will therefore not be impacted by any discharge from the quarry into the stream and thus cannot serve as a foundation for the RSACC standing at issue here. As to Mr. Green, New Enterprise concedes that he fishes in sections of Plum and Halter Creeks that allegedly will be impacted by the permitted quarry operations. However, the permittee notes that Mr. Green is not among the "founding members" who signed RSACC's notice of appeal and he testified at his deposition that he did not attend a meeting of the organization until July 2003. Permittee argues that Mr. Green cannot provide a basis for RSACC's stream-related standing because Mr. Green did not become a "member" of the organization until after the 30-day period for RSACC to file an appeal of the permit revision had elapsed in late May 2003.[1] New Enterprise requests partial summary judgment dismissing all objections by RSACC related to alleged pollution of Plum and Halter Creeks from the permitted quarry operation.

In its response to the motion, RSACC does not argue that the organization has standing in its own right to raise objections related to alleged pollution of the two streams. RSACC does, however, firmly contest permittee's assertion that RSACC has no stream-related standing as a representative of its members. The organization vigorously objects to New Enterprise's characterization of the factual record with respect to uses RSACC members make of the streams, and the particular interests those members have in preventing degradation of the water quality. According to RSACC, the record contains ample evidence that at least five RSACC members have been identified with the requisite interest in the streams, including "founding members"

[1] Notice of issuance of the permit revision was published in the *Pennsylvania Bulletin* on April 26, 2003 and, pursuant to Board rule, RSACC had 30 days after notice of DEP's action was published in the *Pennsylvania Bulletin* to file its appeal with the Board. *See* 25 Pa. Code § 1021.52(a)(2).

who signed the notice of appeal. RSACC asserts there are members who reside along or in very close proximity to the streams and have done so for many years; there are members who make regular recreational use of the two streams by fishing, hiking or ice skating along their length in the quarry area; that the aesthetic character of the environment would be negatively impacted by a significant loss of flow in the streams and that, as residents of the community who take a particular interest in their local natural environment, the quality of life of individual RSACC members would be impaired. RSACC argues that when the record is viewed in the light most favorable to the nonmovant, RSACC has demonstrated stream-related standing as a representative of its members and the motion should be denied.

DISCUSSION

A. Standard of Review

"A grant of summary judgment by the [Environmental Hearing Board] is proper where the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Global Eco-Logical Services, Inc. v. Dept. of Environmental Protection*, 789 A.2d 789, 793 n.9 (Pa. Cmwlth. 2001); *see also County of Adams v. Dept. of Environmental Protection*, 687 A.2d 1222, 1224 n.4 (Pa. Cmwlth. 1997); *Zlomsowitch v. DEP*, 2003 EHB 636, 641. When deciding summary judgment motions, the Board must view the record in the light most favorable to the nonmoving party and all doubts as to the existence of a genuine issue of fact are to be resolved against the moving party. *Bethenergy Mines, Inc. v. Dept. of Environmental Protection*, 676 A.2d 711, 714 n.7 (Pa. Cmwlth.), *appeal denied*, 546 Pa. 668 (1996); *see also, e.g., Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 1162, 1164.

Where standing is challenged in the context of a motion for summary judgment filed after

completion of discovery, a question arises as to the respective burdens of proof. It is clear that "the moving party has the burden of proving the non-existence of any genuine issue" of material fact. *Empire Coal Mining & Development v. Dept. of Environmental Resources*, 615 A.2d 829, 831-32 (Pa. Cmwlth. 1992), *appeal denied*, 535 Pa. 640 (1993). If the appellant demonstrates there is a genuine issue of fact relevant to the standing question the motion should be denied. *See Greenfield Good Neighbors Group, Inc. v. DEP*, 2003 EHB 555, 563; *Giordano v. DEP*, 2000 EHB 1184, 1187. Here, for example, if there is conflicting competent evidence relevant to the nature and extent of the uses RSACC members make of Plum and Halter Creeks, it is not for the Board to decide such issues of fact at this stage.

