Environmental Hearing Board

Adjudications and Opinions

2003

Volume I

COMMONWEALTH OF PENNSYLVANIA
Michael L. Krancer, Chairman

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OF THE

ENVIRONMENTAL HEARING BOARD

2003

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Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 2003 EHB 1

ISBN NO. 0-8182-0289-0

FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 2003.

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

2003 DECISIONS

UNITED STATES CONSTITUTION

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

HANSON AGGREGATES, PMA, INC. GLACIAL SAND AND GRAVEL COMPANY TRI-STATE RIVER PRODUCTS, INC.	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CLEAN WATER ACTION, Intervenor	:	
and		EHB Docket No. 2001-138-R (Consolidated with 2001-139-R; 2001-140-R; 2001-157-R; 2001-158-R and 2001-159-R)
CLEAN WATER ACTION	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GLACIAL SAND AND GRAVEL COMPANY, PIONEER MID-ATLANTIC, INC. and TRI-STATE RIVER PRODUCTS, INC.	:	Issued: January 15, 2003

OPINION AND ORDER ON
MOTION AND AMENDED MOTION
FOR PROTECTIVE ORDER

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board grants a motion for a protective order filed by the Pennsylvania Fish and Boat Commission prohibiting the discovery of confidential information regarding the site-specific locations of threatened and endangered fish species. The permittees have not demonstrated a need for such information that would outweigh the potential injury to the public interest.

OPINION

This case involves the appeal of dredging permits issued by the Department of Environmental Protection (Department). A more detailed background of the matter is set forth in an earlier opinion and order issued on November 8, 2002.

This opinion concerns the Pennsylvania Fish and Boat Commission's (Fish Commission) Motion for Protective Order (Motion) filed on January 6, 2003 and amended on January 9, 2003. Following a conference call with counsel for the parties and the Fish Commission, counsel for the permittees and Clean Water Action filed briefs on behalf of their clients. The Department has not filed any briefs on this issue.

The Fish Commission is an independent administrative agency of the Commonwealth of Pennsylvania with jurisdiction over the protection, preservation and management of fish, reptiles,

amphibians, and other aquatic organisms in Pennsylvania. 30 Pa. C.S. §§ 321(2), 322(2) and 2101(2). In this role, the Fish Commission reviews applications for water obstruction and encroachment permits and provides comments to the Department for its consideration when issuing permits. The Fish Commission reviewed the applications and provided comments for the permits at issue in these appeals.

Among the issues the Fish Commission addressed were concerns regarding threatened and endangered species in the areas proposed for dredging in the Allegheny and Ohio Rivers. These comments were submitted to the Department on behalf of the Fish Commission by its former leader of the Nongame and Endangered Species Unit, Mr. Andrew L. Shiels. Mr. Shiels is now the Fish Commission's Chief of the Division of Research. The comments are set forth in his letter of December 21, 2000.

In response to a discovery request from the permittees directed to Clean Water Action, Mr. Shiels was identified as a witness. On December 27, 2002 the Fish Commission's counsel accepted service of a *subpoena duces tecum* directed to Mr. Shiels. Among the documents the permittees demand Mr. Shiels bring to his deposition (now scheduled for January 17, 2003) are "documents regarding impacts on Pennsylvania threatened and endangered aquatic species relative to dredging activities, including Appendix B to Final Report, Application of Geographic Information Technology System to Fish Conservation in Pennsylvania, Phase 1, June 1, 1998, revised October 1, 1998." It is our understanding that Appendix B contains site-specific information about the location of

threatened and endangered species throughout the Commonwealth. Included are listings of fish species in the Ohio and Allegheny Rivers.

The Fish Commission has filed a motion for protective order asserting that Appendix B and related documents are highly confidential and privileged documents and should not be produced. According to the Fish Commission, they do not even allow sister state agencies, such as the Department, to have access to Appendix B. They argue that if this information fell into the hands of poachers or collectors dire consequences could ensue. The Fish Commission hastens to add that they are "not suggesting that permittees are in any way motivated by a desire to harm the populations of endangered or threatened fish in Pennsylvania or that permittees would use the site specific information in an inappropriate way." They maintain that the disclosure of Appendix B, even under a protective order, "risks further threats and endangerment to these already reduced populations ...and could result in irreparable harm."

The permittees contend that the information in Appendix B is discoverable and that it is highly relevant to their case. Although conceding for the purposes of this litigation that Appendix B contains confidential information, they have offered to accept a highly redacted copy of Appendix B just detailing the fish species information for the relevant areas of the Ohio and Allegheny Rivers. They claim that if Appendix B and related documents are not produced they will be prejudiced in the development of their legal positions in these appeals.

Clean Water Action argues that the Board should grant the Fish Commission's Motion for a

Protective Order and prohibit the discovery of Appendix B. Clean Water Action contends that the permittees have not advanced any compelling reasons why Appendix B should be produced. In their view, the permittees have not sufficiently set forth why they need such site-specific information concerning endangered and threatened species. Clean Water Action points out that neither they nor the Department have the site-specific information in Appendix B and they do not intend to inquire about it during their examination of Fish Commission witnesses.

The Department filed no briefs in this matter but during the conference call indicated they were supportive of the position of their sister agency.

We believe Clean Water Action succinctly sets forth the issues raised in the Fish Commission's motion for protective order. We first must decide whether the site-specific location and numbers of endangered species is confidential information. We believe it clearly is confidential and legally privileged information. Moreover, the permittees agree with our assessment – at least for the purposes of this litigation.

We now move to the second and more difficult issue which is whether the permittees in fact need such site-specific information. Our review of Mr. Shiel's report, together with an exhibit which accompanied the report, Table 2, leads us to the conclusion that the parties already have very site specific information regarding endangered and threatened fish species in the Ohio and Allegheny Rivers thus making it unnecessary for this Board to allow the discovery and production of Appendix B and related documents. Permittees' counsel dismisses the value of Table 2 arguing that it applies

to large stretches of the rivers but our review leads us to conclude that relatively narrow locations of the rivers are set forth with specific listings of fish species. We are not convinced, at this point in the proceedings, that the discovery of Appendix B is necessary. Indeed, we believe that the disclosure of this information might be contrary to the public interest and public policy of the Commonwealth of Pennsylvania regarding the protection of threatened and endangered species.

We earlier have protected from discovery the disclosure of Clean Water Action's membership lists. We held that the membership list of an advocacy group is not discoverable unless the need for discovering such information clearly outweighs the chilling effect such disclosure would have on the members' First Amendment right of association. We also refused to allow the discovery of the permittees' customer lists or specific pricing and expense information. We found that the disclosure of such confidential information was not warranted "where the interests of justice can be served without it." Likewise, we believe that the permittees will not suffer any prejudice if they do not have access to the site-specific information set forth in Appendix B and related documents. Permittees have made no showing of a specific need that would entitle them to the discovery of this information. Therefore, we agree with Clean Water Action, that "the fact that the permittees are willing to enter into a protective order that would limit their use of the requested information is not relevant unless they first can show that they have a real need for the site-specific information regarding endangered species."

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HANSON AGGREGATES, PMA, INC. GLACIAL SAND AND GRAVEL COMPANY TRI-STATE RIVER PRODUCTS, INC.	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CLEAN WATER ACTION, Intervenor	:	
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ORDER

AND NOW, this 15th day of January, 2003, it is ordered as follows:

1) The Pennsylvania Fish and Boat Commission's Motion and Amended Motion for Protective Order are ***granted***.

2) The Permittee's *subpoena duces tecum* is ***quashed*** as to the production and discovery of Appendix B and all documents in the Pennsylvania Fish and Boat Commission's file that contain or display ***site-specific*** information regarding the location of threatened and endangered species in the areas proposed for dredging in the Ohio and Allegheny Rivers.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: January 15, 2003

See service list on the following page.

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

FREDERICK A. KELLY JR.	:	
	:	**EHB Docket No. 2002-210-C**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, STATE CONSERVATION COMMISSION	:	**Issued: January 15, 2003**

OPINION AND ORDER GRANTING A MOTION TO DISMISS

By: Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Department's motion to dismiss for lack of jurisdiction is granted. A proposed, unexecuted, consent assessment of civil penalty does not constitute a final agency action over which the Board may exercise its jurisdiction.

OPINION

This matter involves an appeal from an unexecuted, proposed, consent assessment of civil penalty offered by the Department of Environmental Protection (DEP) to Appellant Frederick A. Kelly, Jr. as a means of resolving an alleged violation of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.1 *et seq.* Presently before the Board is DEP's motion to dismiss the appeal. DEP contends that the appeal should be dismissed because a proposed, unexecuted, consent assessment of civil penalty does not constitute a final agency action and the subject of this appeal is therefore outside the scope of the jurisdiction granted to the Board by its enabling statute. Appellant filed no response to the motion.

I. Factual Background

In late August 2002, the Berks County Conservation District (BCCD) sent a *proposed* Consent Assessment of Civil Penalty to Mr. Kelly in relation to an alleged violation of the Clean Streams Law and certain implementing regulations; Appellant received the document on August 29, 2002. (Notice of Appeal, at 1 and attachment 2). The proposed Consent Assessment states that: (1) Mr. Kelly was involved with earth disturbance activities on residential property he owns in Exeter Township, Berks County; (2) BCCD conducted several inspections of Mr. Kelly's lot; and, (3) BCCD determined that Mr. Kelly failed to have an erosion and sediment control plan available for review and inspection by BCCD at all stages of the earth disturbance activity, in violation of 25 Pa. Code § 102.4 and 35 P.S. § 691.611. (Notice of Appeal, at attachment 2). The document then sets forth typical language by which the parties would agree to a consent assessment of civil penalty in lieu of any litigation, (here in the amount of $250), as a means of resolving BCCD's potential claim for civil penalties and expenses for the alleged violations. The document, however, contains no date and is not signed by either party. *Id.*

After receiving the proposed Consent Assessment from DEP, Mr. Kelly filed an appeal with the Board in which he primarily objected to statements in the document concerning the necessity for an erosion and sediment control plan for the type of earth-moving activity he had performed on his residential property. (Notice of Appeal, at 1 and attachment 2). DEP's Motion states that the proposed consent assessment of civil penalty was only an offer of settlement and there is no allegation in the Notice of Appeal that the offer was accepted by the Appellant. (DEP Motion, at ¶ 6; Notice of Appeal, *passim*).

II. Discussion

The material facts relevant to the motion have not been disputed; Mr. Kelly filed no response to DEP's motion, and DEP has not contested any of the allegations stated in

Appellant's Notice of Appeal. Rather, DEP merely contends that the subject matter of the appeal does not, as a matter of law, constitute an agency final action over which this Board may exercise its jurisdiction. The Board will grant a motion to dismiss where there are no material facts in dispute and the moving party is clearly entitled to judgment as a matter of law. *See, e.g., Smedley v. DEP*, 1998 EHB 1281, 1282; *see also Grimaud v. DER*, 638 A.2d 299, 303 (Pa. Cmwlth. 1994) ("Where there are no facts at issue that touch jurisdiction, a motion to quash [the appeal] may be decided on the facts of record without a hearing.").

We agree with DEP that the proposed consent assessment of civil penalty does not constitute a final agency action over which the Board may lawfully exercise its jurisdiction. The outlines of the Board's jurisdiction are set forth in the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, as amended, 35 P.S. §§ 7511 *et seq.* (the EHB Act). The Board recently explained the scope of its jurisdiction as follows:

> Pursuant to the EHB Act: "The board has the power and duty to hold hearings and issue adjudications under [the provisions of the Administrative Agency Law relating to practice and procedure of Commonwealth agencies, 2 Pa.C.S. § 501 *et seq.*] on orders, permits, licenses or decisions of [DEP]." 35 P.S. § 7514(a). The EHB Act also provides that "no action of the [DEP] 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 . . . ." 35 P.S. § 7514(c). The Board's regulations implementing the EHB Act define "action" to mean: "An order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification." 25 Pa. Code § 1021.2(a). Thus, the EHB Act expressly grants the Board jurisdiction over DEP's "orders, permits, licenses or decisions," 35 P.S. §7514(a), as well as any DEP action "adversely affecting" a person's "personal or property rights, privileges, immunities, duties, liabilities or obligations." 35 P.S. §§ 7514(c); 25 Pa. Code § 1021.2(a).

Donny Beaver v. DEP, EHB Dkt. No. 2002-096-K, slip op. at 7-8 (Aug. 8, 2002).

The proposed Consent Assessment of Civil Penalty is nothing more than an offer of settlement sent by DEP to Mr. Kelly. The document is clearly not an "order, permit, license or

decision" by the Department. 35 P.S. §7514(a). Nor can the simple act of proposing a consent assessment of civil penalty reasonably be considered as an action by the Department which adversely affects the personal or property rights, privileges, immunities, duties, liabilities or obligations of Mr. Kelly. 25 Pa. Code § 1021.2(a).

When determining whether a particular DEP action is appealable, the Board generally considers certain factors including: the specific wording of the communication; its purpose and intent, the practical impact of the communication; its apparent finality; the regulatory context; and, the relief which the Board can provide. *See Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121-24.[1] The document at issue here simply informs the recipient of alleged violations, and offers a means of settling any potential dispute through an agreement of the parties in lieu of litigation. There is no practical impact on Appellant from an unaccepted offer of settlement, no finality to DEP's action and, importantly, no relief whatsoever which the Board can provide in this appeal. We therefore conclude that the proposed, unsigned, Consent Assessment of Civil Penalty is not a final action over which this Board may lawfully exercise its jurisdiction, and accordingly we will grant the motion and enter the following Order dismissing this appeal:

[1] In particular, the Board has distinguished between descriptive and prescriptive communications—*i.e.* those which merely observe conditions, inform the recipient of alleged violations, or advise of the agency's interpretation of applicable law; and, those which direct the recipient to perform a specific course of conduct, or impose an obligation which subjects the recipient to liability or which changes the status quo to the detriment of personal or property rights. *See Donny Beaver*, EHB Dkt. No. 2002-096-K, slip op. at 8-9 (discussing caselaw).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FREDERICK A. KELLY JR.	:	
	:	
v.	:	**EHB Docket No. 2002-210-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, STATE CONSERVATION COMMISSION	:	

ORDER

AND NOW, this 15th day of January, 2003, it is hereby ORDERED as follows:

1. The Department of Environmental Protection's Motion to Dismiss is granted, the appeal at EHB Docket No. 2002-210-C is hereby dismissed, and the docket will be marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

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GEORGE J. MILLER
Administrative Law Judge
Chairman

Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
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Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

Dated: January 15, 2003

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DONALD F. GOETZ	:	
	:	
v.	:	**EHB Docket No. 2002-069-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NATIONAL WIND POWER, Permittee	:	**Issued: January 16, 2003**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Michael L. Krancer, Administrative Law Judge

Synopsis:

In an appeal where the Appellant has objected to the Department's issuance of an NPDES Permit for the discharge of storm water from construction activities, the Board grants a Motion for Summary Judgment filed by the Permittee and dismisses the appeal where the Appellant's objections to issuance of the permit are factually unsubstantiated by any record evidence and/or legally insufficient.

Factual and Procedural Background

This case is Donald F. Goetz's (Appellant or Mr. Goetz) *pro se* appeal of the Department of Environmental Protection's (Department) issuance of National Pollutant Discharge Elimination System (NPDES) Permit No. PAS107421, for the discharge of storm water from construction activities, to National Wind Power, Ltd. (NWP or Permittee). The proposed construction involves erection of the so-called Waymart Wind Farm. Waymart Wind Farm is a

wind energy project consisting of a series of wind turbines on a ridgeline in Clinton and Canaan Townships, Wayne County Pennsylvania, for the generation of electricity.[1] We have issued one previous opinion in this case which denied Appellant's motion to compel discovery. *Goetz v. DEP*, EHB Docket No. 2002-069-K (Opinion issued November 19, 2002).

In November of 2001, the Wayne Conservation District completed its review of Permittee's Permit Application for discharge of storm water from construction activities and forwarded it along with supporting documentation to the Department recommending approval. By letter dated January 18, 2002, the Department approved Permittee's Erosion and Sedimentation Control Plan ("E&S Plan") and issued NPDES Permit No. PAS107421 to Permittee, effective January 22, 2002. On March 11, 2002, Appellant filed this appeal objecting to issuance of the Permit.[2]

Appellant states his objections to issuance of the Permit as follows: 1) permit authorizes discharge of storm water from a construction site without required Preparedness, Prevention and Contingency Plan, 25 Pa. Code §101.3; 2) permit authorizes use of Township dirt road/s for construction site access without Erosion and Sediment Control Plan approval; 3) unauthorized signature in permit application per PART B, 1. MANAGEMENT REQUIREMENTS, C. Signatory Requirements of Permit; 4) inaccurate information furnished in permit application under SITE INFORMATION, Applicant to Site Relationship, page 3 of the GENERAL INFORMATION FORM; 5) inaccurate information furnished in permit application under question 7.1, page 4 of the GENERAL INFORMATION FORM; 6) inaccurate information

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[1] The permit was later transferred from NWP to Waymart Wind Farm, L.P.

[2] Appellant subsequently amended his notice of appeal on March 19, 2002 and March 25, 2002 raising, in total, seven objections to the Department's issuance of NPDES Permit No. PAS107421.

furnished in permit application under question 1, page 3 of the INDIVIDUAL PERMIT APPLICATION, SECTION D, OTHER POLLUTANTS; and 7) inaccurate information furnished in Erosion and Sediment Control Plan approved December 12, 2001, wind turbine tower #'s 37, 38, 39 and 40 not re-located as notified by applicant December 12, 2001 and prior to permit date of January 22, 2002.

Before us is Permittee's timely Motion for Summary Judgment and supporting memorandum of law. The motion is supported by 28 exhibits including various discovery responses. Permittee contends that Appellant's objections to issuance of the Permit are unsubstantiated and as a matter of fact and/or law and cannot be a basis for rescinding issuance of the Permit. The Appellant filed a response, absent any accompanying affidavits, exhibits or a supporting memorandum of law.[3] The response is noteworthy for it is a recitation of numerous bare denials accompanied by narrative explanations. There are no opposing exhibits or affidavits. Permittee filed a reply to Mr. Goetz's response. The Department joins in the Permittee's motion.

Standard of Review

As for the standard of review of a summary judgment motion, we recently said the following on the subject in *Perkasie Borough Authority v. DEP*, EHB Docket No. 2001-267-K (Opinion and Order issued September 17, 2002),

> 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

[3] This being the case, any citations herein to exhibits are, by definition, the exhibits provided by Permittee in its motion.

> 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).

Perkasie, *supra*, slip op. at 7.[4]

Also important to the analysis in this case is Pa. R. Civ. P. 1035.2(2) which provides, in essence, that a party is entitled to judgment as a matter of law if an adverse party who will bear the burden of proof at the hearing has failed to produce evidence of facts essential to the cause of action. Pa. R. Civ. P. 1035.2(2). *Jones v. SEPTA*, 772 A.2d 435, 438 (Pa. 2001); *Screck v. Department of Transportation*, 749 A.2d 1041, 1042 (Pa. Cmwlth. 2000); *Eagleshire v. DEP*, 1998 EHB 610, 614-615; *Belitskus v. DEP*, 1997 EHB 939, 944. In this case, Mr. Goetz, as the challenger to an issued permit, bears the burden of proof. 25 Pa. Code § 1021.101(c)(2). In this case, then, Permittee's entitlement to judgment as a matter of law can be established by a showing that Mr. Goetz, who bears the burden of proof, has failed to produce either any evidence to support his allegations or not enough evidence to have made out a *prima facie* case. *Eagleshire*, *supra* at 615.

A corollary to Rule 1035.2 is stated in the commentary to that Rule which provides that, "to defeat [a summary judgment motion] the adverse party must come forward with evidence showing the existence of the facts essential to the cause of action or defense." *Note*, Pa. R. Civ. P. 1035.2. This corollary is set forth by Rule at Pa. R. Civ. P. 1035.3 which provides as follows:

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[4] The "record" for purposes of motions for summary judgment, consists of the pleadings, depositions, answers to interrogatories, admissions, affidavits, and certain expert reports, if any. Pa. R.C.P. 1035.01. Thus, the record for summary judgment review in this case is derived entirely from Appellant's Notice of Appeal, and the parties' various filings regarding the

> The adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response ...identifying
>
> > (1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or
> >
> > (2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.

Pa. R. Civ. P. 1035.3. This important principle has been repeated many times by Pennsylvania appellate courts, including our Supreme Court, in cases affirming the granting of summary judgments, as well as by this Board. *See Ertel v. The Patriot News Company*, 674 A.2d 1038, 1042 (Pa. 1996); *Yanno v. Conrail*, 744 A.2d 279, 280 (Pa. Super. 1999), *appeal granted*, 764 A.2d 1571 (Pa. 2000); *Nationwide Mutual Insurance Company v. Lehman*, 743 A.2d 933, 937 (Pa. Super. 1999), *appeal granted*, 795 A.2d 978 (Pa. 2000), *appeal dismissed*, 772 A.2d 413 (Pa. 2001); *Brecher v. Cutler*, 578 A.2d 481, 483 (Pa. Super. 1990); *Ainjar Trust, John O. Vartan, Trustee v. DEP*, 2001 EHB 59, 63 *quoting Harriman Coal Corporation v. DEP*, 2000 EHB 1295, 1305 (to prevail against a properly supported motion for summary judgment, the non-moving party must adduce sufficient evidence on an issue essential to his case).

As our Supreme Court summarized these rules in *Ertel*,

> the rule explicitly states that a non-moving party may not avoid summary judgment by 'resting upon the mere allegations or denials of his pleading. [citation omitted]. Allowing non-moving parties to avoid summary judgment where they have no evidence to support an issue on which they bear the burden of proof runs contrary to the spirit of Rule 1035.

Ertel, supra at 1042. Allowing such a result also runs counter the to specific language of Rules 1035.2 and 1035.3.

Permittee's motion for summary judgment.

Discussion

In this case as we have already mentioned, the Permittee's motion is well pled and is supported by record evidence outlined in exhibits including discovery responses. Mr. Goetz's response, on the other hand, is not supported by affidavits, any citations to record evidence controverting the evidence cited in support of the motion or a challenge to the credibility of any witness. As correctly stated by Permittee in its reply brief, "an unsupported or improper denial does not in itself create a genuine issue of material fact". Permittee Reply Brief, p. 2 n. 1. This proposition is an accurate summation of Rule 1035.3.

A review of the record presented to us shows that Mr. Goetz has not adduced any record evidence at all let alone any record evidence which would controvert the motion or establish any fact essential to the viability of his appeal. In any event, we will discuss and deal with each of Appellant's objections individually.

Objection No. 1.

Appellant's first objection to issuance of the Permit is that the "permit authorizes discharge of storm water from a construction site without the requisite Preparedness, Prevention and Contingency ("PPC") Plan, 25 Pa. Code §101.3." Permittee argues, as a matter of law, that this is not a basis for rescinding the permit. We agree. Permittee correctly points out that the regulation cited by Appellant was reserved effective January 29, 2000. 25 Pa. Code §101.3. Moreover, it is well established that preparation of a PPC Plan is not a prerequisite to issuance of an NPDES permit. *See O'Reilly v. DEP*, 2001 EHB 19 (nothing in the regulations or permit application instructions specifically requires preparation of a PPC plan prior to NPDES permit issuance). Furthermore, Mr. Goetz's proposition that the permit under appeal authorizes discharge of storm water without a PPC plan is simply an incorrect assertion. That is not what

the permit says. Paragraph C.6 of the Permit, requires the permit holder to prepare a PPC plan under certain circumstances. Therefore, Appellant's objection to issuance of the permit based upon absence of a PPC plan is not viable and Permittee is entitled to summary judgment in its favor on that claim.

Objection No. 2

Appellant claims that the permit improperly authorizes "use of township dirt roads for construction site access without Erosion and Sediment Control Plan ("E&S Plan") approval." Permittee argues that the objection is not sustainable because the access roads to which Appellant refers are not within the purview of the permit and the activities complained of are not covered by the regulation. We agree.

Appellant contends, without having produced any evidence whatsoever to support its contention, that the use of heavily loaded construction vehicles on un-maintained township dirt roads will cause earth disturbances such that an E&S Plan is required. Even if Mr. Goetz were correct in his assertion, we are unable to find anything in the regulations to indicate that E&S plans are required for construction vehicle traffic over publicly owned roads utilized by a permittee to reach a construction site. The regulations indicate that E&S plans are "site-specific." 25 Pa. Code §102.1. They apply to individuals proposing or conducting earth disturbance activities. 25 Pa. Code §102.2. Earth disturbance activity is defined as "construction or other human activity which disturbs the surface of the land, including but not limited to, clearing and grubbing, grading, excavations, embankments, land development, agricultural plowing or tilling, timber harvesting activities, road maintenance activities, mineral extraction, and the moving, depositing, stockpiling, or storing of soil, rock or earth materials." 25 Pa. Code 102.1. Given the above definition, we cannot conclude that construction vehicle traffic over

public roads is an earth disturbance activity contemplated by the regulations or regulated thereunder. Furthermore, Appellant has failed to produce any evidence that the alleged activities would in fact have any negative environmental impact. Appellant's objection is simply unsupported by law and the facts and Permittee is entitled to judgment in its favor as a matter of law.

Objection No. 3

Appellant contends that the Permit application contains an unauthorized signature per: Part B, 1. Management Requirements, c. Signatory Requirements of Permit. Specifically, Appellant objects to Mr. Steve Macken as signatory of the permit application asserting that he was not a vice-president or corporate officer. Permittee argues that Mr. Macken, National Wind Power's Business Development Manager and representative in the United States, is a proper signatory.

There are several sources which set forth the status required for signatories of a corporation's NPDES application. 25 Pa. Code § 92.23 provides that the signatory of the application, in the case of a corporation, must be a principal executive officer of at least the level of vice president, or an authorized representative, if the representative is responsible for the overall operation of the facility from which the discharge described in the NPDES form originates. 25 Pa. Code § 92.23. The permit itself provides that it applications shall be signed by a responsible corporate officer which means, among others, a vice-president of the corporation in charge of a principal business function or any other person who performs similar policy or decision-making functions for the corporation. Permit, Ex. 9 at B.1.c(1)(a). The instructions in the permit application provide that it may be signed, in the case of a corporate applicant by (1) a president secretary, treasurer, or vice- president of the corporation in charge of

a principal business function, or any other person who performs decision-making functions for the corporation; or (2) the manager of one or more manufacturing, production or operating facilities if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures. Permit Application Instructions, Ex. 16 at G.a(2). In *O'Reilly v. DEP*, the Board held that the signatory must be knowledgeable about the subject matter of the permit application. *O'Reilly*, 2001 EHB at 52-53.

By any standard, Mr. Macken qualifies as an appropriate signatory and Mr. Goetz has not presented any record evidence to the contrary. Permittee has presented the following description of Mr. Macken's status, duties and responsibilities within the corporation which has not been controverted by Mr. Goetz. Mr. Macken signed the application in his capacity as NWP's representative in the United States. In that capacity he managed the day-to-day affairs of NWP in the United States and he performed policy and decision-making functions for NWP in the United States. Motion ¶ 8, Ex. 22, p. 8. Mr. Macken was responsible for NWP's development of wind power projects in the United States from site selection through construction. *Id.* Mr. Macken negotiated and executed land option and easement agreements with property owners on behalf of NWP, put together and managed development teams for each project and had lead responsibility for the permitting process. *Id.* Mr. Macken had check writing authority for NWP's business in the United States and had the power to issue checks for legal services, professional consulting and permit fees. Ex. 23.

As we just noted, Appellant has failed to produce any evidence in response to the Permittee's motion which places any of this into question or that would create a triable issue on the subject.[5] Mr. Goetz's response to the Permittee's motion simply denies that Mr. Macken is

[5] There is a reference in one of Mr. Goetz's discovery responses which states that Mr.

an appropriate official. As we have noted, Rule 1035.3 renders this an ineffective defense to a motion for summary judgment where, as in this case, the moving party has come forward with concrete evidence in its support. Furthermore, as a matter of law, Mr. Macken is clearly within the scope of those who are required to be the signatory on behalf a corporate applicant. Thus, Permittee is entitled to summary judgment in its favor dispensing with this objection.

Objections Nos. 4 and 5, The General Information Form

Both objections 4 and 5 have to do with Appellant's contention that Permittee provided inaccurate information in the General Information Form (GIF). The GIF is a document which is submitted by an applicant in conjunction with the permit application. The Department's "Policy for Consideration of Local Comprehensive Plans and Zoning Ordinances in Department of Environmental Protection Review of Permits for Facilities and Infrastructure," Document ID 012-0200-001, describes the function of the GIF as follows:

> The "General Information Form" (GIF) is a multi-page form used for most Department of Environmental Protection applications. Its purpose is to facilitate coordination between different types of applications for the same project, to provide specific information that facilitates the entry of data into the *e*FACTS system, and collect other necessary information.

Ex. 13, p.1. Appellant asserts that inaccurate information was furnished with regard to two questions on the GIF, namely, the question asking for a qualitative description of the nature of the "Applicant to Site Relationship" on page 3 of the GIF, and question 7.1, regarding whether the construction or operation of the site will involve the "treatment, storage, reuse, or disposal of waste" thereon.

Macken operates or operated out of a suite in Oakland, California with a few assistants. Goetz response to Permittee's First Set of Interrogatories (Ex. 21 at Response 6). Even to the extent that this response is intelligible at all, it does not controvert Permittee's presentation of Mr. Macken's credentials presented in its motion nor does the response operate to create a disputed issue of fact with regard to whether Mr. Macken was a qualified signatory.

The Applicant To Site Relationship Question

Permittee described its relationship to the site as being a lessee by checking that box on the GIF. The choice "lessee" is among various other options to choose from including "owner", "owner/operator", "lessee/operator", contractor for owner or operator", "agent for owner or operator" and "other". Ex. 15 at 9 of 12. Mr. Goetz's point appears to be that Permittee did not have a lease in place for each and every parcel making up the entire project site at the time the GIF was completed and submitted. Permittee admits this to be true. However, Permittee maintains that is irrelevant and we agree.

First, the applicant to site relationship question does not even appear on the actual application. The information is requested on the GIF merely so DEP can create internal records to relate (link) each site with all clients associated with the site and/or its facilities." DEP Technicians Guidance Document, Ex. 13 at 1; Motion § 21. Second, the Department points out that the applicant to site relationship question on the GIF means the anticipated relationship of the applicant to the site at the time of actual construction. According to the Department, an applicant is not required to be in possession of the property at the time it applies for the permit as a prerequisite for permit issuance. It is the applicant's responsibility, separate and apart from the application process, to obtain any authorizations which it might need to perform the construction, including access, ownership or lease of the subject parcel or parcels of property. Ex. 26; Motion ¶ 78.[6]

Also, based on the context of the GIF question at issue, Mr. Goetz has not produced any

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[6] Exhibit 26 is a February 26, 2002 letter to Mr. Goetz from William F. McDonnell, Regional Director of the Northeast Regional Office on behalf of Secretary Hess which outlines these aspects of the NPDES permitting process.

evidence which suggests that the Permittee's answer was incorrect, inappropriate or, if it was so, that another answer was the correct one. Furthermore, Mr. Goetz has not told us how it matters even if the answer to this GIF question was incorrect. There is no sustainable objection to issuance of the Permit unless the Appellant can point to a problem that persists in the final permit. Mr. Goetz has not made that connection. In *O'Reilly* we stated:

> The goal of Board proceedings is not to go back through the entire course of permit application procedures to pick out errors that may have been made along the way. Indeed, the very purpose of a deliberative, iterative permit review process is to correct errors and ensure that, in the end, everything has been done correctly. The Board's objective is to determine whether any action needs to be taken regarding the final permit. There will be errors in virtually any permit application review of even modest complexity. If the errors have been corrected, there is no need to dwell upon them. Errors may have been rendered immaterial or moot by subsequent events or even the passage of time. 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 v. DEP*, EHB Docket No. 2001-295-L (Opinion issued September 6, 2002). Here, not only has the Appellant failed to show that the answer on the GIF was incorrect or inaccurate or that another choice was better, he has he has not told us how such a supposed inaccuracy would have any continuing relevance now. Nor can we discern any continuing relevance now on our own.

For these reasons, Mr. Goetz's challenge to the viability on the permit based on the supposed incorrect answer to the relationship to site question on the GIF raises no triable claim either factually or legally and Permittee is entitled to judgment as a matter of law in its favor on this objection.

The Treatment, Storage, Reuse, or Disposal of Waste Question

Permittee answered "no" to question 7.1, in section D. of the GIF, which asks whether the construction or operation of this project will involve the treatment, storage, reuse, or disposal

of waste. Ex. 3 at p.4). Section D of the GIF is entitled "Permit Coordination" and the instruction explain that the purpose of this information is to aid both the applicant and the Department in determining whether other permits from other Department programs may be necessary for the operation. Ex. 15, p. 8-9.

Appellant asserts, without any supportive evidence, that the project will require anti-freeze mix and gear lubricating oil in the wind turbines during periodic maintenance. Even if that were so, however, the use of these materials does not constitute the treatment, storage, reuse, or disposal of waste. Those activities constitute the use of those materials in the operations of the mechanical devices to be located at the site. This does not even necessarily mean that waste will be generated at the site let alone treated, stored, reused or disposed of there.

Also, as with the objection to the other GIF question to which Mr. Goetz takes exception, there is no connection made how the answer to this question, even if inaccurate or if another answer might have been better, has any continuing relevance now that the NPDES permit has been issued. Permittee will need whatever other permits it may need with respect to any potential other activities to be undertaken at the site or, alternatively, it will not need any such other permits. Nothing on or about the GIF changes that reality.[7]

Objection No. 6

Appellant's sixth objection, which is somewhat related to the objection we just discussed, is that the Permittee provided inaccurate information in the permit application regarding use of "Other Pollutants." The question at issue is in Section D of the permit application which is entitled "Other Pollutants; Preparedness Prevention and Contingency (PPC) Plans". The section

[7] Permittee also argues that GIF information is not part of the Department's substantive consideration of the permit application and, therefore, inaccuracies in the GIF cannot be a basis for objecting to issuance of the permit. In light of our discussion on the topic of the GIF already,

has only one question which is as follows: "will you use and/or store chemicals, solvents, other hazardous waste or materials with the potential to cause accidental pollution during earth disturbance activities?" The permit application form provides that if the answer is yes then a PPC Plan is required. The Permittee checked the box indicating "no". Permittee explained or qualified its answer as follows:

> In addition, there will not be any on-site fuel storage for the construction vehicles. Equipment fueling will only be done by a licensed fuel delivery truck, which will come on site to fuel the construction vehicles and then leave. During peak construction fuel delivery will most likely be 3-4 times per week and once per week thereafter until the wind turbines are erected.

Ex. 2.

Appellant points out, and Permittee does not dispute, that, *after construction*, the wind farm shall consist of wind turbines and transformers which devices to operate will contain oils and other materials including anti-freeze. Based on this, Mr. Goetz contends that the answer "no" to this question was incorrect and constituted a fatal flaw in the permit application. For several reasons, Mr. Goetz is wrong. There is no triable issue of fact on this putative objection and Permittee is, in fact, entitled to judgment in its favor as a matter of law on this issue.

The record evidence demonstrates that the answer provided was correct and there is no basis in the record to conclude otherwise or that would require a trial to delve into this issue further. Permittee's response discloses that during construction (that is when earth disturbance activities associated with construction will be ongoing) there will be fueling operations. Permittee further admits that *after construction*, the operation of the wind farm will involve wind turbines and transformers which will contain oils and other materials. Mr. Goetz has not pointed to any record evidence that any other hazardous materials may be present on the site during earth

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we need not address that argument here.

construction/disturbance activities let alone those having the potential to cause accidental pollution during such time. Absent any evidence to the contrary, we must conclude that Permittee's response was accurate. Pa. R. Civ. P. 1035.3.

Even if the materials Mr. Goetz is focusing on, the turbine and transformer oils and the like are hazardous materials, they do not, by definition and as a matter of law, have the "potential to cause accidental pollution *during earth disturbance activities*". Operation of the wind turbines is, by definition, a post-construction, post earth disturbance activity and does not itself constitute "earth disturbance activity" under the regulations. *See* 25 Pa. Code § 102.1. The regulations define earth disturbance activity as:

> A construction or other human activity which disturbs the surface of the land, including, but not limited to, clearing and grubbing, grading, excavations, embankments, land development, agricultural plowing or tilling, timber harvesting activities, road maintenance activities, mineral extraction, and the moving, depositing, stockpiling, or storing of soil, rock or earth materials.

25 Pa. Code § 102.1. The operation of the wind turbines does not fall within that description. There is no evidence which has been adduced by Mr. Goetz to suggest that any earth disturbance activities will be happening during operation of the wind turbines.

In addition, the permit renders the answer to this question academic and of no continuing relevance. The permit provides as follows:

> If the potential exists for causing accidental pollution of air, land, or water, or for causing endangerment of public health and safety through accidental release of toxic, hazardous, or other polluting materials, the permittee must develop a Preparedness, Prevention and Contingency (PPC) Plan.

Ex. 9 at C.6, p. 17. Thus, the permit governs Permittee's obligation, if any, to draft a PPC plan to accommodate the risk of potential release of hazardous substances during operations. Thus, under the principle of *O'Reilly*, as we have already discussed, even if there were some construction of Permittee's answer to this permit application question which could be considered

inaccurate, the matter would be of no continuing relevance now.

For all of these reasons, summary judgment in favor of Permittee is appropriate with respect to this claim.

Objection No. 7

Appellant's last objection is that "permit was issued knowing specific re-location of wind turbine tower #'s 38, 39, 40 and 41 is not available in the approved Erosion and Sedimentation Control Plan". Permittee describes this as Mr. Goetz's "most perplexing objection." We agree and assume that Appellant is arguing that there is no approved E&S plan which depicts or covers the new locations of prospective towers 38 through 41. Mr. Goetz has not produced any record evidence which supports this assertion. Indeed, our review of the record evidence demonstrates that the opposite is indisputably true. A letter dated December 11, 2001 addressed to the Department memorializes the history of the change in proposed location of turbines 38 to 41. Ex. 19. The proposed locations for these turbines were moved to address concerns regarding their original location and their affect on certain sensitive habitats. Accompanying this letter is a diagram that depicts the old versus the new locations for these turbines. *Id.* The diagram is labeled as follows: "Comparison of Turbine/Road Layout, January 2001 Proposal Vs. October 2001 Final Layout". Ex. 19. The approved E&S Plan is provided as Exhibit 7. That Plan, which bears the *November 6, 2001* stamp "Plan Approved" for the Department of Environmental Protection signed by Mr. Mitchell of the Wayne Conservation District, in fact, depicts the new locations for turbines 38 to 41 as set shown in the October 2001 Final Layout diagram. Ex. 7. This being the case, Appellant's final objection bears no relationship to reality. Accordingly, Permittee is entitled to judgment in its favor as a matter of law on this objection.

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONALD F. GOETZ	:	
	:	
v.	:	**EHB Docket No. 2002-069-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NATIONAL WIND POWER, Permittee	:	

ORDER

AND NOW this 16th day of January, 2003 it is hereby **ORDERED THAT** Permittee's Motion for Summary Judgment is **Granted**. The Appeal of Donald F. Goetz is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANGER
Administrative Law Judge
Member

DATED: **January 16, 2003**

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

For the Commonwealth, DEP:
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Northeast Regional Counsel

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ENVIRONMENTAL HEARING BOARD
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MAPLE CREEK MINING, INC.	:	
	:	
v.	:	**EHB Docket No. 2001-292-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JAMES and EMMA LAPP, Intervenors	:	
MAPLE CREEK MINING, INC.	:	
	:	
v.	:	**EHB Docket No. 2001-293-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JAMES and EMMA LAPP, Intervenors	:	
and		
MAPLE CREEK MINING, INC.	:	
	:	
v.	:	**EHB Docket No. 2001-294-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BARBARA JEAN LITMAN and CHARLES ALVIN LAPP, Intervenors	:	**Issued: January 21, 2003**

OPINION AND ORDER ON
MOTIONS TO DISMISS

By Thomas W. Renwand Administrative Law Judge

Synopsis:

Under the Mine Subsidence Act if the Department orders a mine operator to compensate

a landowner for damages caused by mine subsidence, in order to successfully perfect the appeal of such an order, the mine operator must deposit the ordered compensation amount in an interest-bearing escrow account within sixty days of receiving the Department's order. Failure to do so will result in the dismissal of the appeal.

OPINION

These related appeals are from Orders of the Pennsylvania Department of Environmental Protection (Department) issued on November 29, 2001 to a coal mining company, Maple Creek Mining, Inc. (Maple Creek). The three orders, all dated November 29, 2001 generated three appeals. They are docketed at EHB Docket numbers, 2001-292-R, 2001-293-R and 2001-294-R. In the appeal filed at 2001-292-R, the Department ordered Maple Creek to pay Mr. and Mrs. James Lapp of 103 Sundust Road, Eighty-Four, Pennsylvania, $129,127.50 "as compensation for damages to their dwelling and appurtenant structures caused by Maple Creek's mining activities." In the appeal filed at 2001-293-R, the Department ordered Maple Creek to pay Mr. and Mrs. Lapp $5,636.50 "as compensation for damage to their garage." In the appeal filed at 2001-294-R, the Department ordered Maple Creek to pay Mr. Charles Alvin Lapp[1] of 117 Sundust Road, Eighty-Four, Pennsylvania, $128,466 "as compensation for damage to his dwelling and appurtenant structures caused by Maple Creek's mining activities." Maple Creek owns and operates an underground coal mine known as the Maple Creek Mine. The mining method employed is longwall mining.

James, Emma, and Charles Lapp and Barbara Litman (the Lapps or Intervenors) own dwellings and other structures that were undermined by Maple Creek in May 2000. There is no dispute that the mining resulted in subsidence damage to the Lapps' property. The Lapps and

[1] Barbara Litman evidently is also an owner of this property. See Petition to Intervene.

Maple Creek were unable to amicably resolve the matter. Therefore, on May 20, 2001, approximately *one year* after the Lapps' property was damaged by mine subsidence brought about by Maple Creek's mining operations, the Lapps filed a claim with the Department pursuant to Section 5.5(c) of the Bituminous Mine Subsidence and Land Conservation Act (Mine Subsidence Act), Act of June 22, 1966, P.L. 31, *as amended*, 52 P.S. § 1406.1 – 1406.21, at § 1405.5(e)(c).

Section 1406.5(e) of the Mine Subsidence Act contains very detailed and specific provisions governing the procedure for securing repair and/or compensation for damage to structures caused by underground mining. The section specifically details the duties and responsibilities of the Department in this process. First, it requires the owners of the damaged property to contact the coal mining company to advise them of their alleged damages. § 1406.5e(a). If after six months the parties are unable to amicably resolve the claim, the property owner may file a written claim with the Department, a copy of which must be sent to the mining company. All claims must be filed within two years of the date the damage occurred. § 1406.5e(b). The Department is required to investigate the claim within thirty days and "within sixty days following the investigation, make a determination in writing as to whether the damage was caused by subsidence due to underground coal mining and, if so, the reasonable cost of repairing or replacing the damaged structure." § 1406.5e(c).

The Department, after completing its investigation, pursuant to Section 1406.5e(c) issued the written orders detailed above directing Maple Creek to pay compensation to the Lapps. Maple Creek appealed the orders on December 26, 2001. The Lapps and Barbara Litman petitioned to intervene in July 2002, and their petitions were granted.

On September 6, 2002, the Lapps filed a motion to dismiss the appeals on the basis that

Maple Creek had failed to perfect its appeals by depositing the ordered compensation amount with the Department as required by the Mine Subsidence Act and the Department's order. The Mine Subsidence Act at 52 P.S. § 1406.5e(e) states as follows:

> If either the landowner or the mine operator is aggrieved by an order issued by the department under section 5.4 or this section [5.5], such person shall have the right to appeal the order to the Environmental Hearing Board within thirty days of receipt of the order. The appeal of a mine operator shall not be considered to be perfected unless, within sixty days of the date on which the mine operator received the department's order, the operator has deposited an amount equal to the cost of repair or the compensation amount ordered by the department in an interest-bearing escrow account administered for such purposes by the department.

The Department's order contains nearly identical language.

Maple Creek's notices of appeal state that it received notice of the Department's orders on December 1, 2001. According to its brief in response to the motion, it did not deposit the ordered compensation amount until July 5, 2002. It explains the delay by stating that it had been in settlement negotiations with the Department until that time. In June 2002, the Lapps rejected the settlement offers proposed by Maple Creek and the Department, and in response thereto, Maple Creek deposited the compensation amount with the Department. According to Maple Creek, the delay in depositing the escrow amounts until after settlement negotiations had failed was done with the express consent of the Department. Maple Creek also notes that the Lapps waited eight months to intervene in the appeals, and it would be unjust and prejudicial to reward their delay by granting the motion. The Department also filed a response in opposition to the motion, asserting that it would be unjust to penalize Maple Creek where the parties engaged in good faith settlement negotiations in an attempt to compensate the Lapps. The Department also filed a supplemental response verifying that Maple Creek had deposited the required amount in

an interest-bearing escrow account in July 2002.

The Board must follow the plain language of a statute where its words are clear and unambiguous. Statutory Construction Act, Act of December 6, 1972, P.L. 1339, 1 Pa. C.S. §§ 1501-1991, at § 1921(b). *Blose v. DEP*, 2000 EHB 189, 208. Here, Section 5.5(e) of the Mine Subsidence Act clearly and unequivocally states that an appeal will not be considered to be perfected unless the mine operator deposits the compensation amount in an interest-bearing escrow account within *sixty days* of receiving the Department's order. That was not done here.

Even if Maple Creek's delay in depositing the compensation amount was done with the consent of the Department,[2] as Maple Creek asserts in its brief, that is irrelevant. Section 5.5(e) does not give the Department discretionary authority to require – or not require – that the ordered amount of compensation be placed in an escrow account within the timeframe set by the statute. Moreover, the statute clearly puts the onus on the mine operator, not the Department, to insure that the compensation amount is deposited "within sixty days of the date on which the mine operator receives the Department's order."

In *People United To Save Homes v. Department of Environmental Protection and Eighty-Four Mining Company*, 1999 EHB 457, *aff'd.*, 789 A.2d 319 (Cmwlth. Ct. 2001), a hotly contested issue concerned the Department's practice of requiring only a $10,000 subsidence bond in all underground mining permits. The Department strongly argued that the Board should not change the Department practice of only requiring a $10,000 subsidence bond because the Department had been provided with strong legislative tools to ensure that homeowners were adequately compensated. Indeed, the Department argued in that case that the requirements set

[2] The Department's response neither confirms nor denies Maple Creek's assertion that the Department consented to Maple Creek waiting until after settlement negotiations had broken down before depositing the compensation amount in an escrow account.

forth in this very section under discussion today guaranteed that homeowners suffering mine subsidence damage would be quickly compensated because the money must either be paid to the homeowners or placed in an interest-bearing account administered by the Department within sixty days of a Department order. Furthermore, the Department District Mining Manager testified that the Department had never had to order an underground mining operator to comply with its obligations to repair or compensate for damage due to subsidence. 1999 EHB at 541.

The legislature specifically required the coal mining company to tender the amount ordered by the Department within sixty days of the date on which the coal mining company received the Department's order. In this case, by not tendering the ordered amounts, totalling $129,127.50, $128,466, and $5,636.50, respectively, to the Department as specifically required by the statute, the mining company contravened the express will of the legislature. The Department, rather than insisting on immediate compliance with the law, either expressly or implicitly, condoned this violation of express statutory language.

If the mining company disagrees with the Department's orders and wishes to appeal to the Board, the procedure is clearly set forth in the statute. Notably absent from the statute is a provision allowing the mining company to withhold the ordered compensation while it "conducts good faith negotiations." Instead, the mining company was expressly required to tender its check to the Department within sixty days of its receipt of the Department's orders. This is what the law clearly and specifically requires. This is what was clearly and not specifically done. Therefore, Maple Creek's appeals were not perfected in accordance with the Mine Subsidence Act and Orders will be issued dismissing Maple Creek's appeals and directing the Department to forward the monies now in escrow to the Intervenors.

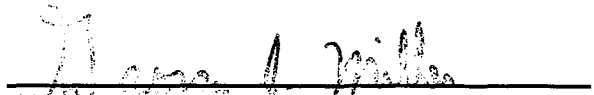
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MAPLE CREEK MINING, INC.	:	
	:	
v.	:	**EHB Docket Nos. 2001-292-R**
	:	**2001-293-R and 2001-294-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
MAPLE CREEK MINING, INC.	:	
	:	
v.	:	**EHB Docket No. 2001-293-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JAMES and EMMA LAPP, Intervenors	:	
and		
MAPLE CREEK MINING, INC.	:	
	:	
v.	:	**EHB Docket No. 2001-294-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BARBARA JEAN LITMAN and CHARLES ALVIN LAPP, Intervenors	:	

ORDER

AND NOW, this 21st day of January, 2003, , the appeals of Maple Creek Mining, Inc. at EHB Docket Nos. 2001-292-R, 2001-293-R and 2001-294-R are **dismissed**. The Department is directed to forward to the Intervenors all monies deposited by Maple Creek Mining, Inc. in these Appeals.

ENVIRONMENTAL HEARING BOARD



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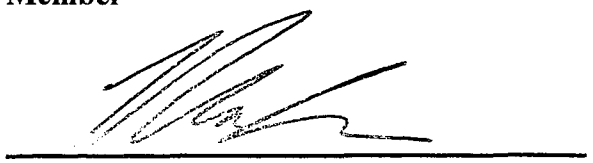
MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member



MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: January 21, 2003

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

EDWARD KEINATH	:	
	:	
v.	:	**EHB Docket No. 2001-253-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 31, 2003**

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Board affirms the assessment of a civil penalty against an appellant who physically prevented a department inspector from investigating an open burning complaint. The Board finds this to be a serious violation of the Air Pollution Control Act, and affirms the assessment in the amount of $19,000.

INTRODUCTION

This matter is an appeal from a $19,000 civil penalty assessment which was levied against Edward Keinath (Appellant) by the Department of Environmental Protection for violating the Air Pollution Control Act (APCA).[1] The appeal was filed on November 8, 2001, and challenged both the fact of the violation and the amount of the civil penalty. A hearing was held before Administrative Law Judge George J. Miller on October 3, 2002. The record consists of a transcript of 289 pages, 19 exhibits and a stipulation of facts. The parties have filed post-hearing memoranda which included proposed findings of fact, conclusions of law and legal argument

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

supporting their positions. After fully considering these materials we make the following:

FINDINGS OF FACT[2]

1. The Department is the agency with the duty and authority to administer and enforce the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119 (1959), *as amended*, 35 P.S. §§ 4001-4106 (APCA), Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §§ 510-17 ("Administrative Code") and the rules and regulations promulgated thereunder. (Ex. B-1, ¶ 1)

2. Edward Keinath, the Appellant, a resident of Media, Delaware County, has been engaged in the occupation of home construction for 41 years. (E.Keinath, N.T. 183; Ex. B-1, ¶ 12)

3. David Knapp is an air quality specialist for the Department. His responsibilities include performing inspections of air polluting facilities and investigating citizens complaints. (Knapp, N.T. 9)

4. On August 30, 2001 Mr. Keinath was on Rosewood Lane working on building a house on Rosewood Lane. He testified that he was working on the second storey of a home when he saw a beige colored Jeep Cherokee enter the cul-de-sac. (Ex. B-1, ¶¶ 2, 3; E. Keinath, N.T. 184-85)

5. On August 30, 2001, Mr. Knapp investigated a burning complaint by Edgemont Township in a residential development on Rosewood Lane. Upon arriving in a small cul-de-sac he saw a pile of burnt debris. Since there were no street signs in the area, he was unsure he was in the correct location. Therefore he drove around a bit to make sure he was in the correct location. (Ex. B-1, ¶ 30; Knapp, N.T.10-11)

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[2] The notes of testimony are designated as "N.T."; the Department's exhibits are "Ex. C-_." The Appellant did not introduce his own exhibits. The parties filed a stipulation which was

6. Having verified the location he parked his vehicle in the cul-de-sac and started to gather his things together when he noticed the Appellant walking toward the vehicle. He grabbed his clipboard, but left his camera and identification on the front seat of the Jeep. He started to walk toward the Appellant. (Knapp, N.T. 15, 65)

7. The Appellant claims he did not see the "DEP" insignias located on the front doors of the vehicle. (E. Keinath, N.T. 185, 188; Exs. C-6a-6c)

8. Before Mr. Knapp said anything the Appellant asked "what are you doing here". (Ex. B-1,¶ 4; Knapp, N.T. 18-19; E.Keinath, N.T. 190)

9. Mr. Knapp responded that he was with the "Pennsylvania Department of Environmental Protection" and that he was investigating an open burning complaint. (Knapp, N.T. 18-19)

10. The Appellant appeared to Mr. Knapp to be very angry and began to shout at him, telling him to leave. He felt the Appellant was very threatening. (Knapp, N.T. 19, 70; *see also* E.Keinath, N.T. 194-95)

11. Mr. Knapp wanted to leave but the Appellant got between him and his vehicle, blocking his access to it. (Knapp, N.T. 21-22, 71)

12. He asked if he could go back to his vehicle but the Appellant just screamed at him to get off the property. (Knapp, N.T. 71)

13. The area was fairly remote and there did not appear to be other people around. Mr. Knapp felt that his life was threatened and he was frightened. He began jogging away and then realized that the Appellant was following him. (Knapp, N.T. 23-24)

14. The Appellant followed Mr. Knapp on Rosewood Lane towards Sycamore Mills.

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admitted into evidence as Ex. B-1.