The Board has also generally placed an initial burden on the movant to show that the appellant lacks standing. *See, e.g., Drummond v. DEP*, 2002 EHB 413, 423-24; *Seder v. DEP*, 1999 EHB 782, 785; *City of Scranton v. DEP*, 1997 EHB 985, 990-91. However, where the movant has made this initial showing, the party whose standing has been challenged in a summary judgment motion filed after completion of discovery must come forward with sufficient evidence to demonstrate that it meets the requirements for standing. *See* 25 Pa. Code § 1021.94(b); Pa. R. Civ. P. 1035.2(2) (summary judgment is warranted where "after the completion of discovery relevant to the motion . . . an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury"); *Pennsylvania Trout et al. v. DEP*, 2003 EHB 622, 625 (in summary judgment context where standing challenge has been raised appellant must set forth sufficient facts to support assertion that it has standing); *cf. Reich v. Berks County Intermediate Unit No. 14*, 2004 Pa. Commw. LEXIS 760 (Pa. Cmwlth. Oct. 18, 2004) (imposing burden on plaintiff to demonstrate that he met standing requirements).

Not only will the appellant bear the burden of proving its standing at the hearing on the merits, 25 Pa. Code § 1021.122(a), but the means of proving standing is peculiarly within its control. *See* 9 Wigmore, Evidence § 2486, p. 290 (J. Chadbourn rev. ed. 1981) (the "burden of proving a fact is said to be put on the party who presumably has peculiar means of knowledge enabling him to prove its falsity if it is false"). Thus, at this stage of the proceedings, it is fair to require RSACC to do more than simply rest upon unsupported allegations in its pleadings; assuming that the movant satisfies its initial burden, the association should either demonstrate genuine issues of fact using controverting evidence in the record or identify the evidence which establishes the facts essential to its claim of standing. *See* Pa. R. Civ. P. 1035.3(a).

B. Standing Requirements for Administrative Appeals to the Board

In essence, the question of standing is whether the litigant is entitled to have the court, or in this case a quasi-adjudicative agency, decide the merits of the dispute. *See Pennsylvania National Mutual Casualty Ins. Co. v. Dept. of Labor and Industry*, 552 Pa. 385, 391 (1998) ("as a general proposition, the concept of 'standing' is concerned only with the question of who is entitled to make a legal challenge to the matter involved"). Under federal law, standing jurisprudence contains two strands: Article III standing, which enforces the U.S. Constitution's case or controversy requirement; and prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction. *See, e.g., Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301, 2308 (2004). Standing jurisprudence under Pennsylvania law does not have a constitutional component, however, because the U.S. Supreme Court "has unequivocally declared that 'state courts are not bound to adhere to federal standing requirements,'" *Erfer v. Commonwealth*, 568 Pa. 128, 134-35 (2002) (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989)); and, there is no standing requirement derived from the Pennsylvania Constitution. *See Housing Authority of the County of Chester v. Pennsylvania*

State Civil Service Commission, 556 Pa. 621, 631-32 (1999) ("unlike the standing requirement in the federal courts, the standing requirement which this Court has traditionally imposed does not ascend to the level of a Constitutional mandate").[2]

The Pennsylvania Supreme Court has developed a prudential standing doctrine for state courts, explaining generally that standing "is a requirement that parties have sufficient interest in a matter to ensure that there is a legitimate controversy before the court." *In re T.J.*, 559 Pa. 118, 124 (1999). Prudential standing encompasses the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a litigant's complaint fall within the zone of interests protected by the law invoked. *See, e.g., Allen v. Wright*, 468 U.S. 737, 750-51 (1984). The prudential dimensions of Pennsylvania's standing doctrine are drawn from these precepts. *See In re T.J.*, 559 Pa. at 124 ("the core concept of the doctrine of standing is that a person who is not adversely affected in any way by the matter he seeks to challenge is not 'aggrieved' and has no right to obtain a judicial resolution to his challenge"); *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 191-202 (1975).[3]

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[2] For this reason, the Pennsylvania Supreme Court has stated that the question of whether a party has standing to maintain an action in state court is not a jurisdictional question. *Beers v. Unemployment Compensation Board of Review*, 534 Pa. 605, 611 (1993). The Pennsylvania Constitution states that the Supreme Court "shall have such jurisdiction as shall be provided by law," PA. CONST. art. V, § 2; *see also* PA. CONST. art. V, § 4 (similarly vesting Commonwealth Court with "jurisdiction as shall be provided by law"). Consistent with the text of the Pennsylvania Constitution, the Court has "repeatedly recognized that the fact that a party lacks standing does not by itself deprive [the Court] of jurisdiction over the action, as it necessarily would under Article III of the federal Constitution." *Housing Auth. of the Cty. of Chester*, 556 Pa. at 632. If a statute properly enacted by the Pennsylvania legislature furnishes the authority for a party to proceed in the state's courts, the fact that the party lacks standing under traditional notions of state court jurisprudence will not be deemed a bar to an exercise of the court's jurisdiction because the legislature constitutionally may enhance or diminish the scope of the court's jurisdiction. *Id.*