(Ex. B-1, ¶ 5; Knapp, N.T. 24, 72)

15. The Appellant was joined by another man. He shouted at Mr. Knapp that the land tract is posted as private property and asked him if he noticed "signage." (Ex. B-1, ¶ 6; Knapp, N.T. 25-26)

16. Mr. Knapp walked away and found someone who let him use their phone to call the state police. (Knapp, N.T. 26-27)

17. He returned to the site with a Pennsylvania State Police Officer. A large tree trunk had been put at the entrance to the cul-de-sac, blocking the entrance. (Ex. B-1, ¶ 9; Knapp, N.T. 27; E. Keinath, N.T. 197)

18. The police officer tried to mediate the dispute without success. (Knapp, N.T. 27-31)

19. The Appellant told Mr. Knapp and the officer that he had an open burning permit from the Township. (Knapp, N.T. 78; E. Keinath, N.T. 202)

20. Mr. Knapp thought that was odd because the burning complaint had come from the Township. (Knapp, N.T. 78)

21. The Appellant asked Mr. Knapp for the name of the party who had registered the complaint of open burning. (Ex. B-1, ¶ 10)

22. Mr. Knapp only had one copy of the complaint form and could not leave it with the Appellant. (Knapp, N.T. 29)

23. This was unacceptable to the Appellant. He refused to allow an inspection if he was not immediately given a copy of the complaint. (Knapp, N.T. 29-30)

24. Mr. Knapp returned to the office and completed an incident report and a workplace violence reporting sheet. (Knapp, N.T. 36-38)

25. David Knapp characterized the incident in his Reporting Data Sheet for Incidents of

Workplace Violence as "verbal abuse", and did not characterize the incident as "disorderly conduct" or a "physical assault" or a "personal threat". (Ex. B-1, ¶ 15; Ex. C-9)

26. David Knapp never showed Edward Keinath his photo identification credentials as a DEP employee, and Edward Keinath never asked David Knapp to show him any identification. (Ex. B-1, ¶ 13; E. Keinath, N.T. 191, 220)

27. Edward Keinath never came in physical contact with David Knapp or the state vehicle. He did not have any tools or weapons, nor did he raise his hands in a fist. However, Mr. Knapp found his demeanor to be aggressive and threatening. (Ex. B-1, ¶ 14; Knapp, N.T. 68)

28. Samantha Reiner is the township manager for Edgemont Township. (Reiner, N.T. 89)

29. She made the open burning complaint to the Department on August 23, 2001. At that time she was unaware that the township fire marshal had issued a burning permit to the Appellant. (Reiner, N.T. 133-134; *see* Gropp, N.T. 234)

30. Richard Ruhl is the operations chief for air quality in the Department's Southeast Regional Office. He has worked for the Department for 30 years. (N.T. 141)

31. He prepared the civil penalty assessment against the Appellant. (Ruhl, N.T. 143)

32. He considered the following factual information in calculating the penalty:

a. Conversations with David Knapp; (Ruhl, N.T. 144; 160)

b. Incident report of David Knapp and its one-page addition. (Ruhl, 159-60)

33. He also considered the requirements of the APCA and the Department's civil penalty policy document. (Ruhl, N.T. 144-45)

34. The base penalty is assessed as a reflection of the seriousness of the violation of the APCA. In this case, the Department considered the interference with the inspection to be an egregious violation because it involved the safety of an inspector. Accordingly, the base penalty

was set at $10,000. (Ruhl, N.T. 150-151; 175-76)

35. Mr. Ruhl considered two factors from the policy document to be relevant to the civil penalty for interfering with an inspection: the Appellant's lack of cooperation and the high degree of willfulness for the violation. (Ruhl, N.T. 145; Ex. C-17)

a. An additional 10% was added to the penalty for very poor cooperation.

b. He considered the violation to have been committed with the highest degree of willfulness and adjusted the penalty upward by 30%, the maximum allowed by the Department's penalty policy. (Ruhl, N.T. 147)

36. Other factors such as environmental impact, compliance history and attainment area were not factored into the penalty calculation because he considered them irrelevant to the facts presented. (Ruhl, N.T. 145-47, 148)

37. He was aware that the Appellant had some compliance problems with the Township, but he but did not know the details. This information was not considered when he calculated the civil penalty. (Ruhl, N.T. 146)

38. Other factors which the Department considered in assessing the penalty included the financial benefit to the violator, cost to the Department, size of the facility or source, and deterrence. (Ruhl, N.T. 148-50; Ex. C-17)

39. Of these, only deterrence was considered significant. The deterrence penalty is meant to motivate people to avoid similar behavior in the future. Five thousand dollars was added to the penalty because the Department felt that it could not tolerate outrageous conduct like the Appellant's. (Ruhl, N.T. 149)

40. In sum, the Department began with a base penalty of $10,000. Then added 10% for poor cooperation plus 30% for willful behavior, created a multiplier of 40%, resulting in a

subtotal of $14,000. To that $5,000 was added as a deterrence penalty. The final penalty assessment was $19,000. (Ruhl, N.T. 151-52; Ex. C-15)

41. This penalty amount was reviewed and approved by the Department's chief of compliance and enforcement statewide for air quality and also by the head of the Department's air quality program. (Ruhl, N.T. 154-56; Ex. C-16)

DISCUSSION

The Board is a quasi-judicial agency, wholly independent from the Department.[3] Our role is to hold hearings and issue adjudications on actions of the Department.[4] Our review is *de novo*. That is, our decision is based on the evidence adduced at the hearing and not solely upon the facts considered by the Department.[5] Where the Department assesses a civil penalty, it bears the burden of proving that the assessment was appropriate.[6] Specifically, it must prove by a preponderance of the evidence that the Appellant (1) violated the applicable statute or regulations, and (2) the amount of the civil penalty assessed for the violation reflects an appropriate exercise of discretion.[7]

Reviewing the evidence, it is abundantly clear that the Department met its burden of proving that the Appellant violated the Air Pollution Control Act (APCA) by preventing Mr. Knapp from performing his inspection. First, the APCA clearly vests the Department with the authority to perform inspections on private property:

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[3] *Smithtown Creek Watershed Ass'n v. DEP*, EHB Docket No. 2002-100-MG (Opinion issued August 15, 2002).

[4] Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. § 7514.

[5] *Pequea Township v. Herr,* 716 A.2d 678 (Pa. Cmwlth.1998); *Warren Sand & Gravel v. Department of Environmental Resources,* 341 A.2d 556, 565 (Pa. Cmwlth. 1975).

[6] 25 Pa. Code § 1021.122(b)(1).

[7] *Graves v. DEP*, EHB Docket No. 2000-189-MG (consolidated)(Adjudication issued

> The department shall have power and its duty shall be to –
>
> . . .
>
> (2) Enter any building, property, premises or place and inspect any air contamination source for the purpose of investigating an actual or a suspected source of air pollution or for the purpose of ascertaining the compliance or non-compliance with this act, any rule or regulation promulgated under this act . . . .[8]

Further, the APCA makes it unlawful to prevent a Department inspector from investigating possible air contamination sources:

> It shall be unlawful to fail to comply with or cause or assist in the violation of any of the provisions of this act, . . . or to hinder, obstruct, prevent or interfere with the department or its personnel in their performance of any duty hereunder, including denying the department access to the source or facility . . . .[9]

In this case, David Knapp lawfully entered the Appellant's property in order to investigate a complaint of a suspected air pollution source, namely open burning. He attempted to orally identify himself and state his business when he was approached by the Appellant. Notably, in an attempt to be clear, he took care to introduce himself by using "Department of Environmental Protection" rather than the more common reference, "DEP."[10] If the Appellant had had a question about his identity, Mr. Knapp had more identification readily available. Further, the truck he was driving had prominently displayed decals bearing the logo of the Department.[11] There is no evidence that the Appellant made any meaningful attempt to learn Mr. Knapp's identity. Instead, the Appellant responded in an aggressive and threatening manner which had the effect of frightening Mr. Knapp.[12] He blocked Mr. Knapp's access to his vehicle.[13] The Appellant then

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June 12, 2002); *Leeward Construction v. DEP*, 2001 EHB 870.

[8] 35 P.S. § 4004(2).

[9] 35 P.S. § 4008.

[10] N.T. 18-19.

[11] Exs. C-6a-6c.

[12] N.T. 19, 23-24.

pursued him until he left the property.[14] This clearly constitutes obstructing the inspection of a complaint and denying the Department access to a potential air pollution source. That the Appellant believed that he had an appropriate burning permit from the municipal fire department or that burning was not occurring on the property is irrelevant and does not justify his behavior. Therefore, we find that the Appellant violated Section 4008 of the APCA.

The APCA authorizes the assessment of a civil penalty of up to $25,000 per day for each violation of the act.[15] The Department is directed to take into consideration a host of factors, including, the willfulness of the violation, damage to the environment, deterrence of future violations, compliance history, severity and duration of the violation, degree of cooperation in resolving the violation, and other relevant factors.[16] In assessing the penalty for the Appellant's obstruction of Mr. Knapp's inspection and the intimidation of Mr. Knapp, the Department assessed a penalty in the amount of $19,000. The Department reached this figure by beginning with $10,000 as a base penalty, which it considered in the middle of a potential $25,000 penalty authorized by the APCA. The Department then weighed several "adjustment factors" to arrive at a multiplier. The adjustment factors are: Environmental impact, degree of cooperation by the violator; remedial action; compliance history; degree of willfulness; and attainment status. Only two adjustment factors were found to be relevant in this case: A low level of cooperation and a high degree of willfulness. These factors resulted in a multiplier of 40%, which resulted in an adjusted penalty of $14,000.[17] In addition, the Department considered three other factors which are considered "add-ons." These factors include financial benefit from non-compliance, cost to

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[13] N.T. 21-22, 71.
[14] Ex. B-1, ¶ 5; N.T. 24, 72.
[15] 35 P.S. § 4009.1.
[16] 35 P.S. § 4009.1(a).

the Department and deterrence. Only deterrence was considered relevant to this penalty which resulted in the addition of $5,000 to the $14,000 penalty, for a total of $19,000.[18]

When we review a civil penalty assessed by the Department, we do not necessarily consider the penalty that we might assess. Rather, we determine whether the civil penalty is reasonable for the violation and the circumstances surrounding it.[19] We are not bound by the mathematical formula that the Department uses to calculate the penalty, but are guided by the factors enumerated by the statute.[20] Where we find a penalty is unreasonable, we will substitute our discretion and modify it.[21]

Here, we strongly agree that the Appellant committed a serious violation of the APCA. As Richard Ruhl testified, inspections are at the heart of the Department's enforcement program and without them "the program is essentially a worthless activity."[22] Even more important is the very serious nature of the physical intimidation which was used by the Appellant to prevent Mr. Knapp from performing his inspection. The Appellant's behavior was clearly willfull. Even if he really didn't see the DEP logo on Mr. Knapp's vehicle or hear his introduction, he was specifically informed of Mr. Knapp's role and duty to inspect when he returned with the State Police Officer. Yet, in the absence of direction from that officer, he persisted in his hostility and would not allow Mr. Knapp to perform his inspection.[23] Therefore the factors considered by the Department are indeed central to the penalty assessment and we agree that those were the

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[17] N.T. 145-148; Ex. C-15.

[18] N.T. 148-50; Exs. C-15, C-17).

[19] *202 Island Car Wash, L.P. v. DEP,* 2000 EHB 679.

[20] *See Phillips v. DER*, 1994 EHB 1266, *affirmed,* 2651 C.D. 94 (Pa. Cmwlth. filed June 16, 1995).

[21] *202 Island Car Wash.*

[22] N.T. 147.

[23] N.T. 29-30.

appropriate factors to consider.

The Appellant contends that the amount of the civil penalty is unreasonable and should at least be reduced. We are constrained to disagree. While the penalty may be higher than what we might assess in the first instance, we find that there is no basis upon which to disturb the Department's judgment in this matter. As explained above, we are not to consider the penalty that we would assess; that is the Department's job.[24] Instead our role is only to consider whether the Department's assessment is in some manner inappropriate. We agree with the Department that its ability to inspect premises and investigate complaints is the cornerstone of its enforcement program. The harassment and intimidation of its inspectors simply can not be tolerated.[25] This penalty assessment should not only deter the Appellant from repeating his behavior, but should send a message to others as well. Therefore we will affirm the Department's $19,000 assessment.

The Appellant contends that the Department erred in its penalty assessment by relying on reports from the Township's files which detail certain events involving the Appellant and Township inspectors. Although we admitted these reports into the record at the hearing, we had serious questions concerning their relevance.[26] Having carefully reviewed the record and the arguments made by the Appellant, it is very clear to us that the Appellant's history with other inspectors is irrelevant to his behavior concerning this incident. It certainly does not excuse or even reasonably explain his conduct. The only issue properly before us is whether the events of August 30, 2001 constitute a violation of the APCA and whether the civil penalty assessed was

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[24] 35 P.S. § 4009.1(a).

[25] *See Booher v. DER*, 1991 EHB 987, 1007, *affirmed*, 612 A.2d 1098 (Pa. Cmwlth. 1992)(affirming the assessment of a civil penalty of $5,000 for grabbing a Department inspector by the shirt).

[26] Exs. C-19-22; 23-26. *See, e.g.* N.T. 92-94. We would also note that the Appellant made no motion to strike these exhibits and did not argue in his post-hearing brief that they were

reasonable. Our decision here is based solely on the Appellant's intimidation of Mr. Knapp and refusal to allow his inspection.[27] Accordingly, we want to make it very clear that our disposition of the Appellant's appeal is not based in any way on those documents. Our concern is strictly what occurred between the Appellant and the Department inspector.

We therefore make the following:

CONCLUSIONS OF LAW

1. The Board's review is *de novo. Pequea Township v. Herr,* 716 A.2d 678 (Pa. Cmwlth.1998); *Warren Sand & Gravel v. Department of Environmental Resources,* 341 A.2d 556, 565 (Pa. Cmwlth. 1975).

2. The Department bears the burden of proof in the assessment of a civil penalty. 25 Pa. Code § 1021.122(b)(1).

3. The Air Pollution Control Act vests the Department with the authority to enter private property to perform inspections. 35 P.S. § 4004(2).

4. It is unlawful to prevent a departmental inspector from investigating an air pollution complaint. 35 P.S. § 4008.

5. By obstructing the inspection of David Knapp by intimidating him and pursuing him off the property, the Appellant violated the Air Pollution Control Act. 35 P.S. § 4008.

6. The testimony of David Knapp was credible and convincing.

7. A civil penalty of $19,000 is a reasonable and appropriate penalty for the severity of the Appellant's violation of the Air Pollution Control Act and is a sufficient deterrent to future

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erroneously admitted into evidence.

[27] Richard Ruhl, who calculated the civil penalty, explicitly stated that although he had some awareness of some controversy involving the Township, he did not know the details and these events played no part in his consideration of the civil penalty. N.T. 146.

similar violations.

We therefore enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

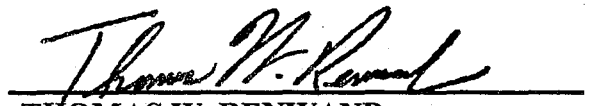
EDWARD KEINATH	:	
	:	
v.	:	**EHB Docket No. 2001-253-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 31st day of January, 2003, the appeal of Edward Keinath of the Department of Environmental Protection's assessment of a $19,000 civil penalty is **DISMISSED.** Edward Keinath shall pay a civil penalty in the amount of **$19,000**. The amount is due and payable immediately to the Clean Air Fund.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman



THOMAS W. RENWAND
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **January 31, 2003**

c: **DEP Bureau of Litigation**
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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

EDWARD KEINATH	:	
	:	
v.	:	**EHB Docket No. 2001-253-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

DISSENTING OPINION OF BOARD MEMBER MICHELLE A. COLEMAN

By Michelle A. Coleman

I agree with the majority's conclusion that Appellant's violation of Section 4008 of the Air Pollution Control Act (APCA), 35 P.S. § 4008, is serious and intolerable. The Department's inspectors are asked to perform a difficult job which by its nature is often confrontational, and I emphasize at the outset my respect for the dedication and professionalism of the Department employees directly responsible for enforcing the environmental laws of the Commonwealth. I disagree, however, with the majority's determination that the two adjustment factors by which the base penalty was incremented, and the $5,000 add-on deterrence factor, are reasonable under the circumstances of this case. Therefore, I respectfully dissent.

In addition to proving that the violations of law giving rise to the civil penalty in fact occurred, the Department must prove by a preponderance that the amount of the penalty is reasonable and appropriate. *See, e.g., Tire Jockey Services, Inc. v. DEP*, No. 2001-155-K, slip op. at 25 (EHB, Dec. 23, 2002); *Stine Farms and Recycling, Inc. v. DEP*, 2001 EHB 796, 811-13. While the Board may owe the Department some measure of deference in the context of reviewing a civil penalty assessment, the Board clearly must examine the evidence *de novo* and

make its own decision whether the penalty amount is reasonable and appropriate for the circumstances presented by the case before it. *See Pequea Township v. Herr,* 716 A.2d 678, 686 (Pa. Cmwlth. 1998); *Gemstar v. DEP*, 1998 EHB 53, 70, *rev'd on other grounds*, 726 A.2d 1120 (Pa. Cmwlth. 1999).

Appellant's only underlying violation of the APCA is for interfering with a Department inspector in the performance of his duty to enter on property for the purpose of investigating a suspected source of air pollution. 35 P.S. §§ 4008, 4004(2). There is no allegation that Appellant caused any environmental pollution or damage. When calculating a civil penalty for Appellant's violation, the Department selected a base penalty amount of $10,000 because it considered the interference violation egregious. However, the Department then applied two adjustment factors—10% of the base penalty ($1,000) was added for Appellant's "very poor cooperation"; and 30% more ($3,000) was imposed for "willfulness," the Department having concluded that the violation was committed with the highest possible degree of willfulness. Finally, not believing that a $14,000 penalty was a sufficient deterrent to Mr. Keinath, the Department determined that it was appropriate to include an additional amount of $5,000 for the purpose of deterring Appellant from committing similar violations of Section 4008 in the future.

My specific disagreement with the majority opinion concerns the reasonableness of these amounts added to the $10,000 base penalty. The Department first added $1,000 for Appellant's "very poor cooperation" with the inspector; I fail to understand the logic of this adjustment. The subject violation was for interfering with a Department inspector's investigation of a suspected source of air pollution. By definition, an act of hindering, obstructing, preventing or interfering with a Department inspector involves not simply "poor cooperation" but an absence of any cooperation with the inspector in the performance of his duty. Thus, this factor was, by logical

necessity, already incorporated into the base penalty amount selected by the Department as a measure of the seriousness of the violation. A further increment for Appellant's "poor cooperation" is illogical, and therefore unreasonable, in the context of penalizing a violation of Section 4008 of the APCA.[28]

The 30 percent upward adjustment for willfulness is similarly problematic. Given the nature of the violation at issue here, Appellant's intent is a factor that was incorporated into the Department's initial evaluation of the seriousness of the violation and its consequent selection of the $10,000 base penalty amount.

Moreover, in my view the evidence does not support a conclusion that Appellant acted with *the highest degree of willfulness* in committing the subject violation. At the time of the Department's attempted investigation of an allegation of unauthorized open burning, Appellant actually possessed a burning permit issued by the township fire marshal. Although the fact that Appellant possessed a township burning permit was irrelevant to the issue of whether the underlying violation occurred, that fact is quite important when considering willfulness in the context of calculating a civil penalty that fits the violation. Appellant's failure to notice the DEP insignia on the inspector's vehicle, and the inadvertent failure by the inspector to present photo identification, also bear on the willfulness evaluation. The Department's assessment of an additional 30% for willfulness, and the majority's affirmation of that additional amount, do not properly take into account the totality of the factual circumstances.

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[28] Moreover, the relevant statutory factor which the Department shall consider is the "degree of cooperation in resolving the violation." 35 P.S. § 4009.1(a). This factor clearly applies to an ongoing violation of air quality standards by a permitted source and is intended to measure an entity's willingness to cooperate with the Department in reaching compliance with pollution limits; a factor which measures the degree of cooperation *in resolving the violation* is of questionable relevance to the type of incident presented in this appeal.

This case involves an isolated incident of interference, precipitated by Appellant's irrational response to the appearance of Mr. Knapp at the property—irrational, not deliberate. This is not a case of an entity that has been repeatedly informed of an ongoing violation of the environmental laws, but continues to engage in the violation of those laws in spite of that knowledge. *Cf. Tire Jockey Services, Inc.*, No. 2001-155-K, slip op. at 39-41 (Department's civil penalty assessment based in part on willfulness of violations was reasonable where operator of waste tire processing facility was repeatedly informed of permit requirement but commenced and continued operation of facility without obtaining required permit); *Goetz v. DEP*, 1998 EHB 955, 956-57 (civil penalty of $56,000 assessed after numerous violations of Noncoal Surface Mining Act resulting in substantial environmental damage and violent interference with Department inspectors).[29] The Department's conclusion that Appellant's violation was motivated by the

[29] *See also Booher v. DER*, 1991 EHB 987, 1005-07, *aff'd*, 612 A.2d 1098 (Pa. Cmwlth. 1992). In that case, the Department assessed a total penalty of $20,000 in connection with appellant's unlawful disposal of approximately 200,000 waste tires on his property without having obtained a permit required by the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq* (SWMA). The penalty was based on a Notice of Violation issued to appellant in March 1988, appellant's failure to comply with a Department cease and desist order issued in January 1989, and a violation of a provision that makes it a violation of the SWMA to hinder, obstruct or threaten a Department employee in the course of his duties. 1991 EHB at 1006-07; 35 P.S. § 6018.610(7). Although the appellant in *Booher* continued to collect and dispose of waste tires on his property after having been informed by the Notice of Violation that it was unlawful to do so, the Department characterized the subsequent violation of the cease and desist order as reckless, not willful. 1991 EHB at 1007-08.

Upon review, the Board in *Booher* reduced the total penalty for all three violations to $14,000—a sharp contrast with the $19,000 penalty assessed here for a single violation of interference with no concomitant violations involving environmental damage. *Id.* at 1008. Notably, the *Booher* violation for hindering a DEP inspector in the course of his duties involved actual physical contact with the inspector, the appellant having grabbed the inspector by the front of his shirt and demanded that he immediately leave appellant's property. *Id.* at 1006-07. In contrast, Mr. Keinath never came into physical contact with the DEP inspector, he had no tools or weapons when he confronted the DEP inspector, and he did not raise his hands in a fist; indeed, the DEP inspector characterized the incident in his written report as "verbal abuse"—not as "disorderly conduct," a "physical assault" or a "personal threat." *See supra* at pp. 4-5 (F.F. #

highest degree of willfulness conflicts with the actual character of the incident, as described by the evidence presented, and is therefore inappropriate and unreasonable. The Board should have exercised its power of *de novo* review and modified the increment for willfulness.

Finally, I find the Department's explanation for the imposition of an additional deterrence penalty unpersuasive. Mr. Ruhl testified that $5,000 was added to the penalty because the Department believed that it could not tolerate outrageous conduct like that exhibited by Appellant. But that rationale does not support a deterrence penalty; that is a reason for deciding to assess a civil penalty for this violation, as opposed to taking no action or simply issuing a notice of violation without any penalty assessment. In other words, the Department decided to assess a civil penalty for this violation, and selected the substantial base amount of $10,000, because Appellant's conduct was intolerable, not merely uncooperative or uncivil.

The question with respect to an add-on deterrence penalty is whether the $5,000 over and above the $10,000 base penalty amount is necessary to deter *this Appellant* from engaging in similar conduct in the future or whether the base penalty will effectuate that purpose in this case. The majority's reference to "sending a message to others" is misplaced, *supra* at p. 11; the law requires that civil penalty assessments be made on a case-by-case basis and that the penalty be reasonable and appropriate to the individual circumstances. *See* 35 P.S. § 4009.1(a). Based on my review of the evidence, I believe that the $10,000 base penalty is sufficient to deter this Appellant, an individual citizen, from engaging in similar conduct in the future. In other words, the base penalty sufficiently takes into account the statutory factor of deterrence. The $5,000 add-on for deterrence appears to me as unnecessary to accomplish the stated purpose, excessive under the circumstances, and therefore unreasonable and inappropriate.

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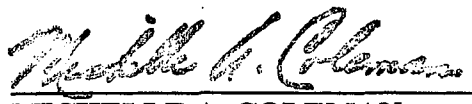
25).

In my view, the substantial base penalty adequately captures the gravity of Appellant's violation of the APCA. I would exercise the Board's power to modify a civil penalty assessment where it has concluded that the Department has acted unreasonably and reduce the $19,000 penalty by subtracting the three upward adjustments totaling $9,000; I would affirm the base penalty of $10,000, which amount reasonably fits the circumstances of this case.



MICHELLE A. COLEMAN
Administrative Law Judge
Member

January 31, 2003

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

EAGLE ENVIRONMENTAL, L.P.	:	
	:	
v.	:	**EHB Docket No. 2001-046-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JEFFERSON COUNTY, Intervenor	:	**Issued: February 3, 2003**

ADJUDICATION

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

Synopsis:

A landfill permittee's suspended permit is void because 25 Pa. Code § 271.211(e) unambiguously provides that a permit becomes void if no solid waste is processed or disposed under the permit in question within five years of its issuance. The parties stipulated that there was no such processing or disposal here. Regulatory interpretation is not necessary because the regulation is clear. Even if interpretation were necessary, the Board's reading of the regulation would not compel an unreasonable or absurd result because of the public interest served by the regulation. The Department order suspending the permit did not supersede the regulatory time limit.

FINDINGS OF FACT

The parties have waived their right to an evidentiary hearing and agreed pursuant to 25 Pa. Code § 1021.112 to have this appeal adjudicated based upon a stipulated record. The

following findings of fact are based entirely upon the stipulated record.

1. The Department of Environmental Protection (the "Department") is the agency of this Commonwealth with the duty and authority to administer and enforce various laws, including the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, No. 97, as amended, 35 P.S. §§ 6018.101-6018.1003 ("Solid Waste Management Act"); the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119 (1950), No. 787, as amended, 35 P.S. §§ 4001-4015 ("Air Act"); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, No. 394, as amended, 35 P.S. §§ 691.1-691.1001 ("Clean Streams Law"); the Dam Safety and Encroachments Act, Act of November 26, 1978, P.S. 1375, No. 325, as amended, 32 P.S. §§ 693.1-693.27 ("Dam Safety Act") and the regulations promulgated under these statutes. (Stipulation of the Parties No. ("Stip.") 1.)

2. On February 9, 1996, the Department issued Waste Management Permit No. 101605 ("Solid Waste Permit") to Eagle Environmental, L.P. ("Eagle") for a new municipal waste landfill in Washington Township, Jefferson County known as the Happy Landing Landfill (the "Landfill"). (Stip. 2; Joint Exhibit ("J. Ex.") 1.)

3. On February 9, 1996, the Department also issued Air Quality Plan Approval No. 33-322-001 ("Air Quality Permit") (J.Ex. 2); Water Quality NPDES Permit No. PA010443 ("NPDES Permit") (J.Ex. 3); and Water Obstruction and Encroachment Permit No. E33-171 ("Encroachments Permit") (J.Ex. 4), which permits also relate to Happy Landing Landfill. (Stip. 3.)

4. After the issuance of the Solid Waste Permit and before September 25, 1996, the Pennsylvania Fish & Boat Commission determined that several streams in the area of the Landfill should now be classified as wild trout streams under Commission criteria, and the

Department determined that some of the wetlands Eagle was permitted to encroach upon under its permits were exceptional value wetlands under 25 Pa. Code Chapter 105. (Stip. 5.)

5. On September 25, 1996, the Department issued an Order ("Suspension Order") to Eagle. In the Suspension Order, the Department modified the Encroachments Permit by revoking Eagle's authorization to fill in any wetlands, and suspended the Solid Waste Permit, the unmodified portion of Encroachments Permit, the Air Quality Permit, and the NPDES Permit. (Stip. 6; J.Ex. 5.)

6. Eagle appealed the Suspension Order to the Board, which appeal was docketed at EHB Docket No. 96-215-MG. (Stip. 7.)

7. By Adjudication and Order dated September 3, 1998, the Board dismissed Eagle's appeal at EHB Docket No. 96-215-MG and sustained the Department's Suspension Order. (Stip. 9.)

8. The Board's Adjudication was upheld on appeal. (Stip. 10-14.)

9. Eagle did not construct the Landfill while its appeals of the Suspension Order were pending before the Board, Commonwealth Court, and Supreme Court. (Stip. 15.)

10. Eagle did not seek a modification of the Solid Waste Permit while its appeals of the Suspension Order were pending before the Board, Commonwealth Court, and the Supreme Court, or at any other time. Eagle did not seek a supersedeas or stay of the Suspension Order from any tribunal while Eagle's appeals were pending or at any other time. (Stip. 16.)

11. Eagle has accepted no municipal waste for disposal under the Solid Waste Permit at the Landfill. (Stip. 17.)

12. Eagle has not disposed of any municipal waste under the Solid Waste Permit at the Landfill. (Stip. 18.) While Eagle's appeals of the Suspension Order were pending, Eagle did

not request an extension of the Solid Waste Permit, and the Department did not extend the Solid Waste Permit. (Stip. 22.)

13. On February 12, 2001, the Department sent a letter to Eagle stating that the Solid Waste Permit had become void pursuant to 25 Pa. Code § 271.211(e) and revoking the Air Quality, NPDES, and Encroachment Permits for the Landfill. (Stip. 19-21; J.Ex. 6.)

14. The instant appeal is Eagle's appeal of the Department's February 12, 2001 letter. Jefferson County sought and was granted leave to intervene. (Stip. 23.)

DISCUSSION

This case is all about 25 Pa. Code § 271.211(e), which states as follows:

> If no municipal waste is processed or disposed under a permit within 5 years of the date of issuance by the Department of a permit for a facility, the permit becomes void.

At one point, Eagle challenged the legality of Section 271.211(e). It did not pursue that contention in its post-hearing brief. Eagle also does not question that the associated Air Quality, NPDES, and Encroachment Permits are appropriately revoked if the Municipal Waste Permit is void. Therefore, this appeal has boiled down to the meaning of Section 271.211(e).

Eagle's first argument is that 25 Pa. Code § 271.211(e) is unambiguous: the regulation only applies if a party is "under a permit" and a party cannot be said to be "under a permit" if its permit is in a suspended status. Eagle's permit was suspended, so the five-year period did not run against it. Secondly, to the extent that the regulation is ambiguous, Eagle argues that we should not interpret the regulation to require the "absurd, impossible, and unreasonable" result that the five-year period runs against a suspended permit. Further to this point, Eagle adds that applying the regulation here will not serve the purposes of the regulation because Eagle would in any event be required to apply for a permit modification, which would ensure compliance with up-to-

date technical requirements. Third, Eagle contends that declaring the permit void is inconsistent with the Suspension Order because the Suspension Order specifically gave Eagle the opportunity to apply for a permit modification.

Section 271.211(e) Is Unequivocal

We happen to agree with Eagle that Section 271.211(e) is unambiguous. We do not agree, however, that Eagle has read the regulation correctly. Indeed, it is difficult to imagine how it could be any more straightforward. The regulation means what it says. If a party does not start disposing of municipal waste at its facility within five years of the issuance of its permit, the permit becomes void. It is as simple as that.

Both Eagle and the Department refer us to *Tri-State Transfer Company v. Department of Environmental Protection*, 722 A.2d 1129 (Pa. Cmwlth. 1998), which appears to be the only reported court decision addressing Section 271.211(e). In that case, the Department attempted to exempt a permittee from the application of Section 271.211(e) because the permit in question had been issued before the regulation was promulgated. This Board found that the Department had erred, and the Commonwealth Court affirmed.

The Court held that the Department had impermissibly ignored the plain language of Section 271.211(e). 722 A.2d at 1132-33. The Court found that there was no ambiguity in the regulation. It found that the regulation did not provide the Department with any authority to grandfather or exempt facilities from the operation of the regulation. It concluded that this Board properly disregarded the Department's interpretation.

Eagle attempts to distinguish *Tri-State Transfer* by asserting that the permittee in that case voluntarily chose not to operate under its permit. Actually, the opinion does not explain why the permittee did not operate within five years. More importantly, Eagle's argument misses

what we believe to be the point of the decision; namely, that Section 271.211(e) is not ambiguous and its plain language does not allow for exemptions. Since there are no exceptions, the particular reason why a permittee does not take advantage of its permit is simply not relevant in a proceeding at law. Eagle may or may not have had a cause of action before a court sitting in equity, but Eagle did not pursue that course, and the availability of equitable relief is beside the point of this Board's role in this proceeding.

Eagle directs our attention to the phrase "under a permit." It argues that it did not have a permit because of the suspension, so it could not possibly have disposed of waste "under a permit." Therefore, under the plain language of the regulation, the five-year period did not run.

Eagle has read far too much into the phrase "under a permit." The phrase simply introduces the concept that Section 271.211(e) applies to solid waste permits. Waste that is disposed without a permit or pursuant to a different permit does not trigger the five-year period.

Even if we attribute more significance to the phrase than we think it deserves, however, it does not help Eagle's case because Eagle *did* have a permit. The permit was suspended, not revoked. The permit may not have been active, but it continued to exist. Indeed, a suspension, by definition, means that the permit continued to exist.

If there were no distinction between a suspension and a revocation, there would be no point to this appeal. Eagle is fighting to maintain its permitted status so that it may apply to modify its permit. If the permit no longer existed, there would be nothing to modify and Eagle would need to start from scratch. This illustrates that, while a suspended permit may temporarily not authorize the disposal of waste, it continues to exist. Eagle was "under a permit" for the entire five-year period.

Thus, given the absence of any ambiguity, the result in this appeal is clear. It is stipulated

that Eagle did not dispose of any municipal waste under its permit within five years of the issuance of its permit. (Stip. 18.)[1] Accordingly, by operation of law, its permit became void.

Regulatory Interpretation

Due to the lack of ambiguity, this appeal does not call for regulatory interpretation. We are repeatedly bombarded with requests to interpret regulations, but it is important to understand that this Board is only called upon to "interpret" a regulation if it is ambiguous, i.e., capable of bearing at least two reasonable meanings. *Scanlon v. Department of Public Welfare*, 739 A.2d 635, 638 (Pa. Cmwlth. 1999); 1 Pa. C.S.A. § 1921(b) ("When the words of a [regulation] are clear and free from all ambiguity, the letter of it may not be disregarded under the pretext of pursuing its spirit.")[2] There is no such ambiguity here. But even if we assume for the sake of discussion that regulatory interpretation is required, we would not agree with Eagle's interpretation.

The first difficulty with Eagle's position is that it would have us manufacture language that simply is not there. Eagle asks us to read an entirely new condition into a rather innocuous provision. Eagle suggests that the regulation really provides that the permit must be issued *and* the operator must otherwise be in a position to dispose of waste. The regulation on its face, however, only depends upon the issuance of the permit. Absent a most creative exercise of "interpretation," we cannot read Section 271.211(e) to mean that the five years only runs if (1) the permit is issued, (2) the permit is not superseded or (3) in litigation or (4) suspended, or (5)

---

[1] We are constrained to point out that Eagle's argument that it was not operating "under a permit" is directly contrary to its own stipulation.

[2] Eagle has not proposed a specific alternate interpretation of Section 271.211(e). Eagle's brief is something less than a model of clarity. To the extent that Eagle is actually asking us to bend, rather than interpret, the rule, we have no such authority. To the extent that Eagle argues that the Department abused its discretion by applying Section 271.211(e), the argument is misplaced. Section 271.211(e) is mandatory. It does not call for the exercise of any discretion. *Tri-State Transfer*, 722 A.2d at 1133.

the operator has not been able to obtain other necessary permits or (6) local approvals, or (7) financing, or (8) the operator is reorganizing under the bankruptcy laws, or (9) its workers are on strike, or (10) construction is much more difficult than anticipated, or the countless other situations that may present themselves where an operator has a permit but is not able to use it. Rather, once the permit is issued, the operator has five years to work out all of its other problems or it will need to apply for a new permit. Not only is the regulation unequivocal, it makes perfect sense. *See Khodara v. DEP*, 2001 EHB 855, 857 (an earlier ruling in this case wherein Judge Miller wrote that Section 271.211(e) "renders the permit automatically void after five years *regardless of the circumstances*." (emphasis added)).

Eagle's argument that the regulation only applies if the permittee "voluntarily" chooses not to exercise its right under a permit fails for the same reason. Happily, the regulation does not contain such a condition because it would be exceedingly difficult to define when a party acts voluntarily. It could certainly be argued here that Eagle's decision not to pursue a modified permit and dispose of waste thereunder was voluntary.

To varying degrees, the parties lapse into a discussion of whether the suspension was appropriate. Again, Section 271.211(e) does not turn on such considerations. Eagle had and in fact took advantage of its legal recourse to challenge the suspension. If the Department interfered with the exercise of that recourse or otherwise acted wrongfully, an equitable remedy could have been sought. This appeal is, of course, a regulatory-interpretation case, and equitable considerations simply do not apply.

We do not agree with Eagle's contention that the meaning that we attribute to Section 271.211(e) cannot be correct because that would render the regulation "absurd, impossible, and unreasonable." By suspending instead of revoking Eagle's permit, the Department provided

Eagle with the opportunity to modify an existing permit rather than requiring Eagle to submit an entirely new permit application. The purpose of suspending rather than revoking the permit was presumably to provide Eagle with an opportunity to submit an application for a modification rather than a new permit. It is neither unreasonable nor absurd for there to be a time limit on Eagle's right to seek a modification. Indeed, if Eagle were correct, it would be allowed to seek a modification in 2003 of a permit that was issued seven years ago. In fact, Eagle's right to modify would presumably go on indefinitely. It is *that* interpretation that strikes us as unreasonable.

What Eagle's argument really boils down to is that it would be absurd to interpret the regulation in such a way that the five-year period runs while Eagle chose to litigate the validity of suspension rather than take advantage of its right to pursue a permit modification. Litigating the suspension and pursuing a modification were not mutually exclusive options. A more conservative, albeit more expensive, business strategy would have been to pursue a modification under protest during the pendency of the litigation. We are not suggesting that Eagle's risky strategy was necessarily ill advised. We are saying that it is not unreasonable or absurd to now conclude that Eagle must live with the consequence of its decision.

Eagle's point that Section 271.211(e) is absurdly harsh is debatable, at best. First, five years would normally appear to be a fairly long period of time within which to work out any impediments to opening a landfill. For example, we have no reason to doubt that Eagle could have pursued a modification here within that time frame. Furthermore, Eagle unquestionably has a right to due process review, but Eagle's rights are not the only rights that are implicated here. The public has a compelling interest in seeing that landfills are constructed with up-to-date methods and technology based upon existing conditions. *Tri-State Transfer*, 722 A.2d at 1133.

We do not see why this interest should give way to Eagle's rights. A five-year limitation period strikes us as a reasonable balance.

Eagle contends that the purpose of Section 271.211(e) would not be served by applying it here. Again, we must disagree. We do not take it as a given that Eagle's need to submit an application for a modification of an existing permit, which in this case would have been directed primarily at changing the footprint of the landfill to avoid wetlands, would have satisfied the need to ensure up-to-date methods based upon existing site conditions. For example, if advancements have been made in liner technology, or daily cover, or waste placement, or any of the many other aspects of landfill operation, those would not necessarily have needed to have been reflected in Eagle's application for a modification. As another example, traffic routes that may have been appropriate seven years ago may no longer be appropriate. Developments may have sprung up around the proposed site. The list goes on indefinitely. Suffice it to say that it is entirely reasonable--not absurd--to read Section 271.211(e) literally and uniformly regardless of any perceived unfairness to a given permittee in certain circumstances. Regardless of individual hardship, at some point, a permit simply becomes too stale from the view of the public interest. Section 271.211(e) codifies that concept.

The Suspension Order

Eagle's final argument--that the Suspension Order superseded Section 271.211(e)--also must fail. We do not agree with Eagle's reading of the order. The order did nothing more (in this respect) than provide Eagle with the opportunity to seek a modification. The order did not say that the opportunity would last forever. The order made no attempt to extend or stay the regulatory time limit on the right to pursue a modification. In any event, Section 271.211(e) is mandatory, not discretionary. *Tri-State Transfer*, 722 A.2d at 1133. The Department would not

in any event have had any authority to supersede the operation of the regulation by issuing an order.[3]

CONCLUSION OF LAW

1. The Solid Waste Permit is void by operation of 25 Pa. Code § 271.211(e).

[3] Due to our disposition on the merits, we do not reach the Intervenor's arguments that (1) the letter notifying Eagle that the permit was void was not an appealable action, (2) this appeal is barred by the doctrine of administrative finality, (3) due to corporate changes, Eagle is no longer the proper party to pursue this appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EAGLE ENVIRONMENTAL, L.P.	:	
	:	
v.	:	**EHB Docket No. 2001-046-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JEFFERSON COUNTY, Intervenor	:	

ORDER

AND NOW, this 3rd day of February, 2003, this appeal is DISMISSED.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: February 3, 2003

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

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WILLIAM T. PHILLIPY IV
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COUNTY OF BERKS	:	
	:	
v.	:	**EHB Docket No. 2002-286-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 4, 2003**

OPINION AND ORDER ON MOTION TO DISMISS

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The Board grants a motion to dismiss an appeal from a Department letter, labeled as a Notice of Violation (NOV), to a County regarding its municipal wastewater treatment plant, which letter informed the County that the Department had observed several alleged violations at the plant, advised the County that the Department interprets the NPDES permitting regulations as calling for a halt to the Department's review of the County's pending NPDES permit application seeking a re-rating of the facility to handle more flow, and recommending that the County consider implementing certain measures at the plant to assist the plant in achieving compliance with its permit and the Clean Streams Law. The NOV did not order the County to take any action. Moreover, the letter was part of the normal give and take or interplay between a permit applicant and the Department regarding a pending permit application. As such, the letter represents one of the potentially many provisional, interlocutory, decisions made during the processing of an application which the Board has consistently held are not appealable in a piecemeal fashion.

Factual and Procedural Background

Before the Board is the Department's Motion to Dismiss the Notice of Appeal filed by the County of Berks. Appellant Berks County (County) operates the Berks County Wastewater Treatment Plant located in Bern Township. County of Berks Notice of Appeal (NOA) ¶ 5. In April, 2002, the County submitted a Part II NPDES permit application for a re-rating of the plant's capacity to 500,000 gallons per day. County's Memorandum of Law at 2. The County received the following letter which is captioned in all capital, underlined bold black lettering as **NOTICE OF VIOLATION** from the Department dated October 8, 2002:

> In light of the confusion over the nature of our earlier letter dated August 13, 2002, this letter supersedes and rescinds that letter. This letter serves to inform you of the existence of certain violations at the Berks County Wastewater Treatment Plant and our recommendations to assist you in abating those violations to achieve compliance with your NPDES permit. The Department observed that the following violations exist at the wastewater treatment plant:
>
> 1. The procedure presently being used for decanting sludge solids into the plant aeration tank is not in accordance with sound operational practices or is it in compliance with the permitted use of those particular units.
>
> 2. It appears that you have consistently hydraulically overloaded your plant by accepting septage waste in excess of permitted plant design parameters.
>
> 3. The plant discharge has caused damage to the receiving stream as evidenced by a recent Department stream survey, a copy of which is enclosed.
>
> We are writing to inform you that the Department's regulations set forth at 25 Pa. Code § 92.14 (b) state as follows:
>
> Upon completing review of the new application, the Department may reissue or renew the permit if, based on up-to-date information on the permittee's waste treatment practices and the nature, contents, and frequency of the permittee's discharge, the Department determines that the:
>
> 1. Permittee is in compliance with all existing Department issued permits, regulations, orders and schedules of compliance, or that any

noncompliance with an existing permit has been resolved by an appropriate compliance action or by the terms and conditions of the permit (including a compliance schedule set forth in the permit) consistent with § 92.55 (relating to schedules of compliance) and other applicable Department regulations.

Also see, 25 Pa. Code § 91.26(a)

Our interpretation of these regulations is that the Department cannot approve a Part II permit application for an increased hydraulic capacity rating until environmental violations have been corrected and there is demonstrated continued environmental compliance. It would be imprudent to increase permitted capacity at a facility that is having current problems with treatment at its present capacity. Pursuant to the Department's Policy for Implementing the DEP Money-Back Guarantee Permit Review Program, we are delaying our review of a permit decision on your Part II application until you resolve the outstanding violations at your plant. To enable us to go forward with the review, we encourage you to submit documentation showing abatement of the violations noted above within 45 days of the date of this letter.

To assist you in achieving compliance with your permit and the Department regulations, the Department recommends that you consider implementing the following:

1. 24-hour composite influent sampling. It is recommended that you do so prior to any biological treatment, but including the septage waste brought in from outside sources. It is recommended that these samples include decants, filtrates and sludge returns, and are collected a minimum of 1 day per week using methods approved by your NPDES permit. The Department requests that you submit sampling results to it upon completion.

2. Daily, 24-hour composite effluent sampling. It is recommended that you do so for a period of at least four weeks. It is recommended that this sampling be done during a period when septage is being accepted into the treatment plant. This will result in the collection of daily effluent samples for a month, using methods approved by your NPDES permit. The Department requests that you submit sampling results upon completion.

3. Calculations regarding septage. We recommend that you submit to us calculations regarding the amount of septage that can be accepted at the plant (organic and hydraulic loadings).

4. Compliance with NPDES permitted hydraulic and organic capacities; permitted sampling procedures; solids handling procedures in

accordance with your NPDES and Part II permits; plant operation as to not cause damage to the receiving stream.

Please be advised that failure to comply with the terms and conditions of your permit constitutes a violation of Sections 202 and 202 [sic] of the Clean Streams Law, and subjects you to enforcement action in the future.

This Notice of Violation is neither an order nor any other final action of the Department. It neither imposes nor waives any enforcement action available to the Department under any of its statutes. If the Department determines that an enforcement action is appropriate, you will be notified of this action.

If you have any questions, please contact Mr. Robert DiGilarmo at 717-705-4789.

(the NOV or October 8, 2002 Letter) NOA, at Ex. A.[1]

The County appealed the NOV to the Board by Notice of Appeal filed on November 8, 2002. The Department filed the instant Motion to Dismiss on December 13, 2002. The County filed its response and a memorandum of law in support thereof on January 10, 2003. The

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[1] As the first sentence of the NOV makes clear, the Department had sent a similar letter to the County dated August 13, 2002 which letter was also designated as a Notice of Violation. That letter was similar to the NOV here at issue except for several noticeable differences. In the August 13, 2002 letter the Department stated that it "had determined that the following violations exist at your wastewater treatment plant". That language was changed in the October 8, 2002 NOV to read, "[t]his letter is to inform you of the existence of certain violations at the Berks County Wastewater Treatment Plant and our recommendations to assist you in abating those violations to achieve compliance with your NPDES permit. . . . The Department observed that the following violations exist at the wastewater treatment plant:" The same list of alleged violations is set forth in both letters. The August 13, 2002 letter cites and quotes 25 Pa. Code § 92.13(b) and then says that "[b]ecause of the violations at your plant, the Department cannot take any actions on the Part II permit application submitted for an increased hydraulic capacity rating at your plant". The October 8, 2002 NOV changes this to say that, "[o]ur interpretation of these regulations is the Department cannot approve a Part II permit application for an increased hydraulic capacity rating until environmental violations have been corrected and there is a demonstrated continued environmental compliance." The August 13, 2002 letter provides that,

> [w]e request that you submit a report to this office within 45 days of the date of this letter, describing the causes of the violations and the steps being taken to prevent recurrence of the violation along with a correction schedule. In addition, the Department requests that you implement the following procedures to verify compliance with your NPDES permit and the Pennsylvania Clean Streams Law:

The October 8, 2002 NOV changes those provisions to read "[t]o enable us to go forward with the review, we encourage you to submit documentation showing abatement of the violations noted above within 45 days of the date of this letter" and "[t]o assist you in achieving compliance with your permit and the Department's regulations, the Department recommends that you consider implementing the following:" The recommendations set forth in both letters are basically the same. The County appealed the August 13, 2002 NOV by Notice of Appeal filed on September 11, 2002 which appeal was docketed as No. 2002-200-K. That case was dismissed per the County's withdrawal of appeal filed on October 30, 2002 and consequent dismissal Order issued on October 31, 2002.

Department closed the pleadings on its Motion to Dismiss by filing its reply on January 22, 2003.[2]

Standard of Review

As we recently set forth in *Donny Beaver and Hidden Hollow Enterprises, Inc., t/d/b/a Paradise Outfitters v. DEP*, EHB Docket Nos. 2002-096-K/2002-15—K (Opinion issued August 8, 2002):

> The Board evaluates motions to dismiss in the light most favorable to the non-moving party. *Ainjar Trust v. DEP*, 2000 EHB 505, 507; *Wheeling and Lake Erie Railway v. DEP*, 1999 EHB 293, 295. The Board treats motions to dismiss the same as motions for judgment on the pleadings: a motion to dismiss will be granted only where there are no material factual disputes and the moving party is clearly entitled to judgment as a matter of law. *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1281.

Donny Beaver, slip op. at 6 (footnote omitted). *Accord Felix Dam Preservation Society v. DEP*, 2000 EHB 409, 420-21.[3]

Discussion

We recently had occasion to restate the parameters of the Board's jurisdiction in cases such as this one in *Donny Beaver* where we stated as follows:

> The outlines of the Board's jurisdiction are set forth in the Environmental

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[2] The County filed a Request To File Sur-Reply on January 28, 2003 which attached a copy of a proposed Sur-Reply. The Board reviewed the proposed Sur-Reply and finds that it contains nothing new and does not add anything which has not already been either argued by the parties or considered by the Board in its review of the pending Motion to Dismiss. Therefore, we are denying the Request as moot.

[3] As the Board noted in *Donny Beaver*,

> As a matter of practice the Board has authorized motions to dismiss as a "dispositive motion" and has permitted the motion to be determined on facts outside those stated in the appeal when the Board's jurisdiction is in issue. *Florence Township and Donald Mobley v. DEP*, 1996 EHB 282, 301-03; *Felix Dam Preservation Association v. DEP*, 2000 EHB 409, 421 n.7; *see also Grimaud v. DER*, 638 A.2d 299, 303 (Pa. Cmwlth. 1994) ("Where there are no facts at issue that touch jurisdiction, a motion to quash may be decided on the facts of record without a hearing."). Accordingly, the Board has considered the statements of fact and the exhibits contained in the parties' pleadings when resolving these Motions to Dismiss.

Donny Beaver, slip op. at 6 n.4.

Hearing Board Act, Act of January 13, 1988, P.L. 530, as amended, 35 P.S. §§ 7511 *et seq.* (the EHB Act). Pursuant to the EHB Act: "The board has the power and duty to hold hearings and issue adjudications under [the provisions of the Administrative Agency Law relating to practice and procedure of Commonwealth agencies, 2 Pa.C.S. § 501 *et seq.*] on orders, permits, licenses or decisions of [DEP]." 35 P.S. § 7514(a). The EHB Act also provides that "no action of the [DEP] 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 . . . ." 35 P.S. § 7514(c). The Board's regulations implementing the EHB Act define "action" to mean: "An order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification." 25 Pa. Code § 1021.2(a). Thus, the EHB Act expressly grants the Board jurisdiction over DEP's "orders, permits, licenses or decisions," 35 P.S. §7514(a), as well as any DEP action "adversely affecting" a person's "personal or property rights, privileges, immunities, duties, liabilities or obligations." 35 P.S. §§ 7514(c); 25 Pa. Code § 1021.2(a).

A review of the caselaw reveals certain principles which guide the determination of whether a particular DEP action is appealable. Although formulation of a strict rule is not possible and the "determination must be made on a case-by-case basis," *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121, the Board has articulated certain factors which should be considered. These include: the specific wording of the communication; its purpose and intent, the practical impact of the communication; its apparent finality; the regulatory context; and, the relief which the Board can provide. *See Borough of Kutztown*, 2001 EHB at 1121-24.

In particular, the Board has distinguished between descriptive and prescriptive communications—*i.e.* those which merely observe conditions, inform the recipient of alleged violations, or advise of the agency's interpretation of applicable law, and, those which direct the recipient to perform a specific course of conduct, or impose an obligation which subjects the recipient to liability or changes the status quo to the detriment of personal or property rights. Thus, for example notices of violation which merely list the violations observed, advise of the possibility of future enforcement action, or inform the recipient of the procedures necessary to achieve compliance, are not appealable actions. *See, e.g., Fiore v. DER*, 510 A.2d 880, 882-84 (Pa. Cmwlth. 1986); *Sunbeam Coal Corporation v. DER*, 304 A.2d 169, 170-71 (Pa. Cmwlth. 1973); *Lower Providence Tp. Municipal Authority v. DEP*, 1996 EHB 1139, 1140-41; *M.W. Farmer Company v. DER*, 1995 EHB 29, 30; *The Oxford Corporation v. DER*, 1993 EHB 332, 333-34. But a notice of violation which orders the recipient to take some specific action affecting its personal or property rights has been held appealable. *See, e.g., S.H. Bell Company v. DER*, 1991 EHB 587, 588-90.

We have applied the prescriptive/descriptive distinction to inspection

> reports, *see, e.g.*, *Goetz*, 2001 EHB at 1137-38 (report that merely recorded inspector's observation of progress of reclamation activities was not appealable); *cf. Harriman Coal Corporation v. DEP*, 2000 EHB 1295, 1300-01 (report which reinstated earlier compliance order and directed appellant to cease all mining activity and begin reclamation was an appealable action). The same analysis applies to DEP letters. *See, e.g.*, *202 Island Car Wash, L.P. v. DEP*, 1999 EHB 10, 13 (portions of DEP letter that merely advised recipient of agency's interpretation of the law were not appealable); *Eagle Enterprises, Inc. v. DEP*, 1996 EHB 1048, 1049-50 (DEP letters which require no specific action on the part of appellants are not final actions over which Board has jurisdiction); *cf. Borough of Edinboro v. DEP*, 2000 EHB 835, 835-37 (letter which declared borough's sewage system hydraulically overloaded and effectively required borough to prohibit new connections, identify steps to correct perceived problems and participate in joint submission of sewage plan revision was appealable); *Medusa Aggregates Company v. DER*, 1995 EHB 414, 418-21 (letter that effectively ordered recipient to cease mining in a certain area was appealable action).

Donny Beaver, slip op. at 7-10.[4]

We are persuaded that under the principles and guidelines stated above, and other precedent, that the Department is correct that the letter at issue here is not appealable. The letter states that it is "*to inform you* of the existence of certain violations" and, further, to let the County know of "our recommendations to assist you in abating those violations." This "to inform you" language contained in this letter is the same formulation which was contained in the letter at issue in *Donny Beaver* which was instrumental in the Board's concluding in that case that the letter in *Donny Beaver* was not appealable. *Donny Beaver*, slip op. at 10. The letter here outlines the Department's interpretation of its regulations and, then, provides certain recommendations to the County for it to consider implementing to achieve compliance. These recitations are advisory and do not cross over the line into the territory of directory or mandatory.

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[4] As we also noted in *Donny Beaver*,

> The fact that DEP's action was in the form of a letter is irrelevant to the issue of appealability. *See, e.g., Bethlehem Steel Corporation v. DER,* 390 A.2d 1383, 1388 (Pa. Cmwlth. 1978). Rather, "the appealability of a Departmental communication turns on the substance of the communication, and not merely its title." *Goetz v. DEP*, 2001 EHB 1127, 1137.

Donny Beaver, slip op. at 8 n.5.

The case of *Kutztown v. DEP*, 2001 EHB 1115, upon which the County relies, does not counsel a contrary result. Our review of *Kutztown* reveals that in that case the Department's action consisted of an unequivocal *finding* and of projected *declaration* overload status under Chapter 94 together with an unequivocal statement that it would be necessary for Kutztown to submit a Chapter 94 corrective action plan. *Kutztown*, *supra* at 1115-16. In this case, the letter states the Department's informing of its observation of alleged violations and provision of advice how to remediate such alleged violations. Also, the letter in *Kutztown* dealt with the Chapter 94 Municipal Wasteload Management program and not the Chapter 92 NPDES permitting program. The finding of projected overload under the Chapter 94 program is an assignment of specific legal status to the party being so designated with appurtenant affirmative mandated consequences. The Department's letter here relative to the Chapter 92 permit review regulations does not involve those attributes. As such, the letter is accurately described as part of the "interplay between the Department and the person who has submitted an application to the Department". *Central Blair County Sanitary Authority v. DEP*, 1998 EHB 643, 646 *citing New Hanover Corporation v. DER*, 1989 EHB 1075.

We do not find on point the County's argument to the effect that the NOV, taken in context with the August 13, 2002 NOV and viewed in light of the August 13, 2002 NOV rises to the level of an appealable action. Whether the August 13, 2002 NOV, as it was worded, may have been an appealable action is academic. The October 8, 2002 NOV specifically rescinds the August 13, 2002 NOV and the effectiveness of the rescission has not been questioned as it was in the twin cases of *Borough of Edinboro v. DEP*, 2000 EHB 835 (*Edinboro I*) and *Borough of Edinboro v. DEP*, 2000 EHB 1067 (*Edinboro II*). It is only the October 8, 2002 NOV which is under appeal, and we focus on it, not the August 13, 2002 NOV.

To the extent the County is focusing on the Department's putting the County's NPDES permit application on hold as tipping the scale toward appealability, the *Central Blair County* case, which we just quoted, refutes that argument directly. In *Central Blair County*, the Authority had submitted an NPDES permit renewal application for its facility. The Department returned the application, however, because it had learned that the Authority may divert some sewage flow and it explained that such a diversion would affect the design flows stated in the application as well as the flows reflected in the relevant municipality's Act 537 Plan. The Department informed the Authority that it could resubmit the application when the municipal allocations and the design flows were finalized. *Central Blair County*, *supra* at 644.

The Authority appealed the Department's putative action of returning the application but also submitted a new application which made no changes to the old one. The Authority withdrew the first appeal. In conducting its review of the new but unchanged application, the Department found that the flows in the application differed from the flows in the relevant municipality Act 537 Plan. Accordingly, the Department transmitted a letter to the Authority which notified the Authority that the Department could not issue an NPDES permit where the flows in the application differed from the flows stated in the municipality's Act 537 Plan. *Id.*

The critical provision of the letter under appeal in *Central Blair County* for purposes of our analysis is its statement that, in accordance with the Money Back Guarantee Program, the clock tracking the time elapsed for Department review of the application had been stopped. The Authority filed a Notice of Appeal challenging the Department's putative action in the letter asserting that the letter was tantamount to a denial of the application. The Department filed a Motion to Dismiss arguing that the letter was not a denial of the application but, instead, merely informed the Authority about the Department's obligations under the law and informed it that the

application had been put on hold until the Act 537 Plan was revised. As such, argued the Department, the letter was not an appealable action.

The Board agreed with the Department. The Board noted that:

> [I]t was never intended that the Board would have jurisdiction to review the many provisional, interlocutory 'decisions' made by [the Department] during the processing of an application. It is not that these 'decisions' can have no effect on personal or property rights, privileges, immunities, duties, liabilities or obligations; it is that they are transitory in nature, often undefined, frequently unwritten. Board review of these matters would open the door to a proliferation of appeals challenging every step of [the Department's review] . . . process before final action has been taken. Such appeals would bring inevitable delay to the system and involve the Board in piecemeal adjudication of complex, integrated issues. We have refused to enter that quagmire in the past . . . and see no sound reason for entering it now.

Central Blair County, *supra* at 646, *quoting Phoenix Resources, Inc. v. DER*, 1991 EHB 1681, 1684. The Board then observed that,

> Indeed, the Department's review process always involves a certain amount of interplay between the Department and the person who has submitted the application to the Department. *New Hanover Corporation v. DER*, 1989 EHB 1075. Therefore, until the Department has approved or disapproved the application, the Board will not intrude upon the review process. *Id.*

Central Blair County, *supra* at 646. In focusing on the specific language of the letter in *Central Blair County* and concluding that it did not rise to the level of an appealable action, the Board had this to say,

> This letter does not *deny* Appellant's NPDES permit renewal application. It simply provides appellant with information about the status of Appellant's application. . . . Thus, *instead of denying the application*, the Department has given Appellant an opportunity to correct the design flow discrepancy. This is part of the interplay that occurs between the Department and permit applicants.
>
> We note that Appellant can refuse to revise the design flows in the Act 537 Plan. In that event, the Department may decide to take final action and deny the permit application. *At that time*, Appellant could appeal the Department's action.

Id. at 647-48 (emphasis in original) (footnotes omitted).[5]

We think the rationales of the Board in *Central Blair County* case on the permit hold question and in *Phoenix Resources* on the non-appealability of the various many interim decisions made by the Department during the processing of a permit application are applicable here. The County's efforts to distinguish the *Central Blair County* case are beside the point. The County offers that, this is more than "interplay" and "the Department has clearly determined that violations exist and is forcing its will upon the County to act as the Department wishes." County Reply Brief at 18. It could be said about all NOVs that they represent the Department's determination that violations exist. Yet NOVs are not generally appealable. Also, the County is

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[5] The rationale of *Phoenix Resources* has been endorsed repeatedly by this Board including as recently as this year in a context other than permitting. *See Smithtown Creek Watershed Association v. DEP*, Docket No. 2002-100-MG (Opinion issued August 15, 2002). In *Smithtown*, the Board granted a motion to dismiss a challenge to the Environmental Quality Board's rejection of a petition to upgrade the designation of a waterway despite provisions in the Rules which provide for the Department to evaluate a stream and report its findings and recommendations to the EQB. The Board reasoned that its exercise of jurisdiction to review the Department's conclusions and recommendations concerning the subject petition "would needlessly draw us into the controversy, complicating and delaying the ultimate decision of the EQB on the petition." *Smithtown*, slip op. at 6. In the permitting context, which is that which we find the instant case, the *Phoenix Resources* principle has been restated twice as recently as just three years ago in *North American Refractories Co. v. DEP*, 2000 EHB 222 and *United Refining Company v. DEP*, 2000 EHB 132.

In *United Refining*, the Board granted a motion to dismiss an appeal of the Department's letter informing an applicant for a garden variety air plan approval that its application was incomplete because the project was subject to complicated New Source Review (NSR) analysis on the grounds that the letter did not constitute a final action. *United Refining, supra* at 133-34. The Board said there that, "[t]his Board has held repeatedly that we will not review the many interim decisions made by the Department during the processing of a permit application, not because they have no impact, but because they are not final." *Id.* at 133. After quoting with approval the same portion of the *Phoenix Resources* case we have heretofore quoted, the Board stated that,

> United would have us disregard this long line of case[s] because an NSR applicability determination could have dramatic consequences and the Department has given every indication that it will not change its mind, but this misses the point. Any number of Department decisions during a permit review could have costly, real-world consequences, but this Board will not review them in a piecemeal fashion. Although NSR applicability is certainly likely to be one issue raised when the Department takes final permitting action (and we do not even know that for certain), there may be other important issues lurking of which we are not aware. We chose (sic) to review all of the issues at once, or not at all. In short, the permit review process must be brought to close before this Board will get involved. Until then, there has been no final action. We note that Appellant can resolve these uncertainties by asking the Department to take final action on its application and then seeking review of the Department's denial of its application.

Id. at 133-34.

wrong in concluding that the Department is forcing its will upon the County to act as the Department wishes.

We also note from the County's own papers, and the Department's as well, that the very "quagmire" that both the *Phoenix Resources* and the *Central Blair County* cases talked about is present in this case. The County sent a letter dated October 22, 2002 to the Department seeking "clarfication" of the issues set forth in the October NOV. Appellant's Answer To Department of Environmental Resources Motion to Dismiss (CBR), ¶ 4. The Department, in turn, responded to the County's letter by letter dated October 31, 2002. CBR ¶ 5, Exhibit "B". That letter makes reference to an examination of the receiving stream by representatives of the Department and the County which took place on October 10, 2002. Then, the County, by letter dated December 6, 2002 to the Department, agreed to operate the plant at a flow rate of under 300,000 gallons per day, including no more than 44,000 gallons per day of septage, for the DEP-recommended sampling period. County Memorandum of Law at 6. However, the County had requested that the Department provide a detailed description of the sampling requirements so that a complete picture of the plant's performance could be obtained. *Id.* Unfortunately, according to the County, the Department has yet to respond to that request, nor has the Department notified the County that it is now considered to be in compliance or that the Department will otherwise continue to review the Part II permit application. *Id.* According to the Department's Reply brief, the Department's so-called Operation Outreach Program visited the plant on January 8, 2003 and will provide the County soon with a written report of its observations and recommendations. Department Reply Brief, Affidavit of Leon Oberdick.

Clearly, there is a quagmire and/or continuing interplay relating to the permit application and the status thereof and, to paraphrase the words of the *Phoenix Resources* and *Central Blair*

County cases, we have refused to enter that quagmire in the past and we see no sound reason for entering it now.

Also, it is significant that the matter which would theoretically be tried in this case is whether the violations observed and/or alleged in the NOV were, in fact, violations. Indeed, in the context of this case we are being asked for what would be no more than an advisory opinion on whether violations in the NOV are actually violations. That is precisely the subject matter upon which our Board, as affirmed by Commonwealth Court, has held over and over again has not ripened to a matter over which we have jurisdiction. *See, e.g., Fiore*, 510 A.2d at 882-84.

Finally, the County states it would have been taking serious risk had it not appealed the NOV and it was subsequently determined that the NOV was a final action in that the County would have been precluded from appealing the provisions of the NOV in any subsequent proceeding. That is an accurate statement of the law and a testament to the quality and good judgment of the County's counsel for its decision to file this appeal, but it is not a valid argument that the NOV is appealable. The bad news for the County is that we hold that the NOV is not appealable and thus we are granting the Department's Motion to Dismiss the County's appeal. However, the good news for the County is that, by virtue of our so holding, the NOV is not a final action and the County is not precluded from challenging any assertion or statement in the NOV at the appropriate time if such time should arise later.

Accordingly, we enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COUNTY OF BERKS	:	
	:	
v.	:	**EHB Docket No. 2002-286-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW this 4th day of February, 2003, it is hereby ORDERED that: (1) The County's Request To File Sur-Reply is denied as moot; (2) the Department of Environmental Protection's Motion To Dismiss is **GRANTED** and this matter is hereby **DISMISSED**; and (3) the conference call previously scheduled for Monday, February 10, 2003 is cancelled.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
ADMINISTRATIVE LAW JUDGE
Chairman

Thomas W. Renwand

THOMAS W. RENWAND
ADMINISTRATIVE LAW JUDGE
Member

Michelle A. Coleman

MICHELLE A. COLEMAN
ADMINISTRATIVE LAW JUDGE
Member

BERNARD A. LABUSKES, JR.
ADMINISTRATIVE LAW JUDGE
Member

MICHAEL L. KRANCER
ADMINISTRATIVE LAW JUDGE
Member

Dated: February 4, 2003

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

MARYANNE GOHEEN	:	
	:	
v.	:	**EHB Docket No. 2002-077-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW MORGAN LANDFILL COMPANY, INC., Permittee	:	**Issued: February 4, 2003**

OPINION AND ORDER ON MOTION IN LIMINE AND MOTION FOR SANCTIONS

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

Synopsis:

A permittee's motion in limine is granted in part and denied in part. The Appellant is precluded from arguing about the formation and legitimacy of a host municipality and whether the Department performed a five-year review. The Appellant is not precluded from arguing that the Department acted improperly by failing to consider the ongoing harms and benefits of a landfill before it decided to renew the landfill's permit. Although the Appellant violated the discovery rules, rather than preclude the introduction of evidence, the discovery period will be reopened for all parties in light of the fact that the hearing in this matter has been stayed.

OPINION

Maryanne Goheen ("Goheen") filed this appeal from the Department of Environmental Protection's (the "Department's") renewal of New Morgan Landfill Company, Inc.'s ("New Morgan Landfill's") solid waste permit. New Morgan Landfill has filed a motion in limine and

for sanctions asking us preclude the presentation of a case-in-chief on certain issues and the admission of certain evidence. The Department has advised us by letter that it concurs with the relief sought in the motion. Goheen opposes all aspects of the motion.

Motion in Limine

The Board has recently cautioned that it will normally decline to decide motions in limine that in reality are summary judgment motions. *Dauphin Meadows, Inc. v. DEP*, EHB Docket No. 2000-212-L (March 5, 2002). New Morgan Landfill's motion in limine, however, is based upon evidence and related contentions that are identified in Goheen's prehearing memorandum that allegedly go beyond the allegations set forth in her notice of appeal. These contentions are the proper subject of a motion in limine. *Id.*, slip. op. at 4.

New Morgan Borough

Goheen's pre-hearing memorandum makes several allegations regarding New Morgan Borough. We addressed this issue at length in an Opinion and Order issued on August 22, 2002. In response to New Morgan Landfill's motion, Goheen responds that she is not precluded from arguing that fees paid to New Morgan Borough should not be considered to be a benefit to anyone other than the Borough, and that the fees are not adequate mitigation for harms suffered by anyone other than the Borough. The facts and argument in her prehearing memorandum, however, go beyond these contentions. They once again get into the formation and legitimacy of New Morgan Borough. Accordingly, New Morgan Landfill's motion is granted on this point.

Harms/Benefits Test

New Morgan Landfill asks us to preclude Goheen from arguing that the Department had a duty to perform a harms/benefits analysis before renewing New Morgan Landfill's permit. It asserts that "[t]he potential applicability of a harms/benefits test was first raised but not answered

by the Board in its October 17, 2002 Opinion on summary judgment and subsequently seized on by Goheen in her Pre-Hearing Memorandum at Paragraph 17 of her Legal Contentions." (Motion p. 5 n.2.)

It is difficult for us to understand how one could read Goheen's notice of appeal and not see that she was positing the applicability of a harms/benefits analysis to New Morgan Landfill's permit renewal. She first asserts that the landfill "does not serve any *public benefit* for the area and the locality, and *the permit renewal fails to take into account that the applicant is a detriment to the area* (emphasis added)." (¶ 2.) She goes on to assert that New Morgan Landfill "has not compensated for the detriment to the area." (¶ 3.) She then lists the alleged harms being caused by the landfill. (¶ 4.) Even a casual reading should have revealed that this appeal would implicate the harms and benefits of the landfill.

New Morgan Landfill seems to be arguing that Goheen's allegation that the Department failed to consider the harms and lack of benefits of the landfill is different than an allegation that the Department failed to apply a harms/benefits test. New Morgan Landfill apparently believes that Goheen should have first enunciated that the harms/benefits test applies, and then secondly, asserted that an application of the test dictates that the renewal application be denied. Instead, Goheen simply assumes that the Department should consider harms and benefits, and jumps right into the conclusion that, if it had, the renewal would have been denied. Goheen also failed to cite the regulation that spells out the harms/benefits test or use the phrase "harms/benefits test." Goheen also does not actually say that the landfill's benefits "clearly outweigh" its unmitigated harms.

The notice of appeal is hardly a study in precision, but it manages to state that the landfill does not serve any public benefit, that the landfill causes adverse effects, and that the landfill has

not compensated the area for those detrimental effects. Appellants are not required to cite specific regulations in their notices of appeal. Furthermore, only issues that are clearly outside the scope of challenges raised in the notice of appeal are waived, and the Board will not find a waiver unless the matter is free from doubt. *Id.*, slip op. at 4; *Ainjar Trust v. DEP*, 2001 EHB 59, 66; *Williams v. DEP*, 1999 EHB 708, 716. If New Morgan Landfill did not anticipate the applicability of a harms/benefits analysis, the notice of appeal is not to blame.

New Morgan Landfill's claim of prejudice and surprise is further weakened by Goheen's responses to New Morgan Landfill's interrogatories, which New Morgan Landfill attached to its motion as Exhibit C. Goheen responded to New Morgan Landfill's contention interrogatories with such answers as the following:

- "The evidence supporting the decision to deny the permit expansion is equally applicable to the general permit and shows that the adverse impacts of this landfill on the community are unreasonable and excessive."
- The landfill "causes substantial harm to the public living near the landfill."
- "The landfill should be required to those provide benefits which would alleviate the adverse impacts of the landfill on the community.
- " 'Public benefit' is the advantage(s) received by the people subject to influence by the landfill and harmed by its operation beyond that which is received by all others."
- "Residents of the neighboring townships are not compensated, yet those uncompensated persons bear virtually all burdens of the detrimental impacts of the landfill."

Again, we fail to comprehend how New Morgan Landfill could read repeatedly about the relative harms and benefits of the landfill, and then present an argument to this Board that it could not have anticipated that this appeal would involve a harms/benefits analysis.

Lest there be any doubt, in our *August 22, 2002* opinion in this appeal, we not only discussed Goheen's various contentions regarding the relative harms and benefits of the landfill, we openly wondered (and continue to question) whether it is appropriate to engage in such an analysis when the Department is considering a permit renewal. (*Goheen*, slip op. at 5.) New Morgan Landfill's brief in support of its first motion for summary judgment, filed on August 26, 2002, drew our attention to this precise issue:

> To the extent Ms. Goheen is attempting to assert that the DEP failed to consider whether the payment of host fees to New Morgan Borough adequately mitigates the harms suffered by other parties, such a harms/benefits argument would only be appropriate in the context of a major permit modification, but not a permit renewal.

(Brief pp. 12-13.) New Morgan Landfill's accusation that the potential applicability of a harms/benefits test was first raised by the Board and not until October 2002 is unfounded, at best.[1] For the time being, we will simply conclude that New Morgan Landfill's motion to preclude evidence on the point is denied.

Five-Year Review

Goheen alleges in her pre-hearing memorandum that the Department failed to conduct a five-year review of the landfill, and that that failure renders the regulatory renewal requirements meaningless. Goheen responds that this particular contention is merely part of its larger argument that the Department failed to consider the harms and benefits of extending the life of

[1] We take note of the fact that the Department concurred with the relief sought in the motion, not the motion itself.

the landfill in light of the positive and negative impact it is having on the surrounding community. We disagree that an alleged failure to conduct a five-year review, which is essentially procedural in nature, falls within the ambit of Goheen's larger theme. New Morgan Landfill correctly argues that this argument can in no way be gleaned from the notice of appeal. Accordingly, its motion on this point is granted.[2]

Motion for Discovery Sanctions

New Morgan Landfill complains that Goheen identified several documents and third-party witnesses for the first time in her pre-hearing memorandum, even though those documents and the identity of the third parties with knowledge had previously been requested in New Morgan Landfill's written discovery requests. New Morgan Landfill's complaint is justified. With the exercise of appropriate diligence, this information could have been provided at an earlier date. New Morgan Landfill proposes as a sanction that Goheen be precluded from introducing any of the documents or the testimony of any of the third parties.

One of the factors that we consider in deciding what, if any, sanction to impose for a discovery violation is the prejudice caused to the opposing party and whether the prejudice can be cured. *ERSI v. DEP*, 2001 EHB 824, 829. We must remain ever mindful that the Board's primary responsibility is to decide cases on the merits. Therefore, excluding important evidence that would otherwise assist the Board in making the best possible decision on the merits is a serious sanction that has an undesirable side effect: it impinges upon the function of the Board as

[2] The Department advised us in a letter that it would seek to file a dispositive motion on this issue. We ruled after a conference call that the Board would not accept any new dispositive motions, but we failed to that a motion in limine would have been acceptable if the basis for the motion related to improper allegations in the pre-hearing memorandum. We apologize to the Department for any confusion on the undersigned's part if the Department had intended to file a motion in limine as opposed to a dispositive motion.

much as it eliminates an advantage gained by a discovery violation.[3] It should generally be limited to cases where it is truly necessary to restore a level playing field due to incurable prejudice, and/or cases where the transgressor has inexcusably defied one or more Board orders. *See, e.g., DEP v. Land Tech Engineering, Inc.*, 2000 EHB 1133.

We believe that any prejudice that has been suffered in this matter can be cured. The hearing in this appeal has been postponed at the suggestion of the parties due to the pendency of a Commonwealth Court matter that involves similar issues. We recently ruled after a conference call that no further discovery was justified. Upon reconsideration in light of New Morgan Landfill's motion, and in consideration of the overriding interest that we have in reaching the best possible decision following the efficient presentation of evidence at the hearing in this important case, we will grant New Morgan Landfill's request that discovery be reopened in this matter. In order to minimize the possibility of further discovery disputes, any party may complete any discovery that it wishes to take (within the bounds of the discovery rules) within 45 days. Discovery should not be conducted to the exclusion of settlement discussions as directed in our Order of January 10, 2003.

[3] Of course, *not* imposing sanctions often has the undesirable side effect of effectively rewarding discovery abuses. These matters tend to present no-win situations.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARYANNE GOHEEN	:	
	:	
v.	:	**EHB Docket No. 2002-077-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW MORGAN LANDFILL COMPANY, INC., Permittee	:	

ORDER

AND NOW, this 4th day of February, 2003, New Morgan Landfill's motion in limine and for sanctions is granted in the following respects:

1. Goheen is precluded from presenting evidence or pursuing arguments regarding New Morgan Borough that are inconsistent with this Board's Opinion and Order of August 22, 2002.

2. Goheen is precluded from presenting evidence and pursuing arguments that the Department failed to conduct a five-year review.

3. The parties shall complete any additional discovery that they wish to pursue on or before **March 24, 2003.**

In all other respects, the motion is denied.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: February 4, 2003

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

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EDWARD P. DAVAILUS and SANDRA DAVAILUS, CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF PAULINE DAVAILUS and DAVAILUS ENTERPRISES, INC.	:	**EHB Docket No. 96-253-L**
v.	:	**Issued: February 6, 2003**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIROMENTAL PROTECTION	:	

ADJUDICATION

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

Synopsis:

The Claimants lawfully harvested peat from wetlands on their property for years. In the mid-1980s, the Department advised the Claimants that they would need to stop further harvesting unless they obtained an encroachments permit. The Department eventually denied the Claimants' permit application, and this Board upheld that denial in an adjudication issued in 1991.

The Claimants brought a takings claim in the Court of Common Pleas. That court transferred the case to this Board for a determination of whether there had been a compensable taking as a result of the permit denial. The Board now holds that no compensable taking occurred. The Claimants' peat operation would not necessarily have violated state law or constituted a nuisance. The Board defines the property in question as the Claimants' entire

parcel, not merely the subset of wetlands on the parcel that were affected by the permit denial, as advocated by the Claimants. There was not a *Lucas* taking because the permit denial left the Claimants with property that had already provided, and continued to retain, substantial value. In applying the *Penn Central* analysis, the Board finds that the permit denial was not unduly oppressive largely because the permit denial only interfered with some of the Claimants' expectations, the Claimants were permitted to remove a significant portion of the peat from the property prior to the permit denial, the property has provided and retains substantial value, and the permit denial promoted the vital public interest in the preservation of wetlands habitat.

Background

The origin of the Dickensian litigation between the Davailus family and the Department can be traced back fourteen years to August 30, 1988, which is when the Department denied Davailus's application for a permit to harvest additional peat on his property in Covington Township, Lackawanna County. (Parties' Joint Stipulation of Fact Number ("Stip.") 12.) Davailus appealed that denial to this Board. On July 22, 1991, this Board upheld the permit denial. *Davailus v. DER*, 1991 EHB 1191 ("*Davailus I*"). The Commonwealth Court affirmed the Board's adjudication. *Davailus v. DER*, Docket No. 1826 C.D. 1991 (Pa. Cmwlth. September 4, 1992) (unpublished). (Stip. 16.) The Supreme Court denied Davailus's petition for allowance of appeal. (Stip. 17.)

In addition to the permit appeal, Davailus filed a petition for appointment of a board of viewers in the Lackawanna County Court of Common Pleas alleging that the permit denial constituted a compensable taking. The court stayed that case pending resolution of the permit appeal before this Board. The court eventually quashed the case on May 1, 1995 for lack of jurisdiction. (Stip. 18.) Davailus appealed that order to the Commonwealth Court. The

Commonwealth Court agreed that the Court of Common Pleas lacked jurisdiction, but held that the proper remedy was to transfer the case to this Board. (Stip. 18.) The Court of Common Pleas transferred its files to this Board on November 5, 1996, and we assigned the matter to docket number 96-253-MG. (Stip. 19.) Davailus, however, petitioned the Supreme Court for allowance of an appeal from the Commonwealth Court's order. The Supreme Court granted the petition on June 1, 1996, but then dismissed the appeal on February 27, 1998 as having been improvidently granted. (Stip. 20.) Davailus filed a statement of claim in this appeal on October 13, 2000. (Stip. 21.)

Edward Davailus and his wife, Pauline Davailus, and Davailus Enterprises, Inc. filed the appeal in *Davailus I* and were the original claimants in the takings litigation. Although Edward Davailus originally operated under the name of North Pocono Peat and Humus, he incorporated and became the sole shareholder of Davailus Enterprises, Inc. in 1978. (Davailus Exhibit No. ("D.Ex.") 21, 25.) Edward and Pauline Davailus have since passed away. By order dated August 14, 2000, the Board substituted Edward P. Davailus and Sandra Davailus, children of Edward and Pauline and co-executors of the last will and testament of Pauline, as the parties in this case. (Stip. 2.) Davailus Enterprises, Inc. remains a party. The majority of the site at issue is currently owned by the Estate of Pauline Davailus. (We fully understand the role of the various parties, but for purposes of readability, we will generally refer to all of the Davailus interests as "Davailus" and refer to the individual parties and/or family members where necessary by their individual names.)

In an opinion and order issued on June 6, 2001, the Board denied the Department's motion for summary judgment. Due to numerous unresolved factual matters, we rejected the Department's argument that, as a matter of law, there had not been a compensable taking. We

also rejected the Department's argument that Davailus's claim was barred by the principles of res judicata, collateral estoppel, and waiver. Finally, we rejected the Department's argument that this case needed to be dismissed because it had been filed more than 30 days after the alleged take. The Department has not pursued any of these arguments in its post-hearing brief.

On June 13, 2002, in response to the Department's motion in limine, we clarified the Board's position regarding the preclusive effect of the Board's findings and conclusions in *Davailus I* in this takings litigation. We ruled that the Board would not accept new evidence or otherwise relitigate the findings and conclusions set forth in *Davailus I*, but that the parties were free to argue about the meaning and the legal significance of those findings and conclusions in this case, particularly in light of the Pennsylvania Supreme Court's ruling in *Machipongo Land and Coal Company, Inc. v. DEP*, 799 A.2d 751 (Pa.), *cert. denied*, 123 S.Ct. 486 (2002) ("*Machipongo*"), which was issued on the eve of the hearing in this matter. *Davailus v. DEP*, EHB Docket No. 96-253-L (Opinion and Order issued June 13, 2002). Neither party has questioned that Board ruling in its post-hearing brief.

We held a hearing on the merits over the course of six days beginning on June 24, 2002. We conducted a site view after the hearing. The parties requested and received several extensions to file their post-hearing briefs, but the matter has at last been fully briefed and is now ripe for adjudication. We, therefore, make the following:

FINDINGS OF FACT

Parties

1. The Department is the agency with the duty and authority to administer and enforce the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1-693.27 (the "Encroachments Act"); the Clean Streams Law, 35 P.S. §§ 691.1-691.1001, the Surface Mining Conservation and

Reclamation Act, 52 P.S. §§ 1396.1-1396.31 ("SMCRA"); Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17, and rules and regulations promulgated under those statutes. (*Davailus I* Finding of Fact ("*Davailus I* FOF") 2; Stip. 1.)

2. Edward Davailus grew up on a farm near Lake Waulanpaupack, left school in the eighth grade, and lived in a trailer home for many years of his life. (Notes of Transcript page ("T.") 132, 135, 348, 564-566; Commonwealth Exhibit No. ("C.Ex.") 31 p. 64.)

3. Edward Davailus was employed by others as a heavy-equipment operator from the time that he left school after the eighth grade until 1972. (T. 348-350, 981.)

The Site

4. Edward and Pauline Davailus purchased a single parcel of land in Covington Township, Lackawanna County in 1965 from the Stansberry Estate (the "Site"). (T. 33; D.Ex. 1; C.Ex. 5 p. 20, C.Ex. 6 p. 69.)

5. The Site originally consisted of at least 375 acres. (T. 229-231; D.Ex. 1, 10; C.Ex. 5 p. 21.)

6. The Davailuses paid $30,000 for the Site (i.e. about $80 per acre). (T. 231-232; D.Ex. 1; C.Ex. 5 p. 169, 961.)

7. The Site contained the branch headwaters of Meadowbrook Stream and several hydrologically connected peat bogs, which are now and/or were originally wetlands, that over time became known as Areas I through VIII. (*Davailus I* FOF 3; T. 36-37; D.Ex. 10.) Almost all of peat on the Site is peat humus, which is primarily used for horticultural purposes. (*Davailus I*, 1991 EHB at 1208-1209; T. 75, 126; D.Ex. 3, 10, 37; C.Ex. 5 p. 172, C.Ex. 6 p. 18.)

8. When Davailus bought the Site in 1965, it was in a relatively isolated, rural area, not characterized by the pervasive residential development that has been common in the Poconos

starting in the early 1970s. (T. 34-35, 131, 141.)

9. In 1967, the Pennsylvania Department of Transportation took 55 acres to build Interstate 380 through the Site. Davailus was compensated $86,598 for the land taken for I-380, about three times what he originally paid for the entire parcel. (T. 233-234; D.Ex. 10, 20.)

10. Route 380 was built through wetlands on the Site. (T. 223-224, 232.) Areas VII and VIII are contiguous with the embankment of fill that was used to build Route 380. (D.Ex. 10.)

11. Route 380 separated approximately 40 acres of the Site to the west of the highway, leaving a tract of approximately 256 acres to the east of the highway. (T. 232; C.Ex. 5 p. 21.) Davailus later sold the 40-acre separated parcel along with another tract that he owned for approximately $1,060 per acre, which equates to about $42,400 for the 40 acres that were part of the original site. (T. 238-241.)

12. Davailus has since sold off several subdivided residential lots on the Site. (T. 241-242; D.Ex. 10; C.Ex. 11.)

13. Davailus family members currently live on portions of the Site. (T. 244, 320-321, C.Ex. 11.) Pauline Davailus's will also leaves lots on the site to her grandchildren. (C.Ex. 73.)

14. Davailus has always paid taxes on the entire tract (or its remainder) as one parcel. (T. 317-318.)

Davailus's Plans and Expectations When Purchasing the Site

15. Davailus purchased the Site in order to have a place for himself and his family to live, to have a base for an excavation business, for general investment purposes, and to use much of the property to mine peat. (*Davailus I*, 1991 EHB at 1198, 1209 n.8; T. 33-34, 129-133, 286, 304, 475-476, 491, 497, 503, 540, 565, 567, 579-580, 604, 981, 985, 1036-1037; C.Ex. 5 p. 21,

28, 46, 77, 82; C.Ex. 6 p. 7; C.Ex. 31 p. 64-66.)

16. Davailus's brother-in-law worked in a peat mine in Gouldsboro, which is what gave Davailus the idea of starting a peat mine. (C.Ex. 5 p. 21.)

17. Davailus learned how to do construction work in wetlands from his experience as a heavy-equipment operator building highways. (C.Ex. 5 p. 21, 26.)

18. Davailus did not have a specific intent to develop the Site into a residential subdivision when he purchased the Site. At some later point between the time that Davailus purchased the Site and the time that the Department directed him to stop harvesting peat, Davailus formulated an intent to develop the Site, but never to the exclusion of harvesting the peat from the Site. Davailus's eventual intent was to transform the excavated peat bogs into lakes that would serve as amenities for a residential development. (*Davailus I*, 1991 EHB at 1209 n.8; T. 129-131, 152, 475-476, 502-503, 521, 534-536, 539, 985, 989, 1035; C.Ex. 5 p. 81, 179, 182, C.Ex. 6 p. 37, 39, 57, C.Ex. 31 p. 87, 89, 91, 97-98.)

19. Davailus's distinct, investment-backed expectation to harvest peat was reasonable in light of his awareness of other peat operations in the area. Davailus's awareness of those operations began before he purchased the Site and continued through the time of the permit denial. (T. 650-666, 1402-1410, 1420-1426; D.Ex. 49; C.Ex. 5 p. 21.)

20. Although Davailus may have intended at some point to also mine and sell gravel from the Site, that intent was never to the exclusion or reduction in importance of the peat operation. It does not appear that Davailus sold much in the way of gravel from the Site. (T. 137-140, 1021-1022; C.Ex. 5 p. 88, C.Ex. 6 p. 78.)

21. Davailus did, however, utilize gravel taken from non-wetland areas of the Site in his peat operations to, e.g., build roads and provide a base in excavated bog areas. (T. 1015,

1021; C.Ex. 5 p. 88, 159, C.Ex. 6 p. 50-51, 78.)

Davailus's Investment-Backed Expectations After Buying the Site Until Permit Denial

22. Davailus did not waiver from his plan to harvest the Site's peat up until the time his operation was ceased. Davailus's peat operation, however, was never his exclusive or even his predominant business interest. (T. 352-353, 985-989, 997-998, 1000, 1030-1036; C.Ex. 5 p. 80, 95.)

23. Although Davailus's expert opined that Davailus could have harvested 40,000 cubic yards a year with the equipment and manpower that he had toward the end of the operation (T. 1323), Davailus in fact harvested far less than that year after year (D.Ex. 7; C.Ex. 7).

24. Davailus's procedure for mining peat was to clear the vegetation from a bog, drain the water from the area by excavating a main drainage ditch and lateral ditches, disc the peat (in order to dry it), push the peat into stockpiles, and process the peat in an on-site processing plant. (*Davailus I*, FOF 27.)

25. Although much of the peat harvesting and processing activity took place within the excavated wetlands, Davailus needed to use, and in fact did rely upon, areas of the Site's uplands and Area III to conduct his peat mining and processing operations. Among other things, Davailus built and used access roads, mined gravel that was used in the peat mining, stored equipment, and stockpiled, processed, and transported peat outside of the jurisdictional peatlands. (T. 54, 125-126, 258, 260-261, 292, 310-314, 573-574, 588, 595, 1671; D.Ex. 10, 42; C.Ex. 5 p. 64-65, 171, 954, C.Ex. 6 p. 23, 25-26, 34-35, 64, 78.)

26. Davailus began clearing vegetation in Areas I-III relatively soon after buying the Site. It was a very slow process due in part to Davailus's absence of equipment. (D.Ex. 3; C.Ex. 6 p. 8, 30, 32.) At the time, Davailus continued to work full-time as a heavy-equipment operator.

(C.Ex. 5 p. 26.)

27. In 1967, Davailus sent a sample of the peat on the site to Penn State for analysis. (C.Ex. 5 p. 128-129.)

28. Using a rented excavator, Davailus built the main drainage ditch from Areas I and II to IV in 1969, which was four years after purchasing the Site. (*Davailus I*, FOF 28; C.Ex. 5 p. 29-31.)

29. Although peat was apparently harvested from Area III, it is not clear when peat extraction started and to what extent peat was excavated from Area III--an area that most likely was a wetland but over which the regulatory authorities never exercised jurisdiction. (T. 41, 49, 52, 70, 218, 567, 624, 694, 981-982; C.Ex. 4 p. 219.)

30. Peat harvesting on the Site was a slow process utilizing family members primarily on evenings and weekends and involving (in the beginning) sales to small local buyers such as landscapers, garden centers, and homeowners. The harvesting increased over time with occasional non-family employees, but it never rose to the level of a full-scale or exclusive operation. (T. 41-48, 57, 58, 59, 70-73, 75, 107-108, 110, 126, 141, 149, 352, 570-571, 582-587, 982-984, 995-996, 1002, 1017-1020, 1665; C.Ex. 5 p. 26, 32, 65, 159-160, C.Ex. 31 p. 22.)

31. Davailus started his own excavation business in 1972. (T. 55, 351.)

32. At all relevant times after 1972, Davailus concurrently engaged in his excavation business and peat harvesting. (T. 141-142, 150, 352-353, 442-443, 568-571, 575, 583, 986, 996, 1002-1003, D.Ex. 20, 21; C.Ex. 6 p. 72, C.Ex. 31 p. 99-100, C.Ex. 20, 21.)

33. For example, Davailus earned $228,000 from excavation and $12,000 from peat in 1982, $146,000 from excavation in 1983 and $69,000 from peat in 1983, $243,000 from excavation and $52,000 from peat in 1985, and $128,000 from excavation and $53,000 from peat

in 1987. (C.Ex. 5 p. 149-152.)

34. As Davailus began to exhaust the peat deposits in Areas I-III in the late 1970s, he began preparations for harvesting in Areas VII and VIII. (T. 49, 70-72, 109, 177-78, 219, 462, 466, 1688; D.Ex. 9; C.Ex. 5 p. 37, 39, 42-45, 66.)

35. Davailus had harvested substantial amounts of peat from Areas I-III by 1976, eleven years after purchasing the Site. (*Davailus I*, FOF 29, 1991 EHB at 1198; T. 51-53, 70, 219, 419-420, 622, 1687; D.Ex. 10; C.Ex. 5 p. 34, 61-62.)

36. After harvesting some of the peat from Area III (not considered a jurisdictional wetland), Davailus set up peat processing facilities within that Area in the early 1970s. Davailus expanded the facilities over time. (T. 52, 57-58, 219; D.Ex. 8.)

37. Davailus removed a couple of hundred yards of material from Area IV in 1976 or 1977, but found that it did not have a good quality of peat. There was a lot of silt mixed in with it, making it more of a topsoil than a humus. (C.Ex. 5 p. 36.)

38. Davailus built a dam to block up water in Area V in 1976 "so that the kids had a place to go ice skating." (C.Ex. 5 p. 36-37.)

39. By 1981-1982, Davailus had excavated both the main drainage ditch and several lateral drainage ditches in Areas VII and VIII. He began removing peat from Area VII in 1981 or 1982, and he continued to remove peat from that area until 1987 or 1988. (*Davailus I*, FOF 30, 31, 1991 EHB at 1198; D.Ex. 3, 10.)

40. Davailus gradually purchased equipment to excavate and process peat, eventually investing more than $200,000 in equipment. Some of the equipment could have been and was in fact used in the excavation business, and/or to help in preparing the Site for residential development, but some of the equipment was designed specifically for peat operations. After

being ceased, Davailus sold off some of the equipment. (Davailus has not made a takings claim for the equipment.) (T. 39-40, 45, 50, 58, 63-69, 84-107, 223, 286-288, 383-386, 577, 998, 1028, 1032; D.Ex. 8, 11, 20, 21; C.Ex. 5 p. 34, 122, 123, 148, C.Ex. 6 p. 21-22, C.Ex. 10, p. 23-24, 26, 94-95.)

41. Over the course of operations, Davailus began selling the peat to Hyponex, a large distributor with a facility in Oxford, Pennsylvania (near the Maryland border) and another facility approximately 12 to 15 miles from the Site. (T. 76; D.Ex. 7.)

42. Hyponex was willing to, and did in fact, buy essentially all of the peat that Davailus could produce. (T. 79-83, 1319-1320; D.Ex. 29; C.Ex. 5 p. 115, C.Ex. 6 p. 27.)

43. In 1975, the Department's Bureau of Mining Reclamation advised Davailus that he was required to obtain a surface mining license and permit to extract peat from the Site. (Stip. 5.)

44. Davailus obtained a surface mining license in 1975. (T. 111; D.Ex. 27; C.Ex. 5 p. 45, 47.) The Department renewed Davailus's license every year thereafter until 1984. (D.Ex. 27; C.Ex. 5 p. 52.)

45. In 1977, the Department granted Davailus a small non-coal surface mining permit to remove peat and gravel from the Site. (Stip. 6; *Davailus I*, 1991 EHB at 1198; T. 116; D.Ex. 3, 25; C.Ex. 5 p. 50.)

46. Beginning in 1975 and continuing through 1983 or 1984, representatives from the Department's Bureau of Surface Mine Reclamation visited the Site on a regular basis. (*Davailus I*, 1991 EHB at 1198; T. 663, 708, 712; C.Ex. 5 p. 48-50, 51.)

47. The Department considered the peat harvesting activities that Davailus conducted pursuant to the terms of his permit to be lawful. (T. 654, 711; D.Ex. 25.)

48. The extent to which Davailus could be said to have had an expectation to be able to continue to harvest peat was reduced somewhat in April 1984, when the Department sent a letter to Davailus informing him of a "Departmental policy decision" that peat moss extraction would no longer be considered to be surface mining as defined in the Surface Mining Conservation and Reclamation Act. The letter stated that Davailus was required to obtain a permit under the Encroachments Act from the Bureau of Dams and Waterway Management. The letter concluded: "We encourage you to contact the Bureau of Dams and Waterway Management...as soon as possible to insure that you hold all the necessary permits to conduct your operation." (Stip. 7; *Davailus I*, 1991 EHB at 1198; C.Ex. 5 p. 52.)

49. Notwithstanding the 1984 letter, it continued to be reasonable for Davailus to have had some expectation of future peat harvesting, particularly in the Areas that had already been mined. (*Davailus I*, 1991 EHB 124; C.Ex. 76.)

50. Although the Environmental Protection Agency sent Davailus a cease and desist order in 1985, an EPA representative told Davailus that he could continue to harvest peat in previously opened-up areas. (T. 165; D.Ex. 4 p. 264, 271, 334, D.Ex. 45; C.Ex. 5 p. 117-118, 962.) The U.S. Fish and Wildlife Service also expressed no objection to continued peat harvesting in Areas I and II. (T. 164; D.Ex. 6.)

51. Davailus, in fact, continued to harvest peat with the Department's knowledge and without any enforcement action being taken. (*Davailus I*, 1991 EHB at 1215 n. 14; D.Ex. 3; C.Ex. 5 p. 61, 165-167, 178, 952, 954.)

52. The Department never expressly revoked Davailus's mining permit. (C.Ex. 5 p. 53.) (We held in *Davailus I*, however, that the 1984 letter, although unfairly vague and "administratively sloppy," had the implicit effect of revoking Davailus's permit. 1991 EHB at

1216.)

53. The Department's 1984 letter regarding the policy shift was followed by additional letters over the next two years reminding Davailus that he did not have the required permit, and threatening legal action. In February 1986, Davailus submitted an application – or what he intended to be an application – to the Department. On May 21, 1986, the Department sent Davailus a letter stating that the submission did not constitute an application and listing the types of information that would need to be submitted. Davailus submitted an administratively complete application on September 23, 1987, three and one-half years after being advised of the Department's policy decision. (Stip. 8; *Davailus I*, 1991 EHB at 1199; T. 490, 494; D.Ex. 3, 42-A; C.Ex. 5 p. 54, C.Ex. 46.)

54. Davailus's primary purpose and intent in applying for a permit was to seek permission to harvest peat, not to improve the Site in preparation for a residential development. (T. 489-491, 501-503.) Developing the Site *after* peat harvesting was, however, contemplated. (C.Ex. 27.)

55. The Department and Davailus's consultants led him to believe that a permit would be obtainable. (T. 512-520, 552.)

56. Davailus spent $40,000 in his attempt to obtain a permit. (*Davailus I*, 1991 EHB at 1212 n. 10; T. 520; C.Ex. 5 p. 961.)

Degree of Interference

57. In his permit, Davailus sought permission to harvest the remaining peat in Areas I and II and all but the bottom two feet of peat from Areas IV, VI, VII, and VIII. It is not clear from the permit application whether Davailus was seeking permission to harvest peat from Area V. Davailus proposed to restore 70 percent of the wetlands to lakes and 30 percent to wetlands.

The lakes were to serve as amenities for a future residential development. (Stip. 9; *Davailus I*, FOF 9; T. 545-547; D.Ex. 10; C.Ex. 5 p. 73, 76, 79, 80, 95-99, 141-143, C.Ex. 63.)

58. On July 16, 1987, the Department ordered Davailus to cease harvesting peat. (T. 73.)

59. On August 30, 1988, the Department denied Davailus's permit application and ordered him to restore portions of the wetlands. (*Davailus I*, 1991 EHB at 1199; T. 625, 629; D.Ex. 2.)

60. Any future request for a permit to encroach upon Areas IV-VIII, other than perhaps a road crossing or the like, would almost certainly be denied by the Department. (T. 610-611, 632, 691; D.Ex. 3.) No peat mining would be allowed. (Stip. 11.)

61. At the time Davailus's harvesting was ceased, Davailus had a stockpile of about 2000 yards of peat available for sale that was not affected by the cessation. (C.Ex. 5 p. 171.)

62. The Department and Davailus entered into a consent order and agreement in 1998. (T. 622; D.Ex. 3.)

63. As part of the 1998 consent order, Davailus was permitted to remove the remaining peat from Areas I-III, and he agreed to reduce his takings claim by not asserting it for Areas I-III. (T. 625; D.Ex. 3.)

64. Davailus thus was ultimately not prohibited from harvesting all of the peat in Areas I-III, and peat was in fact removed from those areas as late as 2001. (T. 249-251, 267, 269, 458, 624, 628, 1559-1561, 1669-1671; D.Ex. 3; C.Ex. 5 p. 61-62, C.Ex. 23.)

65. Davailus engaged in, and was prohibited from, activities in the designated wetlands as follows:

Area	Wetlands Destroyed (acres)	Wetlands Preserved or Restored (acres)	Peat Removed (tons)	Peat Left in Place (tons)
I	10.0[B]		69,615[C]	
II	5.8[B]		40,377[C]	
III	Unknown (assume 0)	N/A	Unknown (assume 0)	N/A
IV		2.4[A]		15,479[A]
V		3.9[A]		27,075[A]
VI		.9[A]		2,916[A]
VII and VIII		16.5[A]		119,495[A]
TOTALS	**15.8**	**23.7**	**109,992**	**164,965**
%	40%	60%	40%	60%

([A]D.Ex. 47; [B]C.Ex. 46; [C]T. 1313-1314 and D.Ex. 47 (Area V ratio applied to known acreage). *See also* T. 162, 166, 247, 622, 1316-1318, 1359, 1487, 1498-1499; D.Ex. 10, 36, 53.) (We take judicial notice of the fact that one acre equals 43,560 square feet.)

66. Where the amount of peat in an Area is unknown, it is reasonable and appropriate to use a weighted average from the Areas on the Site where the amount is known as a rough approximation. (T.1313-1315, 1346, 1349-1352.) This method is, therefore, appropriate for assessing the amount of peat that was or is present not only in Area V, but Areas I and II as well. (T. 1352.)

67. The estimated ratio of peat left *in situ* compared to peat removed in Finding of Fact 65 is conservative in favor of Davailus because (a) it does not account for the two-foot buffer of peat that Davailus agreed to keep in place (T. 1487, 1499), (b) the peat in Area IV was of low quality and may not have been marketable (C.Ex. 5 p. 36), (c) it does not appear that

Davailus had a firm plan to harvest peat from Area V (T. 559-560; D.Ex. 10; C.Ex. 5 p. 36-37), (d) we assigned no peat removal to Area III although peat was in fact harvested from that Area Finding of Fact ("FOF" 29), and (e) the peat that was removed from VII is also not included (FOF 39; D.Ex. 3).

68. Davailus made more than $378,000 from his sales of peat to Hyponex from 1981 to 1988. (C.Ex. 7.) Davailus sold at least 49,000 cubic yards of material to Hyponex during that period. (C.Ex. 7.)

69. If Davailus's peat operation had been allowed to continue, a generous approximation (for comparative purposes only) is that it might have generated sales of as much as $3.3 million. (165,000 tons x $20 per ton). (T. 1322-1323, 1332, 1775; D.Ex. 29.)

70. There is insufficient credible evidence or opinion testimony to determine (a) how long it would have taken Davailus to mine the peat, (b) the cost of harvesting and selling the peat, and (c) Davailus's profit had it harvested the peat. (*See, e.g.*, T. 1325, 1365, 1371, 1373, 1376-1381, 1383-1386, 1394.)

71. In the takings claim that originated this action, Davailus averred that he had suffered a loss in value of an amount in excess of $750,000. (C.Ex. 51 ¶ 23.)

72. There are currently unsold stockpiles of peat on the Site. (T. 458, 1670.)

73. The permit denial has not interfered with Davailus's heirs' ability to use the Site as a homestead. (C.Ex. 11.)

74. The permit denial has not interfered with Edward P. Davailus's ability to use the Site as a base for his landscaping business. (T. 305; D.Ex. 8, 13, 79.)

75. The permit denial did not interfere with Davailus's ability to profit from the Site as a general investment independent of the peat extraction, and in fact, Davailus recouped many

multiples of this original investment by selling portions of the Site. (C.Ex. 11.)

76. The permit denial has not interfered with Davailus's ability to develop the Site into a residential subdivision. (T. 325-342; C.Ex. 11, 79.)

77. Notwithstanding the permit denial, the Site retains substantial value as the location for a residential development. (T. 1810.)

78. A reasonable approximation (for comparative purposes only) is that subdividing the Site into residential lots might generate sales of as much as $3.2 million (80 lots x $40,000 per lot). (T. 1840.)

79. There is insufficient credible evidence or opinion testimony to determine (a) whether all necessary governmental approvals could be obtained for such a subdivision, (b) the cost of sales, and (c) how long it will take to sell the lots. (T. 720-728, 730-735, 802-804, 1800, 1814, 1835-1837, 1843, 1847-1851; D.Ex. 19, 35, 36; C.Ex. 19.)

80. Davailus is slowly moving forward with development of the Site and has sold some lots for total stated consideration to date of at least $172,000. (T. 153-155, 184, 241-243, 388-389, 390, 719-720, 727, 792; D.Ex. 36; C.Ex. 11, 19, 79.)

81. The following lots are some of the lots that have been subdivided from the Site:

Date	Grantees	Stated Consideration
July 8, 1992	Renna	$ 20,000
September 11, 1992	Wagner	$ 25,000
June 2, 1994	Naro	$100,000
May 9, 2001	Jones	$ 27,500

(C.Ex. 11.)

82. Although the Site has not demonstrated itself to be a premium development site due to such factors as its relative distance from New York/New Jersey for potential buyers from that area, development costs (including sewerage fees), drinking water issues, the presence of the

wetlands, streams, and I-380, and the need for open space if a cluster development (which currently appears to be the best option) is pursued, it is nevertheless a valuable, developable Site. (T. 252-255, 468-469, 724-726, 730, 735, 749, 760-767, 775-776, 779, 781-782, 801-802, 805, 811, 830-832, 834, 926-948, 951-965, 967-971, 975, 1153-1159, 1162; D.Ex. 19, 35, 36, 64-67.)

83. The slow pace of development of the site is also due in part to Davailus's less-than-aggressive efforts to date, which in turn may be explained in part by the cost of development. (T. 731, 743, 751, 788, 792, 797; D.Ex. 36; C.Ex. 19.)

84. The Davailus wetlands neither add to nor detract from the monetary value of either the Site as a whole or existing and future residential lots on the Site. (T. 639-642, 822-826, 832-834, 855-856, 860, 880, 882, 1057-1067, 1082-1090, 1098, 1101-1115, 1126, 1135-1137, 1140, 1144, 1159, 1161, 1162, 1166, 1169-1170, 1180, 1196-1197; D.Ex. 12-15, 17, 18.) All other things being equal, a 100-acre tract with 40 acres of wetlands in the area of the Site will sell for about the same price as a 60-acre tract with no wetlands. (T. 1196-1197.)

85. Installing an elevated walkway through the Davailus wetlands as suggested by the Department would be economically impracticable and would not convert the wetlands into an amenity that added monetary value to the residential lots at the site. (T. 838-842, 845, 849-850, 1090-1091; D.Ex. 39.)

86. The Davailus wetlands have no monetary value independent of the uplands on the Site, and no conservation group, land trust, or governmental entity would be likely to be interested in buying or even accepting as a donation the Davailus wetlands. (T. 634-637, 814, 823, 854, 863-864, 903, 933-936, 1080, 1116, 1129, 1174, 1233-1235, 1290; D.Ex. 12-15, 17, 18.)

87. Such conservation-oriented buyers or donees are primarily interested in

purchasing large tracts with exotic species, or unique habitat, undisturbed, contiguous wetlands, distant from major highways. The Davailus wetlands do not satisfy those criteria to a sufficient degree to make them a likely candidate for a sale to such prospective buyers or donees. (T. 636-637, 826-835, 861, 1072, 1074-1080, 1178-1179, 1233-1235; C.Ex. 24.)

88. The Davailus wetlands do not have significant monetary value as the location for a hunting or fishing lease or a furbearer operation. (T. 1236-1247.)

89. The permit denial interfered with Davailus's property rights and its reasonable, investment-backed plans and expectations for the Site, but not to an unduly oppressive, degree. (FOF 57-88.)

Public Interest Served

90. The permit denial prevented 70 percent of Areas IV, VI, VII, and VIII, and probably Area V, from being permanently converted into lakes. (*Davailus I*, FOF 9.) As a result of the permit denial, at least 17 acres of peatlands, which would have been submerged, will remain wetlands (.7 x 24 acres). (D.Ex. 10.)

91. Many of the benefits that would normally be attained by preserving wetlands were not shown to be promoted by the permit denial. It has not been shown that converting the wetlands into open waters would have caused downstream flooding or excessive erosion or siltation, or that it would have adversely affected water quality, water temperature, or groundwater hydrology. (*Davailus I*, FOF 13-18 and 1991 EHB 1205-1207.)

92. The permit denial promoted the general welfare and was reasonably related to the protection of the general welfare, however, because it preserved scarce, vegetated wetlands habitat, and as a result, the animal and plant species that depend upon that habitat. (*Davailus I*, FOF 10, 19-25 and 1991 EHB at 1206-1208.)

93. The wetlands on the Davailus site have a high degree of diversity of plant species. (*Davailus I*, FOF 19.)

94. The conversion of wetlands to open water has an adverse environmental impact because of the relative scarcity of wetlands habitat in Pennsylvania. (*Davailus I*, FOF 20.)

95. While open-water habitat is abundant in the Poconos (*Davailus I*, FOF 21), and there are many wetlands, some of which are on public land, in the vicinity of the Site (T. 613-617, 1221-1224, 1235, 1613; D.Ex. 30, 34), as of 1991, vegetated wetlands constituted less than two percent (420,000 acres) of the Commonwealth's land mass as a whole, and what remains is regularly lost to various types of development. (*Davailus I*, FOF 22.)

96. There are other wetlands in the vicinity of the Site to which wildlife could migrate, but in evaluating the effect of the project on wildlife, the cumulative impact of piecemeal habitat losses must be considered. (*Davailus I*, FOF 24.)

97. The reduction of wildlife habitat ultimately affects the number of animals because many animals, unlike humans, do not tolerate living in crowded conditions. (*Davailus I*, FOF 25.)

98. It is not possible to translate the aesthetic value of the wetlands or the preservation of wildlife that depends on wetland habitat into monetary terms. (T. 1265-1266, 1275-1276.)

99. In light of the critical need to protect rare wetlands habitat, the limitations that the Department placed on Davailus's utilization of the Site were not unduly oppressive. Considering in particular the amount of wetlands that Davailus was allowed to destroy to recover and sell large amounts of peat, as well as the substantial value that the Site has afforded in the past and still retains, fairness and justice do not require that Davailus be compensated for the peat that must be left on the Site.

DISCUSSION

I. Regulatory Takings Law

The United States Constitution provides that private property may not be taken for public use without just compensation. U.S. CONST. Amend. V. The Pennsylvania Constitution is to the same effect:

> [N]or shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.

PA. CONST. Art. I, Section 10. The United States and Pennsylvania Constitutions provide coextensive protection against takings without compensation. *Machipongo,* 799 A.2d at 763. Therefore, Pennsylvania courts and this Board rely upon both federal and state precedent when considering takings issues. *Ibid.*[1]

A governmental action that limits a property owner from making certain uses of private property is not ordinarily considered a taking of private property for which compensation must be paid. It is only where a governmental prohibition "goes too far" that it constitutes a taking. *Machipongo*, 799 A.2d at 765 *citing Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415; *Domiano v. DEP*, 1999 EHB 408, 421. A governmental prohibition "'goes too far' when it

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[1] *Machipongo* lays out the basic legal outline of the principles that we are to follow in analyzing a regulatory takings claim. Davailus seems to suggest in its original brief that *Machipongo* merely represents an interpretation of the Pennsylvania Constitution that in no way precludes a broader or different reading of the United States Constitution. Davailus then proceeds to rely quite heavily in its briefs on takings opinions issued by the Court of Appeals for the Federal Circuit under the U.S. Constitution. Davailus's effort to persuade us to discount the Pennsylvania Supreme Court's teachings in *Machipongo* is wistful, at best. But putting that aside, Davailus is simply wrong in suggesting the state and federal constitutions are to be analyzed differently for purposes of analyzing a takings claim. *See Machipongo*, 799 A.2d at 754 (referring to both constitutions), 763 n. 7 (caselaw under U.S. Constitution applies to analysis of Pennsylvania Constitution), and *passim* (heavy reliance on federal caselaw); *United Artists' Theater Circuit, Inc. v. City of Philadelphia*, 635 A.2d 612 (616) (Pa. 1993) (Pennsylvania Constitution does not provide more extensive protections against uncompensated takings than those offered by the U.S. Constitution); *Sedat Inc. v. DEP,* 2000 EHB 927, 935 n.2 (same). Along the same lines, we reject the Department's assertion that the Pennsylvania Constitution requires allocation of more weight to environmental and public protection concerns than that which is required by the U.S. Constitution.

forces 'some people alone to bear public burdens which in all fairness and justice should be borne by the public as a whole.'" *Machipongo*, 799 A.2d at 765 *quoting Palazzolo v. Rhode Island*, 121 S.Ct. 2448, 2458. There are so many precepts, canons, and directives that make up takings jurisprudence that it is easy to lose sight of this basic guiding principle. When all is said and done, our ultimate responsibility is to exercise our best judgment and decide whether Davailus in all fairness and justice should be paid for not being allowed to mine peat on his land so that we may all benefit from the preservation of wetlands that the peat mine would have otherwise destroyed.