[3] *See also, e.g., Albert v. 2001 Legislative Reapportionment Commission*, 567 Pa. 670, 679 (2002) (in challenge to a reapportionment plan for legislative districts the Court stated that "any entity not authorized by law to exercise the right to vote in this Commonwealth lacks standing to challenge the reapportionment plan"); *Sprague v. Casey*, 520 Pa. 38, 43 (1988) (to have standing "a party must have an interest in the controversy that is distinguishable from the interest shared by other citizens"); *Franklin Township v. Dept. of Environmental Resources*, 452 A.2d 718 (Pa. 1982) (township had standing to contest granting of permit for solid waste disposal facility because granting of permit necessarily implicated township's responsibility of protecting the quality of life of its citizens).

With respect to state administrative agencies, standing is generally conferred by statute. *See* 2 Pa. C.S. § 702; *Pennsylvania Game Commission v. Dept. of Environmental Resources*, 521 Pa. 121, 127-28 (1989) (Environmental Hearing Board Act for EHB); *In re Family Style Restaurant, Inc.*, 503 Pa. 109, 112-14 (1983) (Liquor Code and Administrative Agency Law for Liquor Control Board); *Loudon Hill Farm, Inc. v. Milk Control Commission*, 420 Pa. 548, 549-50 (1966) (Milk Control Law for Milk Control Commission); *Committee to Preserve Mill Creek v. Secretary of Health*, 218 A.2d 468 (Pa. Cmwlth. 1971); *cf. City of Philadelphia v. Philadelphia Board of License and Inspection Review*, 669 A.2d 460, 462-63 (Pa. Cmwlth. 1995) (standing to obtain judicial review of local agency decision conferred by Local Agency Law); *see generally Pennsylvania National Mut. Casualty Ins. Co.*, 552 Pa. at 391 ("Standing may be conferred by statute or by having an interest deserving of legal protection.").

Standing to challenge a DEP final action by filing an appeal with this Board is fundamentally defined by the Environmental Hearing Board Act, as the Pennsylvania Supreme Court explained in *Pennsylvania Game Commission*:

> With regard to actions or decisions of state administrative agencies, section 702 of the Administrative Agency Law, *2 Pa.C.S. § 702*, mandates that a person's right to obtain *judicial* review depends upon his having a direct interest in the agency's action and being aggrieved thereby. . . . A substantially similar definition of "standing" has been legislatively provided with respect to administrative appeals to the Environmental Hearing Board from actions of DER. To have "standing" in that context, section 1921-A of the Administrative Code of 1929 . . . requires that the complainant be "adversely affected" by the DER action in question.

Pennsylvania Game Commission, 521 Pa. at 127-28 (citations omitted).

Notably, the Court in *Pennsylvania Game Commission* distinguished between the right to obtain *judicial* review of an agency action pursuant to § 702 of the Administrative Agency Law, 2 Pa. C.S. § 702, and the definition of standing for *administrative appeals* to the Board legislatively provided by § 1921-A of the Administrative Code of 1929 (and now its successor §

7514 of the Environmental Hearing Board Act, 35 P.S. §§ 7514(b), (c)). Section 702 of the Administrative Agency Law states that any "person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such adjudication shall have the right to appeal therefrom *to the court vested with jurisdiction of such appeals by or pursuant to Title 42* (relating to judiciary and judicial procedure)." 2 Pa. C.S. § 702 (emphasis added). Under the Court's conception in *Pennsylvania Game Commission*, § 702 applies to standing questions in appeals of DEP actions made directly to state courts, while standing for *administrative appeals* to the Board from DEP actions is defined by the "adversely affected" standard prescribed by the legislature in § 7514(c) of the Environmental Hearing Board Act (the EHB Act).[4]

Pursuant to § 7514(c) of the EHB Act, DEP "may take any action initially without regard to [Ch. 5, Subch. A of the Administrative Agency Law] but no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board under [the Board's rules of procedure]." 35 P.S. § 7514(c). Thus, a party has standing to appeal a DEP action to the Board if that person allegedly will be "adversely affected" by the DEP action being challenged.

In deciding standing questions, the Board has at times informed the content of § 7514(c) by applying aspects of the general rule for standing in state courts as developed by the Pennsylvania Supreme Court in its prudential standing doctrine. *See, e.g., Drummond*, 2002 EHB at 423 (citing *Wm. Penn Parking Garage, Inc., supra*); *Giordano*, 2000 EHB 1185-87 (same); *Florence Township v. DEP*, 1996 EHB 282, 289 (same); *see also Susquehanna County v.*

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[4] *But see Western Pennsylvania Conservancy v. Dept. of Environmental Resources*, 367 A.2d 1147, 1150 (Pa. Cmwlth. 1977) (a litigant must meet the "person aggrieved" standard in order to have standing to challenge an administrative agency action through an appeal procedure); *Community College of Delaware County v. Fox*, 342 A.2d 468, 474-75 (Pa. Cmwlth. 1975) (stating "we believe that, in any administrative appeal, a party must still be a 'person aggrieved' by the adjudication in order to appeal from it" and applying standard drawn from § 702 of Administrative Agency Law to whether parties before EHB had standing to raise certain objections to DEP action).

Dept. of Environmental Resources, 500 Pa. 512, 515-17 (1983); *Franklin Township*, 452 A.2d at 719-23. According to the general rule for standing in state courts, to have standing: (i) a party must have a substantial interest in the subject matter of the litigation; (ii) the party's interest must be direct; and, (iii) the interest must be immediate. *Erfer*, 568 Pa. at 135. It is clear that for a person to be *adversely* affected by a DEP action necessarily implies that some interest of that person—economic, property, constitutional, health, recreational, aesthetic, quality-of-life or an organizational interest in protecting the state's wetlands, for example—is threatened with harm by the agency action. Moreover, to be adversely *affected* means that there is a discernible causal connection between the DEP action and an interest of the challenger.

It should be recognized, however, that when enacting the EHB Act the Legislature arguably intended a more capacious view of standing in § 7514(c) than found in traditional notions of state court standing jurisprudence. *See City of Philadelphia*, 669 A.2d at 463 n.4 ("Under the traditional standing requirement, in order to be 'aggrieved' one's interest must be substantial and immediate as well as direct. However, Section 752 of the [Local Agency] Law and Section 702 of Administrative Agency Law with the identical language . . . require only that the injured interest be direct."). Section 7514(c) says nothing about a party's interest having to be "substantial" or "immediate"; only that a person need be adversely affected by a DEP action to pursue an administrative appeal before the Board. In deciding this motion, I remain mindful that the Board's underlying task in deciding a challenge to a party's standing is to apply § 7514(c) of the EHB Act—the statute authorizing this agency to review DEP actions *de novo* by holding hearings and issuing adjudications concerning any DEP action "adversely affecting" a person. 35 P.S. §§ 7514(b), (c); *Pequea Township v. Herr*, 716 A.2d 678, 686-87 (Pa. Cmwlth. 1998).

C. RSACC's Standing to Raise Objections Related to Plum and Halter Creeks

With these principles in mind, I turn to the permittee's challenge to the appellant association's stream-related standing. Pennsylvania courts have held that an organization may have standing either in its own right or on behalf of its members, *see, e.g., In re Family Style Restaurant, Inc.*, 503 Pa. at 115; *Mechanical Contractors Association of Eastern Pennsylvania, Inc. v. Dept. of Education*, 2004 Pa. Commw. LEXIS 764 at *12 (Pa. Cmwlth. Oct. 20, 2004); *Parents United for Better Schools, Inc. v. School Dist. of Philadelphia Bd. of Educ.*, 646 A.2d 689, 692 (Pa. Cmwlth. 1994); and the Board has consistently adhered to this rule when applying § 7514(c) of the EHB Act to standing questions arising in its proceedings. *See, e.g., Pennsylvania Trout*, 2003 EHB at 624; *Valley Creek Coalition v. DEP*, 1999 EHB 935, 942; *Barshinger v. DEP*, 1996 EHB 849, 858. RSACC has not contested the permittee's assertion that the association has no standing in its own right to raise stream-related objections to the permit revision; the issue is whether RSACC has standing on behalf of its members. Where an organization seeks standing as a representative of its members, as long as the organization has at least one member who will be adversely affected by the challenged DEP action, the organization has standing to sue. *Pennsylvania Trout*, 2003 EHB at 624.