There may be some preliminary questions concerning the nature of the property right at issue or the claimant's connection to the property right. *See, e.g., Boise Cascade Corp v. U.S.*, 296 F.3d 1339, 1343 (Fed. Cir. 2002) (initial step in takings analysis is determining whether the claimant possesses a valid interest in the property affected by the governmental action); *Domiano, v. DEP,* 1999 EHB 408 (discussing whether an option to remove culm bank was a cognizable property interest). The claimant's interests may be relevant to whether there is standing. *Machipongo*, 799 A.2d 762-63; *Palazzolo*, 121 S.Ct. 2457. These matters are not in dispute in this case. The Department has not maintained any challenge to Davailus's ownership interest in the land in question, including the peat on the land. The Davailus's claim does not go beyond the value of the land, which includes the *in situ* peat.

A governmental prohibition (or "regulation") by definition does not go too far if it merely prohibits behavior that could be abated as a nuisance or prohibited by general principles of state property law. *Machipongo,* 799 A.2d at 772 *citing Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-30. An activity that has a significant potential to unreasonably interfere with a right of the general public is a nuisance that may be abated or prohibited by state property

law. *Machipongo,* 799 A.2d at 773. Therefore, an activity that is illegal or would have a significant potential to constitute a nuisance may be prohibited without compensation. *Id.* The government's prohibition of an illegal activity or nuisance does not constitute a compensable taking.

Our next step is to define the scope of the alleged take, i.e., what has been taken. Defining the alleged take determines what analysis is to be applied to the claim, and if a balancing analysis is required, the measure of the impact suffered by the claimant. The vertical and temporal dimensions of Davailus's ownership interest are not at issue here. In defining the horizontal extent of the parcel against which the takings test is to be applied, the Pennsylvania Supreme Court instructs that we are to utilize a "flexible approach, designed to account for factual nuances." *Machipongo*, 799 A.2d at 768 *quoting Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1984). The factual nuances that are to be considered include the following:

- Unity and contiguity of ownership
- Dates of acquisition
- The extent to which the proposed parcel has been treated as a single unit
- The extent to which the regulated holding (e.g. wetlands) benefits from the unregulated holding (e.g. uplands), and presumably, *vice versa*
- The timing of transfers, if any, in light of the developing regulatory environment
- The owner's investment-backed expectations
- The landowner's plans for development

Machipongo, 799 A.2d at 768-69.

Once we define the parcel, we return to assessing what portion of that parcel has been lost. If the governmental action deprives a landowner of all economically beneficial use of that

parcel, there is a compensable taking. *Machipongo*, 799 A.2d at 769; *Lucas*, 505 U.S. at 1027. Because the property owner has been left with the equivalent of nothing, fairness and justice require that it be compensated. There is no point to balancing public benefits and private losses because the private loss is complete.

If the owner is left with something, we must balance what the owner has lost against what the public has gained. As previously noted, if this comparison reveals that the loss is unduly oppressive, then the public must share the cost of the public benefit by compensating the owner for his individual loss. *Machipongo*, 799 A.2d at 770-71; *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124-125 (1978). In other words, the take is compensable. When conducting this traditional takings balancing analysis, we must consider the following:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations;
>
> * * * *
>
> The character of the governmental action...[whether there is a] physical invasion...[or whether the regulation is reasonably related to the promotion of the general welfare; and,]
>
> * * * *
>
> [Whether] the health, safety, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land.

Machipongo, 799 A.2d at 770-71 *quoting Penn Central*, 438 U.S. at 124, 125 (brackets original, footnote omitted). The evaluation of the reasonableness of a claimant's investment-backed expectations should take into consideration whether the claimant owned the property on the effective date of the regulation as well as the "regulatory regime in place at the time the claimant acquires the property...[that is, the extent of previous government regulation of the area]." *Machipongo*, 799 A.2d at 770-71 n. 11, *quoting Palazzolo*, 121 S.Ct. at 2466 (O'Connor concurring) (brackets original). Thus, there is a partial overlap between the facts we consider in defining the parcel as a whole and balancing the private loss against the public gain. With this

understanding of the law, we turn to the circumstances of this appeal.

II. Nuisance

The Pennsylvania Supreme Court in *Machipongo* held that the government's regulation (prohibition) of a proposed use of private property cannot constitute a compensable taking if the proposed use would have (1) violated state law or (2) constituted a nuisance. *Machipongo* 799 A.2d at 775.[2] In this case, the "regulation" in question is the Department's denial of Davailus's permit to mine the peat remaining on the Site after 1987. Our first task, then, is to assess whether the peat mining would have either violated state laws or constituted a nuisance.

This Board addressed the legality of Davailus's peat operation in *Davailus I.* In that adjudication, *Davailus I*, we upheld the Department's decision to deny Davailus a permit to continue harvesting peat, but we did not do so because the harvesting would have constituted a nuisance or would have otherwise been barred by state law. We upheld the permit denial because (1) the operation would have had an adverse impact on wildlife habitat and, therefore, the wildlife itself, (2) that impact could not be mitigated, and (3) that harm was not outweighed by the public benefits of the project. *Id.* at 1207-1208, 1209. In other words, even though the project would have unavoidably harmed wildlife habitat, it was not necessarily illegal. It was not *necessarily* a nuisance or otherwise violative of state law. Notwithstanding the demonstrated harm, the project could have been permitted if Davailus had proven that the public benefits of the project outweighed the adverse impact on the wildlife habitat. *Id.* at 1208, *citing* 25 Pa. Code § 105.17(b) (no wetlands permits issued unless Department concludes "that the public benefits of

[2] In order to keep this statement from being circular, we understand the Court to be referring to state law aside and apart from the state action that is the subject of the takings inquiry. For example, the state action at issue in *Machipongo* was a regulation designating an area as unsuitable for mining. The Court's test examines whether the proposed use (the mining) would be a nuisance or violate state laws *aside from* the regulation designating the area unsuitable.

the project outweigh the damage to the wetlands resource and that the project is necessary to realize public benefits.") Davailus put on "very little evidence" of benefits, which is what ultimately led to the rejection of its appeal. *Id.* at 1208-09.

Thus, under *Davailus I*, Davailus's peat mine would not necessarily have violated any state laws. Furthermore, the Department stipulated in this case that the mining was not a nuisance *per se*. (T. 207.) Rather, the peat mining could have been allowed if Davailus had been able to obtain a permit. It is usually only environmental harm that occurs in the absence of a permit or outside the limits of a permit that violates state law. *But see Tinicum Township v. Delaware Valley Concrete*, Docket No. 1119 C.D. 2002, slip op. at 12 (Pa. Cmwlth. December 13, 2002) (an activity that causes or has a significant potential to cause a public nuisance can be prohibited regardless of whether the landowner complied with all applicable statutes and regulations). The Board's analysis in *Davailus I* suggests that Davailus would have been entitled to a permit had he been able to demonstrate that the pollution caused by the peat mining was outweighed by the public benefits of the mining. 25 Pa. Code § 105.17(b).

We are thus left to determine whether Davailus's peat operation would have constituted a nuisance. A use constitutes a nuisance if it would (a) unreasonably (b) interfere with (c) a right of the general public. *Machipongo*, 799 A.2d at 773. To say the same thing in reverse order, we must decide whether there is a public right with which the use would have interfered, and whether that interference would be unreasonable. If so, prohibiting the use cannot constitute a compensable taking. Whether there is a public right is an issue of law and whether there has been unreasonable interference is "essentially a factual question." *Id.*

We must consider whether the activity would have constituted a nuisance at the time of the alleged taking, not at the time the property was acquired. *Machipongo*, 799 A.2d at 772-73.

"Despite the fact that one may have purchased property with the expectation to use it in such a manner that was acceptable before the purchase, there may come a point in time when the original owner's expectations may no longer be reasonable." *Id.* Thus, with regard to the mining at issue in *Machipongo*, the court observed that, while landowners might once have been permitted to mine without regard to the effect it had on public streams, "as evidenced by the spoilage of '11,000 miles of streams' in this country, that expectation is, and has been for some time, no longer reasonable." *Id.* (footnote citation omitted).

Turning first to the question of a public right, *Machipongo* leaves no doubt whatsoever that the public has a right to unpolluted waters of the Commonwealth. *See also Machipongo* at 754 (quoting Pa. Const. Art I § 10 "The people have a right to...pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.") Waters of the Commonwealth include wetlands. 35 P.S. § 691.1; *Oley Township v. DEP*, 1996 EHB 1098, 1117. The Encroachments Act, the statute pursuant to which Davailus's permit was denied, lists as one of its purposes the protection of natural resources secured by the Pennsylvania Constitution and the conservation of the water quality, *natural regime*, and carrying capacity of watercourses. 32 P.S. § 693.2(3). Therefore, there is no doubt that the preservation of unpolluted wetlands on the Davailus property constitutes a public right. Davailus's contention that the public has no rights with respect to the protection of the environment so long as the harm is confined to private property is obsolete. It is antithetical to the very idea of wetlands protection.

The next question is whether Davailus's peat harvesting would have interfered with that public right. *Machipongo* teaches that pollution of waters interferes with the public's right to clean waters. Indeed, the Court criticized the Commonwealth Court for failing to consider the

potential of the mining to "destroy the population of trout" in the receiving stream. *Id.* 799 A.2d at 774. *See also Id.* at 775 (enough to prohibit mining if shown it had "a significant potential" of "destroying the habitat for wild trout population.") These statements reinforce that the statutory definition of pollution encompasses alteration of the physical, chemical or biological properties of waters, particularly if it is shown to be detrimental to wildlife. 35 P.S. § 691.1. *See also Consol v. DEP*, EHB Docket No. 2002-112-L, (Opinion and Order issued December 31, 2002) (discussing definition of "pollution"); *Oley Township v. DEP*, 1996 EHB at 1117 (same).

This Board has previously concluded that Davailus's peat harvesting would have interfered with the public's right to unpolluted wetlands. Although the mining was not shown to threaten water quality in the narrow sense of that term, it would, of course, have drained and cleared the wetlands. *Davailus I* at 1197. Davailus would have restored only 30 percent of the peat bogs as wetlands. The remainder would have been converted into lakes. *Id.* at 1194-96. The permanent elimination of approximately 70 percent of the wetland habitat and the resulting harm to wetland-dependent wildlife (FOF 93-100) falls squarely within the definition of pollution of the wetlands as used by the Court in *Machipongo*. There can be no debate that the peat mine would have interfered to some degree with the public right.

The final question in assessing whether the peat harvesting operation would have constituted a nuisance is whether the interference with the public right would have been unreasonable. In considering whether interference is unreasonable, we are to, among other relevant factors, assess the following:

> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
> (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
> (c) whether the conduct is of a continuing nature or has produced a

> permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Machipongo, 799 A.2d at 773 quoting Restatement (Second) of Torts § 821B(2)(a)-(c).

To repeat, the Board did not find in *Davailus I* that the peat operation would have been a nuisance. The Board did not specifically find that the peat operation would have *unreasonably* interfered with public rights. It did not find that the activity was necessarily proscribed by law. Rather, it held that the Department correctly concluded that the public benefits of the project did not outweigh the harm (i.e. pollution) that it would have caused. It was only on that basis that the permit denial was upheld. We do not believe that Davailus's failure to satisfy the regulatory harms/benefits test necessarily equates to a showing that the project would have unreasonably interfered with the public's right to the preservation of wetlands habitat. They are two different questions. In other words, a project whose harms outweigh its benefits does not *ipso facto* constitute an abateable nuisance.

We are, therefore, left in a position where we believe it would be inappropriate and unfair to relitigate *Davailus I*, and yet our reading of our holding in *Davailus I* fails to definitively resolve the nuisance prong of the *Machipongo* takings analysis. Under such circumstances, we cannot conclude that Davailus's takings claim is precluded by the so-called nuisance defense, and we must proceed with the remainder of the takings analysis.[3]

III. Defining the Property

In this as in all takings cases, defining the parcel against which the takings tests are to be applied ("the denominator problem") "profoundly influences the outcome of the takings analysis." *Machipongo*, 799 A.2d at 766. As previously noted, the Pennsylvania Supreme Court

[3] Davailus asserts that the Board committed various errors with respect to prehearing and evidentiary rulings regarding Davailus's argument that the *Machipongo* nuisance exception does not apply. We do not believe that the Board committed any errors in this regard, but there is no need to dwell on the matter

declined to draw any bright lines, instead instructing us to take a "flexible approach, designed to account for factual nuances." *Id.*, 799 A.2d at 768. Davailus argues that the relevant property is limited to Areas IV-VIII. The Department argues that the relevant property is the entire Site, including all wetlands, not just Areas IV-VIII, and all uplands. We agree with the Department. And to be clear, the entire site includes all of the known peat on the Site.[4]

We start with some of the more obvious points. Davailus bought one parcel with one deed. (FOF 4.) He paid a set amount for the parcel. (FOF 6.) Davailus has always paid taxes on a single parcel. (FOF 14.) Portions of the Site have been lopped off the margins, but there has never been a comprehensive or systematic subdivision of the Site. (FOF 12, 80, 81.) The Site has essentially remained intact. There has never been a legal separation of, say, Areas IV-VIII from the remainder of the Site. There has never been a separation of title of the bulk of the Site. If the takings issue is put to the side, there is no legal basis for treating the parcel that Davailus purchased as anything other than one property.

There are no public roads or other man-made features that divide the Site. There are no natural features that make it seem that there is something other than a single parcel. (D.Ex. 10.) To the contrary, the Site from an ecological point of view is defined roughly by the branch headwaters of Meadowbrook Stream. (FOF 7.) The various wetlands are interspersed throughout the whole of the Site and are hydrologically connected. (FOF 7.) They blend into

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because we have declined to apply the nuisance exception, so any errors that occurred are immaterial.

[4] When we say the entire parcel, we are referring to the 375-tract that Davailus purchased. If we are to consider in particular such factors as Davailus's expectations and Davailus's return on its original investment, it is appropriate to consider the entire original investment, not what was left of the Site in the way of surface acreage by the time the Department denied the permit application. The only notable difference if we focused on the 256+ acres that remained at the time of the permit denial, however, would be to disregard the money that Davailus made from the I-380 condemnation and the sale to the west of the new highway. This would not alter our conclusions or the final result.

the uplands, and there is not a great deal of difference between one part of the Site and another. From an environmental perspective, it is appropriate to treat the Site as one parcel.

The Supreme Court in *Machipongo* listed the extent to which the parcel has been treated as a single unit a relevant factor. *Id.* Here, the Site has been treated as one parcel. *No one* has treated Areas IV-VIII as a distinct parcel.

Davailus never treated Areas IV-VIII separately. He bought the Site to mine all of the peat areas and to otherwise develop the property as a single unit. (FOF 15, 18.) There is absolutely no evidence in the record that Davailus ever thought of the Site as consisting of multiple parcels. He mined peat in Area VII and over in Areas I-III at the same time. (FOF 34, 37, 39.) He processed peat from Area VII in Area III. Thus, he worked simultaneously in multiple Areas.

He obtained a license for the whole site. (FOF 44.) He obtained a mining permit for the entire site. (FOF 45.) He applied for an encroachment permit for wetlands scattered over the entire site. (FOF 53.)

Davailus actually used the whole site. (FOF 13, 21, 24-26, 28-30, 34-39, 51, 57, 61, 65, 72-75, 80, 81.) He did not build fences to separate parts of the Site. He lived there, worked there, and throughout the testimonial and documentary record it is clear that he thought of the Site as a single unit. He dammed up Area V "so the kids would have a place to go ice skating." (FOF 38.) He hunted throughout the Site. (C.Ex. 5.)

As Davailus and his heirs have moved forward with development plans, they have not separated off Areas IV-VIII. (FOF 80.) There is no evidence that Davailus treated the Site as anything other than a single unit when he envisioned development of the Site. To this day, Areas IV-VIII are incorporated into the development plans. There is no indication that the reviewing

authorities have suggested dividing the Site into separate parts for purposes of planning a comprehensive development. Davailus's consultants have never treated the whole parcel is anything more or less than one site. This is consistent with Davailus's vision that lakes scattered throughout the Site would benefit the entire site. (FOF 57.) The project has been marketed as a single development with separate phases. (FOF 80.)

Peat harvesting operations occurred throughout the Site and on both wetlands and uplands. (FOF 25.) Davailus's effort to prove the peat harvesting was segregated entirely to the peat bogs, let alone the alleged separate parcel (i.e. Areas IV-VIII) itself, is contradicted by the record and by common sense. Of course, Davailus used Area III, which was never considered a jurisdictional wetland, extensively for storing and processing peat. There is abundant testimony that Davailus used upland areas to dry and process peat. He mined gravel from nonjurisdictional areas that was in turn used in the bogs and to build roads. The uplands, of course, provided the only access to the bogs. Peat was stockpiled in upland areas. Equipment was stored off peatlands. In short, from an operational perspective, the wetlands and uplands together served as one functionally cohesive unit.

The facts do not support Davailus's contention that there was a "distinct and separate development plan for Areas I-III and Areas IV-VIII." (Brief p. 51.) Instead, the facts show that operations were conducted in multiple bogs at any one time. (FOF 26, 28, 34-37, 39, 51, 64.) Neither the operations nor the peat recovered as a result of the operations were ever treated as "distinct and separate." In particular, Davailus had already started work in Area VII well before I and II were complete. Davailus used III to process peat from all Areas. The drainage system extended into all Areas except Area V. The system incorporated flow through and between Areas that Davailus would have us find were separate. Davailus's permit application did not

describe separate operations. It did not envision, for example, completion and reclamation of one Area before commencing activity in another Area.

Persons other than Davailus have also treated the Site as a single unit. Authorities involved in approving residential development plans have not questioned the development of the Site as a unit. In reviewing Davailus's various license and permit applications throughout the years, the regulatory agencies have not viewed the Site as being divided up in any way. There was no reason to do so. There was no logical basis for anyone to have ever treated the Site as anything other than a single unit. Indeed, this very Board in *Davailus I* addressed the Site as a single unit.

After 1984 when the Site came to the attention of federal and state personnel focused on the protection of wetlands, the evidence shows that, although there may have been some mixed signals, it was generally assumed that Davailus needed to stop working in Areas IV-VIII but that he could continue working in Areas I-III. (FOF 50, 51.) This dichotomy was carried through to the 1998 consent order, which required Davailus to restore Areas IV-VIII, but allowed him to finish harvesting Areas I-III. (FOF 63-64.) Davailus latches on to this treatment as proof that Areas IV-VIII have been treated as a separate unit. We interpret the fact to actually support the opposite conclusion. It is apparent that the regulators--either out of a sense of fairness or in recognition of the fact that there was already so much damage to Areas I-III--treated Davailus's harvesting in Areas I-III as something of a *quid pro quo* for his restoration of Areas IV-VIII. Rather than viewing the different areas in isolation as postulated by Davailus, the regulators considered all the wetlands together in implementing their enforcement strategy.

The governmental action at issue here is the Department's denial of Davailus's application to harvest all of the wetlands, not just Areas IV-VIII. Thus, even the alleged take

itself did not treat Areas IV-VIII as a separate unit.

In arguing that the Site consists of two units, Davailus also relies upon the fact that Areas IV-VIII and the remainder of the Site do not benefit each other in monetary terms on a going-forward basis. Even if this were true, it only tells half the story. As we previously noted, when the Site was a peat mine, the uplands were essential to Davailus's ability to harvest peat in the wetlands. (FOF 25.) If Davailus only owned the bogs, it would have been impossible for him to have harvested and processed peat. Furthermore, from an environmental perspective, Areas IV and VIII certainly cannot rationally be separated from the remainder of the Site. Finally, while it may not be possible to measure any value in the wetlands in monetary terms, noneconomic enjoyment by future property owners of the unique setting provided by the peat bogs is not necessarily entirely irrelevant. *Lucas*, 112 S.Ct. at 2895 fn.8.

In truth, there is *nothing* that justifies treating Areas IV-VIII and the remainder of the Site as two separate units other than Davailus's attempt to define the take in terms of the governmental action at issue. Yet this result-oriented, self-fulfilling approach is directly at odds with the trend and spirit of the case law. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* ("*Tahoe*"), 122 S.Ct. 1465, 1482 (2002) ("Of course, defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every governmental action would become a total ban, and therefore, a take."); *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 643-44, 113 S.Ct. 2264 (1993) ("a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable"); *Keystone Bituminous Coal Co. v. DeBenedictis*, 480 U.S. 470, 498-99, 107 S.Ct. 1232 (1987); *Penn Central*, 438 U.S. 104, 130-31 ("Taking jurisprudence does not divide a

single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." In deciding whether there has been a taking, the Court focuses on "the parcel as a whole.") More to the point, it is inconsistent with the Pennsylvania Supreme Court's instruction in *Machipongo* that we are to take a more holistic view of all of the factual circumstances in defining the horizontal extent of the property at issue. Davailus's approach is similar to the approach that the Commonwealth Court had taken that the Supreme Court specifically rejected in *Machipongo*. *Machipongo*, 799 A.2d at 768 (characterizing Commonwealth Court's approach as "overly restrictive"). When we consider all of the relevant factual nuances, when it comes to defining the relevant parcel, this is not a close case. There is simply no question that the Site as a whole should be treated as a single unit. The Site as a whole must serve as the denominator.

Davailus places tremendous weight upon three federal cases in support of its contention that the parcel as a whole is limited to Areas IV-VIII.[5] Those cases are *Florida Rock Industries v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995), *Loveladies Harbor v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), and *Palm Beach Isle Associates v. United States*, 203 F.3d 1374, *on rehearing*, 231 F.3d 1354 (Fed. Cir. 2000).

Initially, we note that Davailus failed to mention *Walcek v. United States*, 303 F.3d 1349 (Fed. Cir. 2002), the most recent expression of the Federal Circuit on the subject, in its original brief. *Walcek* is more unfavorable to Davailus's position than *Machipongo*, and puts into some question the continuing vitality of the earlier federal cases upon which Davailus so heavily relies. *Machipongo* requires an examination of factual nuances in defining the horizontal extent of the

[5] We are struck by the fact that the mere expression of Davailus's argument exposes just how weak it really is.

parcel as a whole. *Walcek* simply concluded, with very little analysis of the relevant factual nuances, that the parcel as a whole in wetland cases is "the land owner's entire parcel." 303 F.3d at 1356.

The relevant acreages in *Walcek* were as follows:

> Total land (purchased in 2 transactions)..... 14.5
> Federally regulated wetlands..... 13.2
> Development in wetlands prohibited..... 11.0
> Development of wetlands allowed..... 2.2

The court precluded the landowner from arguing that the relevant parcel was the 11 acres defined by the alleged take because the owner failed to make that argument at trial. (Davailus's effort to distinguish *Walcek* in its reply brief only addresses this part of the decision.) The court next determined that, even if the total parcel was limited to the 13.2 acres of wetlands, allowing development of 2.2 acres of those wetlands meant that there had not been a *Lucas* taking. 303 F.3d at 1355.

Finally and more to the immediate point, the court held that the proper denominator acreage was the entire 14.5-acre parcel. The court relied on *Tahoe* for the proposition that "regulatory takings analysis properly analyzes the impact of the challenged regulation on the land owner's entire parcel." 303 F.3d at 1356. The court continued as follows:

> This Court has held that the impact of a challenged regulation must be evaluated in terms of its effect on the landowner's "parcel as a whole" in the context of wetlands regulation. See, e.g., *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993) (holding that "the quantum of land to be considered is not each individual lot containing wetlands or even the combined area of wetlands," but rather, the parcel as a whole). Particularly in light of the Supreme Court's reaffirmation of the "parcel as a whole" approach in Tahoe-Sierra, the Court of Federal Claims committed no error in determining that the relevant parcel consisted of the Walceks' entire 14.5-acres.

Id.

Although *Machipongo* dictates that each case must stand on its own set of facts, *Walcek* is of interest to us for several reasons. First, as previously noted, it is always helpful to see how another tribunal has handled a wetlands/takings case. If we plug in the various acreages affected at the Davailus Site and the acreages discussed in *Walcek*, taking into consideration the relative values of the peat harvested and the peat left behind, Davailus has at least arguably been left better off than the landowners in *Walcek*, whose taking claim was rejected.

Secondly, *Walcek* applied *Tahoe* to the horizontal delineation of the parcel as a whole. *Machipongo* stopped short of doing so, and therefore, so must we. Third, *Walcek* joins with several other cases in illustrating that even a small residual value precludes a *Lucas* takings claim. Finally, as noted in the outset, *Walcek* certainly does not overrule the earlier federal cases out of the Federal Circuit upon which Davailus places so much reliance, but it does seem to signal that those decisions may be increasingly out of synch with the modern trend.

In *Florida Rock*, the claimant purchased for the sole purpose of limestone mining a 1,560-acre tract that consisted almost entirely of wetlands. Florida Rock sought a permit for the entire 1,560 acres. The Corps responded that permits would be issued only for parcels of a size to suffice for three years of mining. In Florida Rock's case, 98 acres would serve its anticipated needs for three years. Florida Rock acquiesced in the Corps' demand and applied for a permit covering only the 98-acre parcel. The Corps then denied the permit. The takings claim was limited to the 98 acres.

It is not clear that the court ever took a hard look at why 98 acres was used as the parcel in question. *See* 18 F.3d at 1579 n.13 (Nies, dissenting) ("Indeed, in this case, it is far from clear in my mind that the 98 acres should be treated as a severed tract rather than part of the 1500+ total acreage.") It is clear that the Corps essentially defined the relevant parcel for all purposes,

including, in the court's mind, the takings question. Within the rubric of the relevant factual nuances discussed in *Machipongo*, the 98 acres were treated by all parties, including the regulatory agency, as a separate parcel. The court merely accepted that treatment. Here, of course, the regulators never subdivided the Site, and Davailus applied for a permit for *all* of the wetlands (except, perhaps, Area V). Areas IV-VIII were not treated as a separate parcel by anyone outside of this takings litigation.

In *Loveladies*, the court declined to include 199 of the 250 acres that made up the original site as part of the analytical parcel because those acres had been developed and sold off well before the restrictions of Section 404 of the Clean Water Act were enacted in 1972. The development occurred over a substantial period of years and involved many kinds of governmental permits. The trial court placed great weight on the factual nuance that the 199 acres were developed in accordance with a regulatory regime that had changed, and the appeals court held that the government had failed to convince it that the trial court "clearly erred" on that issue. 28 F.3d at 1182.

With regard to the land remaining after the new wetlands laws were in place, the court declined to include 38.5 of the remaining 51 acres in the analytical parcel because it

> had been promised to New Jersey in exchange for the NJDEP permit. This is only logical since whatever substantial value that land had now belongs to the state and not Loveladies. It would seem ungrateful in the extreme to require Loveladies to convey to the public the rights in the 38.5 acres in exchange for the right to develop the 12.5 acres, and then include the value of the grant as a charge against the givers.

28 F.3d at 1181.

This case admittedly shares with *Loveladies* the factual nuance of a changed regulatory regime. Applying *Loveladies* by analogy here would suggest that we exclude the value of the

peat that was sold lawfully from Areas I-III from the denominator. Davailus's earlier peat sales were permitted and lawful, and that is a factual nuance that leans in its favor. We do not, however, see that factor as dominant in this case. It is greatly outweighed by all of the other factual nuances which militate in favor of treating the whole site, including all of the peat on the Site, as a unit. Among other things, the Site, unlike the property in *Loveladies*, remained essentially intact and continued to be treated in all respects as a unit. Indeed, peat remained in Areas I-III and those Areas were included in the permit application.

In *Palm Beach*, the owners bought 311.7 acres in 1956. The property consisted of a spit of land between the ocean and a lake which was bisected by a road. The owners sold all 261 acres on the ocean side in 1968. The Corps denied a permit to develop the 50.7 acres on the other side of the property at some point after 1988. The Federal Circuit reversed the trial court's decision to treat the 311.7 acres as the denominator, instead treating the 50.7 acres as the denominator. A comparison of the facts relied upon there and those presented here, however, reveals how the factual nuances of each case can make a big difference. For example,

Palm Beach	**Davailus**
▪ Landowners "never planned to develop the parcels as a single unit"; they were not part of "common development scheme" (208 F.3d at 1380-81)	▪ Landowners consistently planned to use the Site as a single peat mine, and then a single development
▪ Development of 261 acres "was physically and temporally remote from, and legally unconnected to, the 50.7 acres" (*Id.*)	▪ Development of Areas IV-VIII integrated with development of remainder of Site; e.g., all in same permit application
▪ Different parts of parcel were naturally different, bisected by road (*Id.*)	▪ All parts of Site naturally blend into each other, no separation

- Land actually sold off. (Id.)
- Peat sold, but Site itself subdivided along lines proposed by Davailus
- Only thing in common is both parts of site at one time owned by same investor group (*Id.*)
- Common aspects go well beyond common ownership

The key fact for the *Palm Beach* court seemed to be the absence of a common development scheme. As discussed above, there has always been a common development scheme for the Davailus Site.

In the end, *Machipongo* instructs that the process of defining the horizontal extent of the relevant parcel is a fact-specific exercise. The facts in this case, unlike the federal cases cited by Davailus, tilt overwhelmingly in favor in defining the parcel as the Site. Davailus's cases certainly support its contention that it may be appropriate in some cases to conclude that something less than all of the land purchased by a claimant at one time should be treated as the relevant parcel in the takings analysis. We do not doubt that such cases exist. In the cases cited by Davailus, the courts obviously believed that severance was appropriate based upon their assessment of all of the pertinent facts that happened to be present in those cases. The entirely different set of facts before us here, however, compels the opposite conclusion.

IV. *Lucas*

Unless the governmental action deprives the landowner of *all* economically beneficial use of its property, it does not constitute a *Lucas* taking. *Machipongo*, 799 A.2d at 769; *Lucas*, 505 U.S. at 1019 n.8 (categorical rule does not apply if diminution in value of property is 95% instead of 100%); *Tahoe*, 122 S.Ct. at 1482-84 (anything less than a total loss or a complete elimination of value requires a *Penn Central* analysis; *Palazzolo v. Rhode Island*, 121 S.Ct. 2448, 2465 (2001) ("A regulation permitting a landowner to build a substantial residence on an

18-acre parcel does not leave the property 'economically idle.'").

The permit denial has not deprived Davailus of all economically beneficial use of the Site. Far from having been left with the equivalent of nothing, Davailus has already been able to extract tremendous value from the Site. Past benefits alone preclude a finding of a *Lucas* taking. *See Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1363, *cert. denied*, 122 S.Ct. 2660 (2002) (no categorical taking where company mined only 14 percent of coal before its permit was revoked.[6] In addition, Davailus continues to hold a very valuable property. The permit denial did not have any material impact on the Site's uplands.[7] The uplands constitute the majority of the surface area and remain available for development. A residential development, which appears to be the highest and best use, will bring in hundreds of thousands of dollars. The Site also continues to serve as the Davailus family's homestead. The Site provides a base for Edward Davailus's landscaping business. There has not been a *Lucas* taking here.

Davailus was extremely well represented and presented a very thorough case, which included the testimony of numerous experts. Davailus also did an effective job of weakening (if not completely destroying) the credibility of the Department's appraisal of the Site. Yet, Davailus did not offer an appraisal of the Site of its own. Presumably, Davailus staked its success on proving that the parcel as a whole constitutes Areas IV-VIII. (Davailus did offer evidence that those Areas alone are essentially worthless.) Now that we have decided that it is the Site as a whole that matters, we have no evidence from Davailus as to the value of the Site as a whole before or after the permit denial. Davailus has presented absolutely no positive evidence that would cause us to hesitate in concluding that the Site as a whole retains substantial value

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[6] Even if we were to accept Davailus's argument that the parcel as a whole is limited to Areas IV-VIII, Davailus harvested peat from Areas IV and VII. (FOF 37, 39.)

[7] There was no showing that the additional lakes that would have been created would have increased the value of the remaining land as residential property.

after the permit denial.

Davailus's Site retains far more relative value than the property involved in *Palazzolo*. There, the Supreme Court found that there was no *Lucas* taking where the regulation left a property that could have been worth $3.1 million with a residual value of $200,000. 121 S.Ct. at 2448, 2465. The impact of the permit denial on Davailus was far less dramatic.

V. Traditional Takings Analysis

There was not a *Lucas* taking. Therefore, the *Penn Central* analysis applies. We must balance what Davailus has lost against what the public has gained to determine whether the permit denial was unduly oppressive.

A. Interference with Investment-Backed Expectations

Our first task in performing the *Penn Central* analysis is to define Davailus's "expectations." *Machipongo*, 799 A.2d at 770. Davailus's expectation from the time that he purchased the Site until the time that his encroachment permit was denied[8] was to use the Site to produce diverse benefits. There is no question that Davailus expected to mine peat. There is also no question, however, that Davailus expected to use the Site as a home for himself and his family and as a source of other forms of income as well. Among other things, the Site was expected to be a good investment in the sense of offering a return in the form of land sales for amounts in excess of its original purchase price. The Site was also expected to contribute to Davailus's excavation business by providing, among other things, a base of operations close to where Davailus worked.

Davailus's attempt in this case to show that the *only* expectation for the Site was to mine

[8] At least under the circumstances of this case, we believe that Davailus's expectations are relevant from the time he purchased the Site until the permit denial because of his continuing investment in the Site up to the point of the denial.

peat is not only inconsistent with the evidence, it defies common sense. Davailus may have had limited education, but his actions demonstrate that he was a savvy investor and businessman. We would fully expect that he would try to maximize the income-producing potential of his land purchase by the pursuit of multiple, complimentary projects, and that is exactly what he intended to do and that is what he did. (See, e.g., FOF 22, 23, 26, 28, 30-33, 40.)

We agree with Davailus's theory that Edward Davailus probably did not have a specific, well-defined plan to become a large residential developer when he purchased the Site. But while the specifics may not have been crystallized, Davailus unquestionably expected that the Site would be a good investment in real estate apart from its peat reserves. Whether that investment would ultimately be realized by reselling the Site, selling large tracts, or a piecemeal subdivision for individual residences is less significant than the fact that Davailus's expectation went beyond peat mining. In any event, there is no question that Davailus began to envision a residential subdivision well before the permit denial. (FOF 18.) Among other things, the permit application itself discussed the future subdivision. (C.Ex. 27.)

The permit denial only interfered with Davailus's expectation to harvest peat. It did not materially interfere with any of the other aspects of his multifaceted business plan. Given Davailus's multiple expectations, it necessarily follows that the permit denial only constituted a partial interference with Davailus's expectations.[9]

Davailus's expectation relative to peat harvesting was investment-backed. (FOF 6, 14,

[9] The Department's effort to prove that Davailus's *sole* objective was to become a residential developer was even less effective than Davailus's effort to prove that Davailus's *sole* objective was to be a peat miner. There is a wealth of evidence that demonstrates that Davailus expected to mine peat from the time that he purchased the Site up until the point of the permit denial. The peat harvesting was more than just a hobby, and it was more than just a means toward the end of a residential development with lakes. Davailus's actions and his investments went well beyond what would have been required to build lakes on the property.

24, 27, 28, 39, 40, 44, 45, 56.) Davailus, of course, paid for the Site. Davailus prepared the Site for peat mining by clearing and draining bogs. Davailus purchased a great deal of equipment, much of which was geared toward peat harvesting. Davailus hired consultants and submitted expensive permit applications. Although more limited than Davailus would have us believe, Davailus did incur some opportunity costs by devoting attention to peat harvesting in lieu of other endeavors.

Davailus's investment-backed expectation to harvest peat was reasonable. (FOF 16, 19, 43-51, 55, 56.) There were other peat mines in the area. Davailus obtained the permits that were necessary at the time. Davailus, of course, harvested the peat with the knowledge and approval of the regulators.

We do not believe that Davailus's expectation ever entirely stopped being reasonable up until the time that the permit was denied. As this Board previously found, the Department's 1984 letter warning of a new approach to the regulation of peat harvesting was unacceptably ambiguous. Thereafter, it was years before Davailus received unequivocal instruction that he was required to stop his harvesting unless he obtained a permit.

The next step in the *Penn Central* analysis is to assess the extent to which the permit denial "interfered with" what we have found to be Davailus's reasonable, investment-backed expectations. *Id.* As a preliminary matter, we must point out that the Commonwealth Court's case law concerning this Board's role in takings cases requires us to determine whether there has been a taking, but we are not to assess the actual amount of the compensation. *Domiano v. DER*, 713 A.2d 713, 717 (Pa. Cmwlth. 1998); *Beltrami Enterprises v. DER*, 632 A.2d 989, 993, (Pa. Cmwlth. 1993) *pet. for allowance of appeal denied*, 645 A.2d 1318 (Pa. 1994). The latter responsibility resides in the court of common pleas. *Domiano*, 713 A.2d at 717. Yet, if we are

to measure the severity of the governmental action in more than nebulous terms, we must have some understanding of the monetary impact of that action. Thus, it is not necessary for us to put precise values on how much peat was removed from the site, sold, and for how much, or exactly how much remains, or Davailus's lost profit, or how much the Davailus heirs stand to recover from future real estate sales, or the value to be attributed to the use of the site as a homestead or a base of business operations. Indeed, we are sensitive to the need to avoid infringing on the court of common pleas' bailiwick with regard to a calculation of precise damage amounts. We believe that it is sufficient for us to have a rough, but fair, approximation of the economic significance of key elements of the takings analysis, and we have that information here.

That said, turning to the value of the uplands, which were unaffected by the permit denial, the uplands have already provided a significant return. (FOF 6, 9, 12, 13, 20-21, 74-76, 81.) The record shows that they retain considerable value, not only as a homestead and a base for family business operations, but as the site of a residential development as well. With regard to future returns, as already noted, Davailus did not present any evidence regarding the residual development value of the Site. We accept the Department's expert's opinion that the development of the site could generate substantial revenues. (FOF 78.) There is not enough evidence or credible, substantiated opinion testimony to estimate the anticipated profit that would be made on a development (FOF 79), which would have been more meaningful, but there is no doubt that Davailus continues to hold a very valuable piece of real estate, notwithstanding the permit denial.

Aside from the value of the uplands, a comparison of how much peat Davailus was able to harvest versus how much peat he was required to leave behind is also an important factor. Unfortunately, there is limited direct evidence concerning the amount of peat that Davailus was

able to harvest. Many records were lost. (T. 77-78.) The records that did survive, however, show that Davailus had sales of at least $378,000 to Hyponex from 1981 to 1988 alone. (FOF 69.) This does not account for lost records, unrecorded sales, sales to other buyers, use of peat in the excavation business, and sales before 1981 or since 1988.

We also know that Davailus removed substantially all of the peat from Areas I-III. (FOF 36, 37, 63.) The evidence is too spotty to make any accurate estimates of the peat that was removed from Area III. We will assume for analytical purposes that none was taken, which is one of several assumptions that we make that favor Davailus's position.

As to Areas I and II, there is no direct evidence of the amount of peat that was removed. We do, however, know their acreage. Both Davailus's and the Department's experts opined that it was reasonable to estimate the amount of peat in Area V, where the acreage is known but no measurements of peat depth were taken, by referring to the amount of peat that is in other peat bogs on the Site, where measurements were taken. The only difference in opinion between the two experts was that Davailus's expert believed it was more accurate to use all of the measured peat bogs on the Site. (T. 1313-1315, 1346, 1349-1352.) The Department's expert believed that it was more accurate to use only the measured peat bogs on the same branch of Meadowbrook Stream. (T. 1472-1473.) We will simply accept the opinion of Davailus's expert.

Although Davailus's expert's opinion arose in the context of Area V, the reasoning applies with equal force to other Areas on the Site. (T. 1352.) Therefore, we have used his methodology to arrive at a rough approximation of the peat that was harvested from Areas I & II. (FOF 65-67.) When we perform the calculations, we conclude that Davailus was allowed to remove about 40 percent of the peat from the Site at the permanent expense of about 40 percent of the peat lands on the Site. (FOF 65-67.) In other words, the permit denial left Davailus

unable to harvest about 60 percent of the Site's peat reserves. It also preserved (or marked for restoration) about 60 percent of the Site's peatlands.

This estimate is conservative in favor of Davailus for several reasons. As already mentioned, we have disregarded the peat that Davailus harvested from Area III. We have also not included any peat from Area VII even though Davailus had begun peat removal from that Area. We have included peat in Area IV as peat that could have been harvested even though Davailus testified that the peat there was of low quality and may not have been marketable. (FOF 37.) We have not excluded the bottom two feet of peat in the Areas denied to Davailus even though Davailus's permit application (the denial of which constitutes the alleged taking) proposed to leave that peat in place. (*Id.*) We have included the peat in Area V even though Davailus's permit application was equivocal at best about whether there were any firm plans to harvest that peat. (Indeed, Davailus did not bother to measure the peat in that Area.) (FOF 65-66.)

Sixty percent of the peat reserves on the Site is a lot of peat. We have no intention of minimizing the impact of the permit denial. We credit Davailus expert's opinion that the sale of that peat would have generated substantial revenues.[10] We do, however, believe that it is significant that Davailus was also allowed to harvest a great deal of peat. That harvest came at a significant price. By the time the government acted, Davailus had irrevocably destroyed 40 percent of the peatlands on the Site. At least some damage had occurred to all of the wetlands, with substantial activity having taken place in Area VII. As discussed in greater detail below, preserving what was left became proportionately more important.

[10] As with the Department's expert's opinion regarding real estate sales, we do not find Davailus's expert's opinion regarding the profit that could have been expected to be credible. (FOF 70.)

In sum, the measure of the take effected by the permit denial may be expressed by the following fraction:

$$\frac{\text{60\% of the peat}}{\text{100\% of the peat + 100\% of the uplands' development and use value}}$$

The permit denial unquestionably had a significant economic impact. It would be disingenuous for us to say that the permit denial did not interfere with Davailus's reasonable, investment-backed expectations. Yet, when we examine the case law, we are immediately struck by the fact that the courts have found that governmental actions that have resulted in rather dramatic reductions in property value were not found to be compensable takings where the land in question retained at least some residual value. *See generally District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874, 883 (D.C.Cir. 1999) ("[A] claimant must put forth striking evidence of economic effects to prevail even under an *ad hoc* inquiry.")

In addition to the cases discussed above, *Mock v. DER*, 623 A.2d 940 (Pa. Cmwlth. 1993), *aff'd*, 667 A.2d 212 (Pa. 1995), *cert. denied*, 116 S.Ct. 1841 (1996), is noteworthy. Although *Mock* was decided long before the Supreme Court refined the takings analysis in *Machipongo*, it undoubtedly retains some precedential value. In *Mock*, the court bluntly stated that, in order "for a taking to occur, the regulation must have almost the same effect as the destruction of the owner's property rights." 623 A.2d at 949. The property owners in that case claimed that the Department committed a compensable taking when it denied a permit to fill .87 acres of wetlands on their site that would have enabled them to build an auto repair shop. 3.94 acres on the 5.2 acre parcel consisted of wetlands. The uplands on the site consisted of sections that were broken up by wetlands, contained steep slopes, and were relatively distant from the

road that provided access to the site. The owners proposed to build a mitigation wetland of .38 acres, which meant that there would have been a net loss of .49 of an acre of wetlands.

This Board found that the site without a permit to fill a portion of the wetlands was "essentially valueless." Had the permit been granted, the site would have had a value of $175,000. The Board nevertheless concluded that no compensable taking had occurred because the owners had not considered alternate projects or submitted revised applications for a smaller facility.

The Commonwealth Court affirmed. It found that the permit denial did not prohibit all construction on the site, and did not foreclose other uses of the property. 623 A.2d at 946-47. "The Mocks have not established the impossibility of using the property for service or retail shops, for example." 623 A.2d at 947. Thus, there had not been a *Lucas* taking.

The Court went on to hold that there had also not been a compensable taking under a *Penn Central* analysis. There was no record evidence that the land could not be put to economically viable use. The Mocks failed to prove that their land lost all of its residual value. *Id.* at 949. The Mocks presented no evidence about the economic value of their land that could have been realized through other development options. The Mocks fell well short of showing that the permit denial had "almost the same effect as the destruction of their property rights." *Id.*

It is interesting to note that, while there was no showing in *Mock* that other uses were foreclosed, there was also no showing that other uses were realistically available, particularly given the configuration of the site. The proposed use would have resulted in a net loss of .49 of an acre of wetlands. It appeared that the uplands portions of the site were not especially conducive to development. The Mocks were left with what the Board found to be a valueless site, coupled with the ability to apply for new and different permits that might or might not create

some value but which offered an unknown likelihood of success. Yet, there was no taking.

Here, Davailus was permitted to extract 40 percent of the peat on the Site, in the process obliterating 40 percent of the wetlands that stood in the way. The Site retains substantial residual value. That value has been and will continue to be realized by the Davailus's use of the property and residential development. While Davailus is precluded from development in the 24 acres of wetlands that survived his past operations, 232 acres were unaffected by the permit denial (as modified by the 1998 CO&A allowing harvesting Areas I-III) and are available for economically viable use. The permit denial can hardly be said to have had "almost the same effect as the destruction of [Davailus's] property rights."

The Court in *Mock* referred to *Goldblatt v. Town of Hempstead*, 82 S.Ct. 987 (1962). (*Goldblatt* was also cited in *Machipongo*. 799 A.2d at 764.) In *Goldblatt*, the 38-acre site at issue had been used for mining since 1927. Past mining created a 20-acre lake on the site. The town passed ordinances 30 years later that had the effect of prohibiting further mining. The Court rejected the site owner's taking claim with very little discussion, simply noting that there was no showing that shutting down the mine had reduced the value of the site. The Court cited *Hadacheck v. Sebastion*, 239 U.S. 394 (1915), "where a diminution in value from $800,000 to $60,000 was upheld." 82 S.Ct. at 989. *See also Jones v. ZHB of McCandless*, 578 A.2d 1369, 1372 (Pa. Cmwlth. 1990) ("It is clear from the evidence presented that Landowner has not been deprived of the viable use of his property"); *Miller and Son Paving v. Wrightstown Township*, 451 A.2d 1002, 1006 (Pa. 1982) (zoning ordinance that prevented preexisting quarry from mining stone worth $7 million upheld against takings challenge).

Aside from this case law, we also take note of the Supreme Court's telling admonition regarding the practical consequences of takings litigation:

> Indeed, in this case we are mindful of the potential for extended litigation and extraordinary cost to the Commonwealth if compensation is required for all UFM [unsuitable for mining] designations. The often repeated maxim that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law" rings truer today than ever. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 67 L.Ed. 322 (1922) [footnote omitted].

Machipongo, 799 A.2d at 764. The Court was concerned that the Commonwealth has designated sixteen other UFM areas. *Id.* at 764 fn.9. The Court's concern regarding UFM lands is certainly applicable to the protection of wetlands. Although the concern does not trump the careful execution of a takings analysis, it is certainly worth mentioning.

In *Penn Central*, the Supreme Court spoke in terms of a reasonable return on the property owner's overall investment. 438 U.S. at 138. *See also Rith Energy*, 247 F.3d at 1363. While the extent of the return on a claimant's original investment is not necessarily a dispositive basis for measuring the impact of a governmental action, it is certainly relevant. For an initial investment of $30,000, Davailus received $86,598 for the land taken to construct I-380. Davailus later received $42,400 more for the remainder of the parcel that was located to the west of the highway. Davailus has received at least $172,000 for a relatively small number of lots that have been subdivided from the Site to date. And, of course, Davailus otherwise benefited from the use of the Site as a homestead and a base for its excavation business. This sort of return on an original investment of $30,000 does little to bolster Davailus's claim that it has been unduly oppressed.

For all of these reasons, we conclude that Davailus has failed to prove that the interference with his reasonable, investment-backed expectations was unduly oppressive. Arguably, we could have concluded our analysis there.

B. Public Interest and Final Balancing

Machipongo also directs us to consider the public interest served by the governmental action. Denying the permit application served to preserve wetlands. Keeping in mind that Davailus had already destroyed about 16 acres of wetlands, and the mining as proposed would have left 30 percent of the acreage as wetlands, the permit denial prevented about 17 acres of peatlands from being destroyed. The incalculable value of preserving this habitat and the species that depend on the habitat was discussed in detail in *Davailus I* and is repeated in our Findings of Fact above. (FOF 90-98.)

The protracted debate in this case over the value of the Davailus wetlands as a hunting, fishing, or fur-trapping destination was somewhat paradoxical in light of the more fundamental goal served by the permit denial; namely, the preservation of the natural, scenic, and aesthetic values of the environment as embodied in Article I, Section 27 of the Pennsylvania Constitution. The need to preserve wildlife goes beyond the need to propagate fish and game so that it may be harvested for recreation or profit. As we noted in *Davailus I*,

> Wetlands are a distinct type of eco-system, and their rapid disappearance at the hands of man may be viewed by some as raising ethical concerns which are separate from any utilitarian advantage that wetlands may provide to us. *See* Aldo Leopold, "A Sand County Almanac" (Oxford Univ. Press, 1987) pp. 201-226 ("The Land Ethic").

1991 EHB at 1208 n.7.

As noted by the Supreme Court,

> The nature of the public use of the water should not be the focus of our inquiry. To the contrary, we have explained that "we believe that the public has a sufficient interest in clean streams alone *regardless of any specific use thereof*...."

Machipongo, 799 A.2d at 774 (emphasis added), *quoting Barnes & Tucker*, 319 A.2d at 882. As we noted in *Davailus I* and as we continue to believe, the Court's reference to the protection of water resources regardless of any definable, distinct benefit to man is equally applicable to the public's interest in the preservation of natural habitat and the species that depend upon that habitat.

In the final analysis, the preservation of natural habitat is a goal that is not beyond or apart from the human interest, but one that it is at the heart of our humanity:

> We do not understand ourselves yet and descend farther from heaven's air if we forget how much the natural world means to us. Signals abound that the loss of life's diversity endangers not just the body but the spirit....An enduring environmental ethic will aim to preserve not only the health and freedom of our species, but access to the world in which the human spirit was born.

Edward O. Wilson, The Diversity of Life p. 351 (1992). Preserving the quality of human life, and preserving the quality of *all* life, are indistinct and inseparable. There is simply no question here that the permit denial was reasonably related to the protection of the general welfare, and that the general welfare was promoted by preventing the irreversible loss of valuable wetlands habitat and the species that rely on that habitat.[11]

We are left, then, with the unenviable task of weighing all of these factors to determine whether "fairness and justice" require that Davailus be compensated for what he has been required to give up so that the public may benefit from the preservation of rare habitat. Our duty to balance the public interest against private rights is a heavy burden for many reasons, not the

[11] Davailus did not show that the permit denial (as modified by the consent order and agreement) was an unnecessarily excessive vehicle for protecting the general welfare. In other words, this case did not turn on the terms of the permit denial. It is, perhaps, also worth mentioning that, in contrast to the important public benefit attained by the preservation of the wetlands habitat, we found in *Davailus I* that there was little in the way of benefits to the public from the production of peat. 1991 EHB at 1208-09.

least of which is that it is impossible to express either side of the equation entirely in any standard unit of measure, such as in monetary terms. While we can approximate in dollar terms such things as the amount of peat in the ground, the sales value of peat, the fair market value of the property as a residential development, the cost of machinery, income, and the like, Davailus also suffered an intangible loss in the frustration of the goals that he had for the use of the property. The right to hold and enjoy property and to fulfill lawful investment-backed expectations so long as it does not harm others is obviously of paramount importance.

Similarly, it is impossible to place a monetary value on the preservation of natural habitat. The wetlands may not have much in the way of monetary value to a residential developer or buyer, but even Davailus's expert conceded that it is not possible to translate the aesthetic value of the wetlands or the preservation of wildlife that depends on that habitat into monetary terms. (FOF 98.) Preservation of scarce and shrinking habitat is truly priceless in both senses of that word in that it has a value that is above, as well as beyond, calculation. As mentioned above, the benefit provided by natural habitat is obviously critical to human welfare. As an integral part of maintaining quality of life, the preservation of scarce wetlands habitat and the species that depend upon that habitat is immeasurable.

There are admittedly some facts that lean toward a finding of a compensable taking in this case. On the public interest side, the wetlands that were saved here would have been converted into lakes, not a parking lot. We found in *Davailus I* that many of the environmental benefits normally associated with wetlands did not exist or may not have been reduced by the creation of lakes. In *Davailus I*, we specifically rejected the Department's concern that the operation would cause water pollution. Our review of the evidence indicated that excess erosion and sedimentation could have been alleviated through standard engineering practices. 1991 EHB

at 1206. The Department's concern regarding an adverse effect on the receiving stream was unfounded, and if such adverse effects did occur, we found that they would have been easily manageable. *Id.* The alleged loss of flood storage capacity provided by the wetlands was "overstated" and could possibly have been solved by engineering measures. *Id.* Therefore, this case turns on the value of habitat and wildlife preservation.

On the private rights side, the Department's actions terminated an ongoing, permitted, lawful operation. Davailus bought the property in part to mine peat, and he never waivered from that goal, which was perfectly legitimate at the time. He invested money and sweat equity over the years in the operation, and it became an integral part of his life and his legacy. Although the Department has not been found to have acted improperly, we are left with something less than a crushing conviction that Davailus was treated as forthrightly as he might have been.

Nevertheless, in the final analysis, Davailus was able to harvest a great deal of peat at the expense of public's loss of a great deal of wetlands, and he retains a very valuable piece of real estate. He has made quite a return on his original investment. It is imperative to preserve remaining wetlands habitat. In the end, we do not believe that Davailus was unduly oppressed or that fairness and justice require that the General Assembly pay Davailus for not destroying what was left of the wetlands habitat on the property. We conclude that no compensable taking has occurred.

Challenged Evidentiary Rulings

Davailus argues that Administrative Law Judge Labuskes committed "reversible error" with respect to the admission over hearsay objections of certain enumerated documents. Of course, no ruling by a Board Member acting in the capacity of administrative law judge at the hearing is binding upon the full Board in rendering its adjudication. It is only after the full Board

has acted that there is a possibility of a "reversible error" for purposes of appellate review. *See Davailus I*, 1991 EHB at 1199-1202. Therefore, rather than characterizing the evidentiary challenges as "reversible errors," we will view the challenges as requests that the full Board decline to follow the recommended ruling of the administrative law judge.

That said, the Board should not be asked to consider evidentiary rulings that have no significance. Davailus has not explained why the rulings that it questions deserve the full attention of the Board. A review of our findings of fact reveals that this case involved a great deal of cumulative evidence. An evidentiary challenge would be most worthwhile if it involved a single piece of evidence relied upon in support of a critical finding. None of the evidence at issue in Davailus's challenges rises to that level. Nevertheless, while it would have been helpful if we had an explanation of why it is important that the full Board review the rulings, it is not necessarily required and we will address one of Davailus's objections.

Davailus objects to the admission of Commonwealth Exhibit 6, which is the transcript from the deposition of Edward Davailus taken in the prior Board proceedings leading up to *Davailus I*. The sole basis for the objection is that it is hearsay. We confirm that the objection is overruled. Edward Davailus was an original claimant in this matter, as well as the only shareholder and officer of Davailus Enterprises, which continues to be a party. Davailus's statements under oath were clearly "the party's own statement[s] in either an individual or a representative capacity." Accordingly, they are admissible as an exception to the hearsay rule. Pa.R.Ev. 803(25).

Davailus argues that Pa.R.C.P. 4020 (use of depositions at trial) does not authorize the use of Davailus's deposition at the hearing. Rule 4020 does not affect the hearsay rule. Even if it did, we confirm that there is enough of an identity of parties and subject matter that Rule 4020

does not preclude the use of Davailus's deposition in *Davailus I* in this case. Pa.R.C.P. 4020(b); *Ryan v. Kirk*, 180 A.2d 55 (Pa. 1962); *Weintraub v. PennDOT*, 39 Pa. D&C.3d 367 (1983). As a final note, Commonwealth Exhibit 6 was helpful to us, particularly in light of the fact that the most knowledgeable individual with regard to the history of the Site is deceased, but the exhibit did not provide anything other than cumulative evidence in support of any of our findings of fact. Furthermore, the exhibit was generally supportive of Davailus's arguments.

Davailus also objects to our admission of Commonwealth Exhibits 13, 26, 53, and a four-page memorandum of the Department that was part of Exhibit 18 over hearsay objections. We do not need to address these objections because we have not relied in any way on the exhibits in question. They are excluded from the record.