New Enterprise's NPDES permit allows for point source discharges of quarry-captured water into Plum and Halter Creeks and RSACC alleges that degradation of the streams' water quality will occur as a result of permitted discharges from the quarry. A groundwater flow model submitted with New Enterprise's application predicted potential decreases in the flow of Halter and Plum Creeks from deepening the quarry to 950 msl. To remedy this potential capture of stream flow by the quarry, New Enterprise was required to devise measures for redistributing quarry-captured groundwater into the creeks in the event of a quarry-related diminishment of flow in the streams. DEP approved the measures as part of the permit revision; RSACC objects

that the redistribution plan is inadequate to ensure protection of the streams' existing uses. New Enterprise contends that no RSACC member possesses an interest—in terms of a use made of the streams—sufficient to entitle RSACC to raise stream-related objections to the permit.

Describing its view of the evidentiary record, New Enterprise asserts that Mr. Claar testified at this deposition that only two RSACC members, Steve Beach and Jeryl Green, recreate along Plum and Halter Creeks by fishing in these streams. Implicitly accepting that the recreational interests of Beach and Green are sufficient to meet standing requirements, New Enterprise attacks the capacity of these members to serve as a foundation for the organization's stream-related standing on separate grounds.

For Mr. Beach, New Enterprise argues that there is no causal connection between the permitted activity and his interests by asserting that his fishing is limited to segments of Plum Creek which lie upstream of the quarry. According to New Enterprise this fact makes it impossible for the quarry to have any impact on the portion of the stream which Mr. Beach uses. As to Mr. Green—who testified on several occasions that he fishes regularly in Plum and Halter Creeks in areas adjacent to and downstream of the quarry, New Enterprise does not argue that Mr. Green's interests are not cognizable or that there is no discernible causal connection between the permitted activity and those interests. The permittee argues that because Mr. Green did not attend an RSACC meeting until July 2003, he therefore did not become a "member" of the association until after the thirty-day period for filing RSACC's appeal had lapsed. Relying on *Raymond Profitt Foundation v. DEP*, 1998 EHB 677, New Enterprise argues for adoption of a rule that an organization whose standing is derived solely as a representative of its members must demonstrate that at least one individual with standing was actually a member of the organization prior to expiration of the thirty-day appeal period in order for that organization to

have standing. On account of the fact that he did not attend a meeting of the organization until after the thirty-day appeal period had expired, New Enterprise argues that Mr. Green should be ineligible to serve as a foundation for RSACC's member-based stream-related standing.

Initially, I agree with RSACC's contention that New Enterprise has improperly characterized the evidentiary record, especially in the context of a summary judgment motion. The permittee's description of Mr. Claar's testimony is severely constrained in the movant's favor. With respect to Mr. Beach, for example, a reading of the evidence in the light most favorable to RSACC leads to the conclusion that he fishes along Plum Creek in segments that could be affected by the permitted quarry operations. In addition, New Enterprise did not show that a potential loss of flow in Plum Creek will not impact the stream section running alongside Mr. Beach's residential property, thereby potentially injuring his property, aesthetic, and quality-of-life interests in the stream. At a minimum, RSACC has demonstrated genuine issues of fact concerning RSACC's standing as derived from Mr. Beach's uses of Plum Creek.

New Enterprise also omitted various examples of other RSACC members who make use of and have a cognizable interest in the two streams. Citing specific deposition testimony to support its position, RSACC identifies uses other RSACC members make of the two streams and their interests in the streams' water quality. For example, Mr. Claar engages in recreational walking along the streams, and looks for wildlife along sections of the stream downstream of the quarry. He lives between the quarry and Plum Creek and is concerned that a severe loss of flow would have a detrimental impact on the aesthetic quality of the locale where he resides, thereby reducing his quality of life. Mr. Claar testified that RSACC member Austin Walter would be personally affected by degradation of Plum Creek because the stream runs through Mr. Austin's residential property. RSACC member John Biddle, a community resident for more than 50 years,

testified that he often drives along the streams in order to enjoy their scenic effects, that he occasionally looks for birds along the streams and has fished and ice skated on them in the past.

The Board has long held that a person using a surface stream for fishing or other forms of recreation has standing to appeal a DEP permit authorizing an activity that may impact the water quality of the stream. *See, e.g.*, *Blose v. DEP*, 1998 EHB 635, 638; *Belitskus v. DEP*, 1997 EHB 939, 951; *Pohoqualine Fish Association v. DEP*, 1992 EHB 502. If the water quality of the streams is degraded, or a severe loss of flow in the streams occurs as a result of permitted quarry activities, aquatic life in the streams could be negatively impacted and recreational interests would consequently suffer harm. The Board has also recognized that an aesthetic appreciation for an environmental resource is a cognizable interest for purposes of conferring standing on a person. *See Orix-Woodmont Deer Creek I Venture L.P. v. DEP*, 2001 EHB 82, 86; *Ziviello v. DEP*, 2000 EHB 999, 1004 n.9; *see also Franklin Township*, 452 A.2d at 720 (noting that "[a]esthetic and environmental well-being are important aspects of the quality of life in our society" and holding such interests sufficient for standing purposes); *Susquehanna County*, 500 Pa. at 516 (environmental aesthetic and quality of life considerations sufficient to confer standing). When the record is viewed in the light most favorable to RSACC, the organization has adduced enough evidence at this stage to establish the facts essential to its claim of stream-related standing.

Finally, I decline to endorse the rule, advocated by New Enterprise, that an organization whose standing is derived solely as a representative of its members must demonstrate that at least one individual with standing was actually a member of the organization prior to expiration of the organization's thirty-day appeal period. New Enterprise cites only a single Board opinion in support of its proposed rule, *Raymond Profitt Foundation*, (a one-judge opinion), and our

research has uncovered no other Board or state court opinion which has addressed the issue. In the course of denying a motion to dismiss on the ground that genuine issues of fact existed which precluded granting the motion, the Board judge stated the following in *Raymond Profitt Foundation*:

> [W]e believe that individuals who could have appealed an action of the Department for themselves should not be permitted to circumvent the deadlines for the filing of appeals before this Board by signing up with a group after the expiration of the appeal period. . . . We do not believe that an organization whose sole claim to standing rests upon the aggrievement of individual members can do so where those members would not be permitted to continue their appeal in their own right because the Board's jurisdiction could not attach to their untimely appeal.

Raymond Profitt Foundation, 1998 EHB at 684 (citing *Petro-Chem Processing Inc. v. EPA*, 866 F.2d 433, 437 (D.C. Cir.), *cert. denied sub nom, Hazardous Waste Treatment Council v. EPA*, 490 U.S. 1106 (1989)). In my view, a rule requiring organizations with member-based standing to demonstrate that individual persons serving as the foundation for standing were actually "members" within the thirty-day appeal period should not be applied to Board proceedings because such a rule is inconsistent with the intent of § 7514(c) of the EHB Act, conflicts with other Board procedures, and would be difficult to administer consistently.

According to § 7514(c), if a person is adversely affected by a DEP action that person is entitled to appeal to the Board; the agency action is the subject of an appeal, not the individual objections raised. New Enterprise is not seeking dismissal of RSACC's entire appeal for lack of standing so, at least at this stage of the proceedings, New Enterprise is accepting that RSACC has standing to appeal the April 2003 revision to the mining permit—*i.e.*, the DEP action at issue in this proceeding. If an organization has standing to challenge the DEP action in some cognizable manner, it seems anomalous in the context of a *de novo* review of the action to prohibit that same appellant from raising a particular objection on the basis of a technical

absence of member-based standing derived from a Board rule pertaining to subject matter jurisdiction.

Second, the stated purpose of the rule—to prevent individuals from circumventing the thirty-day deadline for filing appeals with the Board by signing up with an association that has already filed an appeal—most likely cannot be accomplished on account of conflicts with other Board procedures. The rule advocated by New Enterprise would conflict with the Board's practice for intervention in pending appeals. Pursuant to § 7514(e) of the EHB Act, "any interested party may intervene in any matter pending before" the Board, 35 P.S. § 7514(e), and the Board's rules permit any "interested person" to intervene in any pending matter "prior to the initial presentation of evidence." 25 Pa. Code § 1021.81(a). *See Browning-Ferris, Inc. v. Dept. of Environmental Resources*, 598 A.2d 1057 (Pa. Cmwlth. 1991). The thirty-day appeal period is not applied to any intervenor, whether individual or citizens group. *See Consol Pennsylvania Coal Co. v. DEP*, 2002 EHB 879. Thus, a citizens group could intervene in a pending appeal even though the individuals on which its standing was based were not association members until after the original thirty-day appeal period had elapsed.