CONCLUSIONS OF LAW

1. Davailus bears the burden of proving that a compensable taking occurred. *Miller & Son Paving, Inc. v. Plumstead Township*, 717 A.2d 483, 485 (Pa. 1998), *cert. denied*, 525 U.S. 1121 (1999). The Department bears the burden of proving that a governmental action that might have otherwise been a taking is not compensable because the action restricted activity that would have violated state law or constituted a nuisance. *Machipongo*, 799 A.2d at 775.

2. A governmental action that restricts activity that would have violated state law or constituted a nuisance does not effect a compensable taking. Davailus's peat operation would not necessarily have violated state law, and it was not found to have constituted a nuisance.

3. We are to adopt a flexible approach designed to account for factual nuances when defining the horizontal extent of the property to be considered when analyzing an alleged take. Based upon all of the factual nuances, the property to be considered here is the Site as a whole, not Areas IV-VIII as advocated by Davailus.

4. Denying Davailus's permit application to harvest peat did not effect a *Lucas* taking because it did not deprive Davailus of all economically beneficial use of the Site.

5. In the absence of a *Lucas* taking, the Board must apply a traditional takings analysis (*i.e. Penn Central* analysis) that balances the public interest against the interference with private rights to assess whether the governmental action was so unduly oppressive that fairness and justice require that the property owner be compensated.

6. Denying Davailus's permit application was not unduly oppressive largely because the permit denial only particularly interfered with Davailus's overall expectations, Davailus was permitted to remove a significant percentage of the peat from the Site, the Site has provided and continues to retain substantial value, and the permit denial promoted the important public interest in the preservation of wetlands habitat.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EDWARD P. DAVAILUS and SANDRA DAVAILUS, CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF PAULINE DAVAILUS and DAVAILUS ENTERPRISES, INC.	:	
v.	:	**EHB Docket No. 96-253-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIROMENTAL PROTECTION	:	

ORDER

AND NOW, this 6th day of February, 2003, the Board finds that there was no compensable taking. The Secretary of the Board is directed to return this matter to the Court of Common Pleas of Lackawanna County. Our jurisdiction is relinquished.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: February 6, 2003

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

For the Commonwealth, DEP:
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EDWARD P. DAVAILUS and SANDRA DAVAILUS, CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF PAULINE DAVAILUS and DAVAILUS ENTERPRISES, INC.	:	
v.	:	**EHB Docket No. 96-253-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

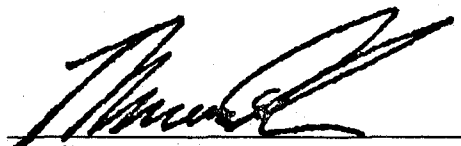
CONCURRING OPINION

By Michael L. Krancer, Administrative Law Judge

I concur with the majority opinion. I recognize the significant impact on the Davailuses of the action about which they complain. However, I have to agree with the conclusion in Section V.A. of the majority opinion (Interference With Investment-Backed Expectations) that they failed to prove, under the current state of takings law, that the interference with Davailus's reasonable, investment-backed expectations was so unduly oppressive so as to effect a taking. I think that conclusion is mandated by the present state of takings law as interpreted by the United States Supreme Court and the Pennsylvania Supreme Court which make the threshold for constituting a taking very high indeed. Unless and until those Courts revisit the parameters of takings law and what constitutes a taking we must and we do apply their lessons thereon.

Also, I would conclude my analysis with Section V.A. of the majority opinion. I do not find it necessary to go any further. Therefore, I do not join in Section V.B. of the majority opinion which goes on to discuss "Public Interest and Final Balancing".

ENVIRONMENTAL HEARING BOARD



MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: February 6, 2003

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ENVIRONMENTAL HEARING BOARD
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

DAUPHIN MEADOWS, INC.	:	
	:	
v.	:	**EHB Docket No. 99-190-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and UPPER DAUPHIN AREA CITIZENS ACTION COMMITTEE, et al., Intervenors	:	**Issued: February 10, 2003**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

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

Synopsis:

The Department denied a Permittee's application for a permit to expand its landfill. In denying the Permittee's motion for summary judgment, the Board holds that the Permittee has failed to convince the Board that it should depart from its traditional practice of applying the regulations that were in effect at the time of the Department took its final action. The environmental assessment of a proposed permit modification is limited to the subject of the proposed modification itself. The Department has the authority and duty to consider the impacts of the proposed facility modification on traffic safety, aesthetics, historical resources, and farmland. The Board defers a ruling on whether the Department may consider the effect of a modified facility on local property values pending the development of a full record.

OPINION

Dauphin Meadows, Inc. ("Dauphin Meadows") appeals from the Department of Environmental Protection's (the "Department's") decision following an earlier remand in this appeal to deny Dauphin Meadows' application for a major permit modification that would have allowed it to expand its landfill in Dauphin County. The Upper Dauphin Area Citizens Action Committee ("UDACAC"), Dauphin County, and Senator Jeffrey E. Piccola have intervened. Dauphin Meadows has filed a motion for partial summary judgment, to which the other parties have responded.[1]

Which Version of the Environmental-Assessment Regulations Applies

The Department originally denied Dauphin Meadows' application for a permit modification on August 17, 1999. On April 27, 2000, this Board remanded Dauphin Meadows' permit application for further review that did not rely upon the balancing test set forth in a guidance document. We retained jurisdiction. *Dauphin Meadows v. DEP*, 2000 EHB 521, 536.

In December 2000, the Environmental Quality Board revised the applicable regulations. Over the course of the past two years, Dauphin Meadows submitted and the Department acted upon extensive new information relating to the permit application that the Department had originally denied in 1999. The Department reviewed Dauphin Meadows' new information in accordance with the December 2000 version of the applicable regulations. The Department performed a new harms/benefits analysis of the revised information using the new regulation. It denied Dauphin Meadows' application on May 30, 2002. Dauphin Meadows then reactivated this appeal, which had never been closed.

---

[1] The standard for the Board's review of motions for summary judgment is set forth in Pa. R.C.P. 1035.1-1035.5.

Dauphin Meadows now argues that this Board should apply the environmental-assessment regulation that was in place prior to December 2000 in the Board's review of the Department's May 30, 2002 permit modification denial. It cites two bases for doing so. It contends that it is necessary to apply the obsolete regulation here "in order to correct the Department's bad faith and gross abuse of discretion." It also argues that the Board is actually reviewing the August 17, 1999 denial in this proceeding, not the May 30, 2002 denial.

The immediate problem with both of Dauphin Meadows' arguments is that they are too late. This Board did not remand Dauphin Meadows' application for consideration of extensive new information, but that is apparently what happened. Dauphin Meadows substantially revised its application and actively participated over the last two years in an entirely new review of its revamped permit application. If Dauphin Meadows believed that the Department was acting improperly or with "bad faith," it had a readily available remedy. Indeed, it exercised that option on November 29, 2000 by filing a motion to rescind the remand. The Board scheduled an immediate hearing on that motion. Dauphin Meadows, however, withdrew its motion.

Along the same lines, it is artificial to argue that the Board is actually called upon to review the Department's August 17, 1999 denial. Had Dauphin Meadows not presented a revised application, it *might* have been appropriate to review the original application in accordance with the old regulation. That is no longer the case. The original application no longer exists and is no longer at issue. The final action that we are now called upon to review is the May 30, 2002 denial of a substantially revised application. In sum, we have not been presented with a compelling reason to depart from our traditional practice of applying the regulations that were in effect at the time of the Department's final review of that denial.

Jefferson County Commissioners v. DEP, EHB Docket No. 95-097-C, slip op. at 49 (February 28, 2002).

The Scope of the Environmental Assessment

Dauphin Meadows argues that the scope of the environmental assessment that the Department was permitted to perform in this case is defined by 25 Pa. Code § 271.126(c), and that the Department failed to limit its assessment in accordance with that section. Section 271.126(c) reads as follows:

> (c) For facilities which have previously been subject to the environmental assessment process, the Department will limit the scope of review under that process to the following:
>
> (1) Proposed modifications to the facility.
>
> (2) Changes in the areas covered by the assessment that have occurred since the assessment was conducted.

25 Pa. Code § 271.126(c).

UDACAC argues that Section 271.126(c) does not define the scope of the assessment in this case because that section only applies to "facilities which have previously been subject to the environmental assessment process." It contends that this phrase really means "an environmental assessment process conducted pursuant to the December 2000 amendments to Section 271.127." Since the Dauphin Meadows landfill was not previously assessed pursuant to the 2000 version of assessment regulation, the scope limitations set forth in Section 271.126(c) do not apply. In other words, the Department should have conducted the assessment as if the landfill were a new facility. (If Section 271.126(c) does apply, UDACAC argues that the Department properly scoped the assessment.)

UDACAC reads too much into the prefatory clause of the regulation. Had the drafters intended to limit the provision to environmental assessments conducted pursuant to the 2000

revisions to the assessment regulation, they would have said so. UDACAC's interpretation would be the equivalent of a comprehensive repermitting requirement, which if intended, would have been spelled out. UDACAC has not cited any regulatory history or any other evidence of any kind that would suggest that Section 271.126(c) was intended to require the equivalent of repermitting of existing facilities.

Beyond UDACAC's preliminary argument, all of the parties otherwise agree that Section 271.126(c) defines the proper scope of the Department's analysis of Dauphin Meadows' application for a permit modification. We concur. Thus, in *Giordano v. DEP*, 2001 EHB 713, we limited our review to the effects associated with proposed modification itself. 2001 EHB at 737-38. In that case, the modification was for an increase in daily tonnage. Therefore, only benefits and harms associated with the increase in daily tonnage were directly relevant. Here, the modification sought is for an expansion of the landfill. Therefore, only benefits and harms associated with that expansion are directly relevant. The Department may consider what benefits and harms flowed from the original landfill in deciding whether to grant the modification, but only by way of background and as a predictor of what benefits and harms would be likely to flow from the expansion. *Id.*

Giordano did not hold that the Department is foreclosed from considering a harm associated with the change in daily tonnage if that same harm had also been associated with the landfill without the increase in tonnage. To the contrary, we considered the odors that would be associated with the increased pace of operations even though odors would also have been considered in connection with the original permitting of the landfill. Here, if harms are associated with the Western Expansion, they must be considered even if those very same harms were considered when the landfill was originally permitted.

Thus, one operative question in this appeal appears to be whether the Western Expansion will have an adverse impact on historical resources. It is, at most, indirectly relevant what impact the landfill had on historical resources prior to the expansion. It does not necessarily follow that the Western Expansion will have no impact because the original landfill had no impact. The Department is not rethinking the impact of the unmodified landfill; it is too late for that. It is not too late, however, to consider the impact on historical resources *of the Western Expansion.* That determination is the proper subject of this appeal.

Whether the Department in fact limited its review in accordance with 25 Pa. Code § 271.126(c) is the subject of vigorous factual dispute. It is, therefore, not capable of being resolved in the immediate context. Dauphin Meadows' motion for summary judgment on this issue is denied.

Traffic, Farmland, Aesthetics, Property Values

Dauphin Meadows argues that the Department exceeded its authority when it considered and denied the permit modification based upon harms related to traffic safety, reduction of farmland, visual impacts to a historic district, and a decrease in local property values. It contends that the Department has infringed upon the exclusive authority of the Department of Transportation ("PennDOT") (regarding the use of roads) and local government (regarding the other issues).

Regarding traffic, Dauphin Meadows has constructed some rather elaborate arguments to support its contention that the Department may not become a traffic cop, if you will, but we simply disagree with Dauphin Meadows' initial premise that the Department is attempting to regulate traffic safety. The Department is fulfilling its legal obligation to assess whether the proposed location for a particular solid waste facility is appropriate. In considering whether the

location is appropriate relative to the operation that is being proposed, the Department must determine whether the local roads will support such an operation. *Korgeski v. DER*, 1991 EHB 935, 949. This rather obvious point is codified at 25 Pa. Code § 271.127(a), which provides that each environmental assessment shall include "a detailed analysis of the potential impact of the facility on the environment, public health and public safety, *including traffic*...(emphasis added)."

Whether local roads are adequate to support a proposed facility at a proposed location is not always a clear-cut, all-or-nothing determination. It may be that local roads are almost, but not quite, suitable to justify the location of a proposed facility. In such cases, it may be possible to reduce waste volumes, or execute road improvements or access restrictions that, "individually and collectively," "adequately protect the environment and the public health, safety and welfare." 25 Pa. Code § 271.127(b). Where the adverse impacts on local roads from a proposed landfill cannot be adequately mitigated, the Commonwealth Court has held today that the Department may nevertheless conclude that the benefits of the project clearly outweigh the unmitigatable impacts pursuant to 25 Pa. Code § 271.127(c). *Tri-County Industries, Inc. v. Department of Environmental Protection*, No. 1179 C.D. 2002 (February 10, 2003). Throughout this process, the Department's function is not to regulate the use of highways; it is to determine whether a proposed operation can be safely located at a particular site.

Dauphin Meadows' response to the fact that 25 Pa. Code § 271.127(a) and (g) expressly require the Department to consider traffic impacts is that the Department cannot derive its authority solely from regulations. Pointedly, Dauphin Meadows makes no attempt to directly challenge the legality of Section 271.127(a). Instead, the parties needlessly argue about the extent to which the Department has the statutory authority to regulate the transportation of waste.

The Department's authority to regulate the transportation of waste is entirely beside the point of this appeal. The point of this appeal is to determine whether the proposed operation of the Western Expansion at the proposed location is appropriate. The Department is regulating the disposal, not the transportation, of waste. We are not concerned with the nexus between traffic safety risks and the transportation of waste as Dauphin Meadows asserts, we are concerned with the nexus between traffic safety risks and the disposal of waste.

The Department has ample authority to regulate the disposal of waste, including the location of waste disposal facilities. *Tri-County Industries, supra. See also* 35 P.S. §§ 6018.104(6) (authority to regulate disposal of solid waste). The Environmental Quality Board has the authority to promulgate regulations that the Department must follow as it exercises its authority to regulate disposal, 35 P.S. § 6018.105. Many of those regulations relate to the siting of potential facilities. *See, e.g.*, 25 Pa. Code §§ 273.111-121. It is unlawful to operate a disposal facility without a permit from the Department, 35 P.S. § 6018.501, an application for a permit must include such relevant data as the Department may require, § 6018.502(a), and the Department may require such other information as it deems necessary or proper to achieve the goals of the Act, § 6018.502(f). The goals of the Act include protecting the public health, *safety*, and welfare. 35 P.S. § 6018.102(4).

Of course, the Department does not have unfettered discretion when it assesses traffic impacts. *Empire Sanitary Landfill, Inc. v. DER*, 1992 EHB 848, 872-73. In *Empire*, the Department ordered the permittee as a condition of its permit to conduct and finance biannual traffic studies until a certain interchange was built. We held that it was unreasonable for the Department to order such a study in light of the relatively small percentage of truck traffic associated with the landfill at the location in question. Admittedly, the Board focused on the

Department's authority to regulate the transportation of waste in that case. That focus was only natural, however, because what was styled as a permit condition was in reality an order addressed to traffic safety and nothing else. The location of the landfill did not appear to be at issue. Whether a permit would be issued did not appear to depend in any way on the results of the study. If any changes needed to be made, it appeared that they would be made to the roadways, not the landfill. The traffic study was to go on indefinitely pending construction activity that was beyond the permittee's control. In short, the Department in that case truly was regulating the transportation of waste. In this appeal, the Department is focused upon the potential disposal of waste and the impact such disposal would have on the surrounding area. The Department has not asked Dauphin Meadows to do anything with respect to traffic.

Whether the Department properly exercised its authority when it denied Dauphin Meadows' permit is the subject of legitimate dispute. That question cannot be resolved here.

Bypassing the regulation that is directly on point and truly unequivocal (§ 271.127), Dauphin Meadows argues that the Solid Waste Management Act must be interpreted to avoid an absurd result, and interpreting the Act to authorize the Department to evaluate traffic impacts would be absurd. As we recently noted in *Eagle Environmental, L.P. v. DEP*, EHB Docket No. 2001-046-L, slip op. at 7 (February 3, 2003), "We are repeatedly bombarded with requests to interpret regulations [and statutes], but it is important to understand that this Board is only called upon to 'interpret' a regulation [or statute] if it is ambiguous, i.e., capable of bearing at least two reasonable meanings." We detect no such ambiguity in the pertinent sections of the Act. Even if we did, we would view it as unreasonable and absurd if the Department did *not* have the authority to consider traffic impacts when it reviews the proposed location of a solid waste facility.

Dauphin Meadows' argument that the Department was not entitled to consider the impact of the proposed expansion on farmland and the visual aesthetics of the area must suffer a similar fate. The Department has done nothing more or less than fulfill its express duty under 25 Pa. Code § 271.127(a) and (g) to consider the potential impact of the operation on "aesthetics" and "land use." In fact, the Department is specifically required under the regulation to consider features such as historic sites and farmland. *Id.* Section 271.127 is direct and unequivocal, and to repeat, Dauphin Meadows has not directly articulated a challenge to the validity of the regulation.[2] Without such a challenge, Dauphin Meadows' arguments are rather academic.[3]

In an attempt to avoid a regulation that is right on point, Dauphin Meadows crafts rather circuitous arguments generally based upon preemption cases and asserts that the Department has intruded into the exclusive domain of local government. Once again, we find ourselves in disagreement with one of Dauphin Meadows' basic premises; namely, that the consideration of aesthetics and loss of farmland are the *exclusive* domain of local government. *Cf. Concerned Citizens For Orderly Progress v. DER*, 387 A.2d 989, 993-94 (while local governments must deal with zoning, it is incumbent upon DER to ensure that a proposed project is consistent with statewide supervision of water quality management). We are not called upon to interpret an ambiguous statute or regulation, so there is no need to dwell on Dauphin Meadows' interpretative arguments, such as that the Solid Waste Management Act" must be interpreted in light of coexisting grants of authority to other entities."[4] Suffice it to say that, even if we were called upon to interpret the Act, we would not agree that there is anything inconsistent or

---

[2] We are not suggesting that such an argument would have had a likelihood of success. *See Tri-County Industries, supra.*

[3] For example, Dauphin Meadows places great weight upon *Community College of Delaware County v. Fox*, 342 A.2d 468 (Pa. Cmwlth. 1975), but there was no regulation like Section 271.127 in that case.

[4] At one point, Dauphin Meadows goes so far as to suggest that, in relation to aesthetics, the Department may consider noise and smell but not the visual impact of a facility. In other words, the Department can regulate noise and smell but only municipalities may regulate visual impacts.

improper in assigning the local and state governments overlapping authority to consider the effect of a solid waste facility upon land use. Each entity has a different set of responsibilities, but perhaps more importantly, a different perspective. It is for the state to ensure that the location, operation, and design of a facility is consistent with statewide supervision of solid waste management. *See Concern Citizens*, 387 A.2d at 993.

Of course, to the extent the parties actually argue about whether the Department made the correct decisions regarding aesthetics and land use, resolution of those questions presents a legitimate factual dispute.

Dauphin Meadows raises a closer question when it challenges the Department's authority to consider the effect that a facility will have on local property values. The Department's position that a decline in property values constitutes the sort of impact on the environment, or the public health, safety or welfare that is covered by 25 Pa. Code § 271.127(a) and (b) is questionable, notwithstanding Section 271.127(a)'s reference to "land use." *Cf. Kwalwasser v. DER*, 1986 EHB 24, 41 (in reviewing a mining permit, DER should not attempt to balance the financial gains and losses of various parties). *But see PEMS v. DER*, 503 A.2d 477, 480 n.9 (agricultural value of lands near proposed landfill appropriately considered under PA. CONST. ART. I § 27). Perhaps in tacit recognition that property values are more in the nature of an economic issue, the Department also relies upon Section 271.127(c), which speaks of "social and economic harms," and more remotely, the delineated purposes set forth in Section 102 of the Solid Waste Management Act, 35 P.S. § 6018.102 (stating that improper solid waste practices can create "economic loss"). Although the Department's position, and in particular its reliance on Section 271.127(c) is stronger after the Commonwealth Court's recent decision in *Tri-County Industries, supra*, we would prefer to consider this question more fully following the

development of a complete record. Therefore, we defer determination on this aspect of Dauphin Meadows' motion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAUPHIN MEADOWS, INC.	:	
	:	
v.	:	**EHB Docket No. 99-190-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and UPPER DAUPHIN AREA CITIZENS ACTION COMMITTEE, et al., Intervenors	:	

ORDER

AND NOW, this 10th day of February, 2003, it is hereby ordered that Dauphin Meadows' motion for summary judgment is **DENIED.**

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: February 10, 2003

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

JACK BOGGS AND FALLING SPRING TECHNOLOGIES	:	
v.	:	**EHB Docket No. 2002-266-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 12, 2003**

OPINION AND ORDER ON MOTION TO DISMISS

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The Board grants the Department's motion to dismiss an appeal as moot when a second letter unequivocally and completely withdraws the letter under appeal and there are no other potential adverse collateral consequences from the first letter.

Factual and Procedural Background

Before us is the Department's January 9, 2002 Motion to Dismiss the Notice of Appeal of Appellants Jack Boggs and Falling Spring Technologies (Boggs), on the basis that the appeal is allegedly moot. The appeal is of a letter, dated September 23, 2002, sent by the Department to Jonathan Piper, the sewage enforcement officer ("SEO") for Metal Township, Franklin County (the Letter or the September 23, 2002). The Letter, which deals with a proposal by Boggs to implement an alternative sewage disposal system on a property located in Metal Township, Franklin County, states as follows:

> The Department of Environmental Protection has reviewed the proposal for an alternate sewage disposal system consisting of the AB Soil System. The property in question is located at 12835 Creek Road. The submission is deficient for the following reasons:
>
> > The AB Soil System makes no allowance for the use of an Ecoflow Biofilter to take the place of the re-circulating subsurface sand filter prescribed in the alternate system guidance. It may be possible to receive approval as an experimental system if the requirements of Chapter 73.71 are met and documented.
>
> Please correct the above deficiencies and resubmit the proposal for our review.

DEP Motion Ex. 1. The Department sent a second letter, dated December 20, 2002, upon which the Department's instant motion to dismiss for mootness is based. The second letter contains two sentences and states in full as follows:

> The Department hereby withdraws its September 23, 2002 letter to you that contained the Department's comments regarding the above-referenced permit application. The Department, by separate letter, will submit to you its revised comments regarding this application.

DEP Motion Ex. 2.[1]

Along with the December 20, 2002 putative withdrawal letter to Mr. Piper, the Department sent another December 20, 2002 letter to Mr. Piper. This is the "separate letter"

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[1] In the meantime, between the September 23, 2002 Letter under appeal and the December 20, 2002 letter withdrawing that Letter, the Department had filed a Motion to Dismiss earlier than the one *sub judice* on November 11, 2002 based on the argument that the Letter was not a final action. That Motion argued that the Department's letter only provides comments to the local SEO regarding the pending application and that it is the local SEO who is authorized to grant or deny such applications, not the Department. Thus, according to the Department, Boggs's appeal right would only be from a potential denial of the application by the SEO. Furthermore, the Department's first motion to dismiss argued that the Letter did not approve or disapprove of Boggs's application nor did it include a "determination" regarding whether the proposal substantively qualified for classification as an alternative system. Instead, the Letter merely offered the Department's opinion that the Boggs application was deficient for the enumerated technical reasons. Thus, argued the Department, the Letter was not an appealable action. On December 31, 2002, the Department withdrew its first motion to dismiss based on the December 20, 2002 letter withdrawing the September 23, 2002 Letter.

referred to in the second sentence of the putative withdrawal letter. The second December 20, 2002 letter to Mr. Piper states as follows:

> The Department of Environmental Protection has reviewed the proposal for an alternate sewage disposal system consisting of the AB Soil System using a Ecoflow Biofilter...The Department is submitting these comments pursuant to the requirements of 25 Pa. Code § 73.72(f).
>
> The Department believes the submission may be deficient because is does not appear to demonstrate that the requirements of 25 Pa. Code § 73.72 have been satisfied. The Department, of course, is willing to consider any additional information submitted by the applicant to demonstrate that this system satisfies all regulatory requirements. In addition, it may be possible for the system to receive approval as an experimental system if the requirements of 25 Pa. Code § 73.71 are met and documented.
>
> As you are aware, pursuant to 25 Pa. Code § 72.25, it is the municipality's responsibility to take final action on the application by either granting or denying the permit.

Boggs's Memorandum of Law In Opposition To DEP's Motion to Dismiss, unlabelled exhibit.

Boggs filed a new Notice of Appeal of the second December 20, 2002 letter by Notice of Appeal filed on February 3, 2003. That appeal is pending at EHB Docket No. 2003-026-K.

Standard of Review

As we just stated in *County of Berks v. DEP*, EHB Docket No. 2002-286-K:

> As we recently set forth in *Donny Beaver and Hidden Hollow Enterprises, Inc., t/d/b/a Paradise Outfitters v. DEP*, EHB Docket Nos. 2002-096-K/2002-15—K (Opinion issued August 8, 2002):
>
> > The Board evaluates motions to dismiss in the light most favorable to the non-moving party. *Ainjar Trust v. DEP*, 2000 EHB 505, 507; *Wheeling and Lake Erie Railway v. DEP*, 1999 EHB 293, 295. The Board treats motions to dismiss the same as motions for judgment on the pleadings: a motion to dismiss will be granted only where there are no material factual disputes and the moving party is clearly entitled to judgment as a matter of law. *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1281.

County of Berks v. DEP, EHB Docket No. 2002-286-K, slip op. at 5 (Opinion issued February 3,

2003) *citing Donny Beaver and Hidden Hollow Enterprises, Inc., t/d/b/a Paradise Outfitters v. DEP*, EHB Docket Nos. 2002-096-K/2002-15-K, slip op. at 6 (Opinion issued August 8, 2002); *Accord Felix Dam Preservation Society v. DEP*, 2000 EHB 409, 420-21.[2]

Discussion

As we noted, the Department argues that the first, shorter December 20, 2002 letter effectively withdraws the September 23, 2002 Letter and has rendered the appeal of the September 23, 2002 Letter moot. The Appellant's primary argument in opposition to dismissal for mootness is that the *second, longer December 20, 2002 letter* shows that the Department has not really withdrawn the September 23, 2002 Letter. Much of the Appellants' papers in opposition to the instant motion appear to focus on the second letter and argue that, in light of it and the regulatory framework, that the Department has indeed either actually or effectively denied its application.

We think Appellants have not focused properly on what is before us at this juncture and we reject their arguments. The short December 20, 2002 letter withdraws unequivocally the September 23, 2002 Letter. Thus, we are not faced here with the situation the Board faced in the twin cases of *Borough of Edinboro*, 2000 EHB 835 (*Edinboro I*) and *Borough of Edinboro*, 2000

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[2] The Board also noted the following in *County of Berks* and *Donny Beaver*,

> As a matter of practice the Board has authorized motions to dismiss as a "dispositive motion" and has permitted the motion to be determined on facts outside those stated in the appeal when the Board's jurisdiction is in issue. *Florence Township and Donald Mobley v DEP*, 1996 EHB 282, 301-03; *Felix Dam Preservation Association v DEP*, 2000 EHB 409, 421 n.7; *see also Grimaud v DER*, 638 A.2d 299, 303 (Pa. Cmwlth. 1994) ("Where there are no facts at issue that touch jurisdiction, a motion to quash may be decided on the facts of record without a hearing."). Accordingly, the Board has considered the statements of fact and the exhibits contained in the parties' pleadings when resolving these Motions to Dismiss.

EHB 1067 (*Edinboro II*). In those cases the Board dealt with the question of when does a second letter from the Department effectively withdraw a previous letter and when does it not do so. The undersigned had occasion recently to analyze the twin *Edinboro* cases in some detail as follows:

> In *Edinboro I*, the Department sent a letter to the appellants which stated that the Department expected the Borough to prohibit new sewer connections in certain areas and that it was requiring the full participation by the Borough in the development and submission of a Sewage Facilities Plan update together with another municipality. The Borough appealed. Then, the Department sent a second letter which stated that,
>
> > This letter is being sent . . . to clarify the [previous letter]. Please be advised that the [first letter] only intended to inform you of your obligations under Pennsylvania Law. To the extent that a portion of the [first letter] can be construed to require anything beyond what Pennsylvania statutes or regulations require, that was not intended and that portion of the [first letter] is hereby withdrawn.
>
> *[Edinboro I]* at 836. The Department argued that the first letter was not appealable but, in any event the second letter rendered the matter moot. The Board held that the first letter was appealable and, importantly for the present analysis, that the second letter did not render the appeal moot. The Board reasoned as follows:
>
> > The [second letter] does not withdraw the duties imposed by the [first letter]. It does not advise Edinboro that it is no longer required to institute a connection ban, submit a report that describes how overloading will be addressed, or participate in a joint planning effort with Washington Township. It is merely an attempt to characterize the earlier letter as a nonappealable action. It is irrelevant.
>
> *Id.* at 837-38.
>
> Then, in response to the Board's decision denying its first motion to dismiss, the Department issued a third letter to Edinboro. According to the description of that third letter by the Board in its opinion and order on the second Department motion to dismiss which was based [on] the third letter, that letter "specifically withdrew the original letter 'in its entirety' and stated that Edinboro

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County of Berks, slip op. at 5 n.3 *citing Donny Beaver*, slip op. at 6 n.4.

> was not required to take any action." *Edinboro II*, *supra* at 1068. This time the Board granted DEP's motion to dismiss because the third letter "explicitly" and "completely" withdrew the first letter and had, thus, rendered the appeal of the first letter moot. *Id.*

Donny Beaver and Hidden Hollow Enterprises, Inc., t/d/b/a Paradise Outfitters v. DEP, EHB Docket Nos. 2002-096-K/2002-15—K (Opinion issued August 8, 2002)(Krancer, J., Dissenting, slip op. at 32-33.

Appellants do not suggest that the lessons from the first of the twin *Edinboro* cases defeat the Department's Motion. Nor could they since the short December 20, 2002 letter explicitly and completely withdraw the September 23, 2002 letter. Appellants' focus on the second, longer December 20, 2002 letter raises an issue about whether that letter is appealable, but not about whether the first, shorter December 20, 2002 letter effectively withdraws the original September 23, 2002 Letter.[3]

We also reject Appellants' argument that the appeal is not moot because the effect of the first letter has some continuing potential impact or effect on Boggs. Appellant cites the seminal case on this point of *Al Hamilton Contracting Co. v. Department of Environmental Resources*, 494 A.2d 516 (Pa. Cmwlth. 1985). Our most recent application of *Al Hamilton* came in *Goetz v. DEP*, 2001 EHB 1127. In *Al Hamilton*, the Commonwealth Court held that an appeal of a compliance order which had been complied with and consequently lifted was not moot because of the potential that the allegations of violations set forth in the compliance orders may provide the basis for enhanced civil penalties in a future proceeding on account of a provision in environmental laws which allows enhanced penalties to be sought in cases where the violator has a record of prior violations. *Al Hamilton*, *supra*, at 518-19. In *Goetz*, the appeal was from

[3] As we have noted already, an appeal is pending of the second, longer December 20, 2002 letter.

Compliance Orders which Goetz had complied with, DEP had lifted and as to which the Department had agreed to not use as the basis for any enhanced penalties against Goetz under the Non-Coal Surface Mining Act. *Goetz*, *supra* at 1135. Nonetheless, the Board found that the appeals were not moot because the DEP waiver was only partial and that the Compliance Orders still had continuing potential adverse impact on Goetz in that DEP would still be able to consider the alleged violations in potential future permitting decisions under the Non-Coal Surface Mining Act or even in enhanced penalty provisions under environmental laws other than the Non-Coal Surface Mining Act. *Id.* at 1135-36.

We do not see the principles of *Al Hamilton* and *Goetz* applying here. The September 23, 2002 Letter is truly a "dead letter" as to Boggs. There is no potential that we see that the Letter could be used in any way to enhance future penalties or to deny a permit application. The Letter simply has no potential impact on Boggs or any continuing relevance. Whether the second, longer December 20, 2002 letter may have a potential impact which is cognizable before the Board is separate and independent issue from the one which is presented by the instant motion to dismiss.[4]

Accordingly, we issue the following order:

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[4] We add as a final note that the question whether the September 23, 2002 Letter was or was not an appealable is likewise separate and independent from the question posed by the instant motion. That question was at issue in the original Department Motion to Dismiss which was withdrawn but it has no continuing relevance with respect to the instant motion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JACK BOGGS AND FALLING SPRING TECHNOLOGIES	:	
v.	:	**EHB Docket No. 2002-266-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 12, 2003**

ORDER

AND NOW, this 12th day of February, 2003, The Department's motion to dismiss is GRANTED. This appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **February 12, 2003**

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

JOSEPH J. BRUNNER, INC.	:	
	:	
	:	
v.	:	**EHB Docket No. 2002-304-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 14, 2003**

OPINION AND ORDER
ON PETITION TO INTERVENE

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

Synopsis:

The Board denies a steel manufacturer's petition to intervene in an appeal from a Notice of Deficiency sent by the Department to a landfill operator for failing to timely pay a $4.00 disposal fee on solid waste utilized as alternate daily cover, where the petitioner has failed to demonstrate a substantial, direct, and immediate interest in the outcome of the appeal.

OPINION

Joseph J. Brunner, Inc. ("Brunner"), operator of a municipal waste landfill, filed this appeal from a Notice of Deficiency ("NOD") sent to it by the Department of Environmental Protection (the "Department") on October 31, 2002. The NOD was sent to Brunner pursuant to 27 P.S. §6301(a) for failing to timely pay a $4.00 disposal fee on all solid waste disposed of at its landfill during the third quarter of 2002. Specifically, Brunner objects to the Department's assessment of the $4.00 per ton fee for material being utilized by the landfill as alternate daily

cover. Brunner asserts that charging the $4.00 per ton fee for material used as alternate daily cover violates 27 P.S. § 6301(b), which provides that residual waste permitted for beneficial use or for use as alternate daily cover at a municipal waste landfill is exempt from the $4.00 per ton fee.

On January 23, 2003, United States Steel Corporation ("USS") filed a petition to intervene in Brunner's appeal. Brunner has indicated by letter that it does not object to USS's petition to intervene. The Department filed an answer and supporting memorandum of law opposing the petition. The Department argues that USS does not have an interest sufficient to establish a right to intervene.

We have addressed intervention in Board proceedings numerous times. Recently, in *Consol Pennsylvania Coal Co. v. DEP*, EHB Docket No. 2002-112-L (Opinion issued October 10, 2002), slip op. at 2-3, we said:

> We previously enunciated some of the general principles regarding intervention in *Conners v. State Conservation Commission*, 1999 EHB 669, 670-71, as follows:
>
> > Section 4(e) of the Environmental Hearing Board Act, 35 P.S. §7514(e), provides that "[a]ny interested party may intervene in any matter pending before the [B]oard." The Commonwealth Court has explained that, in the context of intervention, the phrase "any interested party" actually means "any person or entity interested, i.e., concerned, in the proceedings before the Board." *Browning Ferris, Inc. v. DER*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991) ("*BFI*"). The interest required must be more than a general interest in the proceedings; it must be such that the person or entity seeking intervention will gain or lose by direct operation of the Board's ultimate determination. *Jefferson County v. DEP*, 703 A.2d 1063, 1065 n. 2 (Pa. Cmwlth. 1997); *Wheelabrator Pottstown, Inc. v. DER*, 607 A.2d 874, 876 (Pa. Cmwlth. 1992); *BFI,* 598 A.2d at 1060-61; *Wurth v. DEP,* 1998 EHB 1319, 1322-23.
>
> > Gaining or losing by direct operation of the Board's determination is just another way of saying that an intervenor must have standing.

> Stating the Commonwealth Court's holdings another way, a party who has standing must be permitted to intervene. *Fointaine v. DEP*, 1996 EHB 1333, 1346. Considerations concerning whether the intervenor's rights will be adequately protected by existing parties and whether the intervenor will add anything new to the proceedings are irrelevant. *General Glass Industries Corp. v. DER*, 1995 EHB 353, 355 n.2.

See also Pennsylvania Game Commission v. DEP, EHB Docket No. 2000-067-R (Opinion issued June 19, 2000), slip op. at 2-3; *Ainjar Trust v. DEP*, EHB Docket No. 99-248-K (Opinion issued January 31, 2000), slip op. at 3-4; *Heidelberg Township v. DEP*, 1999 EHB 791, 793-94.

> A person has standing–and is, therefore, entitled to intervene–if the person is among those who have been or are likely to be adversely affected in a substantial, direct, and immediate way. *Friends of the Earth, Incorporated v. Laidlaw Environmental Services, Inc.*, 120 S. Ct. 693, 704-05 (2000) ("*FOE* "); *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 280-83 (Pa. 1975); *Wurth v. DEP*, EHB Docket No. 98-179-MG, slip op. at 16-17 (Opinion issued February 29, 2000).

In this instance, USS produces steel products. Iron and steel residual wastes from the steelmaking process have been approved for use as alternate daily cover at Pennsylvania landfills. USS, however, does not assert that it has any connection with the Appellant or its landfill. USS indicates that it utilizes various landfills including USA South Hills Landfill, Inc., Monroeville Landfill, and Valley Landfill. All three of these landfills utilize USS's residual waste as alternate daily cover. (Petition ¶¶ 9-10) USS states that the operator of the landfills, Waste Management, Inc., passing along the $4.00 per ton fee for residual waste that is being used as alternate daily cover.[1] (Petition ¶ 11)

USS asserts that it has a direct and immediate interest in this appeal that is greater than the general public because a decision by the Board with regard to the fees will have a substantial

[1] The owner or operator of a municipal waste landfill that collects and remits the $4.00 per ton disposal fee may pass through and collect the fee from any person who delivered waste to the landfill, thereafter the waste transporter or transfer station may obtain the fee from the waste generator. 27 P.S. § 6303(a), (b).

and direct effect on USS's daily disposal of slag and other waste materials it generates. (Petition ¶ 12) The Department argues that USS does not have a direct and immediate interest in the outcome of this appeal sufficient to establish standing to intervene. We agree with the Department. USS fails to allege that its operations are in any way connected to Brunner's. There are no allegations that the operator of the three landfills used by USS has any connection to Brunner. The present appeal is limited to Brunner's landfill and the materials it utilizes as alternate daily cover.

What USS is really arguing is that it has a keen interest in the legal issue that is presented in this appeal. A party with such an interest may very well be entitled to participate as an *amicus curiae*, but such an interest, without more, is insufficient to justify standing as a party. USS will not gain or lose by *direct* operation of anything that we decide vis-à-vis the Brunner landfill. *Cf. McCutcheon v. DER*, 1995 EHB 6, 9 (interest in trying to protect private business interest in use of certain cover material insufficient to confer standing); *Shoff v. DER*, 1995 EHB 140, 145-146 (same).

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOSEPH J. BRUNNER, INC.	:	
	:	
v.	:	**EHB Docket No. 2002-304-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 14th day of February, 2003, the petition to intervene of United States Steel Corporation is Denied.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: February 14, 2003

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

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and
Edward S. Stokan, Esquire
Southwest Regional Counsel

For Appellant:
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SECRETARY TO THE BOAR

CITIZENS ALERT REGARDING THE ENVIRONMENT and DAVID KURTZ	:	
v.	:	**EHB Docket No. 2002-289-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JEFFERSON TOWNSHIP, Appellee	:	**Issued: February 19, 2003**

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By: Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Department's and Jefferson Township's motion for nonsuit at the supersedeas hearing requesting denial of Appellants' Petition for Supersedeas is granted. Appellants, who presented the testimony of only a single witness and no other evidence at the hearing, failed to meet any of the criteria required for the grant of a supersedeas.

OPINION

This matter involves an appeal of the Department's approval, pursuant to the Pennsylvania Sewage Facilities Act,[1] of the most recent revision to Jefferson Township's Official Sewage Facilities Plan (the "2002 Plan Revision"). Notice of the approval—which occurred on September 27, 2002—was published in the Pennsylvania Bulletin on October 19, 2002, and Appellants Citizens Alert Regarding the Environment (CARE) and David Kurtz, *pro*

[1] Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. § 750.1 *et seq.*

se, filed an appeal of the 2002 Plan Revision with this Board on November 12, 2002. According to the Notice of Appeal, CARE is a Pennsylvania non-profit corporation with members who own property in Jefferson Township, Lackawanna County, and Mr. Kurtz is an individual who owns real estate in the Moosic Lakes community situated in Jefferson Township. *See* Notice of Appeal, at ¶¶ 1-2. Appellants objected to the approval of the 2002 Plan Revision, among other reasons, on the basis of: excessive cost; an alleged negative impact from the sewer system to "rare and endangered special habitat of the Moosic Mountain Ridge Top Barrens"; and, the system's connection to the Lackawanna River Basin Sewer Authority—allegedly an "environmentally unsound sewer system." *Id.* at ¶ 5.

I. Procedural Background

On December 19, 2002, Appellants filed an Application for Temporary Supersedeas and a Petition for Supersedeas in which they effectively sought an order from the Board prohibiting Jefferson Township from engaging in further construction of the sewer system, or at least some part of the system, pending resolution of the appeal.[2] Following supplementation of Appellants' papers, the Board issued an Order scheduling a teleconference on January 3, 2003 to address the Application for Temporary Supersedeas. The parties were also informed that the Board planned to hold a hearing on the Petition for Supersedeas commencing January 9, 2003. The Department filed a written response to the Petition on December 31, 2002; in addition to its opposition to the petition, Jefferson Township filed a motion requesting that the hearing be rescheduled for a later

[2] The Application and Petition filed by Appellants were not supported by affidavits, nor did they contain an explanation why supporting affidavits were not submitted, as required by Rule 1021.62(a). In addition, no attorney had yet entered an appearance for CARE in the appeal, as required by Rule 1021.21. The Department, joined by Jefferson Township, filed a Motion to Dismiss the Supersedeas Petition, on December 20, 2002, for failure to comply with Board procedural rules and for substantive deficiency on its face. In lieu of simply denying the Supersedeas Petition in accordance with Rule 1021.62, we provided Appellants with an opportunity to have an attorney enter an appearance for CARE and to supplement their supersedeas papers prior to holding a hearing with respect to the Application for Temporary Supersedeas. On December 23, 2002, an attorney entered an appearance on behalf of CARE. Appellants supplemented their Petition with an affidavit by Kevin J. McDonald, President of CARE, and an affidavit by Mr. Kurtz, both filed on December 24, 2002.

date, due to a conflict that Township counsel had with litigation proceeding in another state.[3]

The Board held a teleconference on January 3, 2003 with respect to the Temporary Supersedeas Application, at which all parties were represented. After several hours of argument on the Application and the Township's motion, we determined that Appellants had failed to satisfy the criteria for issuance of a temporary supersedeas and issued an order denying the Application, stating in part:

> [T]he Board has determined that Appellants have failed to satisfy the criteria for the grant of a temporary supersedeas set forth in 25 Pa. Code § 1021.64(e) and applicable Board precedent. Appellants failed to demonstrate that, before a supersedeas hearing can be held, CARE and/or David Kurtz will suffer immediate and irreparable injury as a direct result of the DEP action which forms the subject of this appeal—*i.e.*, the September 27, 2002 Plan Revision to Jefferson Township's Official Act 537 Plan. Appellants have also failed to show that there exists a likelihood of injury to the public resulting from the September 27, 2002 Plan Revision, which revision merely provides for collected wastewater from Jefferson Township to be treated at the Lackawanna River Basin Sewer Authority's Throop treatment plant, instead of at the Scranton Sewer Authority's treatment plant as called for in the Township's prior Sewage Plan, approved on July 3, 2000.

Order, dated January 3, 2003. We also granted the Township's motion and scheduled the supersedeas hearing to commence on February 5, 2003.[4]

The Board held a supersedeas hearing on February 5, 2003; all parties were present with the exception of Mr. Kurtz who failed to appear for the supersedeas hearing.[5] At the hearing,

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[3] According to the Township's Motion seeking to extend the date for the supersedeas hearing, Mr. Childe, Township counsel and a sole practitioner, was not available for a hearing at any time between January 7, 2003 and January 21, 2003 due to commitments for litigation in Federal District Court in Florida. He requested that the supersedeas hearing be scheduled for a date after January 21, 2003. All parties acquiesced to the extension of the hearing date, with the exception of Mr. Kurtz who opposed the motion.

[4] During the discussion of the motion, Mr. Kurtz indicated that he would not be available for a supersedeas hearing during the week of January 20-24, although the other parties were available during that time frame; he stated that he would be out of the country on business during the last part of January and he could not attend a hearing until the first week of February. Based on discussions with the parties, the earliest available mutual date for the supersedeas hearing was the first week of February, and all parties indicated that they were available on February 5th for the commencement of the hearing.

[5] On the morning of February 5, 2003, the day of the supersedeas hearing, at approximately 9:00 a.m., the Board

CARE presented only the testimony of a single witness, the President of CARE, Mr. Kevin McDonald. CARE did not seek to qualify Mr. McDonald as an expert witness, and his testimony was essentially limited to issues concerning the association's standing. No documents were offered into evidence. *See* Transcript of Supersedeas Hearing (Tr.), at 18-46. Following a brief cross examination of CARE's only witness, CARE rested its case for a supersedeas. (Tr. at 54). The Department and the Township then made a motion for a nonsuit—in effect renewing their motion to deny the Petition for Supersedeas—arguing that Appellants had failed to carry their burden of satisfying the criteria for issuance of a supersedeas by the Board. We granted the motion and denied Appellants' supersedeas petition. (Tr. at 55).

II. Discussion

The Board may grant a supersedeas upon cause shown. 35 P.S. § 7514(d)(1). In granting or denying a supersedeas, the Board will be guided by relevant judicial, and the Board's own, precedent. 25 Pa. Code § 1021.63(a). Among the factors the Board considers when determining whether to issue a supersedeas are: (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. *Id.* Notably, 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." 25 Pa. Code § 1021.63(b).

"Where the mandatory prohibition against issuance of a supersedeas does not apply, the Board ordinarily requires that all three statutory criteria must be satisfied. . . . In the final analysis, [however,] the issuance of a supersedeas is committed to the Board's discretion based

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received a telephone call from Mr. Kurtz. During the call, Mr. Kurtz informed the Board, for the first time, that he was scheduled to appear at a hearing before the Disciplinary Board that same day. Mr. Kurtz stated that he had unsuccessfully attempted to have the Disciplinary Board hearing continued; that he was going to appear at the Disciplinary Board hearing; that he would not be appearing for the supersedeas hearing; and, that the supersedeas hearing should simply proceed without him. He made no request for a continuance of the supersedeas hearing. He also stated that he had informed the attorney for CARE that he would not be appearing at the supersedeas hearing.

upon a balancing of all of the statutory criteria." *Global Eco-Logical Services, Inc. v. DEP*, 1999 EHB 649, 651 (citations omitted).

Appellants failed to satisfy their burden of demonstrating any of the three statutory criteria for issuance of a supersedeas. There was no evidence presented regarding any irreparable harm that would be suffered by Appellants from the Department's approval of the 2002 Plan Revision. The only salient issue that the Board could discern from the testimony offered was that the association had a concern that installation of a sewage collection system in Jefferson Township may spur residential or commercial development. (Tr. 38-40). There was some vague testimony regarding alleged harm to special habitat of the Moosic Mountain Barrens by construction of the sewage system, but there was no explanation of the nature of such harm and no evidence of causation offered. Moreover, CARE's witness was not qualified as an expert and there was no proper evidentiary basis for an assertion that a special habitat exists on Moosic Mountain, or that such habitat, if it exists, would be affected by the sewer system. Indeed, the Board was unable to ascertain, from the evidence presented, the most basic facts concerning this appeal such as, *e.g.*, the planned route of the sewage conveyance system.[6]

No evidence was offered with respect to alleged legal deficiencies in the Department's approval. There was no evidence or argument whatsoever to support any of Appellants' objections to the 2002 Plan Revision, and no evidence upon which an argument for a likelihood of success on the merits of the appeal could be grounded. Finally, CARE presented no evidence

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[6] Ultimately, it was not clear what Appellants were seeking in the petition. They seemed to be requesting the Board simply to order the Township to cease all construction of its entire sewage system, even though the 2002 Plan Revision apparently involves only a determination to convey collected wastewater from Jefferson Township to a Lackawanna River Basin Sewer Authority treatment plant, instead of to the Scranton Sewer Authority's treatment plant, (as called for in a prior plan revision approved in 2000). The Board lacks the power to grant a supersedeas that seeks only equitable relief such as an injunction. *See Darlene Thomas v. DEP*, 1998 EHB 778, 782-83 (discussing distinction between a supersedeas and injunctive relief and denying petition for supersedeas that sought only injunctive relief). Moreover, this appeal concerns only the changes to Jefferson Township's Official Sewage Facilities Plan that were made in the 2002 Plan Revision. Appellants presented no evidence which would enable the Board to understand the modifications at issue in this appeal, nor how those modifications will cause harm.

concerning injury to the public that would be caused by the Department's approval of the 2002 Plan Revision.

Appellants having failed to satisfy any of the criteria for the grant of a supersedeas, we granted the motion for nonsuit and denied Appellants' Supersedeas Petition.[7] Accordingly, we enter the following Order:

---

[7] In the week before the hearing, the Department filed a Motion in Limine, which was joined by Jefferson Township. The Department's Motion requests the Board to preclude the presentation of any evidence by Appellants concerning issues that are outside the scope of the 2002 Plan Revision. CARE filed opposition to the Motion prior to the hearing, but Mr. Kurtz has filed no response to date.

In support of its request, the Department first invoked principles of administrative finality, because prior plan approvals in 1996 and 1997 were not appealed by either CARE or Mr. Kurtz and their separate appeals of a 2000 plan revision approval were either withdrawn or dismissed. *See Kurtz v. DEP*, EHB Dkt. No. 2000-182-MG (dismissed by Order dated May 10, 2001); *Citizens Alert Regarding the Environment v. DEP*, EHB Dkt. No. 2000-162-L (withdrawn by appellant and docket marked closed and discontinued by Order dated April 19, 2002).

The Department also argued, citing the Board's holding in *Winegardner v. DEP*, No. 2002-003-L, 2002 Pa. Envirn. LEXIS 55, at *5-*11 (EHB, Sept. 17, 2002), that an appellant may not use an appeal from the most recent update to an Act 537 Plan as a vehicle for attacking concepts contained in previous updates; the scope of such an appeal is limited to objections material only to the changes in the most recent update.

We heard oral argument on the Motion prior to commencing the supersedeas hearing. We reserved a ruling on the motion until the conclusion of the hearing, but granted a continuing objection to the Department and the Township with respect to the relevance of questions pertaining to information that may lie outside the scope of the issues raised by the 2002 Plan Revision. In that way, determinations could be made with respect to specific questions during the course of the hearing. (Tr. at 18). At the close of the hearing, we granted the Motion in Limine solely with respect to the supersedeas hearing. (Tr. at 56). However, we reserve any ruling on the issues of administrative finality raised in the Motion in Limine until a suitable motion for partial summary judgment is made. *See Perkasie Borough Authority v. DEP*, No. 2001-267-K, 2002 Pa. Envirn. LEXIS 56, at *9-*11 (EHB, Sept. 17, 2002). Similarly, we will not resolve issues concerning the proper scope of this appeal, which may be dispositive, in the context of a motion in limine. *See Winegardner, supra* at *2 n.1.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

CITIZENS ALERT REGARDING THE ENVIRONMENT and DAVID KURTZ	:	
v.	:	**EHB Docket No. 2002-289-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JEFFERSON TOWNSHIP, Appellee	:	

ORDER

AND NOW, this 19th day of February, 2003, pursuant to 25 Pa. Code § 1021.63, it is hereby ORDERED that Appellants' Petition for Supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Administrative Law Judge
Member

Dated: February 19, 2003

c: **For the Commonwealth,**
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Northeastern Regional Counsel
Joseph S. Cigan, Esquire

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PENNSYLVANIA TROUT, TROUT UNLIMITED—PENNS WOODS WEST CHAPTER and CITIZENS FOR PENNSYLVANIA'S FUTURE	:	
v.	:	**EHB Docket No. 2002-251-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ORIX-WOODMONT DEER CREEK VENTURE, Permittee	:	**Issued: February 20, 2003**

OPINION AND ORDER ON
MOTION TO COMPEL CORPORATE DESIGNEE DEPOSITION
MOTION FOR SANCTIONS AND MOTION TO COMPEL
MORE SPECIFIC ANSWERS TO INTERROGATORIES

By Thomas W. Renwand Administrative Law Judge

Synopsis:

Interrogatories seeking the factual basis of an Appeal are proper. Factual information otherwise discoverable is not shielded from discovery by the attorney work-product doctrine. The Pennsylvania Rules of Civil Procedure set forth specific procedures for the discovery of expert testimony. These specific procedures take precedence and the Board will not order a corporate designee deposition for the discovery of basically expert testimony. Where a party raises the attorney-client privilege to the discovery of documents, the Board will order the party to file a privilege log so the Board may properly evaluate whether the privilege applies.

OPINION

Presently before the Board are the following Motions filed by Permittee Orix-Woodmont Deer Creek Venture (Orix-Woodmont): 1) Motion to Compel More Specific Answers to Interrogatories; and 2) Motion to Compel Corporate Designee Deposition and Motion for Sanctions.

Orix-Woodmont also filed a supporting Memorandum of Law. The Motions are directed against Appellants Pennsylvania Trout, Trout Unlimited – Penns Woods West Chapter, and Citizens for Pennsylvania's Future (Penn Future). Penn Future vigorously opposes the Motions. Penn Future has also filed a supporting Memorandum of Law. The Department of Environmental Protection (Department) has not taken any written position regarding the Motions.

Penn Future appealed the Department's issuance of a Water Obstruction and Encroachment Permit (Permit) for Orix-Woodmont's proposed shopping center and office complex (a "mixed – use commercial center" according to the Permit) in Harmar Township, Allegheny County, Pennsylvania. Notice of the Permit was published in the *Pennsylvania Bulletin* on September 14, 2002. On October 15, 2002, Penn Future filed its Notice of Appeal requesting this Board to revoke the Permit. On November 27, 2002, Penn Future filed an Amended Notice of Appeal.

The Board earlier denied Orix-Woodmont's Motion for an expedited hearing. Nevertheless, the parties are proceeding to a hearing in a much more rapid fashion than in the usual Appeal. A merits hearing is scheduled to begin on May 13, 2003.

The Amended Notice of Appeal sets forth somewhat concise objections to the Department's Action of issuing the Permit. In addition to reserving its right to file objections for anything learned

in discovery, Penn Future objects to the Department's action:

1) because the Permit does not comply with 25 Pa. Code Chapter 105;
2) because Orix-Woodmont did not affirmatively demonstrate that there was no practicable alternative to the proposed project nor did the Department make all the findings required under 25 Pa. Code § 105.18a(b);
3) because adverse impacts on the affected wetlands were not avoided or reduced to the maximum extent possible;
4) because Orix-Woodmont did not adopt alternative configurations, as a reduction in size and scope of the development could have minimized its impact on the wetlands;
5) because Orix-Woodmont neither adequately explored off-site alternatives nor did it provide reliable and convincing evidence to support its bases for excluding various off-site locations; including, but not limited to, availability and economic feasibility; and
6) because Orix-Woodmont's definition of the "basic purpose of the project is, among other things, improperly narrow and specific."

1. **Motion to Compel More Specific Answers to Interrogatories**

Orix-Woodmont served Penn Future with two sets of interrogatories. It is moving to compel more specific answers to three of the interrogatories. In its first set of interrogatories, Orix-Woodmont asked Penn Future to "identify each and every individual of whom you are aware who has knowledge and/or information that relates to and/or supports the allegations of the Appeal."

Penn Future first filed an answer objecting to the interrogatory as "overly broad and unduly burdensome." It evidently amended its answer to list 28 individuals. In light of the amended answer filed by Penn Future after Orix-Woodmont's Motion to Compel we will not require any further supplementation at this time.

The next interrogatory answer Orix-Woodmont believes is legally deficient is Penn Future's answer to Interrogatory 2 of Orix-Woodmont's second set of interrogatories. This interrogatory asked Penn Future to "set forth in detail all properties whether previously considered by Permittee or not, that each Appellant Organization contends or may contend are practicable alternatives pursuant to Section 105.18a(b)(1-7). For each property listed, set forth in detail why it is a preferable alternative to the subject property." Penn Future answered as follows: "Appellants object to Interrogatory 2 to the extent it seeks attorney work product in asking for properties Appellants may contend are practicable alternatives. Not waiving this objection, Appellants have not yet determined which, if any, properties it will contend are practicable alternatives." In its Memorandum of Law, Penn Future expands on its response. It argues that "insofar as Interrogatory 2 asks for the identity of properties Appellants *'may contend'* are practicable alternatives, it seeks the mental impression and legal conclusions of Appellants' counsel and is clearly protected work product." Penn Future cites to Pennsylvania Rule of Civil Procedure 4003.3 and *Hickman v. Taylor*, 329 U.S. 495, 511 (1949) in support of its contention.

The Pennsylvania Rules of Civil Procedure together with the Board's Rules envision the broad discovery of information. The "attorney work product" doctrine is a narrow exception

basically intended to protect the internal legal memoranda of attorneys. See *Claster v. Citizens General Hospital*, 14 D.&C.Pa.3d 243, 248-250 (1980). If we adopted Penn Future's position arguably all factual information regarding this Appeal would be protected from disclosure as long as Penn Future's attorney was formulating a legal argument that the Department's permit approval was legally flawed. Penn Future's attorney's legal memoranda are clearly protected. However, Penn Future contends that other properties were practicable alternatives to the property selected by Orix-Woodmont and approved by the Department. In its Memorandum of Law Penn Future also contends that its experts are still evaluating this interrogatory and "answers are not yet available." Ignoring for the moment the fact that this objection was neither raised in its answer to the interrogatories nor in its response to the Motion to Compel, simply because Penn Future will offer expert testimony to support its alternative properties argument does not shield from discovery *at this time* the factual underpinnings of its position. At this late date Penn Future should surely have identified these alternative properties and Orix-Woodmont is entitled to a detailed listing of these properties. This information is relevant and goes to the very heart of Penn Future's Appeal.

Interrogatory 3 of Orix-Woodmont's Second Set of Interrogatories directed to Appellants reads as follows: "If you contend that any of the alternatives analyzed by Permittee should have been chosen over the subject site, set forth in detail the identification of each such property and the specific reasons why each Appellant Organization believes that said off-site alternative was more practicable as set forth in Section 105.18a(b)." Appellants admit that they did not answer this interrogatory although they contend that their failure to answer was "inadvertent." Appellants further

contend that the interrogatory basically is asking for expert opinion which they contend their experts are still formulating. Putting aside for the moment the fact that Appellants' failure to file any response to the Interrogatory, inadvertent or not, can be considered by the Board as a waiver of any objections to the Interrogatory, we believe that Orix-Woodmont is entitled to the identification of the subject properties. Since Appellants failed to file any objection whatsoever to the interrogatory we will also require them to set forth their specific reasons why they believe that said off-site alternatives were more practicable than the subject-site.

Orix-Woodmont also moved that we require the interrogatory answers to be properly verified pursuant to Pennsylvania Rule of Civil Procedure 4006(a)(2). Following the filing of Orix-Woodmont's Motion to Compel, Penn Future has filed a verification to the answers and responses.

2. **Corporate Designee Deposition and Motion for Sanctions**.

A review of the papers leads us to believe that the only people who would have knowledge of the important areas listed in the Notice of Corporate Designee Deposition are Appellants' attorney and experts. We are hesitant to allow the deposition of Appellants' attorney. The Pennsylvania Rules of Civil Procedure set forth a specific procedure for conducting expert discovery. Once Appellants serve their expert reports, if an appropriate Motion is filed, we will consider further discovery including oral testimony according to the guidelines specifically set forth in the Pennsylvania Rules of Civil Procedure.

We also will deny Orix-Woodmont's request that we sanction Appellants in the amount of $1,000 for failing to produce a corporate designee who could testify in all of the areas set forth in the

Notice of Deposition. We find no fault on either Penn Future's part or on the part of their attorney. In fact, Penn Future's attorney warned counsel for Orix-Woodmont that going through with the corporate designee deposition likely would not be productive for any of the parties.

3. **Privilege Log**

Appellants have refused to produce certain documents based on a claim of attorney-client privilege. In order to properly evaluate this claim, Appellants' counsel shall prepare a privilege log of all withheld documents and file such log with the Board on or before February 28, 2002.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNSYLVANIA TROUT, TROUT UNLIMITED—PENNS WOODS WEST CHAPTER and CITIZENS FOR PENNSYLVANIA'S FUTURE	:	
v.	:	**EHB Docket No. 2002-251-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ORIX-WOODMONT DEER CREEK VENTURE, Permittee	:	

ORDER

AND NOW this, 20th day of February, 2003, it is ordered as follows:

1) Appellants shall file answers to Interrogatories 2 and 3 of Orix-Woodmont's Second Set of Interrogatories as set forth in this Opinion. Said Answers shall be filed on or before **February 28, 2003**.

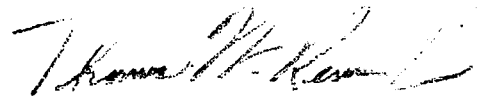
2) Orix-Woodmont's Motion to Compel a More Specific Answer to Interrogatory 7 of Orix-Woodmont's First Set of Interrogatories is **denied**.

3) Orix-Woodmont's Motion to Compel Corporate Designee Deposition and Motion for Sanctions are **denied**.

4) Penn Future shall prepare a privilege log of all documents not produced

which it claims are protected by the attorney-client privilege. The privilege log shall be filed with the Board on or before **February 28, 2003**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: February 20, 2003

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

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WILLIAM T. PHILLIPY I
SECRETARY TO THE BOA

SOLEBURY TOWNSHIP and BUCKINGHAM TOWNSHIP	:	
v.	:	**EHB Docket No. 2002-323-K (Consolidated with 2002-320-K)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Permittee	:	**Issued: February 20, 2003**

OPINION AND ORDER ON MOTION TO DISMISS

By Michael L. Krancer, Administrative Law Judge

Synopsis:

PennDOT's motion to dismiss, in which the Department joins, for untimely filing of the Notices of Appeal is denied. The Notices of Appeal state that they appeal the Department's granting of Section 401, Federal Water Pollution Control Act, Water Quality Certification to PennDOT's Section 700 road construction project. The action was taken in a letter dated January 20, 1999 which specifically stated that the Department was approving PennDOT's environmental assessment for the Section 700 Project and that the approval of the environmental assessment includes Section 401 Certification. The subsequent March 20, 1999 Notice in the Pennsylvania Bulletin stated only the Department had granted approval of an environmental assessment. The Board holds that the Notice in the Pennsylvania Bulletin, under the circumstances presented here, was not reasonably calculated to provide notice of the approval of Section 401 certification.

Factual and Procedural Background

Before the Board is the Commonwealth of Pennsylvania, Department of Transportation's (PennDOT) Motion to Dismiss the Notices of Appeal filed by the Appellants on December 17, 2002 (Buckingham Township) and December 18, 2002 (Solebury Township), which Motion is joined by the Department.[1] The sole basis for each of the motions to dismiss is that the appeals were filed well beyond the 30 day time allowed for appeal.

Both Appellants' Notices of Appeal state that they are appealing the Section 401 water quality certification for a PennDOT road construction project known as the U.S. Route 202 Section 700 bypass project (the Section 700 Project). The Section 700 Project is a prospective 11 mile stretch of limited access, four lane highway which, if constructed, will connect U.S. Route 202 in Upper Gwynedd Township, Montgomery County to U.S. Route 611 in Doylestown Township, Bucks County.

Both Notices of Appeal attach as the action being appealed a letter dated January 20, 1999 from James Newbold, Regional Manager of the Southeast Region Water Management Program to Mr. Vito Genua of PennDOT. The letter states, in relevant part, as follows:

> This is in reference to your request, dated December 11, 1997, for 401 Water Quality Certification for the construction and maintenance of a proposed limited access highway which is also referred to as the new alignment alternative or the U.S. Route 202, Section 700 bypass project...
>
> Based on a review of your environmental assessment reports and supplemental information that was received on December 23, 1997 and January 23, March 24, April 13 and 28, May 21, July 10 and December 10, 1998, the Pennsylvania Department of Environmental Protection (DEP) is approving your environmental assessment with the following conditions:

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[1] Both Notices of Appeal challenge the very same Department action and, thus, the two cases were consolidated by Order dated February 19, 2003. Another appeal of the same Department action was filed on January 16, 2003 by Delaware Riverkeeper, Maya van Rossum, and the Delaware Riverkeeper Network, which case is docketed at EHB Docket No. 2003-012-K. Appellants in that case have filed a motion to consolidate it into these cases which motion is still under review. No motion to dismiss for untimeliness has been filed in the *Riverkeeper* case as of this time.

[conditions omitted]

This approval of your environmental assessment includes 401 Water Quality Certification. Be aware that this certification shall not be construed to waive or impair any rights of the DEP during the review of permits or other approvals which are required for this project. If you have any questions please feel free to contact Mr. Joseph Snyder of this office...

(January 20, 1999 Letter). The January 20, 1999 Letter shows that it was carbon copied to a host of persons and municipalities, but not to either appellant in this case.

Notice had been published in the Pennsylvania Bulletin long before the issuance of the January 20, 1999 Letter that PennDOT was requesting Section 401 Water Quality Certification for the Section 700 Project. The following notice appeared in the January 31, 1998 edition of the Pennsylvania Bulletin:

ENVIRONMENTAL ASSESSMENT

Requests for Environmental Assessment approval under 25 Pa. Code § 105.15 and requests for certification under section 401 of the Federal Water Pollution Control Act

***

Southeast Regional Office, Program Manager, Water Management Program, Lee Park, Suite 6010, 555 North Lane, Conshohocken, PA 19428

EA09-004SE, EA46-001SE, Encroachment. **PA DOT,** 200 Radnor Chester Rd. St. Davids, PA 19087. Commonwealth of Pennsylvania Department of Transportation is requesting 401 water quality certification to construct and maintain a limited access expressway beginning at a point just south of S.R. 63 (Ambler, PA USGS Quadrangle, N: 16.5 inches; W: 17.2 inches) and ending at an interchange with S.R. 611 (Doylestown, PA USGS Quadrangle, N: 7.9 inches; W. 1.9 inches). This expressway will run roughly parallel to a portion (Section 700) of the existing U.S. Rte. 202. This project will involve the construction and maintenance of the following:

a) 11 new bridge structures with approximately 1,875 linear

feet of impacts to watercourses.

b) 9 new culvert stream crossings with approximately 1,735 linear feet of impacts to watercourses.

c) 6 extensions of existing culvert structures with approximately 190 linear feet of impacts to watercourses.

The project will also impact a reported 14.9 acres of wetlands. The impacted water resources are located within the West Branch Neshaminy Creek (WWF, MF), Mill Creek (TSF, MF), Little Neshaminy Creek (WWF, MF) and Neshaminy Creek (TSF, MF) watersheds. The expressway will be located through sections of the Townships of Montgomery, Lower Gwynedd and Upper Gwynedd, Montgomery County, and within the Boroughs of Chalfont and New Britain, and the Townships of Doylestown, New Britain and Warrington in Bucks County.

28 Pa. Bull. 542 (January 31, 1998)(hereinafter referred to as the January 31, 1998 Notice)(bolding and italics in the original)(underlining for emphasis supplied). As is quite clear, the January 31, 1998 Notice provided that PennDOT was requesting "401 water quality certification" for the Section 700 Project.

Notice in the Pennsylvania Bulletin was also published after, and with regard to, the January 20, 1999 Letter. That notice, which is the basis for PennDOT's contention that the appeal of the January 20, 1999 Letter is untimely, was published in the Pennsylvania Bulletin on March 20, 1999. The notice provides as follows:

ENVIRONMENTAL ASSESSMENT

Southeast Regional Office: Program Manager, Water Management Program, Lee Park, Suite 6010, 555 North Lane, Conshohocken, PA 19428.

EA09-004SE AND EA46-001SE. Environmental Assessment. **Pennsylvania Department of Transportation, District 6-0**, 200 Radnor-Chester Road, St. Davids, PA 19087. The Department is granting conditional approval of the Environmental Assessment for a proposal to construct and maintain a limited access expressway, beginning at a point just south of S.R. Route 63 (Ambler, PA USGS Quadrangle N: 16.5 inches; W: 17.2 inches) and ending at an interchange with S.R. Route 611

> (Doylestown, PA USGS Quadrangle N: 7.9 inches; W: 1.9 inches). This expressway will run essentially parallel to a section (Section 700) of the existing U.S. Route 202, and will impact a reported 6,500 linear feet of watercourse and 16 acres of wetland. The impacted water resources are located within the West Branch Neshaminy Creek (WWF, MF), Mill Creek (TSF, MF), Little Neshaminy Creek (WWF, MF) and Neshamininy Creek (TSF, MF) watersheds. The expressway will be located through portions of the Townships of Lower Gwynedd, Upper Gwynedd and Montgomery within Montgomery County, and the Townships of Doylestown and Warrington within Bucks County. PennDOT will be developing a mitigation plan to compensate for the proposed impacts to wetlands and watercourses.

29 Pa. Bull. 1555 (March 20, 1999)(hereinafter referred to as the March 20, 1999 Notice)(bold in the original).

PennDOT's motion is very straightforward. It argues that under 25 Pa. Code § 1021.52(a)(2)(i), a third party appeal, as these are, must be filed within 30 days of publication of notice of the action in the Pennsylvania Bulletin. 25 Pa. Code § 1021.52(a)(2)(i). PennDOT states that notice of the 401 certification was published in the Pennsylvania Bulletin on March 20, 1999, and, thus, these appeals, which were filed on December 17th and 18th, 2002, are obviously too late and must be dismissed. The essence of the Appellants' counter-argument is equally straightforward. They argue that the March 20, 1999 Notice was notice of an approval of an environmental assessment, not notice of any purported approval of a Section 410 Certification. It is the approval of the Section 401 Certification which is under appeal, not the approval of the environmental assessment.

Standard of Review

As we recently set forth in *County of Berks v. DEP*, EHB Docket No. 2002-286-K (Opinion issued February 4, 2003) and in *Donny Beaver and Hidden Hollow Enterprises, Inc., t/d/b/a Paradise Outfitters v. DEP*, EHB Docket Nos. 2002-096-K/2002-15—K (Opinion issued August 8, 2002):

> The Board evaluates motions to dismiss in the light most favorable to the non-moving party. *Ainjar Trust v. DEP*, 2000 EHB 505, 507; *Wheeling and Lake Erie Railway v. DEP*, 1999 EHB 293, 295. The Board treats motions to dismiss the same as motions for judgment on the pleadings: a motion to dismiss will be granted only where there are no material factual disputes and the moving party is clearly entitled to judgment as a matter of law. *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1281.

Donny Beaver, slip op. at 6 (footnote omitted). *Accord Felix Dam Preservation Society v. DEP*, 2000 EHB 409, 420-21.[2]

Discussion

It is virtually black letter law that notice provided must be at least that which is reasonably calculated to inform interested parties of the action taken and provide the information necessary to provide an opportunity to present objections, or, in our case, to appeal to the Board. *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950); *Pennsylvania Coal Mining Association v. Insurance Department*, 370 A.2d 685 (Pa. 1977). Given this standard for notice and the difficult standard to achieve dismissal, we cannot, under the circumstances presented to us here, grant PennDOT's request to dismiss this case.

The specific wording of the March 20, 1999 Notice states that the Department is granting approval of the *environmental assessment* for the Section 700 Project, it says nothing about granting approval for Section 401 Certification. This silence in the March 20, 1999 Notice on the 401 Certification is even more salient in light of the original January 31, 1998 Notice which

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[2] As the Board noted in *Donny Beaver*,

> As a matter of practice the Board has authorized motions to dismiss as a "dispositive motion" and has permitted the motion to be determined on facts outside those stated in the appeal when the Board's jurisdiction is in issue. *Florence Township and Donald Mobley v DEP*, 1996 EHB 282, 301-03; *Felix Dam Preservation Association v DEP*, 2000 EHB 409, 421 n.7; *see also Grimaud v DER*, 638 A.2d 299, 303 (Pa. Cmwlth. 1994) ("Where there are no facts at issue that touch jurisdiction, a motion to quash may be decided on the facts of record without a hearing."). Accordingly, the Board has considered the statements of fact and the exhibits contained in the parties' pleadings when resolving these Motions to Dismiss.

Donny Beaver, slip op. at 6 n.4.

specifically states that PennDOT is requesting 401 water quality certification. Also, while the January 20, 1999 Letter states that "this approval of your environmental assessment includes 401 Water Quality Certification", the March 20, 1999 Notice relied upon by PennDOT and the Department does not follow through on the reference in the January 20, 1999 Letter to its including Section 401 Water Quality Certification.

We take further note of the fact that Appellant Buckingham Township has pointed out other instances where Pennsylvania Bulletin notices of approvals of Section 401 Certifications have specifically stated that the notice is regarding the approval of a Section 401 Certification. Appellant's Answer And New Matter To Permittee's And DEP's Motion To Dismiss, Ex. B, C and D. As we have pointed out, the March 20, 1999 Notice, which PennDOT and DEP contend provides notice of the Section 401 Certification, did not likewise so specifically state.

The Department and PennDOT's joint reply goes to great lengths, with extensive citations to the regulations, to attempt to show us that approval of the environmental assessment *is* approval of the Section 401 Certification. That argument misses the point on several levels. First, Appellant Solebury has told us that "[a]pproval of an environmental assessment is a separate departmental action from issuance of the 401 Water Quality Certification". Solebury Memorandum of Law In Response to Motion to Dismiss at 6. Thus, we have a disputed factual or mixed factual and legal question precluding dismissal. We are not prepared at this stage to come to the factual and/or mixed factual and legal conclusion posited by the Department on that point. At the very least, it is not clear that the Department is entitled to judgment on this question as a matter of law.

Also, the very complexity of the analysis undertaken in the joint reply shows that the March 20, 1999 Notice, which states that it is notice of the approval of an *environmental*

assessment, should not be considered to provide reasonable notice that it is, at the same time, also an approval of a *Section 401 Certification.* Perhaps one who has a law degree *and* who has extensive long-term experience dealing in the field of Section 401 Certifications could come to the conclusion that the approval of an environmental assessment is the same thing as an approval of a Section 401 Certification, but I doubt this could be said about most of the rest of us—this Judge included.[3] As the Board said in a similar case, "[i]t is unreasonable to assume that members of the public are intimately acquainted with the minutiae of the Department's manner of administering its regulatory programs and that, as a result, they receive notice of the issuance of a mining permit from the issuance of a Mine Drainage Permit." *P.R.I.D.E. v. DER*, 1986 EHB 905, 907.

Neither appellant cited *P.R.I.D.E*, and one may argue that it is not exactly the same situation as we have here, but we think the case is very instructive and we take guidance from it.[4] In *P.R.I.D.E.*, the Board held that publication of notice of the issuance of a mine drainage permit did not act as notice of the issuance of the accompanying mining permit. The Department, in its motion to dismiss the appeal of the mining permit as having been filed late, presented affidavit evidence that it normally did not publish separate notification of the issuance of a mining permit, that mining permits were usually issued simultaneously with the mine drainage permit and, thus, the notice of the mine drainage permit served as notice of the issuance of the mining permit.

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[3] Our conclusion here is bolstered by what we have already noted about the contrast between the January 31, 1998 Notice, which states specifically that PennDOT is requesting Section 401 Certification, and the March 20, 1999 Notice which does not specifically state that it relates to Section 401 Certification approval; the contrast between January 20, 1999 Letter, which does state that approval of the environmental assessment includes 401 Water Quality Certification and the March 20, 1999 Notice which does not say anything specifically about Section 401 Certification; and the March 20, 1999 Notice which does not state specifically that it is a Section 401 Certification approval and other notices of Section 401 Certification approval which do state specifically that they are approvals of Section 401 Certifications.

[4] We do note that counsel for appellants in *P.R.I.D.E.* is the same counsel who represents Appellant Buckingham Township in this case.

P.R.I.D.E., *supra* at 906-07. The Board rejected that argument reasoning that, although the permits were related, they were separate and independent permits. *Id.* at 907. Also, the Board concluded from its review of the notice language itself, which specifically stated that "permit" had been issued, that it was unreasonable to assume that a member of the public would be notified of the issuance of two permits. *Id.* at 908. The Board specifically noted that, "the publication did not mention the mining permit...Only issuance of the mine drainage permit is evident from the publication. In addition, the singular form of the noun "permit" is employed to describe DER's action". *Id.* As we have discussed, much of what the Board said and its rationale in *P.R.I.D.E.* when it concluded that the notice in that case was not reasonably calculated to provide notice of the issuance of the mining permit is applicable here in our concluding that the March 20, 1999 Notice did not include notice of the Section 401 Certification.

Also, the January 20, 1999 Letter itself states that "[t]his approval [of the environmental assessment] also includes 401 Water Quality Certification". Thus, even the author of the approval letter himself thought it necessary, wise, or prudent to point out, specifically and separately, that approval of the environmental assessment includes approval of 401 Water Quality Certification. The Department could have been spared the present extensive and time-consuming effort on the joint reply, and, perhaps, in the further proceedings in this case, had it spent just a fraction of that time and effort back in 1999 when it drafted the March 20, 1999 Notice by simply stating specifically in that notice, as it did in the letter, that approval of the environmental assessment included 401 Certification.[5]

[5] The Department's and PennDOT's joint reply also spends a great deal of time and effort going through virtually each and every allegation contained in both NOAs and arguing that almost all of the contentions presented by the Appellants are, in reality, challenging the environmental assessment which is foreclosed due to un-timeliness. At first blush, based on our review of the Notices of Appeal, much of what the Department has to say in this regard,

We do not think it is unreasonable, on a motion to dismiss, to construe the published notice strictly against the party or parties seeking to rely on it. This is especially so where the Department is one of those parties seeking to rely on the notice and it is the party who controls the publication of the notice. Given the total absence of any specific reference to the granting of section 401 water quality certification in the March 20, 1999 Notice combined with the contrasts and anomalies between the March 20, 1999 Notice versus the original January 31, 1999 Notice and the January 20, Letter, we cannot conclude that the March 20, 1999 Notice was sufficient to pass the test on a motion to dismiss that it was reasonably calculated to provide due notice to these appellants that the Department had granted section 401 water quality certification. Therefore, PennDOT's and the Department's motion to dismiss which, to be granted, required an affirmative conclusion in that regard must be denied.

Accordingly, we enter the following Order.

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seems possibly so. However, as the joint reply states, "this argument might more properly belong in a Motion in Limine". Joint Reply at 3. Also, perhaps, in a motion for summary judgment. In any event, this argument is raised for the first time in the reply, Appellants have had no chance to respond, and we will not entertain it now. *Greenfield Good Neighbors v. DEP*, EHB Docket No. 2002-006-R (Opinion issued September 24, 2002), slip op. at 7.

Likewise, based on our denial of the Motion to Dismiss, we need not deal with Appellant Buckingham's alternative contention that the Board should allow appeal *nunc pro tunc*.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SOLEBURY TOWNSHIP and BUCKINGHAM TOWNSHIP	:	
v.	:	**EHB Docket No. 2002-323-K**
	:	**(Consolidated with 2002-320-K)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Permittee	:	

ORDER

AND NOW this 20th day of February, 2003, it is hereby ORDERED that: (1) PennDOT's Motions to Dismiss, in which the Department joins, are both **DENIED**; (2) The Order For Temporary Stay of Discovery entered in these cases on January 22, 2003 is **VACATED**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
ADMINISTRATIVE LAW JUDGE
Member

DATED: February 20, 2003

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

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2001-280-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LOWER MOUNT BETHEL ENERGY LLC, Permittee	:	**Issued: February 21, 2003**

OPINION AND ORDER GRANTING APPELLANT'S PETITION FOR RECONSIDERATION

By: Michelle A. Coleman, Administrative Law Judge

Synopsis:

Appellant's petition for reconsideration of an order issued with respect to a discovery motion is granted, and the order is revised to vacate the overruling of Appellant's assertion of the deliberative process privilege in response to Permittee's discovery requests. An intervening change in the applicable law, enunciated by the Commonwealth Court, constitutes extraordinary circumstances justifying reconsideration of the matter. Commonwealth Court having expressly recognized the existence of the deliberative process privilege as part of Pennsylvania law, and Appellant having met its initial burden of showing that the privilege applies to certain documents it seeks to shield from disclosure, Appellant is entitled to invoke the privilege in this proceeding. The Board reserves, however, any ruling on whether the Appellant has properly asserted the privilege with respect to the specific documents itemized in Appellant's privilege log until the issue has been joined in an appropriate motion seeking such a ruling.

OPINION

This appeal concerns a challenge by the New Jersey Department of Environmental Protection (NJDEP) to Plan Approval No. 48-328-004, issued on October 29, 2001 by the Pennsylvania Department of Environmental Protection (PADEP) to Lower Mount Bethel Energy, LLC (LMBE) pursuant to the Air Pollution Control Act.[1] The Plan Approval authorizes construction of a combined cycle turbine electric generating plant in Lower Mount Bethel Township, Northampton County, Pennsylvania. NJDEP objects, *inter alia*, to PADEP's reliance on the non-guideline dispersion model used to perform the plant impact analysis.

Presently before the Board is NJDEP's Petition for Reconsideration of an Order, dated December 10, 2002, in which the Board granted in part, and denied in part, LMBE's Motion to Compel Discovery. NJDEP seeks reconsideration of that part of the Order in which the Board overruled NJDEP's objection to responding to certain written discovery requests on the basis of an asserted deliberative process privilege. After careful consideration, we will grant the Petition for Reconsideration and amend our Order accordingly.

I. LMBE Motion to Compel

On November 12, 2002, LMBE filed a motion to compel discovery from Appellant. LMBE had served interrogatories and document requests; NJDEP had objected to certain requests and withheld unspecified documents on the basis of a deliberative process privilege.[2] LMBE's motion requested the Board, *inter alia*, to overrule NJDEP's objection to responding to

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

[2] The deliberative process privilege is a common law doctrine that "permits the government to withhold documents containing 'confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice.'" *Redland Soccer Club, Inc. v. Dep't of the Army*, 55 F.3d 827, 853 (3d Cir. 1995) (quoting *In re Grand Jury*, 821 F.2d 946, 959 (3d Cir. 1987)). *See generally* Kirk D. Jensen, Note, *The Reasonable Government Official Test: A Proposal for the Treatment of Factual Information Under the Federal Deliberative Process Privilege*, 49 DUKE L.J. 561, 563-81 (1999) (discussing origin, justification and requirements of the privilege); *Developments in the Law—Privileged Communications: Part VI. Institutional Privileges*, 98 HARV. L. REV. 1592, 1613-23 (1985) (discussing governmental process privileges).

discovery requests on the basis of a deliberative process privilege and to compel NJDEP to provide all information withheld on the ground of this privilege.

In its motion, LMBE argued that the deliberative process privilege is not recognized in Pennsylvania statutory or common law, and therefore NJDEP had not raised a valid objection to responding to discovery requests on that basis. Alternatively, LMBE argued that if the Board concluded that Pennsylvania law does recognize the privilege and NJDEP had consequently raised a generally valid objection, then we should find that the privilege is not applicable to NJDEP in this proceeding because Appellant is not the government decision-maker being reviewed here. In other words, the deliberative process privilege should not be applied where its underlying purpose would not be served, and allowing NJDEP—a third-party appellant challenging a permit approval action arguably as a surrogate for individual New Jersey residents—would not be a proper application of the deliberative process privilege.

NJDEP's opposition to the motion framed the privilege issue as a choice of law question. New Jersey common law recognizes a deliberative process privilege. *See In the Matter of the Liquidation of Integrity Insurance Company*, 165 N.J. 75, 88 (2000); *McClain v. College Hosp.*, 99 N.J. 346 (1985). Referring the Board to Pennsylvania's choice of law rule for *substantive* law conflicts, NJDEP first argued that Pennsylvania courts had adopted the deliberative process privilege, that consequently a false conflict was presented because the laws of the two competing states harmonized, and NJDEP should therefore be entitled to invoke the deliberative process privilege in the context of this proceeding.[3]

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[3] With respect to substantive law conflicts: "In Pennsylvania, choice of law analysis first entails a determination of whether the laws of the competing states actually differ. If not, no further analysis is necessary. If we determine that a conflict is present, we must then analyze the governmental interests underlying the issue and determine which state has the greater interest in the application of its law." *Ratti v. Wheeling Pittsburgh Steel Corp.*, 758 A.2d 695, 702 (Pa. Super. 2000); *see also Commonwealth v. Sanchez*, 552 Pa. 570, 575-76 (1998) ("In cases where the substantive laws of Pennsylvania conflict with those of a sister state in the civil context, Pennsylvania courts take a flexible approach which permits analysis of the policies and interests underlying the particular issue before the court.").

NJDEP alternatively asserted that if we determined that Pennsylvania had not recognized the privilege and a conflict of law therefore existed, then New Jersey law should be applied because New Jersey had a greater interest in the outcome of the privilege issue. That is, New Jersey's interest in protecting the internal deliberations of its agency outweighed Pennsylvania's countervailing interest in the truth-seeking function of its adjudicative agency.

A. The Board's Analysis of the Privilege Issue

We accepted the contention that—in this somewhat unusual context where the appellant is an executive agency from a sister state—the dispute presents a choice of law question. We then undertook a review of the relevant precedent to ascertain whether a conflict existed. Although we found a trend toward recognition of the privilege had been gaining strength in recent years, the precedents were ambiguous and, most importantly, no appropriate authority had formally adopted the deliberative process privilege as part of Pennsylvania law.

In 1990, the Commonwealth Court unequivocally declared: "Pennsylvania Courts have not recognized the deliberative process privilege for executive agencies." *Department of Environmental Resources v. Texas Eastern Transmission Corp.*, 569 A.2d 382, 384 (Pa. Cmwlth. 1990). *See also City of Harrisburg v. DER*, 1990 EHB 442, 446 (deliberative process privilege does not apply to Board proceedings because that privilege is not recognized in Pennsylvania).

More recently, however, some members of the Pennsylvania Supreme Court have indicated a belief that the Court should recognize the deliberative process privilege. In *Commonwealth ex rel. Unified Judicial System v. Vartan*, 557 Pa. 390 (1999), the Court decided whether the Board of Claims may issue a subpoena to former Chief Justice Nix to give deposition testimony in a contract dispute arising out of the construction of a court house for the Commonwealth Court. A plurality of the Court "recognize[d] the existence of a deliberative process privilege that protects confidential deliberations of law, or policymaking that reflect

opinions, recommendations or advice." *Id.* at 402.[4] The plurality specifically held that the privilege may be invoked by members of the Court to prohibit disclosure of their deliberations regarding the signing and termination of a lease, and they quashed the subpoena. *Id.* at 403-04.

Two years after *Vartan*, in an opinion joined by five Justices, the Pennsylvania Supreme Court stated: "This Court has not definitively adopted the deliberative process privilege, cf. *Vartan*, 557 Pa. at 402 . . . (reflecting the view of a plurality of the Court that the privilege should be adopted) . . . ." *Lavalle v. Office of General Counsel for the Commonwealth*, 564 Pa. 482, 496 (2001). The *Lavalle* Court declined to address the privilege question, considering it beyond the scope of the case.[5] Although the Court did not adopt the deliberative process privilege, the majority did consider the policies that inform the privilege pertinent to its construction of the Right to Know Act. *Id.* at 496-97. In addition, Justice Cappy wrote a concurring opinion specifically advocating adoption of the deliberative process privilege.[6]

Shortly following the Supreme Court's declaration in *Lavalle*, the Commonwealth Court decided *Joe v. Prison Health Services, Inc.*, 782 A.2d 24 (Pa. Cmwlth. 2001), which affirmed the grant of a motion to compel production of documents. When resisting the document requests, the defendant had raised numerous objections, including the deliberative process privilege. 782 A.2d at 29-30. Citing both *Vartan* and *Lavalle*, the Commonwealth Court in *Joe* did not reject the

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[4] Justices Newman and Castille were the only two members of the Court to join the plurality opinion. Chief Justice Flaherty and Justices Zappala and Cappy did not participate in the consideration of the case, and Justices Nigro and Saylor concurred in the result only. *Vartan*, 557 Pa. at 405.

[5] *Lavalle* concerned a request for access to a document that was lodged with the Office of General Counsel by two members of the General Assembly pursuant to the Right to Know Act, Act of June 21, 1957, P.L. 390, *as amended*, 65 P.S. §§ 66.1-66.4. The specific issue in the case involved construction of the Act's definition of "public records" as set forth in 65 P.S. § 66.2. *See Lavalle*, 564 Pa. at 487-91.

[6] *See Lavalle*, 564 Pa. at 501 (Cappy, J. concurring) ("while I acknowledge that the majority does not adopt the deliberative process privilege, . . . it is my strong belief that this court should recognize the existence of such a privilege"). Justice Cappy's concurring opinion was joined by Justice Castille (but not by Justice Newman, the author of the plurality opinion in *Vartan*). *Id.* at 501-02.

defendant's assertion of the deliberative process privilege outright, but neither did the court expressly recognize the existence of the privilege. Nevertheless, the court outlined the contours of the privilege and then determined that because the defendants had failed to identify any deliberative process associated with the requested documents, they had failed to meet their burden of establishing that the privilege applied. *Joe*, 782 A.2d at 33-34.

Our review of the precedents discussed above led us ultimately to agree with LMBE's position that Pennsylvania law did not as yet include a deliberative process privilege. Notably, "Pennsylvania law does not favor evidentiary privileges." *Joe*, 782 A.2d at 31. Moreover, exceptions to the demand for every person's evidence "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Commonwealth v. Stewart*, 547 Pa. 277, 282 (1997). In light of these overarching principles governing Pennsylvania's privilege law, the precedents were sufficiently uncertain that we could not conclude with confidence that the deliberative process privilege was part of Pennsylvania common law.

A conflict of law was therefore presented by NJDEP's assertion of the deliberative process privilege. But while NJDEP had referred to the correct choice of law rule for substantive law conflicts, it is clear that in "conflicts cases involving procedural matters, Pennsylvania will apply its own procedural laws when it is serving as the forum state." *Sanchez*, 552 Pa. at 575; *see also Commonwealth v. Dennis*, 618 A.2d 972, 980 (Pa. Super. 1992) ("It is a fundamental principal of the conflicts of laws that a court employs its own state's procedural rules."); RESTATEMENT (SECOND) CONFLICT OF LAWS § 122 (1971).[7]

The rules of evidence, including those of privilege, have "traditionally been characterized

[7] *Cf. Samuelson v. Susen*, 576 F.2d 546, 549 (3d Cir. 1978) (Fed. R. Evid. 501 "requires a district court exercising diversity jurisdiction to apply the law of privilege which would be applied by the courts of the state in which it sits"); *Myers v. Uniroyal Chemical Co., Inc.*, No. 91-6716, 1992 U.S. Dist. LEXIS 6472 (E.D. Pa. May 5, 1992).

as procedural law." *Dennis*, 618 A.2d at 980.[8] Consequently, Pennsylvania's privilege law applied to the dispute over NJDEP's withholding of documents on the basis of a deliberative process privilege. Because we had determined that Pennsylvania law did not recognize a deliberative process privilege, we overruled NJDEP's objection and ordered NJDEP to produce all requested documents withheld by Appellant solely on the basis of that privilege.

II. NJDEP's Petition for Reconsideration

NJDEP timely filed a petition for reconsideration of the Board's interlocutory order pursuant to Rule 1021.151, in which Appellant requested that the Board reconsider its decision overruling NJDEP's assertion of the deliberative process privilege. By agreement of counsel, sanctioned by the Board, the Board's directive that NJDEP produce documents was stayed pending resolution of the Petition for Reconsideration.

Appellant's Petition argued that the Board had not sufficiently accounted for principles of comity and the interests of a sister sovereign state. According to NJDEP, New Jersey law recognized the deliberative process privilege as an important means of promoting the quality of communications within its executive agencies. While conceding that Pennsylvania courts had not definitively adopted the privilege, Appellant argued that those courts had at least recognized the benefits of the privilege for the quality of government decisions. For NJDEP, the Board's ruling effectively penalized a sister-state agency with the loss of an important privilege as a result of that agency's effort to protect the welfare of New Jersey citizens by challenging a PADEP permitting decision in litigation necessarily brought before this Board.

NJDEP emphasized that the Board was not addressing an assertion of the privilege by PADEP and, therefore, Board precedent was inapposite. Appellant also cast doubt on the

[8] *See* MCCORMICK ON EVIDENCE § 73.2, at 103 (4th ed. 1992) ("Under traditional choice of law doctrine all rules of evidence, including those of privilege, were viewed as procedural and thus appropriately supplied by the law of the forum."). *Cf.* RESTATEMENT (SECOND) CONFLICT OF LAWS § 139(2) (1971).

relevance of its internal deliberative documents to the Board's examination of the challenged PADEP approval. Thus, the Board's interest in performing its duty to review PADEP's decision-making processes *de novo* was not impacted by allowing NJDEP to assert the privilege here.

LMBE countered that NJDEP had not met the criteria established for reconsideration of Board interlocutory orders because Appellant had not presented any extraordinary circumstances warranting consideration of the matter anew. For example, NJDEP had not presented the Board with any newly-discovered facts which were inconsistent with the Board's ruling and justified a different result; nor had NJDEP proffered any controlling legal authority inadvertently omitted in the parties' motion papers and not considered by the Board when ruling on the motion. LMBE also denied the relevance of comity principles because, according to LMBE, NJDEP was not acting in a governmental capacity but had assumed the role of a private party in filing a third-party appeal of LMBE's plan approval. Finally, LMBE argued that because NJDEP had voluntarily elected to litigate in Pennsylvania, there was no unfairness in the application of Pennsylvania privilege law to NJDEP in this proceeding.

PADEP took no position with respect to the underlying LMBE motion to compel, however, the agency filed a response to the Petition for Reconsideration. PADEP agreed with NJDEP's original argument that Pennsylvania courts had recognized a deliberative process privilege. But PADEP argued that the sole issue for the Petition was whether NJDEP had established the criteria for reconsideration of an interlocutory order and, on that issue, PADEP agreed with LMBE. According to PADEP, Appellant's Petition simply offered an elaboration of a governmental interest analysis presented in NJDEP's response to the motion to compel, and a reworking of previously-presented arguments did not constitute extraordinary circumstances warranting reconsideration of an interlocutory order.

III. Supplemental Briefing in Light of an Intervening Commonwealth Court Opinion Explicitly Adopting the Deliberative Process Privilege

In conducting its review of the Petition, the Board examined a case decided by the Commonwealth Court on January 3, 2003, captioned *Tribune-Review Publishing Company v. Department of Community and Economic Development*, No. 2541 C.D. 1999, 2003 Pa. Commw. LEXIS 9 (Pa. Cmwlth. Jan. 3, 2003). In *Tribune-Review*, the Commonwealth Court addressed whether unfunded state program applications are public records subject to disclosure pursuant to the Right to Know Act. *Tribune-Review*, 2003 Pa. Commw. LEXIS 9, at *1. Upon initial consideration, the court had concluded that all applications for funds under the Community Revitalization Program are essential components to the agency's decision as to which applicants are to receive grants, and therefore the applications constitute public records under the Right to Know Act. *Tribune-Review,* 751 A.2d 689, 694 (Pa. Cmwlth. 2000). The Pennsylvania Supreme Court disagreed, vacated the Commonwealth Court's order, and remanded for reconsideration in light of its decision in *Lavalle*. *Tribune-Review*, 568 Pa. 36 (2002) (per curiam).

On remand, Commonwealth Court noted that, in *Lavalle*, the Supreme Court had enunciated the principle that predecisional, internal, deliberative aspects of agency decisionmaking are not within the definitional scope of the term "public record" contained in the Right to Know Act, because the mandatory disclosure of such information could have a chilling effect on the deliberative process of an agency. *Tribune-Review*, 2003 Pa. Commw. LEXIS 9, at *3 (citing *Lavalle*, 564 Pa. at 498). The court then determined that, in light of *Lavalle*, it must consider whether the deliberative process privilege restricts disclosure of documents sought pursuant to the Right to Know Act. Following a discussion of the deliberative process privilege in which the court cited to both *Lavalle* and *Vartan*, the Commonwealth Court expressly adopted the deliberative process privilege. *See Tribune-Review*, 2003 Pa. Commw. LEXIS 9, at *6

("Consistent with the above, this Court adopts the deliberative process privilege.").

Due to the potential impact of the *Tribune-Review* decision on the pending Petition for Reconsideration, and the fact that the parties had not had an opportunity to address it, we requested the parties to file supplemental briefs discussing the decision's impact on the issues presented by the Petition. *See* Order, dated January 8, 2003. In addition, we directed NJDEP to submit a "Vaughn index," *i.e.*, an itemized list of the allegedly privileged documents containing descriptive information sufficient for the other parties to determine whether to challenge NJDEP's assertion of the privilege with respect to specific documents. *See, e.g., City of Colorado Springs v. White*, 967 P.2d 1042, 1053-54 (Colo. 1998) (discussing contents of requisite index for documents allegedly subject to deliberative process privilege); *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973).

In its supplemental brief, NJDEP argued that the *Tribune-Review* decision supports its request for reconsideration because of the court's formal adoption of the privilege and its application of the privilege to a state agency. For NJDEP, the *Tribune-Review* decision crystallized a trend developing in *Vartan* and *Lavalle* in which a deliberative process privilege of general applicability is being recognized as part of Pennsylvania common law. Appellant also maintained that the *Tribune-Review* court's adoption of the privilege in the context of ruling on a Right to Know Act request is insignificant because the policies underlying the privilege are identical in both the public documents law and litigation discovery contexts.

PADEP agrees with NJDEP that reconsideration is warranted in light of the *Tribune-Review* decision because, for PADEP, the decision presents an intervening change in the law on which the motion ruling was based and, as such, constitutes extraordinary circumstances justifying reconsideration of the Board's order. PADEP also agrees that NJDEP is entitled to

invoke the deliberative process privilege in this proceeding. However, PADEP contends that NJDEP must meet its burden of demonstrating that the individual specific documents withheld by NJDEP are covered by the privilege before the Board can rule that the privilege has been properly asserted by NJDEP in response to the LMBE discovery requests.

LMBE argues that the holding in *Tribune-Review* does not justify reconsideration of the Board's order. According to LMBE, the *Tribune-Review* court only acknowledged an exception to the definition of "public records" under the Right to Know Act for documents covered by a deliberative process privilege. The *Lavalle* court similarly addressed a Right to Know Act request and established an exception to the definition of "public records" for pre-decisional, internal, deliberative aspects of agency decisionmaking. Given that the Commonwealth Court in *Tribune-Review* was ordered to reconsider in light of the Supreme Court's decision in *Lavalle*, LMBE argues that Commonwealth Court did not intend to create a deliberative process privilege that would have any application beyond the realm of public documents law. That is, *Tribune-Review* does not create an evidentiary privilege of general applicability to litigation discovery; rather, the Board should interpret the case as limited to public documents law and therefore inapplicable to this proceeding. Finally, LMBE reiterates its argument that, even assuming a deliberative process privilege has been recognized in Pennsylvania, that privilege should not be applied to NJDEP because Appellant is essentially acting as a private party litigant in this proceeding and therefore the policies underlying the privilege will not be effectuated.

IV. Discussion

A petition for reconsideration of an interlocutory order "must demonstrate that *extraordinary circumstances* justify consideration of the matter by the Board." 25 Pa. Code § 1021.151(a) (emphasis added); *see Starr v. DEP*, No. 2002-049-C, 2002 Pa. Envirn. LEXIS 57, at *18 (EHB, Sept. 18, 2002). "Extraordinary circumstances" justifying reconsideration may

consist of: newly-discovered facts that are inconsistent with the Board's findings, justify reversal of the interlocutory order, and could not have been presented earlier with the exercise of due diligence, *see, e.g., Harriman Coal Corporation v. DEP*, 2001 EHB 1, 4-5. Or, they may consist of: an inadvertent ruling by the Board on a substantive legal issue that was not presented by the parties, *see Miller v. DEP*, 1997 EHB 335, 340 (reconsideration appropriate where Board had inadvertently ruled on an objection in the notice of appeal for which neither party had sought a determination in a motion to dismiss). Reconsideration is not exclusive to those particular circumstances, however, and the Board has granted reconsideration where justice warrants. *See, e.g., County of Berks v. DEP*, 1998 EHB 12, 18 (fact that Board's order refusing to reinstate appeals presented risk that parties may be deprived of their right to obtain appellate review of earlier partial summary judgment was extraordinary circumstance warranting reconsideration).

A. Extraordinary Circumstances Are Presented Here

We believe that an intervening change in the applicable law of the kind presented here by the Commonwealth Court's decision in the *Tribune-Review* case constitutes an extraordinary circumstance warranting reconsideration of an interlocutory order. The Board's order overruling NJDEP's objection to discovery requests on the basis of a deliberative process privilege was grounded on the Board's determination that Pennsylvania law had not formally recognized the privilege. While the Petition for Reconsideration was pending, Commonwealth Court issued an opinion formally recognizing the privilege, thereby shifting the legal ground upon which the Board's choice of law analysis rested. NJDEP is now able to point us to an appropriate authority which has explicitly adopted the deliberative process privilege as part of Pennsylvania law. Thus, *with respect to the threshold choice of law question* presented by the underlying motion to compel, we believe that the Commonwealth Court's express adoption of the privilege in *Tribune-Review* tips the balance in favor of a determination that Pennsylvania law has recognized the

deliberative process privilege.[9]

We are not persuaded by LMBE's argument that the *Tribune-Review* holding should be exclusively limited to the context of disputes over Right to Know Act requests. The cumulative effect of the *Vartan*, *Lavalle*, *Joe* and *Tribune-Review* cases supports a conclusion that the Commonwealth Court intended to recognize a more generally-applicable evidentiary privilege which extends beyond the confines of public documents law. Indeed, Commonwealth Court need not have formally adopted the privilege in *Tribune-Review*. The court could have limited its decision in the same manner as *Lavalle*; instead, Commonwealth Court went further and explicitly adopted the deliberative process privilege, without expressly limiting application of the privilege to a Right to Know Act request.

In any event, we agree with NJDEP and PADEP that, for purposes of deciding the threshold question whether *NJDEP* is entitled to invoke the privilege here, the distinction drawn by LMBE based on the Right to Know Act is insignificant. The same policies that inform the common law deliberative process privilege as generally applied to litigation discovery have also propelled the Pennsylvania courts' interpretation of the Right to Know Act. *See Lavalle*, 564 Pa.

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[9] We emphasize that the dispute presently before the Board does not involve an assertion of the deliberative process privilege by the *Pennsylvania* Department of Environmental Protection, the agency whose final actions this Board must review *de novo* pursuant to the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511 *et seq.* Though Commonwealth Court has recognized and applied the privilege with respect to state agencies, there clearly remains a question whether the deliberative process privilege may be properly asserted by PADEP in a Board proceeding, given the conflict between the privilege and the Board's statutory duty to review PADEP's decision-making process. *See Lower Paxton Township v. DEP*, 2001 EHB 256, 260-62 (refusing to bar deposition of PADEP Deputy Secretary on basis of deliberative process privilege and discussing conflict between Board's duty to conduct *de novo* review of PADEP actions and privilege's function of preventing disclosure of information pertinent to PADEP decisionmaking process); *F.A.W. Associates v. DER*, 1990 EHB 1802, 1804 (Board has repeatedly held that it does not recognize deliberative process privilege asserted by PADEP). *See also Azon v. Long Island Railroad*, No. 00 Civ. 6031, 2001 U.S. Dist. LEXIS 18742, at *7 (S.D.N.Y. Nov. 16, 2001) (when the subject of the litigation is the very nature of the decisionmaking process, the deliberative process privilege should not foreclose production of critical information); *Burka v. New York City Transit Authority*, 110 F.R.D. 660, 667 (S.D.N.Y. 1986) ("Where the decision-making process itself is the subject of the litigation, the deliberative process privilege may not be raised as a bar against disclosure of critical information."). While we believe that, with the recent *Tribune-Review* decision, Pennsylvania courts have sufficiently recognized the deliberative process privilege for purposes of an *out-of-state* governmental agency's assertion of the privilege before this Board, we express no view on whether the recent cases provide adequate authority for an assertion of the privilege by PADEP in a Board proceeding.

at 496. The privilege and the Right to Know Act are clearly interrelated,[10] and it would be anomalous for the Commonwealth Court to recognize a common law privilege in the statutory-construction context without similarly applying that privilege in litigation proceedings. *See Vartan*, 557 Pa. at 403-04; *Joe*, 782 A.2d at 33-34.

Finally, we reject LMBE's argument that the purposes of the privilege would not be served by NJDEP's invocation of the privilege in this Board proceeding. Unquestionably, the "scope of the privilege is limited by its underlying purpose and [the privilege] should not be applied where that purpose would not be served." *See, e.g., Gomez v. City of Nashua, New Hampshire*, 126 F.R.D. 432, 435 (D.N.H. 1989). However, LMBE's argument hinges on its assertion that NJDEP is not acting as a government agency in this appeal simply because it occupies a role normally assumed by individual Pennsylvania citizens challenging a PADEP permitting decision. We disagree with that characterization. NJDEP does not cease to operate as a governmental agency simply because it attempts to carry out its duty to protect its citizens from environmental pollution by means of litigating before a tribunal, instead of through permitting or enforcement. Moreover, the ultimate purpose of the deliberative process privilege "is to prevent injury to the quality of agency decisions," *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975), and LMBE's argument fails to explain why this purpose will not be served.

B. NJDEP Has Met its Initial Burden

We also find that NJDEP has met its initial burden of making a prima facie showing that the privilege is generally applicable to the documents listed on the Vaughn index submitted with NJDEP's supplemental brief. A privilege unique to the government, the deliberative process

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[10] *Cf.* Jensen, *supra* note 2, at 580 (Exemption 5 of the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(5), "incorporates the deliberative process privilege . . . . Since courts rarely distinguish clearly between the common law deliberative process privilege and the privilege under FOIA, FOIA cases provide valuable guidance in establishing the boundaries of the privilege."); *See also, e.g., EPA v. Mink*, 410 U.S. 73, 86-92 (1973); *Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473, 481-84 (2d Cir. 1999).

privilege allows the government to withhold documents and other materials that would reveal advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. *See, e.g., In re: Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *Vartan*, 557 Pa. at 399. "The privilege rests on the ground that public disclosure of certain communications would deter the open exchange of opinions and recommendations between government officials, and it is intended to protect the government's decision-making process, its consultative functions, and the quality of its decisions." *City of Colorado Springs*, 967 P.2d at 1047; *see also Redland Soccer Club, Inc.*, 55 F.3d at 854; *Coastal States Gas Corp.*, 617 F.2d at 866.

In light of its purposes, the privilege protects only material that is both pre-decisional and deliberative. *In re: Sealed Case*, 121 F.3d at 737; *Coastal States Gas Corp.*, 617 F.2d at 866; *Vartan*, 557 Pa. at 401; *City of Colorado Springs*, 967 P.2d at 1051. A document is pre-decisional when it is prepared in order to assist an agency decisionmaker in arriving at her decision. A document is deliberative when it is actually related to the process by which policies are formulated. *Grand Central Partnership, Inc.*, 166 F.3d at 482; *see also Vartan*, 557 Pa. at 401 ("the communication must have been made before the deliberative process was completed" and must be a "direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters"). The privilege does not protect material that is purely factual, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations. *In re: Sealed Case*, 121 F.3d at 737; *Vartan*, 557 Pa. at 401.

The initial burden falls on NJDEP to show that the documents it seeks to shield are both

pre-decisional and deliberative in nature. *In the Matter of the Liquidation of Integrity Insurance Company*, 165 N.J. at 88; *City of Colorado Springs*, 967 P.2d at 1053. *See also Conrail, Inc v. DEP*, 1999 EHB 190, 195 (the "burden of establishing that a privilege applies is on the party invoking it"). To meet its burden, NJDEP must present more than a bare conclusion or statement that the documents sought are privileged. *See, e.g., Redland Soccer Club, Inc.*, 55 F.3d at 854.

In response to the Board's request, NJDEP submitted a Vaught index which provides an itemization of the allegedly-privileged documents, including a description of the type of document, the author, recipients, and a brief description of contents. NJDEP also submitted three affidavits from NJDEP officials who prepared many of the documents and were involved in the deliberative process concerning the challenge to LMBE's plan approval. The affidavits provide a general description of the deliberative and consultative process of the agency, the nature of specific documents and their function in that process, and the harm that would result from disclosure; the index and the affidavits are correlated for reference. Based on our review of the index and accompanying affidavits, we believe that NJDEP has met its initial burden of showing that the documents are generally subject to the deliberative process privilege.

However, we emphasize that we are not yet ruling on whether any specific document is covered by the privilege. "The deliberative process is a qualified privilege and can be overcome by a sufficient showing of need." *In re: Sealed Case*, 121 F.3d at 737; *see also Redland Soccer Club, Inc.*, 55 F.3d at 854 (the privilege is "not absolute" and after government makes sufficient showing of entitlement to the privilege, a court "should balance the competing interests of the parties"). The balancing of the competing interests is to be made on a case-by-case basis and among the considerations to be taken into account are the importance of the evidence to the movant, its availability from other sources, and the effect of disclosure on frank and independent

discussion of contemplated government policies by agency employees. *In re: Sealed Case*, 121 F.3d at 737-38; *In the Matter of the Liquidation of Integrity Insurance Company*, 165 N.J. at 88.

LMBE and PADEP were provided with a Vaughn index only as part of the requested supplemental briefing, and therefore they have not had any opportunity to respond to NJDEP's assertion of the privilege with respect to the documents described in the index. The information contained in the index and accompanying affidavits submitted by NJDEP will enable the other parties to decide whether to challenge NJDEP's assertion of the privilege with respect to any or all of the documents listed in the index. We will reserve a ruling on whether any particular document listed in the index is covered by the privilege, or whether the party seeking disclosure has met its burden of overcoming the privilege for certain documents, until an appropriate motion joining the issue is filed. As part of our resolution of such a motion, we will likely request that NJDEP submit a copy of the document being challenged to the Board for an *in camera* inspection.

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2001-280-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LOWER MOUNT BETHEL ENERGY LLC, Permittee	:	**Issued: February 21, 2003**

ORDER

AND NOW, this 21st day of February, 2003, it is hereby ORDERED as follows:

1. Appellant's Petition for Reconsideration of the Board's Order of December 10, 2002 is hereby granted;

2. Paragraphs 2 and 3 of the Board's December 10, 2002 Order are vacated and the Order is amended to deny the request in LMBE's Motion to Compel for the Board to overrule NJDEP's objection to LMBE's Interrogatories and Requests for Production of Documents on the basis of a deliberative process privilege. NJDEP shall be permitted to invoke the deliberative process privilege in this proceeding.

3. However, the Board reserves any ruling with respect to whether NJDEP has properly invoked the deliberative process privilege with respect to specific documents listed in NJDEP's Vaughn Index, or whether any party seeking disclosure has met its burden of overcoming the privilege for specific documents, until an appropriate motion joining the issue has been filed.

EHB Docket No. 2001-280-C

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Administrative Law Judge
Member

Dated: February 21, 2003

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

CONSOL PENNSYLVANIA COAL COMPANY	:	
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COLUMBIA GAS TRANSMISSION CORPORATION, WHEELING CREEK WATERSHED CONSERVANCY, and CITIZENS FOR PENNSYLVANIA'S FUTURE, Intervenors	:	**EHB Docket No. 2002-112-L**
	:	
	:	**Issued: March 10, 2003**

OPINION AND ORDER ON
PETITIONS FOR RECONSIDERATION

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

Synopsis:

On reconsideration, the Board withdraws the portion of its prior Opinion and Order that held that 25 Pa. Code Chapter 93 (water quality standards) does not apply to the subsidence impacts of underground mining. The Board grants reconsideration because the holding was unnecessary to the result and went beyond the argument contained in the motion for summary judgment.