Analogous issues arise with respect to the Board's amendment practice, given that an appeal may amended as of right within 20 days after the filing of a notice of appeal. 25 Pa. Code § 1021.53(a). Here, for example, there has been no challenge thus far to RSACC's standing to raise the objections in its notice of appeal related to blasting, air quality, well contamination and water resources other than Plum and Halter Creeks. A person with the requisite interest in impacts on the two streams could have "joined" RSACC after its thirty-day appeal period, but prior to expiration of the amendment period, and RSACC could simply have amended its notice of appeal to include allegations of harm to the streams at that point. The rule offered by New

Enterprise thus amounts to little more than a technical formality grafted onto the statutory requirement that an appellant only be adversely affected by a DEP action, 35 P.S. § 7514(c), and it would neither advance the substantive purposes that inform prudential standing doctrine nor the goal of administrative finality promoted by the Board's rule setting a thirty-day appeal period.

Third, problems of administration would result as the Board is immersed in needless distractions over what it means to be a "member" of an organization and in-depth inquiries into the timing of membership for specific individuals. Arguments would ensue over the nature of practices an organization must follow before being considered a legitimate "association" with actual "members" and acceptable membership rituals. Here, for example, RSACC is an unincorporated association that meets irregularly and informally; membership appears to be based on an individual's interest and willingness to contribute to the association's goals rather than any formalized practice. Defining "membership" could prove to be quite time-consuming. The discovery and motion practice connected with such inquiries would work special hardship on local citizens groups and non-profit recreational associations. Citizens groups in particular can be loose affiliations of individuals with a common interest in protecting local environmental resources who are only able to effect oversight of agency actions by pooling their resources under the rubric of an unincorporated association. Though these associations may lack corporate-style formality, their interest in the controversy is close to home, and they can serve an important function as protectors of the public interest. Associations can also serve to greatly simplify the process of administering the appeal of a DEP action that could have taken the form of a multitude of individual appeals. *See Parents United for Better Schools, Inc.*, 646 A.2d at 692 (representational standing is particularly appropriate where there is a large number of potential

parties). We should not adopt a technical procedural rule for standing that cannot be consistently and usefully applied to all organizations.

In sum, I see no basis for the proffered rule in the text of § 7514(c) of the EHB Act and, for the reasons stated, I believe the statute should not be interpreted to require an organization with member-based standing to demonstrate that at least one individual with standing was actually a "member" of the organization prior to expiration of the organization's thirty-day appeal period. Therefore, Mr. Green should not be excluded from my consideration of RSACC's member-based standing in the context of deciding this motion. As an individual member with stream-related standing, he provides a solid foundation for the organization's standing to challenge the permitted quarrying activities' alleged harm to Plum and Halter Creeks. Accordingly, I will enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

ORDER

And now this 21st day of December 2004, it is hereby ordered that the Motion for Partial Summary Judgment filed by Permittee New Enterprise Stone & Lime Company Inc. against Appellant Roaring Spring Area Citizens Coalition is denied.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Administrative Law Judge
Member

Dated: December 21, 2004

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

For the Commonwealth, DEP:
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Southcentral Regional Counsel

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JOHN A. PIKITUS	:	
	:	
v.	:	**EHB Docket No. 2004-215-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WEST MAHANOY TOWNSHIP, Permittee	:	**Issued: December 23, 2004**

OPINION AND ORDER ON MOTION FOR DEFAULT JUDGMENT

By: George J. Miller, Administrative Law Judge

Synopsis:

A motion for a default judgment against the Department and a Township is denied in a *pro se* proceeding designed to avoid his being required to connect to the Township's proposed central sewage facility and pay the fees required by the Township, because (1) no answer to a notice of appeal is required, (2) the Board has no jurisdiction over this proceeding if it were filed as a complaint rather than as an appeal, and (3) the Department and the Township were not given notice that they were required to answer the document that initiated this proceeding.

OPINION

This proceeding was commenced by John A. Pikitus, *pro se,* by filing a handwritten document with the Environmental Hearing Board entitled "Request to revise official Plans of West Mahanoy township sewer project 25 § 71.14 request to revise official plans." The document is captioned "John A. Pikitus V. West Mahanoy township sewer project." This request seeks to avoid Mr. Pikitus being required by the Township to connect to the proposed sewer project by paying a

tapping fee and monthly household fees rather than to continue to rely on on-lot sewage disposal such as septic tanks that his request claims he and others have relied upon all their lives. The request contends that such a requirement would violate his constitutional rights. The request does not attach a copy of any action by the Department. Instead it attaches as Exhibit C a document presumably prepared by the Township explaining why a public sewer system is required and estimating the costs of such a system to the residents of the Township. The document states that the cost to residents will consist of a tapping fee of $1,000 and a monthly household fee of between $40 to $55.

Since the Board has no jurisdiction over requests made to a municipality absent some final action of the Department of Environmental Protection (Department) and the Township's plan had to be approved by the Department at some time in the past, the Board docketed this request as an appeal. Thereafter Mr. Pikitus filed with the Board proofs of service of his request on both the Department and the Township in response to the Board's orders.

On December 3, 2004 Mr. Pikitus filed with the Board a handwritten motion for a default judgment against the Department and West Mahanoy Township since he had received no response from them to his request within 20 working days. When advised by the Board that no response is required in an appeal proceeding, Mr. Pikitus supplied the Board with a letter stating that he had filed a complaint, not an appeal, attaching a complaint form apparently used by a federal district court in Pennsylvania. In a conference call held by the Board with Mr. Pikitus and counsel for the Department and the Township, Mr. Pikitus elected to have the Board rule on his motion rather than withdraw it voluntarily.

DISCUSSION

We will continue to treat this proceeding as an appeal from an action of the Department approving the Township's sewage facilities plan. The Environmental Hearing Board Act[1] and the Sewage Facilities Act[2] grants the Board jurisdiction to adjudicate timely appeals from final actions of the Department, but does not give it general jurisdiction over complaints by individuals against a municipality. While the Board's Rules of Practice and Procedure do provide a procedure for complaints by individuals against the Department[3], the Board's jurisdiction to entertain such a complaint is limited to only a few special grants of jurisdiction contained in other statutes or to cases properly referred to it by Pennsylvania courts. No such grant of jurisdiction exists for a complaint in the present proceeding.

We will deny the motion for a default judgment because the Board has no jurisdiction over a complaint proceeding under these circumstances and no response by the other parties is required to a notice of an appeal.[4] In addition, nothing in the documentation filed by the Appellant gave notice to the other parties that an answer to his filing was required by any specific time.

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[1] Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511 – 7516.

[2] Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1 - 750.20a.

[3] 25 Pa. Code § 1021.72.

[4] A notice of appeal is not a "pleading" under the Board's Rules of Practice and Procedure at 25 Pa. Code § 1021.2. Accordingly, no answer is required to a notice of appeal and the Board will not entertain a motion for judgment on the pleadings in an appeal proceeding. *See Milco Industries, Inc. v. DEP*, 2001 EHB 995; *Allegro Oil and Gas Inc., v. DEP*, 1998 EHB 790.

Because the Appellant may find that this appeal is untimely,[5] the Board advised him in the conference call that his course of action may be limited to filing a private request with the Department to require the Township to revise the Township's official plan. Such a private request can be made under the Department's regulations at 25 Pa. Code § 71.14 only after making a prior written demand for revision of the plan with the Township that the Township denies. If the Department in turn denies such a private request, the Board may have jurisdiction over an appeal from such a denial by the Department filed within thirty days from the Department's denial. However, there may be no reason for the Board to require the Department to reconsider its prior approval now even if this procedure is followed.

Accordingly, the Board issues the following

[5] The Department has responded to the Appellant's appeal with a motion to dismiss on the ground, among others, that the appeal is untimely. We will deal with that motion after the Appellant has had an opportunity to respond to it.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN A. PIKITUS	:	
	:	
v.	:	**EHB Docket No. 2004-215-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WEST MAHANOY TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 23rd day of December, 2004, the motion of the Appellant for a default judgment against the Department and West Mahanoy Township is DENIED.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Member

DATED: December 23, 2004

c: **Department Litigation:**
Attention: Brenda Morris
Library

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