OPINION

This appeal concerns the scope of the Department's authority to regulate the impacts of subsidence from underground mining on the waters of the Commonwealth. In an Opinion and Order issued on December 31, 2002, this Board held that the Department's authority to regulate such subsidence impacts is not limited to the Bituminous Mine Subsidence and Land

Conservation Act ("BMSLCA"), 52 P.S. § 1406.1 *et seq.*, and the regulations promulgated thereunder at 25 Pa. Code Chapter 89 Subchapter F ("Subchapter F"). Although we held that the Department does not have the authority to regulate such impacts under the Dam Safety and Encroachments Act ("DSEA"), 32 P.S. § 693.1 *et seq.*, and the regulations promulgated thereunder at 25 Pa. Code Chapter 105, the Department does have the authority to regulate such impacts under the Clean Streams Law, 35 P.S. § 691.1 *et seq.*, and the regulations promulgated thereunder at 25 Pa. Code Chapter 86 and portions of Chapter 89 that go beyond Subchapter F. The Board also held that 25 Pa. Code Chapter 93, although promulgated under the Clean Streams Law, does not apply to subsidence impacts. It is this last holding (and only this last holding) that we revisit today.

This case originated when Consol Pennsylvania Coal Company ("Consol") filed an appeal from, *inter alia*, Condition 26 in a permit revision issued by the Department of Environmental Protection (the "Department") to Consol's Coal Mining Activities Permit for its Bailey Mine in Richhill Township, Greene County. Wheeling Creek Watershed Conservancy and Citizens for Pennsylvania's Future ("Intervenors") intervened in the appeal. Condition 26 read in part as follows:

> If permittee wishes to conduct full extraction mining in the revision area, it must submit another permit revision application seeking approval pursuant to, among other things, 25 Pa. Code Chapters 86, 89, 93 and 105.

On October 22, 2002, Consol moved for summary judgment. Consol asked us to strike Condition 26 in its entirety from the permit. The bases for Consol's motion were that Condition 26 contained new permitting and performance requirements that (a) were not authorized by statute, (b) not properly promulgated as regulations, and (c) inconsistent with existing regulations.

In its brief, Consol explained that Condition 26 is not authorized in its view because the *only* basis that the Department has for regulating subsidence impacts of underground mining is the BMSLCA and Subchapter F. Because the BMSLCA and Subchapter F are the *exclusive* source of authority, it was Consol's position that the Department has no authority to regulate subsidence impacts under the DSEA, the Clean Streams Law, and the rules and regulations promulgated under those statutes, such as 25 Pa. Code Chapters 86, 89, 93, and 105. Along the same lines, any attempt to regulate subsidence impacts under the DSEA and Clean Streams Law regulations would be improper because to do so would be inconsistent with the BMSLCA and Subchapter F. Consol also expanded upon its improper-rulemaking argument in its brief. Importantly, Consol did *not* expressly argue that Chapter 93 does not apply to subsidence impacts by its own terms or anything specific to Chapter 93.

In opposition to the motion, the Department and the Intervenors contested Consol's exclusivity argument. One way that they did so was to argue that Chapter 93 provided additional authority to regulate the subsidence impacts in question. (*See, e.g.*, DEP's Answer ¶¶ 33-37 ("The Clean Streams Law and 25 Pa. Code Chapter 93 provide additional authority for protecting surface waters from the impacts of underground coal mining and subsidence."); Intervenors' Brief pp. 25-29 ("DEP has authority under 25 Pa. Code Chapters 86, 89, and 93 to Require [Consol] to Submit Additional Permit Application Information...."). In other words, they went beyond Consol's argument and cited to specific sections of Chapter 93. (*See, e.g.*, DEP Memorandum pp. 9, 23-24; Intervenor's Brief pp. 25-29, 37, 41.) In the opponents' view, Consol's exclusivity argument could not be correct because the other statutes and regulations by their own terms also apply; if other provisions apply, it follows that Subchapter F cannot be exclusive.

In its reply, Consol continued to press its position that Chapter 93 does not apply, but again, it did not point to anything specific to Chapter 93. There was no argument, for example, that subsidence impacts are not "discharges" within the meaning of Chapter 93.

The Board granted Consol's motion for summary judgment in part. Of relevance here, we rejected Consol's contention that the BMSLCA and Subchapter F are the exclusive source for regulating subsidence impacts on waters of the Commonwealth, and that any attempt to regulate subsidence under the other laws cited in Condition 26 would be improper rulemaking or inconsistent with the BMSLCA and Subchapter F. As part of our discussion, we rejected the Department and the Intervenors' argument that Chapter 93 provides authority for regulating subsidence impacts pursuant to Condition 26. The Department and the Intervenors filed timely petitions for reconsideration arguing that we should not have done that. Consol opposes the petitions.

Although we agree with Consol (Memorandum in Opposition pp. 1-3) that it is somewhat paradoxical that the Department and the Intervenors would now argue that we went too far in addressing arguments that they themselves seemed to raise, we nevertheless conclude that they are correct. Our Opinion, in addressing the scope and terms of Chapter 93, unnecessarily went beyond the argument presented *by Consol.* "[T]he Board cannot speculate or supply the legal or factual arguments lacking *in the movant's motion.*" *Holbert v. DEP*, 2000 EHB 796, 808 (emphasis added); *Grazis v. DEP*, 2000 EHB 1112, 1120 (same); *Harriman Coal Corporation v. DEP*, 2000 EHB 1227, 1232 (Board careful to limit its review of summary judgment motion to arguments set forth in motion). Indeed, although there has been extensive briefing in connection with the petitions for reconsideration, Consol has never vigorously pressed the notion that Chapter 93 does not apply by its own terms to subsidence impacts. (To the contrary, see, e.g.,

Supplemental Brief p. 5 n. 5 [conceding that Chapter 93 might apply to subsidence impacts if such impacts occur].) This confirms in our mind that Consol never meant to argue the terms of Chapter 93 in the first place. By discussing the scope and terms of Chapter 93, we did more than Consol asked. If Consol truly intended to advocate this point, the Intervenors correctly point out that our ruling today does not preclude Consol from doing so in the future. (Intervenors' Supplemental Memorandum p. 2.)

Furthermore, the Board strives to avoid advisory opinions by limiting its opinions to only those issues that are not only properly raised, but necessary to the result as well. *Stevens v. DEP*, 2000 EHB 653, 654-55; *Boyle Land & Fuel Co. v. DER*, 1982 EHB 326, 327. Discussing the scope and terms of Chapter 93 was not necessary to address Consol's motion. Although it was necessary to discuss the applicability of 25 Pa. Code Chapters 86 and all of 89 to refute Consol's contention that only the BMSLCA and Subchapter F apply, holding that Chapter 93 does *not* apply added nothing. Similarly, the applicability *vel non* of Chapter 93 adds nothing to our holding that the Department has the authority under the Clean Streams Law and 25 Pa. Code Chapters 86 and all of 89 to regulate the impacts of subsidence on waters of the Commonwealth. Again, exactly what standards apply to that regulation--the subject of Chapter 93--was not put at issue in Consol's motion.

Accordingly, we enter the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONSOL PENNSYLVANIA COAL COMPANY:		
v.	:	**EHB Docket No. 2002-112-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COLUMBIA GAS TRANSMISSION CORPORATION, WHEELING CREEK WATERSHED CONSERVANCY, and CITIZEN'S FOR PENNSYLVANIA'S FUTURE, Intervenors	:	

ORDER

AND NOW, this 10th day of March, 2003, it is hereby ordered that the Department and the Intervenors' petitions for reconsideration are granted. The portions of the Board's December 31, 2002 Opinion that address 25 Pa. Code Chapter 93 are withdrawn and the Order ruling upon Consol's motion for summary judgment is revised to provide as follows:

> Consol's motion for summary judgment is granted in part and denied in part. Condition 5 remains the same. Condition 26 of CMA Permit No. 30841316 is revised to read as follows:
>
> > If permittee wishes to conduct full extraction mining in the revision area, it must submit another permit revision application seeking approval pursuant to, among other things, 25 Pa. Code Chapters 86, 89, and 93.
>
> In accordance with Pa.R.C.P. 1035.5, this appeal shall proceed to a hearing to address any remaining issues. The parties shall advise the Board within ten (10) days of this Order how they would suggest that we proceed to address any outstanding issues that remain in this appeal.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

Dated: March 10, 2003

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

GREGORY STRUBINGER	:	
	:	
v.	:	**EHB Docket No. 2001-220-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 10, 2003**
	:	

ADJUDICATION

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

Synopsis:

The Appellant, acting through his contractor, unlawfully diverted a watercourse and filled in a pond on his property. The Department's compliance order directing the Appellant to submit a restoration plan is necessary and reasonable except to the extent that it requires the Appellant to return the watercourse to its original location and to build a new pond.

FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and enforce the Clean Streams Law, 35 P.S. § 691.1 *et seq.* ("Clean Streams Law"), the Dam Safety and Encroachments Act, 32 P.S. § 693.1 *et seq.* ("Encroachments Act"), Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 ("Administrative Code"), and the rules and regulations promulgated thereunder. (Joint Stipulation ("Stip.") No. 1.)

2. Gregory Strubinger ("Strubinger") owns real property along the north side of

West Eighth Street between Spring and Pine Streets in Jim Thorpe Borough, Carbon County (the "Site"). The Site was deeded to Strubinger on May 9, 1996 and is identified as Carbon County Tax Map Assessment No. 82A3-16-A41.01. (Stip. 2.)

3. A conveyance of surface water having a defined bed and banks with at least intermittent flow (the "Watercourse") crossed the Site prior to August 2000. (Transcript of Proceedings page ("T.") 19, 41-43, 60, 65, 75, 102, 110, 113, 181, 183, 200, 204, 241, 247, 249, 386-387, 392, 403; Commonwealth Exhibit No. ("C.Ex.") 1, 2, 11, 14, 16, 17, 26, 27, 35, 40; Appellant Exhibit No. ("A. Ex.") 3.)

4. The Watercourse continues both above and below the Site. (T. 63, 100, 158, 161, 204, 384; C.Ex. 13, 26; A. Ex. 3.)

5. Strubinger, acting through his contractor (his father), changed the course, current, and cross-section of the Watercourse by filling in the old channel and diverting flow into a new channel that he dug at a different location on the Site. (T. 19, 40, 43-45, 52, 59, 73, 104-105, 158, 170, 183, 242, 250, 257, 315, 318, 383-385; C.Ex. 1, 2, 4, 9, 11, 15, 18, 19, 21-24, 27, 28, 30, 43.)

6. Strubinger did not have a permit and was not otherwise authorized to fill in the original channel and relocate the Watercourse. (C.Ex. 2, 7.)

7. A small, intermittent, man-made pond existed on the Site prior to August 2000. (T. 119-122, 124-126, 128-135; C.Ex. 39, 44.)

8. Strubinger filled in and graded over the pond. (T. 132, 184.)

9. Strubinger did not have a permit and was not otherwise authorized to eliminate the pond. (C.Ex. 2, 7.)

10. The Department issued the compliance order that is the subject of this appeal to Strubinger on August 31, 2001 (the "Order"). (Stip. 6.) The compliance order cited Strubinger

for unlawfully and without a permit constructing a channel change to the Watercourse and filling in a pond on the Site. The Order directs Strubinger to submit a restoration plan that includes (1) the restoration of the Watercourse to its original location prior to the unpermitted activity at the Site, and (2) the complete removal of the fill material placed in the pond. (C.Ex. 1.)

11. The new channel of the Watercourse started as an unlined ditch that emptied out into an open area, and it has been substantially eroded since its construction. (T. 52, 166-167, 230-231, 247, 261, 275-278, 384, 389-390, 399; C.Ex. 19, 20, 21, 26, 28, 30, 31, 32.)

12. The new channel is causing excess erosion and sedimentation of the Watercourse. (T. 230-231, 245, 247, 261, 275-278, 280, 390, 399; C.Ex. 19.)

13. The new channel will continue to cause excess erosion and sedimentation until the situation is addressed. (T. 231, 245, 273, 276, 280.)

14. The excessive erosion and sedimentation that is occurring in the new channel did not occur in the original, undisturbed channel. (T. 232-233, 267, 277, 280.)

15. Although excessive erosion is occurring upstream of the Site as well (T. 63-65, 106, 113, 159, 163, 233, 295, 322-323; C.Ex. 33; A.Ex. 8), Strubinger's unauthorized relocation of the Watercourse on the Site has contributed to the problem (T. 231, 232, 245, 276-278, 290).

16. Although a restoration plan is necessary, there is no evidence that moving the Watercourse to its original location is a necessary or even a well advised component of such a plan.

17. There is no record evidence that any purpose would be served by building a new pond, or that it is otherwise necessary, appropriate, or even well advised to build a new pond on the Site.

DISCUSSION

The Department issued the Order pursuant to the Encroachments Act and the Clean Streams Law. Section 20(a) of the Encroachments Act provides that "[t]he department may issue such orders *as are necessary* to aid in the enforcement of the provisions of this act....The Department may, in its order, require compliance with such terms and conditions *as are necessary* to effect the purposes of the act." 32 P.S. § 693.20(a) (emphasis added). The purposes of the Act include the protection of natural resources and the environmental rights and values secured by the Pennsylvania Constitution, and the conservation of water quality, natural regime, and carrying capacity of watercourses. 32 P.S. § 693.2(3). The Clean Streams Law is to the same effect. 35 P.S. §§ 691.5(7) and 691.610. The Department bears the burden of proving by a preponderance of the evidence that the Order is necessary and reasonable. 25 Pa. Code § 1921.122(b)(4); *Livingston v. DEP*, 2000 EHB 467 at 485, 489, and 494-95.

There is no question that Strubinger, acting through his contractor (who also happened to be his father), moved the channel of the Watercourse. It is unlawful to move a watercourse without a permit, 32 P.S. § 696.6(a) and 25 Pa. Code § 105.11, and Strubinger did not have a permit. *See generally Gambler v. DEP*, 1997 EHB 914 (dismissing appeal from order to restore stream channel). The relocated channel started out as little more than a muddy ditch that emptied out onto an open area. Water found its way across the open area and returned to the preexisting channel below the Site. Excessive erosion and sedimentation, which had not been shown to have been occurring on the Site before Strubinger's actions, has resulted, and it continues to be a problem. There is no doubt that this problem must be remedied. The fact that other parts of the Watercourse are also suffering erosion problems does not change the fact that the portion of the Watercourse that is on Strubinger's property is contributing to the problem as a direct result of Strubinger's unlawful activity, and it must be fixed. In the current context, it is

irrelevant whether the Watercourse is fed by stormwater runoff, groundwater, untreated sewage, or all of the above. The issuance of the Order under Encroachments Act does not depend upon such considerations.

Although the Department proved that the new channel must be repaired, the Department failed to show by a preponderance of the evidence that it is necessary or reasonable to require Strubinger to return the Watercourse "to its original location prior to the unpermitted activity at the Site" as specified in the Order. (C.Ex. 1.)[1] The Department presented evidence that the current design of the channel is unacceptable. Indeed, there was little dispute that the relocated channel is improperly designed and constructed. The Department did not present any credible evidence, however, that there would be any benefit to relocating the Watercourse to its original location. We cannot simply assume that the Watercourse must be relocated. In the years that have passed since the channel relocation, the new channel has reestablished itself. It is not hard to imagine that it would do more harm than good to dig the Site up yet again just to move the new channel a few yards away at a location that may or may not match up with the original channel. In short, it is entirely necessary and reasonable to insist that Strubinger submit a restoration plan that alleviates the damage that he has caused, but the record does not support the requirement that the restoration plan must include relocation of the entire length of the channel. Beyond that, we express no opinion on the details of an appropriate restoration plan. We are not necessarily foreclosing, for example, the possibility that it may be necessary to change portions of the course of the new channel to eliminate unacceptable meanders.

---

[1] We reject the Department's contention that Strubinger did not object to the corrective action required by the Order in his notice of appeal. Strubinger goes on at some length in the notice of appeal about the restoration requirement in the Order, including the obligation to relocate the channel. Strubinger's broadly worded notice of appeal fairly put the Department on notice that it would need to satisfy its burden of proof regarding all aspects of the Order. (See especially Objections 5-8.)

Similarly, there is no question that Strubinger filled in a small, intermittent, man-made pond on the Site. There was no attempt by the Department, however, to prove that it is necessary or reasonable to require Strubinger to build a new pond. There is no proof of any kind on that point. The Department's brief makes no attempt to explain what purpose would be served by requiring Strubinger to build a new pond. Again, we cannot simply assume that it is necessary and reasonable to construct a new pond. The requirement in the Order to restore the pond cannot be sustained on the record before us.

The Department argues that Strubinger willfully violated the law, but the purpose of the Order is to alleviate an adverse environmental impact, not to punish. It is remedial, not punitive. *See Bradford Coal Co. v. DER,* 1986 EHB 611, 613. The Department has other means at its disposal to impose sanctions, deter unlawful conduct, and recover its costs. *See, e.g.*, 32 P.S. § 693.21(a) (civil penalties). We cannot sustain the requirement to relocate the channel again or build a pond simply as a punitive measure.

Strubinger complains that the Order imposes undue hardship due to, *inter alia*, his financial situation. He alleges that the Department has been motivated by personal animosity and unspecified political considerations. First, such allegations are not particularly relevant in an appeal from a compliance order. *Whitemarsh Disposal Corporation v. DEP,* 2000 EHB 300, 330-35. But even if they were, Strubinger's allegations are unfounded. Strubinger does not back them up with anything in the record. Not only is there no evidence of improper conduct on the part of the Department, there is no evidence that compliance with the Order would, in fact, cause undue hardship. The Order was based on serious violations of the law. If Strubinger finds himself in a fix, he has only himself to blame. The record supports the Department's claim that it has made every effort to work with Strubinger in a cooperative fashion and has otherwise treated him fairly under the circumstances. (Stip. 5; C.Ex. 8.)

CONCLUSIONS OF LAW

1. The Department bears the burden of proof. 25 Pa. Code § 1021.122(b)(4).

2. No person may construct an encroachment that changes the course, current, or cross-section of a watercourse or a body of water without a permit. 32 P.S. § 696.6(a); 25 Pa. Code § 105.11.

3. A pond is a body of water and a water of the Commonwealth. 32 P.S. § 693.3; 35 P.S. § 691.1.

4. A watercourse is a channel or conveyance of surface water having defined bed and banks, whether natural or artificial, with perennial or intermittent flow. 32 P.S. § 696.3; 25 Pa. Code § 105.1

5. Strubinger, acting through his contractor, unlawfully encroached upon a watercourse on his property by filling in the old channel and digging a new one.

6. Strubinger, acting through his contractor, unlawfully encroached upon a pond on his property by filling it in.

7. The Department may issue such orders with such terms and conditions as are necessary to aid in the enforcement or effect the purposes of the Encroachments Act and the Clean Streams Law. 32 P.S. § 693.20(a); 35 P.S. §§ 691.5(7) and 691.610.

8. The Board's role is to review the Order to determine whether it is necessary and reasonable. *Livingston v. DEP*, 2000 EHB 467 at 485, 489, and 494-95.

9. All aspects of the Order are necessary and reasonable except to the extent that it requires Strubinger to (a) return the Watercourse to its original location, and (b) build a new pond.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GREGORY STRUBINGER	:	
	:	
v.	:	**EHB Docket No. 2001-220-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 10th day of March, 2003, the Order is revised to delete the requirements that Strubinger (a) build a new pond and (b) restore the Watercourse to its original location. Strubinger's appeal from the Order, including the requirement that he submit a restoration plan that alleviates the environmental harm that is occurring due to the channel relocation on the Site, is in all other respects dismissed. The deadlines set forth in the Order shall recommence as of the date of this Order.

ENVIRONMENTAL HEARING BOARD

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BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: March 10, 2003

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

UNITED MINE WORKERS OF AMERICA, UNITED MINE WORKERS OF AMERICA DISTRICT 2, AND UNITED MINE WORKERS OF AMERICA, LOCAL 1197	:	
v.	:	**EHB Docket No. 2001-081-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND EIGHTY FOUR MINING COMPANY, Permittee	:	**Issued: March 11, 2003**

OPINION AND ORDER ON APPELLANTS' PETITION FOR ATTORNEYS FEES AND COSTS

By: Michael L. Krancer, Administrative Law Judge

Synopsis:

Appellants' Petition for Attorneys Fees and Costs is denied. The statutory provision under which Appellants sought fees and costs, 27 Pa. C.S. § 7708 (Act 138 of 2000), applies only to proceedings which involved coal surface mining and surface related impacts of coal subsurface mining. The instant proceeding involved, instead, an underground mine safety matter relating to the timing of pre-shift examinations in an underground mine under the Bituminous Coal Mine Act for an underground coal mine.

Introduction

The matter before us now is Appellants' (collectively referred to as UMW) petition for an award of attorney's fees and costs after conclusion of litigation against the Department in which it obtained a successful result. The substantive matter of the previous litigation for which the

UMW now seeks attorneys' fees and costs was its appeal of the Department's approval of a request submitted by Eighty-Four Mining Company (EFMC) to vary from certain substantive mining safety requirements of the Bituminous Coal Mine Act (BCMA)[1] relating to the timing and frequency of pre-shift safety examinations performed in an underground bituminous coal mine operated by Permittee. Following a two week trial, we issued an Adjudication in this matter which, although favorable to the Department on several under-card statutory and procedural issues relating to the BCMA, the Department's implementation of the variance program thereunder, and its processing of this variance, provided the UMW with the victory in the main event in that we found the Department had substantively erred in the granting of this variance and we rescinded it. *United Mine Workers of America v. DEP*, 2001 EHB 1040. Our Adjudication was recently affirmed on appeal by the Commonwealth Court and no further appeals have been taken. The UMW now seeks an award of $73,587.38 in attorneys' fees and costs allegedly incurred by it in prosecuting the appeal before the Board. After careful review, we will deny the Petition.

I. Procedural History

At the time we heard this case in June and July, 2001, EFMC was operating an underground bituminous coal mine located in South Strabane Township, Washington County, Pennsylvania. In October 2000, EFMC had sought a variance from the requirements of Section 228(a) of the BCMA, 52 P.S. § 701-228(a). Section 228(a) requires that a pre-shift examination of the mine be performed within the three hours immediately preceding the start of a coal or non-coal producing shift. EFMC proposed instead to perform the mine inspections at evenly spaced eight-hour intervals. This variance would have unlinked the timing requirement set forth in Section 228(a) that pre-shift examinations be performed within the three hours immediately

[1] Act of July 17, 1961, P.L. 659, *as amended*, 52 P.S. § 701-101 *et seq.*

before the start of shifts. The Department evaluated EFMC's request pursuant to Section 702 of the BCMA, 52 P.S. § 701-702. Section 702 provides that nothing in the BCMA shall be construed to prevent the adoption or use by any operator of new methods and processes, if such new methods and processes accord protection to personnel and property substantially equal to or in excess of the requirements set forth in the BCMA. In March 2001, DEP granted the variance subject to certain conditions. The heart of the basis for the granting of the variance was the Department's conclusion that the new evenly timed inspection regime accorded protection to personnel and property substantially equal to or in excess of the extant requirement that pre-shift examinations be timed to happen within the three hours immediately preceeding the start of a shift.

Appellants appealed the grant of the variance to the Board in April 2001. A two-week trial was held in June and July 2001. The Board issued an Adjudication on December 5, 2001. *United Mine Workers of America*, 2001 EHB 1040. We held that the Department did not err in considering EFMC's variance request under Section 702 of the BCMA, that the Department did not act outside the scope of its authority under the BCMA when it issued a 1995 Technical Guidance Document setting forth procedures for Section 702 variance requests, and that the Department followed its Guidance Document in all material respects with respect to the review of this variance request. *United Mine Workers of America*, 2001 EHB at 1105-06. More to the point, however, we concluded that the Department was wrong when it concluded that the variance accorded protection to personnel and property substantially equal to or in excess of the 3 hour pre-shift examination regime required by the BCMA. Thus, we held that the Department's approval of this variance was improperly granted and we rescinded it. 2001 EHB at 1106-07.

On January 3, 2002, the permittee filed a timely Petition for Review of our Adjudication with the Commonwealth Court. That same day, Appellants filed their Petition for Attorneys Fees and Costs with the Board. By Order dated January 11, 2002, we stayed disposition of Appellants' fee petition until a final resolution of EFMC's appeal of the Board's Adjudication. On November 14, 2002, the Commonwealth Court issued an unpublished opinion and order affirming the Board's Adjudication. *Eighty-Four Mining Company v. United Mine Workers of America*, No. 22 C.D. 2002 (Cmwlth. Ct. Nov. 14, 2002). No appeal of the Commonwealth Court's decision was taken. We consequently issued an Order, dated January 13, 2003, setting a schedule for filing responses to Appellants' fee petition, and the Department and EFMC duly filed opposition on February 5, 2003.

II. Discussion

"The general rule within this Commonwealth is that each side is responsible for the payment of its own costs and counsel fees absent bad faith or vexatious conduct." *Lucchino v. Department of Environmental Protection*, 809 A.2d 264, 267 (Pa. 2002). *See also Department of Environmental Protection v. Bethenergy Mines, Inc.*, 563 Pa. 170, 179 (2000) ("Generally, a litigant cannot recover counsel fees or costs from an adverse party unless the General Assembly has expressly authorized such an award."). This general rule has, however, been modified by a variety of statutes that provide for an award of counsel fees and costs to the prevailing party. For example, the Costs Act[2] authorizes awards to prevailing parties in administrative proceedings where the Commonwealth has initiated the action, see 71 P.S. § 2033, and the General Assembly has authorized recovery of fees and costs in the context of a variety of remedial statutes reviewed

[2] Act of December 13, 1982, P.L. 1127, No. 257, *as amended*, 71 P.S. § 2031 *et seq.*

in appeals to this Board.[3] Notably, the Pennsylvania Supreme Court has cautioned that "[n]ot all fee-shifting statutes are the same and care is required in comparing such statutes, as the language or purpose of a particular fee-shifting provision will affect its construction and, hence, its application." *Lucchino*, 809 A.2d at 268.

The UMW pins its right to the award of fees and costs to Act 2000-138, Act of December 20, 2000, P.L. 980, 27 Pa.C.S. §§ 7707-7708 (Act 138), which Act amended Title 27 of the Pennsylvania Consolidated Statutes by, *inter alia*, adding Chapter 77 entitled "Costs and Fees."[4] The UMW asserts it is entitled to fees and costs from the Department specifically under subsection 7708(c)(2), which states:

> Appropriate costs and fees incurred for a proceeding concerning coal mining activities may be awarded . . .
>
> (2) To any party, other than a permittee or his representative, from the department if that party:
>
> (i) Initiates or participates in any proceeding concerning coal mining activities.
>
> (ii) Prevails in whole or in part, achieving at least some degree of success on the merits.
>
> upon a finding that the party made a substantial contribution to a full and fair determination of the issues.

27 Pa.C.S. § 7708(c)(2).

The UMW says that it meets the criteria imposed by § 7708(c)(2). They contend that: (1) this is a "proceeding concerning coal mining activities"; (2) Appellants initiated and participated

---

[3] *See, e.g.*, Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.307; Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. § 4013.6(f). *See generally Lucchino*, 809 A.2d at 267-68 (listing variety of statutes which authorize recovery of counsel fees and costs). The Board's rules prescribe procedures for submitting applications for fees and costs. *See* 25 Pa. Code §§ 1021.171-174 (applications pursuant to the Costs Act); 25 Pa. Code §§ 1021.181-184 (requests for costs and fees authorized by statute other than the Costs Act); 25 Pa. Code § 1021.191 (procedure for seeking fees and costs under more than one statute).

[4] The UMW's Memorandum in Support Of Petition For Attorney Fees And Costs makes passing reference to the Costs Act but the Petition does not base any claim for attorneys fees or costs thereon. We do not therefore address that Act in this Opinion.

in the proceeding before the Board; (3) they made a substantial contribution to a full and fair determination of the issues in the appeal; and, (4) Appellants prevailed, at least in part, when the Board rescinded EFMC's variance from the pre-shift examination requirements of Section 228(a) of the BCMA. The focal point of the Department's opposition is that this appeal—which concerned a variance for an underground coal mine from safety requirements imposed by the BCMA—is not a "proceeding concerning coal mining activities" as that term is intended in Act 138. According to the Department, the meaning of "coal mining activities" and thus the scope of the Act 138 is limited to only surface mining activities and surface related effects of underground mining.

EFMC echoes the Department's argument that Act 138 does not apply to this appeal concerning mine safety requirements for an underground coal mine. The permittee also asserts that Appellants would not in any event be entitled to seek fees from the permittee because, under § 7708(c)(1), a party may seek fees from the permittee only in "any proceeding reviewing enforcement actions upon a finding that a violation of a Commonwealth coal mining act, regulation or permit has occurred or that an imminent hazard existed." 27 Pa.C.S. § 7708(c)(1). Since this appeal did not involve an enforcement action, nor did it concern a "coal mining act" as defined by Section 7708, Appellants may not seek fees from the permittee under Act 138.

It is clear from the language of Act 138 that the Department and EFMC are correct and that the UMW's request cannot come within the ambit of Act 138's threshold prerequisite that the underlying matter be a proceeding involving coal mining activities. Act 138 was specifically meant to and is specifically drafted such that its fee and cost recovery authority applies only with respect to proceedings which involved surface mining or surface related impacts of subsurface mining. It does not apply to a proceeding, as this one was, involving the mining safety aspects of

subsurface mining.

The definition of "coal mining activities" is as follows:

> "Coal mining activities." The extraction of coal from the earth, waste or stockpiles, pits or banks by removing the strata or material which overlies or is above or between them or otherwise exposing and retrieving them from the surface, including, but not limited to, strip mining, auger mining, dredging, quarrying and leaching and all surface activity connected with surface or underground coal mining, including, but not limited to, exploration, site preparation, coal processing or cleaning coal refuse disposal, entry, tunnel, drift, slope, shaft and borehole drilling and construction, road construction, use, maintenance and reclamation, water supply restoration or replacement, repair or compensation for damages to structures caused by underground coal mining and all activities related thereto.

27 Pa. C.S.A. § 7708(h). It is no accident that this definition of "coal mining activities" in Act 138 mirrors the definition of "surface mining activities" contained in the Pennsylvania Surface Mining Control and Reclamation Act, (Pa.SMCRA). 52 P.S. § 1396.3 (definition of "surface mining activities"). Act 138 was drafted with the stated purpose of dovetailing with Pa.SMCRA and the Federal SMCRA. In passing Act 138 in 2000, the Legislature declared that its purpose in doing so was as follows:

> **Purpose.** - This section establishes costs and fees available in proceedings involving coal mining activities. The purpose of this section is to provide costs and fees to the same extent of section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (Public Law 95-87, 30 U.S.C. § 1201 et seq.) and the regulations promulgated pursuant thereto. It is hereby determined that it is in the public interest for the Commonwealth to maintain primary jurisdiction over the enforcement and administration of the Surface Mining Control and Reclamation Act of 1977 and that the purpose of this section is to maintain primary jurisdiction over coal mining in this Commonwealth but in no event to authorize standards which are more stringent than Federal standards for the award of costs and fees.

27 Pa.C.S. § 7708(a).[5]

[5] In addition, 27 P.S.C.A. § 7708(c) provides for awards of fees and costs from permittees where the proceedings involve any violation by the permittee of a "coal mining act". 27 Pa.C.S.A. § 7708(c). "Coal mining acts" is

A review of the legislative history and background of Act 138 confirms its specific limiting language regarding what "coal mining activities" means. As stated in Section 7708, Act 138 was passed in order that Pennsylvania's Pa.SMCRA program to attain "primacy" under the federal SMCRA. The federal SMCRA, established a nationwide program for dealing with the various problems arising from surface mining in the United States. The federal SMCRA provides that, because of differing conditions from state to state, the primary governmental responsibility for developing, authorizing, issuing and enforcing regulations for surface mining and reclamation operations should rest with the states. 30 U.S.C. § 1201(f). Before states are permitted to administer their own exclusive regulatory programs, however, the SMCRA requires each state to establish to the satisfaction of the Office of Surface Mining that it has statutes that are in accordance with the requirements of the federal act and that state regulations are consistent with the regulations issued by the Secretary of the Interior pursuant to the federal act. *See* 30 U.S.C. § 1253(a).

In order to meet the federal standards certain Pennsylvania laws were amended and in early 1982 Pennsylvania applied to the Office of Surface Mining for exclusive jurisdiction, or primacy, in the regulation and control of surface mining in Pennsylvania. *See* 47 Fed. Reg. 33050 (1982); *see also Pennsylvania Coal Mining Assoc. v. Watt,* 562 F. Supp. 741, 743 (M.D.

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defined as:

> "Coal mining acts." The provisions of the act of June 22, 1937 (P.L. 1987, No. 394), known as The Clean Streams Law, the act of May 31, 1945 (P.L. 1198, No. 418), known as the Surface Mining Conservation and Reclamation Act, the act of April 27, 1966 (1st SP.Sess., P.L. 31, No. 1), known as The Bituminous Mine Subsidence and Land Conservation Act, and the act of September 24, 1968 (P.L. 1040, No. 318), known as the Coal Refuse Disposal Control Act, which govern coal mining or activities related to coal mining.

27 Pa.C.S.A. § 7708(h). Not surprisingly given what we have already discussed, the BCMA is absent from this list.

Pa. 1983).[6] In July 1982, the federal Office of Surface Mining gave conditional approval to Pennsylvania's application, which allowed Pennsylvania to assume authority over surface mining of coal in the Commonwealth. 30 C.F.R. § 938.11 (1982). One of the conditions of approval was the submission by Pennsylvania of "copies of enacted laws, or other program amendments providing for the award of costs and expenses which is no less effective than 30 CFR 840.15 and in accordance with Section 525(e) of SMCRA." 30 C.F.R. § 938.11(i) (1982).

In January 2001, Pennsylvania submitted excerpts of House Bill 393, *i.e.*, 27 Pa.C.S. § 7708, to the Office of Surface Mining as a proposed amendment to Pennsylvania's program for implementing the federal SMCRA. *See* 66 Fed. Reg. 10405 (2001). The amendment was intended to revise Pennsylvania's program to make it consistent with the SMCRA and corresponding federal regulations, meet the condition imposed by 30 C.F.R. § 938.11(i), and thereby maintain Pennsylvania's primacy over surface mining in the Commonwealth. *See* 66 Fed. Reg. 10405; *cf.* 27 Pa.C.S. § 7708(a). The text of Section 7708 tracks the text of the federal regulations providing for awards of fees and costs pursuant to Section 525(e) of the SMCRA. *See* 30 U.S.C. § 1275(e); 43 C.F.R. §§ 4.1292, 4.1294.

In November 2001, the Secretary of the Interior determined that Section 7708 satisfied the condition for approval of Pennsylvania's regulatory program found at 30 C.F.R. § 938.11(i) because the legislation provides for the award of attorneys fees in accordance with section 525(e) of SMCRA. *See* 66 Fed. Reg. 57662 (2001). The federal regulations were accordingly amended to remove the condition of approval pertaining to awards of costs and fees consistent with the

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[6] The amended environmental statutes submitted by Pennsylvania as part of its application for primacy over surface mining in the Commonwealth are the Pennsylvania Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.1 *et seq.* (PASMCRA); the Coal Refuse Disposal Control Act, Act of September 24, 1968, P.L. 1040, *as amended*, 52 P.S. § 30.51 *et seq.* (CRDCA); The Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966, P.L. 31, No. 1, *as amended*, 52 P.S. § 1406.1 *et seq.* (BMSLCA); and the Clean Streams Law, 35 P.S. § 691.1 et seq. (CSL). *See* 47 Fed. Reg. 33050 (1982).

federal SMCRA and implementing federal regulations. *See* 30 C.F.R. 938.11 (2001).

Thus, the history of birth of Act 138 shows that it was specifically designed to authorize the award of fees and costs only in proceedings arising from the statutes and regulations which form part of Pennsylvania's regulatory program for implementing the federal SMCRA. Indeed, that was the very *raison d'etre* of the statute. As we have discussed already, the Legislature was very successful in crafting the precise language of the statute to so limit it consistent with the intended purpose for its passage. Act 138 was not intended to extend to proceedings such as the UMW's challenge to a variance from mine safety requirements imposed on underground coal mines by the BCMA. Thus, the UMW's Petition must be denied and we enter the following Order consistent with this Opinion.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

UNITED MINE WORKERS OF AMERICA, UNITED MINE WORKERS OF AMERICA DISTRICT 2, AND UNITED MINE WORKERS OF AMERICA, LOCAL 1197	:	
v.	:	**EHB Docket No. 2001-081-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND EIGHTY FOUR MINING COMPANY, Permittee	:	**Issued: March 11, 2003**

ORDER

AND NOW, this 11th day of March, 2003, it is hereby ORDERED that Appellants' Petition for Attorneys Fees and Costs is 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: March 11, 2003

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

For the Commonwealth, DEP:
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Southwest Region

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For Permittee:
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Thomas C. Reed, Esquire
DINSMORE SHOHL LLP
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DONALD C. RUDDY and PAUL G. MORROW	:	
	:	
v.	:	**EHB Docket No. 2003-032-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 12, 2003**

OPINION AND ORDER ON MOTION TO INTERVENE

By George J. Miller, Administrative Law Judge

Synopsis:

The Board grants a motion to intervene by a township in an appeal from the denial of a private request for the amendment to its sewage facilities plan. Clearly, the township is an "interested party" as defined by the Environmental Hearing Board Act.

OPINION

Before the Board is the motion to intervene by Solebury Township. For the purposes of this motion the relevant facts are these. On May 3, 2002, Donald Ruddy and Paul Morrow (Appellants) filed a request with the Township to amend its official sewage facilities plan to include public sewer service to their lots, which are currently served by on-lot sewage. The Township did not approve their request. The Appellants then filed a private request with the Department of Environmental Protection which was also denied. The Appellants filed an appeal from this denial with the Board in February 2003. The

Township seeks to intervene in this appeal in support of its current sewage facilities plan and in opposition to the private request of the Appellants.

Pursuant to the Environmental Hearing Board Act, "[a]ny interested party may intervene in any matter pending before the Board."[1] "Interested" has been defined as one who has a substantial, direct and immediate interest in the outcome of the matter.[2] In its petition the Township contends that the revision proposed by the Appellants "would fundamentally alter one of the key features of the Plan which is to permit public sewages only in the high density residential, commercial and industrial zoning districts where public water is available."[3] Clearly the Township has a substantial interest in the outcome of an appeal from its own sewage facilities plan inasmuch as it will certainly gain or lose by direct operation of the Board's determination in this appeal.[4]

The Appellants oppose the intervention by the Township on several grounds.[5] First they argue that the Township failed to respond to their request in a timely manner and therefore their request was "deemed approved" by operation of law. While this fact, if true, may be relevant to whether or not the Department acted correctly in denying their request, it has no bearing on whether or not the Township is an interested party before the Board. Similarly, the Appellants' charge that the Township's reason for not designating other areas of the sewage plan for public area is irrelevant to their appeal and not a valid

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

[2] *Borough of Glendon v. Department of Environmental Resources,* 603 A.2d 226 (Pa. Cmwlth.) *petition for allowance of appeal denied*, 608 A.2d 32 (Pa. 1992); *Conners v. DEP,* 1999 EHB 669.

[3] Motion to Intervene at ¶ 9.

[4] *Pennsburg Housing Partnership v. DEP*, 1999 EHB 1031.

[5] The Department does not object to the Township's intervention.

ground for opposition to it. However, this is a question germane to the merits of the appeal and not to the Township's intervention.

The Appellants also argue that the Township should not be permitted to argue in opposition to the private request because of its deemed approval of the private request. This issue may be relevant to the scope of the Township's intervention, but is not sufficient to bar the Township's intervention completely. We do not have sufficient facts properly before us to judge whether or not the Appellants' request to the Township was deemed approved. Nor have the parties had an opportunity to present their legal arguments concerning the implication to the proceedings before the Board of the alleged approval. At this point early in the proceedings we are not willing to limit the Township's participation on this basis. The better practice in this case is to allow the parties, including the Township, to address that claim in the context of an appropriate motion.[6]

Next, the Appellants oppose the Township's intervention on the grounds that its interest is not greater than that of the general public and that its position is adequately represented by the Department. First, we have allowed intervention many times where the intervenor and the Department are in support of the same position. Moreover, the Environmental Hearing Board Act does not grant the Board the discretion to deny intervention simply because a petitioner's interests may be arguably represented adequately by another.[7]

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[6] *See Connors,* 1999 EHB at 676 (holding that limiting the issues which may be raised by an intervenor is discretionary with the Board based on the facts of the individual case).

[7] *Browning-Ferris, Inc. v. Department of Environmental Resources,* 598 A.2d 1057 and 598 A.2d 1061 (Pa. Cmwlth. 1991); *Conners,* 1999 EHB at 674.

Second, as we explained above, the Township certainly has an interest greater than the general public. The courts have held many times that municipalities have a substantial interest in that which affects environmental conditions within its borders.[8] In this case, the Township has an even more specific interest inasmuch as it may be directly affected by the outcome of this appeal especially if we rule in the Appellants' favor and require it to provide for public sewers for the Appellants' residences.

In short, we see no reason not to grant the Township's petition to intervene in this appeal.[9] We therefore enter the following order:

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[8] *E.g., Borough of Glendon v. Department of Environmental Resources*, 603 A.2d 226 (Pa. Cmwlth.), *petition for allowance of appeal denied,* 608 A,2d 32 (Pa. 1992)(reversing the Board's denial of the borough's intervention in an appeal concerning a permit for an incinerator).

[9] The Appellants also argue that the petition should be denied because the Township cited 25 Pa. Code § 1021.62 as the regulation concerning intervention rather than our current rule, 25 Pa. Code § 1021.81. As our rules were recently renumbered, this was obviously an oversight. Moreover, the Township's statement of the standard was otherwise correct. Such miniscule procedural defects will rarely provide a basis for the denial of a petition to intervene. *See* 25 Pa. Code § 1021.4.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

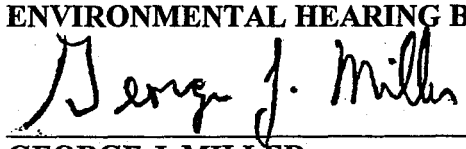
DONALD C. RUDDY and PAUL G. MORROW	:	
	:	
v.	:	**EHB Docket No. 2003-032-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 12th day of March, 2003, the petition to intervene of Solebury Township is hereby **GRANTED**. All future filings with the Board shall bear the following caption:

DONALD C. RUDDY and PAUL G. MORROW	:	
	:	
v.	:	**EHB Docket No. 2003-032-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SOLEBURY TOWNSHIP, Intervenor	:	

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Member

DATED: March 12, 2003

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

For the Commonwealth, DEP:
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Southeast Region

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And
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

WALTER SCHNEIDERWIND	:	
	:	
v.	:	**EHB Docket No. 2000-113-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 26, 2003**

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Board sustains the appeal of a farmer whose water supply had been affected by noncoal surface mining. The appellant proved that his water had been adversely affected by a lowering of the water table which was used by his corn crop for moisture. While the Department's investigation of his claim concluded that pumping at the quarry had lowered the water table of the appellant's farm, it failed to properly investigate whether or not the lowered water table provided sufficient moisture for corn growth in some of the farm's coarse and less silty soil. Further the Department failed to present evidence to support its position that the lowered groundwater table was not necessary to provide moisture for corn growth in coarse soil.

The Board also holds that the Department's denial of the appellant's claim is reviewable because it is a decision affecting the appellant's personal or property rights and does not constitute an exercise of the Department's prosecutorial discretion.

FINDINGS OF FACT[1]

1. The Department is the agency of the Commonwealth which is responsible for enforcing the provisions of the Noncoal Surface Mining Conservation and Reclamation Act[2] (Noncoal Act) and the regulations promulgated thereunder.

2. The Appellant is Walter D. Schneiderwind. He owns a farm of 24.75 acres in Tinicum Township, Bucks County. In the summer he grows, among other things, sweet corn. (Schneiderwind, N.T. 16)

The Farm

3. The Appellant's farm is adjacent to the southern boundary of a sand and gravel quarry owned and/or operated by Delaware Valley Concrete. (Schneiderwind, N.T. 18)

4. His farmhouse is approximately 900 feet from the quarry pit. (Schneiderwind, N.T. 23)

5. From the edge of the quarry pit to the end of his corn field is approximately 1,550 feet. (Schneiderwind, N.T. 23)

6. He purchased this farm in 1987. From that time until 1992 he had no problems with his crops. (Schneiderwind, N.T. 17, 49)

7. During his fifth growing season for corn, 1992, he noticed "dipping" in the height of the stalks. That is, the size and health of the corn was not uniform as it had been in previous growing seasons. (Schneiderwind, N.T. 17-18)

8. From 1992 to the 1997 growing season, he observed a 30-40% decrease in the crop

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[1] The notes of testimony from October 21, 2002 are designated as "N.T.". The notes of testimony from October 22, 2002 are designated as "N.T.*". The Appellant's exhibits are designated as "Ex. A-_", and the Department's as "Ex. C-_".

[2] Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301-3326.

yield per acre of corn. During the drought of 1999 he experienced a 70% decrease in crop yield for corn. (Schneiderwind, N.T. 20-21)

9. He consulted an agricultural extension, the fertilizer company and did extensive soil testing to determine the cause of the wilting of some of the corn. Those consultations revealed that the wilting was not due to disease. (Schneiderwind, N.T 29).

10. The Appellant also consulted a hydrogeologist to determine the cause of the wilting of portions of his corn crop. (Schneiderwind, N.T. 21)

11. The Appellant described his planting practices. He plants his corn once per week in rows running from east to west across the field. (Schneiderwind, N.T. 34)

12. Yet the wilting is in bands that run diagonally across all the plantings of corn. That is, the Appellant has not suffered a uniform crop failure; there are areas of normal corn and areas of compromised corn. (Schneiderwind, N.T. 33-34; Ex. A-16a)

13. Therefore it is highly unlikely that the wilting is caused by his farming practices or use of fertilizer. (Schneiderwind, N.T. 35; see also Siet, N.T. 210)

14. A farm one and a half miles to the south has not had this problem with the corn crop. The corn on that farm in 1999 was uniformly green and healthy. (Schneiderwind, N.T. 44-45; Ex. A-16a)

15. The Appellant filed a water loss complaint with the Department in 1999. (Schneiderwind, N.T. 27, 39)

16. After an investigation (described below), the Department, by letter, informed the Appellant that it had concluded that there was no correlation between the mining activities at the quarry and the failure of his corn crop. (Ex. A-1)

17. At that time the Appellant did not irrigate his crops. (Siet, N.T. 209)

The Quarry

18. James Yost is a production manager employed by Delaware Valley Concrete (DVC). He is responsible for the oversight of the concrete plant and pumping operations. He was responsible for the quarry site in 1999. (Yost, N.T.*5)

19. There is a buffer of 250 feet between the quarry pit and Mr. Schneiderwind's southern property line. (Schneiderwind, N.T. 23-24)

20. Historically, sand and gravel were mined from the quarry. However, in 1996 Delaware Valley Concrete began to mine shale from the pit. (Yost, N.T. *26-27)

21. Another operator, M&M, began mining the pit in 1998 or 1999. Although they widened the pit to the west, their activity remained at a depth of around the 90 feet mean sea level (msl). (Yost, N.T. *26-27)

22. Water is pumped from the quarry with the use of a six-inch submersible sump on a float system. It allows water to build up to a certain pre-set level and then will begin pumping until the water level drops. At that point, the pump will turn off, allowing the water level to build up again. (Yost, N.T. * 9)

23. The pump is located in the northeast corner of "section A" of the quarry, in an area where Delaware Valley Concrete began to extract shale. (Yost, N.T. *10-11; Ex. C-2)

24. From March until October of 2002, the pump ran 24 hours a day, seven days per week. Until April, the water level of the pump was set at 91 feet msl. Beginning in mid-April the pump was set at 95 feet msl at the request of the Department. During that period, approximately 1.2 million gallons per day of water was removed from the quarry. The pump is currently set to 103 feet msl. (Yost, N.T. *24-25)

Hydrogeological Investigation

25. Gill Oudijk is a hydrogeology consultant. He holds a degree in geology from Penn State University and has 20 years of experience in the area of groundwater analysis. He was accepted by the Board as an expert in the field of hydrogeology. (Oudijk, N.T. 64, 75)

26. Michael Hill is a hydrogeologist working for the Department. He has worked for the Department for ten years. He holds a degree in geology from Kutztown University and has completed some graduate coursework. One of his primary responsibilities with the Department is the investigation of water loss complaints. He was also accepted by the Board as an expert in the field of hydrogeology. (Hill, N.T.* 54-56, 60)

The Lowered Water Table

27. Both Mr. Oudijk and Mr. Hill agreed that the groundwater table below the Appellant's property had been lowered due to pumping at the quarry.

28. Mr. Oudijk testified that one would expect groundwater to flow toward the river and therefore it would be at a higher elevation than the river. However, in this case, the groundwater elevation is lower than the river. Data from monitoring wells demonstrate that the groundwater is being diverted and is flowing toward the quarry rather than directly toward the river. (Oudijk, N.T. 79-80; 82; see also Ex. C-5 at ¶ 7.6a)

29. Mr. Hill agreed that the quarry creates a low point in the local hydrology. Therefore the water table surrounding the quarry migrates toward it. (Hill, N.T. *72-73)

30. Finally, Mr. Oudijk testified, based on the nature of the geology, that when the water level in a pit, which is close to a square mile in area and located only 250 feet away, is dropped by 30-35 feet, it is a reasonable conclusion that there would be an adverse impact on the underlying water table, especially given the porous nature of the sediments. (Oudijk, N.T. 88)

31. Pumping water from the shale would increase the drawdown from the sand and gravel. (Oudijk, N.T. 89)

32. Because the sand and gravel is more transmissive than the shale, water will preferentially flow from the sand and gravel rather than from the shale. There is no evidence that there is an impermeable layer between the sand and gravel and the shale that would prevent this preferential flow. (Oudijk, N.T. 89, 97)

33. Therefore although the Appellant's property was affected by some drawdown before 1997, the effect would be increased when the quarry operator began pumping water from the shale in 1997 to 1999. (Oudijk, N.T. 89, 96)

34. Mr. Oudijk arrived at his conclusion without considering the drought in 1999. If he had considered it, he would expect that the drought would accentuate the amount of drawdown caused by pumping at the quarry. (Oudijk, N.T. 147)

35. Mr. Hill agreed that long-term pumping at the quarry has lowered the groundwater table, especially to the south. He calculated the zone of influence of the pumping to be 4,460 feet extending southward from the edge of the quarry. (Hill, N.T. *119; Ex. C-3)

36. The water table is currently about 18 to 20 feet below the surface. Phrased another way, it is at an elevation of approximately 100 to 102 feet msl, near the water pumping level of the quarry. (Oudijk, N.T. 79-80; Hill, N.T. *182)

The Historic Level of the Groundwater Table

37. Mr. Oudijk testified that according to his analysis the groundwater table was located between six and ten feet below the ground surface before pumping occurred at the quarry. The range of elevation of the groundwater was based on the range of elevation of the ground surface, which is 120-122 feet msl. (Oudijk, N.T. 76, 77-78)

38. Mr. Hill, largely relying on data supplied in the hydrogeological assessments included in 1976 and 1996 permit applications for the site, believed that the historic water table was at approximately 110 feet of elevation. The 1976 permit application notes that approximately 106 feet msl is the highest ground water elevation in the area. The 1996 permit application notes a historic groundwater table of 106-110 feet above mean sea level. (Hill, N.T. *88-89; Exs. C-4; C-5)

39. The 1996 application notes that "[q]uarry dewatering activities have lowered the historic static water table from approximately 106-110 ft. above MSL to 100.2 ft. above MSL in the current pit." (Ex. C-5 at ¶ 7.6a))

40. Mr. Hill also based his opinion on data from the U.S. and Pennsylvania Geological Survey. Therefore, in his analysis, the groundwater table was ten to twelve feet below the surface. (Hill, N.T. 89-94; see Ex. C-1)

41. He did not believe that there was any information which indicated that the pre-mining water table was any higher than ten feet below the ground surface. (Hill, N.T. *90, *94, *102)

42. Mr. Oudijk believed that the USGS data indicated that the historic water table was generally within ten feet of the surface. (Oudijk, N.T. 141-142)

43. Both Mr. Hill and Mr. Oudijk agree that the groundwater table before pumping at the quarry was approximately ten feet below the ground surface, even though they do not agree as to whether the water table was any closer to the ground surface. (See Oudijk, N.T. 144; Hill, N.T. *103)

44. Mr. Oudijk's opinion that the water table may have been as high as five feet below the ground surface, was also based on mottling found in test pits which were performed on the Appellant's property. Mottling is a discoloration of the soil caused when the iron in the soil is

under water or saturated with water and deprived of oxygen. (Oudijk, N.T. 86-88, 144; see also Siet 205-206)

45. Mr. Hill did not have the mottling data available to him in his analysis. He does not have a lot of experience with mottling data. Yet he testified that he didn't think it would change his opinion about the historic height of the groundwater table. (Hill, N.T. *101-102, *175)

46. Mr. Oudijk's opinion was further based on his investigation of the Appellant's farm, reports from the quarry, reports from the Department, and data from the Pennsylvania and United States Geological Surveys. He also reviewed Mr. Hill's report. (Oudijk, N.T. 71-73)

Soil and Corn

47. Kenneth B. Siet is a hydrogeology consultant and an expert in agronomy. He holds a degree in biology from New York University. He has done graduate work and performed research in soils and crops. He has also taught these subjects at the college level. He is currently a consultant for Dan Raviv Associates where his practice concentrates on groundwater, land use and soil pollution. He was accepted by the Board as an expert in agronomy as it relates to water availability to crops. (Siet, N.T. 186-89)

48. The soils of the Appellant's farm are typical of those found along the floodplain of the Delaware River. These soils are considered good for corn and have historically been used for that purpose. (Siet, N.T.190-91; see also Hill, N.T. *71-72)

49. Corn has a high requirement for water. Although the root system draws most of its moisture from a soil depth of three to four feet, in drought conditions it will go as deep as six or seven feet. (Siet, N.T. 192, 207)

50. The capillary fringe is a semi-saturated zone which is on top of the water table. The "vadose zone" is an unsaturated area above the capillary fringe. This is the zone where a corn

crop is situated. (Oudijk, N.T. 66; Siet, N.T. 197-200; Ex. C-3)

51. The roots of corn can not live within the water table, but will draw water from the capillary fringe. However, the root system need not reach the capillary fringe; it is able to draw moisture from the vadose zone above the capillary fringe. (Siet, N.T. 203-204)

52. Mr. Siet believed that the root systems of corn planted on the Appellant's farm was able to draw water from the capillary fringe in times of drought before mining lowered the water table. This conclusion was based on the analysis of Mr. Oudijk. (Siet, N.T. 206-208)

53. In his investigation of the Appellant's crop failure, Mr. Siet reviewed the Appellant's planting practices. He considered the possibility of the misapplication of fertilizer or pesticides, liming and pH requirements and the type of seed he was using. He concluded that none of these factors played a role in the crop failure. (Siet, N.T. 210)

54. If a factor such as liming or fertilizer were a cause of the crop failure, one would expect the crop failure to follow Mr. Schneiderwind's planting pattern. Yet, the failed corn ran in three bands which ran diagonally to the angle of tillage. (Siet, N.T. 210)

55. Mr. Siet observed the Appellant's soil and saw that the soil where the failed corn was planted was significantly drier and more coarsely textured then the soil where the corn did not fail. The soil where the corn did not fail had a higher amount of defined, smaller particles. This type of silty soil holds a lot more water than coarser soils with less silt. (Siet, N.T. 211, 223-25; see also Oudijk, N.T. 99-101)

56. The lack of connection to the Appellant's farming practices and the different zones of soil in the field indicated to him that the crop failure was due to a moisture issue. Specifically, corn growing in coarser soils was not able to draw or retain the same amount of moisture as corn growing in siltier soil which had a higher ability to retain moisture. (Siet, N.T. 212-13)

57. It was the opinion of all the hydrogeologists that when the quarry expanded and began aggressive pumping the water table was significantly lowered. Based on this conclusion, Mr. Siet testified that the crop was not able to overcome the effect of the drought in 1999 because it was not able to draw moisture from some of the farm's soil. (Siet, N.T. 213; *see, e.g.,* Hill, N.T. *119; Oudijk, N.T. 89, 96)

58. The failure of the crop was not uniform because of the different soil zones present in the field. The corn which did not fail was in a zone of silty soil which is better able to hold moisture and was able to draw moisture from the soil above the capillary fringe. (Siet, N.T. 223, 227)

59. If the capillary zone had been adequate, the drought in 1999 would not have caused a crop failure. In fact, other farms south of the Appellant's farm did not suffer from crop failure. (Siet, N.T. 236-37)

60. There was no evidence that contradicted Mr. Siet's conclusion that the variation of soils found in the Appellant's field, combined with the lowering of the water table caused the failure of the Appellant's corn crop. (Siet, N.T. 229-30)

61. Mr. Hill has no experience or expertise in agronomy or the moisture requirements of corn and was unable to contradict Mr. Siet's testimony that the lowering of the water table combined with the variation of soils on the Appellant's farm caused the failure of the corn crop. (See N.T. *60)

DISCUSSION

This appeal raises interesting issues involving the quantum of evidence which is necessary to demonstrate that a scientific conclusion by the Department is wrong, the scope of relief which may be provided by the Board, and the scope of the Board's jurisdiction to review

the Department's action. The Appellant in this case attacks a conclusion by the Department that pumping by a quarry adjacent to his farm did not cause the failure of his corn crop because by lowering the water table the corn crop was no longer able to access adequate moisture from the soil. Our review of an action of the Department is *de novo*.[3] That is we consider not only the evidence which was considered by the Department, but we may consider other evidence as well.[4]

The Appellant argues that the Department's investigation was inadequate because it did not go far enough. That is, the Department concluded that the water table had been lowered by pumping at the quarry, yet it did not go to the next step and adequately investigate whether this lowering of the water table affected the corn crop. The Department goes to great lengths to defend the report of its hydrogeologist, Michael Hill, and contends that the Appellant failed to fulfill his burden of proof because he failed to attack the methodology used by Mr. Hill in reaching his conclusions concerning the water table. The Department also attacks various pieces of evidence which the Appellant's experts relied upon in reaching their conclusions. The Department offered no agronomy evidence concerning the moisture needs of corn.

The Department's authority to require the replacement of a water supply that has been damaged by noncoal surface mining is found in Section 3311(g) of the Noncoal Act:

> Any surface mining operator who affects a public or private water supply by contamination, interruption or diminution shall restore or replace the affected supply with an alternate source of water adequate in quantity and quality for the purposes served by the supply. . . .[5]

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[3] *Leatherwood, Inc. v. Department of Environmental Protection,* __ A.2d__ (No. 807 C.D. 2002 Pa. Cmwlth. filed March 18, 2003); *Warren Sand & Gravel v. Department of Environmental Resources,* 341 A.2d 556 (Pa. Cmwlth. 1975).

[4] *Id.; O'Reilly v. DEP*, 2001 EHB 19; *Grand Central Sanitary Landfill, Inc. v. DER,* 1993 EHB 357; *Hrivnak Motor Co. v. DER,* 1993 EHB 432.

[5] 52 P.S. § 3311(g).

The Department's regulation on this topic is virtually identical to the statutory language, but elucidates the meaning of "water supply" to include "an existing source of water or facility or system for the supply of water for human consumption, for agricultural, industrial or other uses."[6]

The scientific question in this case has two pieces: (1)was the water table lowered as a result of activity at the quarry; and (2) did the corn crop use the water from that water table. There is no real disagreement as to the first part of the puzzle: Both Mr. Oudijk, the Appellant's hydrogeologist, and Mr. Hill, the Department's hydrogeologist, agree that the water table was lowered as a result of activity at the quarry.[7] Furthermore, there is no real disagreement that the historic level of the water table was as high as ten feet below the ground surface. Mr. Hill does not believe that there is any basis to conclude that the water table was higher than ten feet. Mr. Oudijk believes that there is evidence to support a conclusion that the water table was as high as six feet below the ground surface. As we explain below, this difference of opinion is of minor significance to our resolution of the Appellant's claim, because the testimony of the Appellant's agronomist suggests that the corn crop could have accessed adequate moisture from the soil if the water table was as high as ten feet.

The Appellant offered the testimony of Kenneth Siet, an agronomy expert. He testified that corn roots will draw water from the capillary fringe. The capillary fringe is a layer of moisture which lies above the vadose zone or, for our purposes, the groundwater table.[8] All of the hydrogeologists who testified agree that the capillary fringe extended approximately three

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[6] 25 Pa. Code § 77.533.
[7] E.g. N.T. *119.
[8] Ex. C-3.

feet above the water table.[9] If the groundwater table was ten feet below the ground surface, then the capillary fringe was seven feet below the ground surface.[10]

Mr. Siet also testified that the root system of corn will go as deep as six or seven feet to draw moisture. He concluded that historically the Appellant's corn was able to draw moisture from the soil, but that it is now unable to do so effectively because of the drop in elevation of the groundwater table. He also testified that during his investigation he ruled out other possible causes of the Appellant's crop failure, such as planting or fertilizing practices. The Department presented no competent evidence to rebut this conclusion.

We find that there is more than enough evidence to conclude that the operation of the quarry not only affected the groundwater table at the Appellant's farm, but that moisture related to the water table was a water supply used by the corn. That supply became unavailable, at least in some of the farm's more coarse and less silty soil once the water table was lowered. The Department also reached the conclusion that the operation of the quarry had affected the water table. However, it did not go far enough in its investigation. The Department presented no competent evidence at the hearing in support of its conclusion that the corn was not affected by the lowering of the water table. Mr. Hill had no expertise in agronomy. Although Mr. Hill is clearly a competent hydrogeologist, he was not qualified to conclude that the water table was not a water supply used by the Appellant's corn. In short, we agree with the Appellant that the Department's study of the Appellant's farm was inadequate to conclude that the lowering of the water table by the quarry operation affected a water supply used by the Appellant.

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[9] N.T. 193-95, *113; Ex. C-3.
[10] N.T. 143-44.

The Department, in its brief, suggests that the Appellant's evidence failed because it did not prove that the lowering of the water table by the quarry was the only cause of the failure of his corn crops. It points to the fact that the Appellant did not suffer a complete crop failure, but rather a partial crop failure evidenced by the three bands of failed corn interspersed with bands of successful corn. We agree that there were clearly other contributing factors to the failure of the corn crop. Specifically, there is the presence of at least two types of soil in the Appellant's field; silty soils that hold moisture and coarse and less silty soils that do not. And also there is the drought condition which existed in 1999. Yet there is no requirement in the statute or the regulation which requires that a surface mining activity be the *sole* cause of the water loss. It requires a water supply to be replaced if it is "affected." Here, the quarry pumping clearly "affected" a water supply by lowering the water table, which exacerbated other conditions at the site. In fact, Kenneth Siet testified that if the water table and concomitant capillary fringe had been available to the corn growing in the soil that was less capable of retaining moisture, it would have been able to survive the drought condition.[11] We see no language in either the statute or the regulation requiring a more restrictive causal nexus.

The Department contends that the only thing that the Appellant's evidence demonstrates is that there is a difference of opinion between the Department's hydrogeologist and the Appellant's experts. It further argues that there were scientific problems with the evidence proffered by the Appellant in support of his position which requires us to reject it as not credible. Yet, we believe that the Appellant's evidence demonstrates more than a difference of opinion and also that none of the bases offered by the Department for rejecting the Appellant's expert opinions are sufficient.

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[11] N.T. 236-37.

First, the Department argues that the Appellant did not attack the methodology used by Michael Hill, but only attacked his conclusions. Not only is this not fatal to the Appellant's case,[12] but we disagree with this characterization. Although perhaps not a direct attack, the Appellant cross-examined Mr. Hill concerning his use of certain data upon which his opinion relied and why he did not consider other data.[13] This was similar to the strategy that the Department used to impeach the Appellant's experts. Much of the data relied upon by Mr. Hill was from old permit applications that had been filed with the Department from the quarry. Mr. Hill admitted that if any of that data in the permit applications had indicated that the pre-mining water table was 111 feet above mean sea level (msl) (9 feet below ground surface), he could have used that number in his analysis instead of 110 feet msl.[14] Clearly the Appellant also disagreed with Mr. Hill's assumptions regarding the use of USGS data[15] and his failure to consider other factors, such as soil mottling data. In short, the Appellant did attack Mr. Hill's methodology by challenging his reliance and assumptions about certain data.

Second, the Department attacks Mr. Oudijk's opinion because of what it calls the "predictive" nature of his February 1997 report. That is, the purpose of Mr. Oudijk's report was to predict what would happen if pumping at the quarry were accelerated as proposed in DVC's 1997 permit application. We fail to understand why this is fatal to Mr. Oudijk's conclusion concerning the historic level of the groundwater table in the vicinity of the quarry. The testimony referenced by the Department as "predictive" had nothing to do with the historic level of the

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[12] It goes without saying that there are many ways to attack an expert opinion. Attacking an expert's methodology is but one mode of attack.

[13] N.T. *123-46

[14] N.T. *169.

[15] See discussion below.

water table.[16] Mr. Oudijk testified that the purpose of his 1997 report and accompanying calculations was to predict the potential drawdown of the groundwater table from pumping at the quarry if the pit were lowered as proposed in the 1997 permit application. The historic level of the water table was not part of the mathematical formula used for that calculation. Yet the *data* gathered in creating that report was considered when he arrived at his conclusion concerning the historic water table.[17]

Third, the Department attempts to impeach Mr. Oudijk's opinion because he relied on data from the USGS report which the Department contends does not support his conclusion concerning the historic groundwater table. Specifically, none of the wells noted in the USGS report showed groundwater levels higher than ten feet below the ground surface. The closest one measured 11.6.[18] However, Mr. Oudijk explained his use of this data. He explained that since the USGS study was done in 1991, it did not undercut his conclusion concerning the height of the water table before mining began.[19] The well was located 500 feet south of the Appellant's farm.[20] Further, since the well was a "pumping well" it is not unexpected it would yield a water table measurement that was lower than the actual water table.[21]

Although Mr. Hill testified that he disagreed that this data supported an opinion that the pre-mining water table was higher than ten feet below the ground surface, he did not explain the basis for his disagreement.[22] Moreover, this USGS data was only one of several pieces of evidence Mr. Oudijk examined to support his conclusion that the pre-mining water table was

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[16] N.T. 121
[17] N.T. 73.
[18] N.T. 134-36.
[19] N.T. 135.
[20] N.T. 141.
[21] N.T. 136.

higher than ten feet below the ground surface. Mr. Oudijk explained that he plotted the USGS well data and considered it in the context of the information such as the soil mottling, the nature of the geology in the area and other similar factors.[23] Therefore, even if we disregarded Mr. Oudijk's reliance upon the USGS well data, there was other information upon which Mr. Oudijk's expert opinion was founded.

Finally, the Department argues that both Mr. Siet and Mr. Oudijk erred in relying on the soil mottling data, which indicated the seasonal high water table was at one time five to six feet below the ground surface.[24] The Department charges that Mr. Siet "conceded" that factors other than a seasonal high water table might cause soil mottling, such as a "history of flood events." The Department mischaracterizes Mr. Siet's testimony. Although he did state that there are other "possible" causes for soil mottling generally, read in context these other causes were unlikely explanations in this case in Mr. Siet's view. In fact, although Mr. Siet conceded that theoretically long-term flooding might cause soil mottling, he had never seen that condition or read about it in any source.[25] Moreover, the Department provided no evidence of its own on this topic. Mr. Hill conceded that he was not familiar with soil mottling tests.[26] Although he also stated that the mottling information would not change his opinion, due to his admitted unfamiliarity with the topic, he was no more than speculating.

The most important factor is that Mr. Hill had no expertise of his own to evaluate whether the corn could survive under all soil conditions when the water level had been lowered. Kenneth

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[22] N.T. *96-100

[23] See N.T. 86-100.

[24] N.T. 86-88; 205-206.

[25] N.T. 219.

[26] Specifically he said: "I've heard of the condition of modeling [sic] but I don't know all the parameters that result in these conditions." N.T. * 175.

Siet's testimony, offered by the Appellant, was sufficient to demonstrate from an agronomist's knowledge of soil conditions that the lowered water table caused the failure of the Appellant's corn crop.

We now turn to the Appellant's request for relief. Specifically he argues that "that money be paid to compensate for the cost of installation of an irrigation system . . . ."[27] We have found that the Department's investigation of the Appellant's water loss complaint was insufficient and its conclusion that the lowering of the water table by the quarry operation did not cause the Appellant's crop loss was in error. Accordingly, we will exercise our *de novo* authority and find that the Appellant's water supply was adversely affected and direct the Department to issue an order to DVC to provide the Appellant with an alternate source of water adequate in quantity and quality for the purpose of providing moisture for the growth of the Appellant's corn. The Board's authority to substitute its discretion for that of the Department includes the authority to direct the Department in what is the proper action to be taken.[28] Nevertheless we do not have sufficient information before us to determine the precise amount, nature and manner in which an alternate water supply of adequate quantity and quality should be provided. Moreover, having determined that the Appellant's water supply was affected by surface mining, it is more appropriate in this case to allow the Department to determine what is the appropriate manner of replacing the affected supply in accordance with the requirements of the Noncoal Act.[29] Should the Appellant

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[27] Appellant's Proposed Conclusion of Law No. 10.

[28] *Pequea Township v. Herr,* 716 A.2d 678 (Pa. Cmwlth.1998).

[29] *Thornhurst Township v. DEP*, 1996 EHB 258 (it is appropriate to remand a matter to the Department where it has not had an opportunity to consider certain alternatives.)

disagree with the relief ordered by the Department, that order can then be reviewed by the Board after a thorough record has been made.[30]

Next, we reject the Department's contention that its letter informing the Appellant of its conclusion that activities at the DVC quarry had not affected a water supply is not an appealable action. The Department takes the position that its decision reflects an exercise of the Department's prosecutorial discretion, relying on *Ridenour v. DEP*[31] and *Beaver v. DEP*.[32]

We believe that the Department's decision not to require replacement of the Appellant's water supply is an adjudicatory act subject to the Board's jurisdiction. Rather than an exercise of prosecutorial discretion, it reflects a decision which adversely affects this Appellant's right to be provided with an alternative water supply. An adjudication is defined by the Administrative Agency Law as follows:

> Any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceedings in which the adjudication is made. The term does not include any order based upon a proceeding before a court or which involves the seizure or forfeiture of property, paroles, pardons, or releases from mental institutions.[33]

Further, the Environmental Hearing Board Act grants the Board the power and duty to hold hearings and issue adjudications under the Administrative Agency Law on "orders, permits,

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[30] *See Carlson Mining Co. v. Department of Environmental Resources,* 639 A. 2d 1332 (Pa. Cmwlth. 1994)(the Board has the authority to decide whether a Department order requiring permanent water replacement was "adequate" within the meaning of the surface coal mining law.) We also note that the Commonwealth Court in *Carlson* pointed out that the water replacement provisions of SMCRA did not constitute an action in tort and that compensatory damages were not the type of relief that could be appropriately ordered by the Department. 639 A.2d at 1337. Although the water replacement provisions of the Noncoal Act are not identical to those found in the Surface Mining Act, the policies and logic underlying the legislation are similar in this regard.

[31] 1996 EHB 928.

[32] EHB Docket Nos. 2002-096-K, 2002-151-K (Opinion issued August 8, 2002).

licenses or decisions of the department." At the same time, this Act enables the Department to take action without complying with the requirements of the Administrative Agency Law, but provides that "no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board..." under the Board's regulations. [34]

The applicable provision of the Noncoal Act, Section 3311(g), creates a right to replacement of an affected water supply by stating that "any surface mining operator who affects a public or private water supply by contamination, interruption or diminution shall restore or replace the affected water supply with an alternate source of water adequate in quantity and quality for the purposes served by the supply."[35] Further, one of the central purposes of the Noncoal Act is to protect water supplies. It states explicitly that a purpose of the act is to, among other things, "protect and maintain water supply."[36] In discussing similar water replacement provisions under surface mining law, the Commonwealth Court emphasized their importance and observed that the purpose of such provisions is to protect the public from the hardship caused by partial or complete water loss.[37]

Therefore the Department's determination that there was no such diminishment adversely affecting the Appellant clearly affects a right of the appellant to an adequate water supply. The Board's regulatory definition of "action" includes the Department's decision that the Appellant had no right to replacement of his water supply. "Action" is defined in these regulations as

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[33] 2 Pa C.S. § 101.
[34] 35 P.S. § 7514 (b) and (c).
[35] 52 P.S. § 3311(g).
[36] 52 P.S. § 3302.
[37] *See Carlson Mining Co. v. Department of Environmental Resources,* 639 A.2d 1332 (Pa. Cmwlth. 1994).

follows:

> An order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification.[38]

Court decisions on what constitutes an adjudication squarely support this view. In *Pennsylvania Social Services Union, Local 668 v. Pennsylvania Labor Relations Board*, 392 A.2d 256 (Pa. 1978), our Supreme Court held that the courts have jurisdiction over a decision of the Labor Board not to pursue an unfair labor practice claim at the request of the Union over a decision of the Department of Public Welfare to increase the price of cafeteria lunches supplied to its employees. The court held that this decision was an adjudication within the Administrative Agency Law over which the courts have jurisdiction, but dismissed the proceeding because there could not be an unfair labor practice under these circumstances when the contract with the Union still continued in force.

Similarly, in *Roberts v. Office of Administration,*[39] police officers appealed the Office of Administration's (OA) refusal to hear their grievance concerning the reclassification of their jobs. OA argued that their appeal should be quashed because it was not an adjudication and therefore was not reviewable by the court. Commonwealth Court disagreed. It found that the officer's entitlement to promotion invoked a personal or property right, or privilege, and the OA's decision to deny them a hearing involved an exercise of discretion and not the performance of a purely ministerial duty. Therefore the decision was "judicial in nature." The court was further persuaded by the fact that the letter refusing to hear the grievance discussed in detail the

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[38] 25 Pa. Code § 1021.2.

[39] 372 A.2d 1233 (Pa. Cmwlth. 1977).

merits of the officers' claim. Therefore the letter constituted an adjudication which could be reviewed by the court.

While not precisely analogous, the Commonwealth Court's recent decision in *Pennsylvania Association of Independent Insurance Agents v. Foster,*[40](*PAIIA*) supports our view that there are few agency decisions which should be completely insulated from review by the Board. The issue before the court in *PAIIA* was whether the appellant could appeal the approval of a settlement agreement by the insurance commissioner which allowed an automobile association to continue selling insurance in Pennsylvania. The court examined the provisions of the Insurance Department Act of 1921 and determined that since a purpose of the act was to protect independent insurance companies from unfair competition it created a protectable property right. Further, since the appellant had complained that the settlement agreement would subject it to unfair competition, the order approving the settlement was appealable as an adjudication.[41]

The doctrine of prosecutorial discretion cannot be applied to adjudicatory decisions of an administrative agency which are based upon the merits of a claim rather than based upon a determination of policy. The concept of prosecutorial discretion is analogous to the power vested with district attorneys to the criminal law and the power vested with district attorneys to choose against whom criminal charges may be brought.[42] The theory is that decisions to prosecute a matter are vested within the discretion of the district attorney who may decide, for policy reasons unrelated to the merits of a case, that it is not prudent to pursue a complaint. Such decision-

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[40] 616 A.2d 100 (Pa. Cmwlth. 1992).
[41] 616 A.2d at 102.
[42] *See Columbo v. DER*, 1991 EHB 370.

making based on policy is largely sheltered from review by courts.[43] Furthermore, a crime victim generally has no right to relief in the criminal courts:

> It is a well-settled principle of law that a crime is an offense against the sovereignty [sic], a wrong which the government deems injurious not only to the victim but to the public at large, and which it punishes through judicial proceeding in the Commonwealth's name. Though the same wrongful act may constitute both a crime and a tort, the tort is a private injury which is to be pursued by the injured party. Criminal prosecutions are not to settle private grievances but are to rectify the injury done to the Commonwealth. The individual who is the victim of a crime only has recourse in a civil action for damages.[44]

Yet even a district attorney's discretion is not unfettered. The Pennsylvania Supreme Court made the distinction between a prosecutor's decision not to prosecute a case for policy reasons even if a *prima facie* case may be established from the evidence and a decision not to prosecute based upon the lack of the evidence.[45] Such policy choices as a "discretionary use of the executive powers conferred in [the district attorney]" are accorded deference by the courts. But, in contrast, "the final decision of sufficiency of the evidence has been a judicial judgment."[46] But in this case, the Department did not decline to order a replacement of water because of some policy. It declined to take such action because it decided on the merits of Appellant's claim that he was not entitled to such an alternate supply. Moreover, even a policy matter may be reviewable to

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[43] *Commonwealth v. Benz*, 565 A.2d 764 (Pa. 1989); *Commonwealth ex rel. Corbett v. Large,* 715 A.2d 1226 (Pa. Cmwlth. 1998).

[44] *Commonwealth v. Malloy*, 450 A.2d 689, 691 (Pa. Super. 1982)(citations omitted); *see also Lutz v. Commonwealth,* 505 A.2d. 1356 (Pa. Cmwlth. 1986).

[45] *Benz,* 565 A.2d at 767 n. 4.

[46] *Id.* at 767. In *Benz* the Supreme Court upheld the Superior Court's jurisdiction to review the lower court's disapproval of a private criminal complaint.

determine whether it comports with "both law and justice. A policy must embrace the general principles by which the prosecutor is guided in the management of his public responsibilities."[47]

For the foregoing reasons, we decline to follow the Commonwealth Court's decision of *In re Frawley.*[48] In that case the appellant, an individual, filed a complaint with the Bureau of Professional and Occupational Affairs demanding the revocation of the medical licenses of some doctors and nurses. The Bureau investigated and declined to prosecute. On appeal, the Commonwealth Court held that the decision whether or not to press charges is not "properly subject to judicial review, for such actions are not adjudicatory in nature."[49] The court's decision offered very little in the way of analysis of the statutory structure under which the complaint was filed or what actions by an administrative agency are in fact "prosecutorial." In addition, that decision appears to have been largely ignored in subsequent decisions of the Supreme and Commonwealth Court described above and does not reflect the current status of administrative law.

Moreover, *Frawley* is clearly distinguishable from this case. First, as we explained above, a decision concerning a water supply under the Noncoal Act clearly is adjudicatory in nature. The statute specifically provides that owners of water supplies that are affected in quality or quantity by mining have a right to special protection. The appellant in *Frawley* did not appear to have a unique interest specifically protected by the statutory framework at issue in that case which would create a personal or a property right.

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[47] *Ex rel. Corbett*, 715 A.2d at 1228 (finding that the attorney general's internal policy to defer to the local district attorney in any action challenging an individual's eligibility for local office was consistent with the reasonable management of the attorney general's public responsibilities).

[48] 364 A.2d 748 (Pa. Cmwlth. 1976)(*en banc*), *cert. denied sub nom.*, *Downey v. Fraggassi*, 436 U.S. 910 (1978).

The Department argues that the decision under appeal here is not adjudicatory because the statute grants the appellant the right to take his case to the court of common pleas in certain circumstances.[50] We do not believe that this provision acts to deprive the Board of jurisdiction. Assuming that it would apply to this case, at most it provides an appellant with a choice of venue to pursue his claim. There may be circumstances where an aggrieved individual seeks relief broader than that which can be provided by the Board and therefore an action in the courts may be viewed as desirable. Yet we see no purpose to be served by depriving a water supply owner of the unique expertise of this Board, and there is no language in Section 3320 of the Noncoal Act, which requires us to do so.

We realize that we came to a different result in *Ridenour v. DEP.*[51] We dismissed that appeal on a motion by the Department that its letter to the Appellant refusing to order a coal company to remedy the degradation of her water supply was an act of prosecutorial discretion. Our decision was hampered by the fact that the appellant was pro se and failed to respond to the Department's motion. We therefore did not have full briefing on the issue of appealability and

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[49] 364 A.2d at 749.

[50] 52 P.S. § 3320(a). Specifically, that provision provides:

> Except as provided in subsection (c), a person having an interest that is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this act or any rule, regulation, order or permit issued pursuant to this act against the department where there is alleged a failure of the department to perform any act that is not discretionary with the department or against any other person who is alleged to be in violation of any provision of this act or any rule, provision of this act or any rule, regulation, order or permit issued pursuant to this act. Any other provision of law to the contrary notwithstanding, the courts of common pleas shall have jurisdiction of such actions and venue in such action shall be as set forth in the Rules of Civil Procedure concerning actions in assumpsit.

the Commonwealth Court's decision in *Frawley* seemed to be on point.[52] Therefore, to the extent that *Ridenour* conflicts with our decision in this case, it is overruled.

The Department also relies on our recent decision in *Beaver v. DEP*.[53] Specifically, the Department argues that because the letter to the Appellant is "descriptive" rather than "prescriptive" it can not constitute an appealable action. The Department's reading of *Beaver* is too narrow. Whether the language of a Department letter is merely an opinion (descriptive) or requires a person to do something (prescriptive) is one factor of many that the Board considers when determining whether a written communication is an appealable action.

In *Beaver* the appellant received a letter from the Department concerning the navigability of a portion of the Little Juniata River. The appellant operated a fly fishing business and advertised a stretch of the river as private property accessible only to their customers. The Department, after receiving complaints from some citizens' groups, wrote a letter on behalf of the Commonwealth informing the appellant of its belief that the stretch of the river was property of the Commonwealth and that he had no right to exclude the public from its peaceable use. The letter warned of possible legal action by the Commonwealth if the appellant continued to interfere with the public's right of access. The Board dismissed the appellant's appeal of the letter, in part, because the language of the letter was merely a statement of the Commonwealth's position concerning the ownership of the river, described the fact that the Department had received complaints, and advised the appellant that it might seek legal relief if the situation

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[51] 1996 EHB 928.

[52] See also *Huey v. DER*, 1984 EHB 667, where the Board expressed doubt that the *Frawley* decision applied to a complaint that mining had degraded a water supply, but since the appellant had failed to respond to the Department's motion to quash, the Board granted the motion.

[53] EHB Docket Nos. 2002-096-K, 2002-151-K (Opinion issued August 8, 2002).

remained unresolved. This language was characterized by the Board as "descriptive" rather than "prescriptive."

Yet this distinction was only one of several factors that the Board relied upon in reaching its conclusion. The Board also considered other factors cogently described by Judge Labuskes in *Borough of Kutztown v. DEP,*[54] which the Board will consider when determining the appealability of a communication by the Department: wording of the letter, the substance, meaning, purpose and intent of the letter, the practical impact of the letter, the regulatory and statutory context of the letter, the apparent finality of the letter, what relief the Board can offer, and any other indicia of a letter's impact upon its recipient's personal or property rights.[55] Consequently the Board considered that the context of the letters was an ongoing property dispute and not the enforcement of a statute or regulation administered by the Department. Further, the Board analyzed the relief it might offer and concluded that the relief sought by the appellant – a declaration that the Department did not have the authority to state the opinion in its letter – was not within the Board's jurisdiction and would not change the general nature of the property dispute.

While we agree that the Department's letter in this case does not require the Appellant to do anything, that fact is not dispositive here. It is difficult to imagine *any* denial by the Department which would contain "prescriptive" rather than "descriptive" language. Moreover, there are other factors which weigh in favor of appealability. Unlike the facts of *Beaver*, this letter was written within the context of a specific regulatory structure which authorizes the Department to provide for the Appellant's relief. Moreover, the Board is able to provide

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[54] 2001 EHB 1115.
[55] 2001 EHB at 1121.

effective relief, and there is no indication in the letter that the position presented by the Department is anything other than its last word.[56]

In sum, we conclude that we have jurisdiction to review the Appellant's claim and that there are no policy reasons not to afford him the benefit of such review. We therefore make the following:

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this appeal. 35 P.S. § 7514.

2. The operation of the DVC quarry affected the Appellant's water supply within the meaning of Section 3311(g) of the Noncoal Act. 52 P.S. § 3311(g) and 25 Pa. Code § 77.533.

3. The Department's investigation of the Appellant's claim that his corn crop used the moisture supplied by the affected water table was inadequate and incomplete.

4. The Board concludes that the failure of the Appellant's corn crop was a result of the lowering of the water table caused by the mining activities at the quarry of Delaware Valley Concrete.

5. Section 3311(g) of the Noncoal Act does not require that mining be the sole cause of the diminution of a water supply. 52 P.S. § 3311(g).

6. The Department's determination that the Appellant's crop loss was not caused by DVC's mining activity was a result of an inadequate investigation leading to its erroneous conclusion that the Appellant's corn crop was not affected by the lowering of the water table.

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[56] We are aware that the Department offered to refer the matter to its Central Office for review. However, to do so the Appellant felt that he ran the risk of losing his right to appeal to the Board. Inasmuch as that informal review process is voluntary and initiated by the appellant, for the purpose of our analysis here we do not believe that it is sufficient evidence that the Department's conclusion concerning his water loss claim was not final.

7. As a result, the Board may substitute its discretion for that of the Department and direct the Department to order Delaware Valley Concrete to replace the Appellant's water supply in accordance with Section 3311(g) of the Noncoal Act. *Pequea Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998).

8. The appropriate remedy is for the Board to direct the Department to issue an order to Delaware Valley Concrete which requires it to restore or replace the Appellant's affected water supply with an alternate source of water adequate in quantity and quality for the purpose of providing moisture to the Appellant's corn crops. *Pequea Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

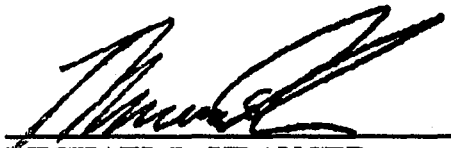
WALTER SCHNEIDERWIND	:	
	:	
v.	:	**EHB Docket No. 2000-113-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

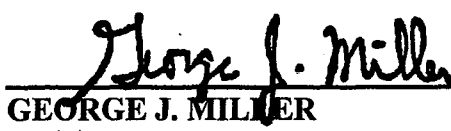
AND NOW, this 26th day of March, 2003, the appeal of Walter Schneiderwind in the above-captioned matter is hereby SUSTAINED. This matter is remanded to the Department to issue an order to Delaware Valley Concrete requiring it to restore or replace the affected water supply with an alternate source of water adequate in quantity and quality for the purpose of providing moisture to the Appellant's corn crops.

Jurisdiction relinquished.

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: **March 26, 2003**

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

For the Commonwealth, DEP:
Thomas M. Crowley, Esquire
Southcentral Region

For Appellant:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

BURNSIDE BOROUGH	:	
	:	
v.	:	**EHB Docket No. 2002-138-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 27, 2003**

OPINION AND ORDER GRANTING A MOTION FOR SUMMARY JUDGMENT

By: Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Department's motion for summary judgment is granted and the Board sustains a Department order directing Appellant to take specific actions to abate continuing violations of the Sewage Facilities Act. The Department met its burden of proving the material facts supporting its order, including the existence of an ongoing unpermitted discharge of raw sewage within the Borough and a failure by Appellant to take any action to abate the discharge for nearly ten months prior to issuance of the order. The Department's order was authorized by applicable law, and the order was a reasonable and appropriate exercise of the agency's discretion.

OPINION

This matter involves an administrative order issued by the Department of Environmental Protection (DEP) to Appellant Burnside Borough (the Borough) directing that certain actions be taken by the Borough to abate violations of the Pennsylvania Sewage Facilities Act (SFA),[1] the

[1] Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. § 750.1 *et seq.*

Clean Streams Law (CSL),[2] and implementing regulations, occurring within the Borough. The Department initially received a complaint in July 2001 that raw sewage was being discharged onto the ground at property located in the Borough. After DEP requested the Borough to address the complaint, conducted its own inspection of the ongoing discharge, and made further requests for action, DEP ultimately issued an order to the Borough nearly ten months later on May 10, 2002 (the 2002 Order). The 2002 Order determined that Appellant had violated its statutory and regulatory duties by, *inter alia*, failing to take any action to abate the ongoing violations. DEP ordered the Borough to investigate the sources of the discharge and require those sources to obtain permits and abate the discharge; the Borough was also directed to institute suits in equity to restrain and prevent further violations in the event of noncompliance.

The Borough appealed the 2002 Order and subsequently filed an amended Notice of Appeal which generally did not contest the factual findings in the 2002 Order; rather, Appellant objected to the order on legal grounds. Appellant conceded that its failure to resolve the described discharge justified a DEP order directing the Borough to take actions which DEP deemed necessary for the Borough to properly administer the SFA. Nevertheless, Appellant objected that the facts do not constitute a sufficient basis for DEP's determination that the Borough violated the SFA because Appellant's duty to take action to address the ongoing discharge is discretionary, not mandatory. Alternatively, the Borough implied that it was not responsible for taking action to abate the discharge because it had allegedly transferred its administration of the SFA to the Clearfield County Sewage Committee (CCSC) and was therefore dependent upon the CCSC to address the SFA violations occurring in the Borough.

Presently before the Board is a motion for summary judgment, filed by DEP on December 12, 2002, seeking dismissal of the appeal. The Motion is supported by several

[2] Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.1 *et seq.*

affidavits and attached exhibits, as well as by a set of Requests for Admissions served on Appellant during discovery proceedings.[3] The Borough filed opposition on January 13, 2003. In its response, the Borough reiterates the legal contentions raised in its amended Notice of Appeal, but does not contest or offer evidence controverting the basic material facts supporting DEP's Motion.[4] DEP timely filed a Reply in further support of its Motion. We find that there are no genuine issues of material fact and that DEP is entitled to judgment as a matter of law; we will accordingly grant the motion and dismiss this appeal.

I. Factual Background

Appellant is a Pennsylvania borough located in Clearfield County. Between May 1, 2001 and July 31, 2002, the Borough was a member of the CCSC—a local agency that participates in the administration of certain aspects of the SFA for its member municipalities in Clearfield County. (Affidavit of R. Curt White, at ¶ 6; Request for Admission No. 1).[5]

The CCSC provides several limited administrative functions for its members: (1) reviews the qualified sewage enforcement officers (SEO) available in the area and negotiates a fee

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[3] The Borough admits in its opposition to the Motion that it never served any response to DEP's Requests for Admissions, see Appellant's Memorandum in Opposition, at page 6, and discovery proceeding have been closed since September 2002. The assertions set forth in the Requests for Admissions are therefore deemed admitted pursuant to Pa.R.Civ.P. 4014(a) and Board Rule 1021.102(a). *See* 25 Pa. Code § 1021.102(a) (discovery in proceedings before the Board is generally governed by the Pennsylvania Rules of Civil Procedure); Pa.R.Civ.P. 4014(b) ("Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless . . . the party to whom the request is directed serves upon the party requesting the admission an answer verified by the party or an objection, signed by the party or by the party's attorney").

[4] The only exception is the submission of an affidavit by the Borough Council President concerning the alleged transfer by the Borough to CCSC of the Borough's responsibility to administer the SFA. As discussed below, this belated attempt by the Borough to create an ostensible issue of material fact is not convincing—given its prior admission to the contrary when it failed to respond to DEP's Requests for Admissions; the conceded lack of the statutorily-required concomitant acceptance by CCSC of the attempted delegation of responsibility by the Borough; and, the SFA's prohibition on the voluntary transfer by a municipality of its responsibility for administering the SFA, thus rendering the Borough's unilateral attempt to delegate responsibility legally ineffective.

[5] A "local agency" is defined by the SFA as "a municipality, or any combination thereof acting cooperatively or jointly under the laws of the Commonwealth, county, county department of health or joint county department of health." 35 P.S. § 750.2. "Municipality" means "a city, town, township, borough or home rule municipality other than a county." *Id.*

schedule with these SEOs; (2) keeps records of sewage applications submitted to the SEO chosen by the municipality to do application work; (3) receives invoices for work performed by SEOs on applications; and, (4) files for reimbursement from DEP, pursuant to Section 6 of the SFA, 35 P.S. § 750.6, for the work done by the SEOs for the member municipalities. (Req. Adm. Nos. 2-7; Exhs. B-1, B-2). The CCSC is not involved in the administration of sewage complaints by its member municipalities. Sewage complaints are handled exclusively by the member municipality and the particular SEO that the member has selected to assist with its SFA administration. When the member municipality receives a complaint regarding an SFA violation, the municipality is responsible for submitting its own complaint form directly to its SEO in order to engage his services. The SEO then investigates and addresses the complaint, and sends invoices for all complaint work directly to the municipality. (Req. Adm. Nos. 2-8; Exhs. B-1, B-2).

During the relevant period, the Borough was aware that the CCSC does not participate in, or take any responsibility for, the investigation and resolution of complaints for alleged SFA violations. (Req. Adm. 8, Exh. B-2). Between May 1, 2001 and July 31, 2002, the Borough had not transferred or delegated to the CCSC the administration of the Borough's responsibilities under the SFA to investigate and resolve complaints related to alleged unlawful discharges of sewage. (Req. Adm. No. 9). During the same period, the CCSC had not accepted the transfer or delegation of the Borough's responsibilities under the SFA to investigate and resolve complaints related to alleged unlawful discharges of sewage in the Borough. (Req. Adm. No. 10).

On July 30, 2001, DEP received a complaint alleging that raw sewage was running onto the ground at the residence of Suzanne Koziel, located on East Fifth Street in the Borough. DEP Sewage Planning Advisor Curt White subsequently spoke with the complainant on several occasions in order to verify the facts of the complaint. By correspondence to the Burnside

Borough Council, dated August 6, 2001, DEP then forwarded the complaint to the Borough. In its accompanying letter, DEP indicated that the matter came within the Borough's jurisdiction, and requested the Borough to investigate the complaint and advise DEP of the results of the investigation. (White Affidavit, at ¶¶ 1-3; Exh. A-1).

Having learned that the unpermitted discharge had still not been abated, DEP sent a letter to the Borough, dated September 7, 2002, regarding its failure to properly address the complaint, and requested the Borough to attend an administrative conference in early October to discuss the matter. (White Affidavit, at ¶ 4; Exh. A-2). The Borough did not attend the proposed administrative conference. (Affidavit of Richard L. Hoover, at ¶ 14).

Acting in his capacity as DEP Sewage Planning Advisor, Mr. White inspected the Koziel property on February 26, 2002. During his inspection, Mr. White confirmed that raw sewage was continuing to discharge onto the surface of the ground at the property. He then drafted and sent a letter that same day to the Borough and the CCSC advising them that the sewage discharge at the Koziel property had still not been corrected, and that raw sewage was continuing to discharge from numerous homes in the Borough onto the Koziel property more than six months after DEP had forwarded the Koziel complaint to the Borough for action. DEP's letter of February 26th also requested the Borough to respond in writing by March 15, 2002 providing details of the steps taken to resolve the Koziel complaint. (White Affidavit, at ¶¶ 6-7, Exh. A-3).

After determining that the Borough had still not taken action to restrain or prevent the ongoing unpermitted discharge at the Koziel property, DEP issued the 2002 Order to the Borough on May 10, 2002. (White Affidavit, at ¶ 8, Exh. A-4). The 2002 Order recited the facts concerning the unpermitted discharge of sewage at the Koziel property and that, as of the date of the 2002 Order, the Borough had still not abated the discharge or taken sufficient steps to resolve

the complaint. Noting that the discharge of sewage onto the ground or into the waters is a violation of the SFA and the CSL, the 2002 Order cited the Borough's statutory and regulatory duty to assure the proper operation of sewage facilities within its borders, as well as its responsibility to take action necessary to assure continued compliance with the SFA, the CSL and implementing regulations. DEP concluded that the Borough's "failure to effectively administer the [SFA] and take measures to correct and abate the sewage discharge [at the Koziel property] constitutes a violation of . . . 35 P.S. § 750.8(b)(7); 25 Pa. Code §§ 71.71, 71.73(a), and 73.11(c); and . . . 35 P.S. § 691.201." In addition, DEP determined that the Borough's failure to abate the discharge "constitutes unlawful conduct under . . . 35 P.S. § 691.611; and a statutory nuisance under . . . 35 P.S. § 691.202 [and] 35 P.S. § 750.14." *See* 2002 Order, at ¶¶ T, U.

Consequently, pursuant to, *inter alia*, Section 10 of the SFA, 35 P.S. § 750.10, DEP ordered the Borough within fifteen days to: (1), investigate and identify all of the sources of raw sewage discharging onto the Koziel property; (2) conduct an investigation to determine if the hose in the alley adjacent to the Koziel property is used to intermittently pump sewage from the basement of the neighboring structure onto the ground surface or otherwise ascertain whether any violation existed with respect to sewage generated in the neighboring structure; and, (3) require all persons identified as contributing to the discharge of sewage at the Koziel property to, within sixty days, obtain necessary permits, abate the discharges, and correct any other violations of the SFA found to exist at their properties. The 2002 Order further directed the Borough to, within eighty days, institute a suit in equity, pursuant to Section 12 of the SFA, 35 P.S. § 750.12, to restrain or prevent all violations of the SFA and the CSL against those persons who had failed to correct their unpermitted discharge of sewage onto the Koziel property. Finally, DEP ordered the Borough to submit a report to DEP within twenty days of conducting the required

investigations which described the results of the investigation and detailed the steps the Borough had taken or would be taking to abate the discharge violations. *See* 2002 Order, at ¶¶ 1-5.

The Borough has admitted that it failed to abate the discharge at the Koziel property. (Req. Adm. No. 11; Affidavit of Gary L. Metzger, at ¶¶ 1-6, Exhs. C-1, C-2). Indeed, in its response to the Motion, the Borough concedes that "it is uncontestable that Burnside Borough didn't stop the discharge." (App. Memo, at page 7). Subsequent to issuance of the 2002 Order, the Borough acknowledged its responsibility to undertake action to abate the discharge. In June 2002, DEP representatives met with the Borough Council to discuss the discharge at the Koziel property, as well as the functional status of sewage disposal systems throughout the Borough. (Metzger Affidavit, at ¶¶ 1-2). In late June 2002, the Borough Secretary informed DEP that the Borough Council had decided to address the Borough's sewage problems in a comprehensive fashion, and the Borough had hired an engineering firm to prepare an update revision to the Borough's Act 537 Official Sewage Facilities Plan. (Metzger Affidavit, at ¶ 3).[6]

II. Discussion

A. Standard of Review

The Board may grant a motion for summary judgment where the pleadings, depositions, answers to interrogatories, admissions of record and affidavits show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Pa.R.Civ.P. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222, 1224 n.4 (Pa. Cmwlth. 1997); *Holbert v. DEP*, 2000 EHB 796, 807-08. When deciding

[6] The Borough's engineering firm submitted a plan of study for preparation of an update to the Borough's Act 537 Plan, which was reviewed and approved by DEP in late August 2002. The Borough's engineering firm, along with a member of the Borough Council, performed a sanitary survey of the Borough in October 2002. The Borough's engineering consultant then submitted a draft report of the sanitary survey to DEP in November 2002. Notably, the results of the survey indicate the existence of four unpermitted wildcat sewer systems that discharge inadequately treated sewage onto the ground or into the waters. The survey specifically indicates that one of the identified community wildcat sewer systems is discharging onto the Koziel property. (Metzger Affidavit, at ¶¶ 4-5, Exh. C-2).

motions for summary judgment, we view the record in the light most favorable to the nonmoving party. *See, e.g., Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 1162, 1164.

DEP bears the burden of proving the order was properly issued. 25 Pa. Code § 1021.122(b)(4). Specifically, DEP must prove the existence of the facts supporting the order, demonstrate that the order was authorized by applicable law, and show that it is a reasonable and appropriate exercise of the agency's discretion. *See, e.g., Tire Jockey Services, Inc. v. DEP*, No. 2001-155-K, 2002 Pa. Envirn. LEXIS 78, at *42 (EHB, Dec. 23, 2002); *Goetz v. DEP*, No. 99-168-C, 2002 Pa. Envirn. LEXIS 60, at *15-*16 (EHB, Oct. 11, 2002); *Board of Supervisors of Middle Paxton Tp. v. DER*, 1991 EHB 546, 556.

B. The 2002 Order Was Properly Issued

The basic facts underlying the 2002 Order are undisputed. Neither in its Notice of Appeal, nor in its response to DEP's Motion, does the Borough contest that during the relevant period there was an ongoing unpermitted discharge of untreated sewage onto the ground at the Koziel property from a wildcat sewer system. There is no dispute that DEP advised the Borough of its duty to restrain and prevent the sewage discharge. Finally, the Borough has admitted that, from the time it received the complaint regarding the discharge in August 2001 until issuance of the 2002 Order ten months later in May 2002, it took no action to effectively abate the ongoing sewage discharge, the discharge remained unabated, and the complaint unresolved.

Section 7 of the SFA forbids persons from installing or constructing an individual sewage system without first obtaining a permit indicating that the system is in compliance with the SFA. 35 P.S. § 750.7(a)(1). The statute declares that "the discharge of untreated or partially treated sewage to the surface of the ground or into the waters of this Commonwealth," except as specifically approved by DEP under the CSL or by the local agency pursuant to section 7.3 of the SFA, "shall constitute a nuisance and shall be abatable in the manner provided by law." 35 P.S. §

740.14. *See also* 25 Pa. Code § 73.11(c) (a "sewage system may not discharge untreated or partially treated sewage to the surface of the ground or into the waters of this Commonwealth" except as specifically permitted under the CSL).[7] The ongoing unpermitted discharge of sewage at the Koziel property was clearly a violation of various provisions of the SFA and the CSL.

The 2002 Order was issued pursuant to the authority granted to DEP by the SFA and the CSL. According to Section 10 of the SFA, DEP has the power to "review the performance of local agencies in the administration" of the SFA, 35 P.S. § 750.10(5), and, to "order a local agency to undertake actions deemed by the department necessary to effectively administer [the SFA] in conformance with the rules and regulations of the department." 35 P.S. § 750.10(7). Section 5 of the CSL authorizes DEP to "issue such orders as may be necessary to implement the provisions of [the CSL] or the rules and regulations of the department." 35 P.S. § 691.5(b)(7).[8]

Moreover, each local agency administering the SFA has "the *duty*" to "restrain violations" of the SFA and the regulations adopted thereunder. 35 P.S. § 750.8(b)(7) (emphasis added). The implementing regulations specifically state that the local agency has "the power and the *duty*" to "proceed under sections 7, 8, 12, 13, 13.1, 13.2(b), 14, 15, and 16 of the [SFA] to restrain violations of the [SFA and implementing regulations], and to abate nuisances in accordance with existing statutes, or as defined in the [SFA]." 25 Pa. Code § 72.42(a)(13)

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[7] Further, the CSL states: "No municipality or person shall discharge or permit the discharge of sewage in any manner, directly or indirectly, into the waters of this Commonwealth unless such discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department." 35 P.S. § 691.202; *see also* 35 P.S. § 691.201 ("No person or municipality shall place or permit to be placed, or discharge or permit to flow, or continue to discharge or permit to flow, into any of the waters of the Commonwealth any sewage, except as hereinafter provided in this act.").

[8] *See also* 25 Pa. Code § 72.43(a) (DEP "is empowered to review the performance of local agencies and their sewage enforcement officers in the administration of sections 7, 8, 12, 13, 13.1, 13.2(b), 14, 15 and 16" of the SFA); § 72.43(b) (DEP may "require the submission of papers, books and records by the local agency or its sewage enforcement officer"); § 72.43(c) ("If the Department finds that a local agency has failed to effectively administer section 7, 8, 12, 13, 13.1, 13.2(b), 14, 15 or 16 of the [SFA], the Department, in addition to other remedies it may seek at law or in equity, may order the local agency to take actions the Department deems necessary to obtain effective administration.").

(emphasis added). *See also* 25 Pa. Code § 71.71 ("Municipalities are required to assure the proper operation and maintenance of sewage facilities within their borders."); 25 Pa. Code § 71.73(a) ("When sewage facilities are permitted by local agencies, the municipality is responsible for taking actions necessary to assure continued compliance of these sewage facilities with the [SFA], the [CSL], and regulations promulgated thereunder."). *See generally* 25 Pa. Code § 72.42(a).

It is evident from a review of these provisions that DEP was authorized by applicable law to issue the 2002 Order. Having verified the existence of the ongoing violations of the SFA and CSL occurring within the Borough at the Koziel property, and having repeatedly advised the Borough of its statutory responsibility to undertake sufficient action to abate the discharge and resolve the complaint, DEP allowed ten months to pass while the Borough was given an opportunity to meet its legal responsibilities. After ten months of inaction by the Borough, DEP's determination that the Borough had failed to perform its legal duties to restrain the ongoing violations of the SFA and assure the proper operation and maintenance of sewage facilities within its borders was undoubtedly reasonable and correct. DEP rightly concluded that the Borough had failed to properly administer the SFA; DEP then simply exercised the agency's statutory authority to order the Borough "to undertake actions deemed by the department necessary to effectively administer" the SFA. 35 P.S. § 750.10(7).

Appellant has conceded that its failure to abate the discharge at the Koziel property justified the issuance of a DEP order commanding the Borough take actions deemed by DEP necessary for the proper administration of the SFA. *See* Notice of Appeal, at ¶ 5; App. Memo, at pages 3-4. Notwithstanding this concession, the Borough raised two relevant points in its opposition to the Motion. First, Appellant suggested, without explicitly stating, that it did not

have legal responsibility to take action to abate the discharge because the Borough had allegedly transferred all aspects of the Borough's administration of the SFA to the CCSC. Second, the Borough contended that the facts underlying the 2002 Order do not support DEP's determination that the Borough committed a violation of the SFA.

The Borough's contention that it had no responsibility for the discharge because of an alleged transfer of its administration to the CCSC is flawed in several respects. By its failure to serve any response to DEP's Requests for Admissions, the Borough specifically admitted that it "had not transferred or delegated to the CCSC the administration of its responsibilities under the Sewage Facilities Act to investigate and resolve complaints related to alleged unlawful discharges of sewage for the period May 1, 2001 through July 31, 2002." Req. Adm. No. 9. *See* Pa.R.Civ.P. 4014(b). Any matter admitted under Rule 4014 "is conclusively established" unless the Board "on motion permits withdrawal or amendment of the admission." Pa.R.Civ.P. 4014(d). Appellant has not made a motion seeking the withdrawal or amendment of any of its admissions pursuant to Rule 4014(d). Consequently, the Borough's admission has conclusively established, for purposes of this appeal, the fact that the Borough did not transfer its responsibility for taking action to investigate and resolve the complaint concerning the discharge at the Koziel property. In the absence of any motion seeking withdrawal of its admission, the Borough's belated attempt to introduce evidence pertinent to an alleged transfer is not effective.

Moreover, even accepting the contention in the affidavit submitted by the Borough at face value would not enable the Borough to evade its responsibility for addressing the discharge. The SFA provides that "sections 7, 8, 12, 13, 13.1, 14, 15, and 16 of this act shall be administered by each municipality unless said municipality has transferred or delegated the administration of [such sections] to another local agency . . . *and said other local agency has*

accepted administration of sections 7, 8, 12, 13, 13.1, 14, 15, and 16 of this act." 35 P.S. § 750.8(a) (emphasis added). Before any attempted transfer by the Borough to the CCSC of administration for addressing sewage discharge violations could be effective, the CCSC was required to formally accept such transfer or delegation. There is no evidence of such acceptance. The Borough has specifically admitted that the "CCSC had not accepted transfer or delegation of Appellant's responsibilities under the Sewage Facilities Act to handle complaints related to alleged unlawful discharges of sewage for the period May 1, 2001 through July 31, 2002." Req. Adm. No. 10. Further, Appellant has not asserted in its response to the Motion that the CCSC ever accepted any attempted transfer of responsibility for addressing sewage complaints and, the Borough has not introduced any evidence in support of such an assertion. The evidence of record is to the contrary. Indeed, the Borough's unilateral attempt to transfer its relevant responsibilities under the SFA, without the concomitant formal acceptance of such transfer by the CCSC, would appear to violate the statute. Section 8 of the SFA states: "No local agency shall voluntarily surrender administration of the provisions of this act except to another local agency pursuant to this section." 35 P.S. § 750.8(a).

In sum, the Borough has not created a *genuine* issue of material fact with respect to its obligation to administer those provisions of the SFA relevant to this proceeding. Pa.R.Civ.P. 1035.2, 1035.3; *see* Note, Pa.R.Civ.P.1035.2 ("the adverse party must come forth with evidence showing the existence of the facts essential to the . . . defense"); *Goetz v. DEP*, No. 2002-069-K, 2003 Pa. Envirn. LEXIS 1, at *4-*8 (EHB, Jan. 16, 2003).

We also disagree with the Borough's argument that the underlying facts of the 2002 Order did not justify DEP's determination that the Borough had committed a violation of the SFA. The Borough's assertion strikes us as a semantic distinction without a difference, given its

concession that DEP was justified in issuing an order to the Borough to undertake those actions which DEP deemed necessary for a proper administration of the SFA. The Borough does not explain how DEP would be justified in issuing an order to the Borough for its failure to take action if DEP had not correctly determined that the Borough had been derelict in its duty. Given DEP's oversight role, such a determination is a fundamental premise, a condition precedent, of an order issued to a local agency directing actions DEP deems necessary for administration of the SFA in conformity with applicable law. By conceding that DEP was justified in issuing an order to the Borough to take specific actions with respect to the discharge, Appellant is necessarily conceding that DEP correctly concluded that the Borough had neglected its statutory and regulatory duties pursuant to the SFA and implementing regulations.

Appellant argues that its duty to administer the SFA in relation to the abatement of the discharge at the Koziel property was discretionary. However, again it is not apparent why the Borough believes DEP was justified in issuing an *order* to the Borough to take actions with respect to the ongoing discharge (as opposed to merely making recommendations) if the Borough's duty to effectively administer the SFA is discretionary. Moreover, the Borough responds to DEP's assertion that a municipality has a mandatory duty to properly administer the SFA by stating: "Certainly, the general duty is mandatory." Appellant's Memorandum, at 4. The Borough then tries to draw a distinction between a general duty to administer the SFA and specific decisions on how to enforce regulations applicable to a wildcat sewer system.

We discern no distinction in the statute or regulations between a "general" and a specific duty with respect to a municipality's enforcement of the SFA, and the Borough does not provide any authority for such a distinction. The SFA granted the Borough the power, and imposed upon it the corresponding duty, to properly administer the SFA in relation to sewage discharge

violations occurring within its borders. 35 P.S. § 750.8(b). We believe DEP was justified in reaching a conclusion that Appellant was derelict in its duty after the Borough failed, for ten months, to take any action to abate the discharge at the Koziel property.

Finally, the 2002 Order was a reasonable and appropriate exercise of DEP's discretion under the circumstances. After giving the Borough ample time to take some effective action, DEP ordered the Borough to thoroughly investigate the sources of the discharge and report on its investigation. DEP also directed the Borough to require those contributing to the discharge to obtain necessary permits and abate the discharges within sixty days. If the Borough could not obtain voluntary compliance, the 2002 Order directed the Borough to institute a suit in equity within eighty days to restrain or prevent all violations of the SFA against those persons who had failed to correct their unpermitted discharge of sewage onto the Koziel property. We find nothing arbitrary about the manner in which the 2002 Order directed the Borough to address the discharge at the Koziel property. All of the actions are expressly authorized by the SFA, see 35 P.S. §§ 750.8, 750.12. The statute specifically imposes a duty on the local agency to undertake investigations necessary to carry out the provisions of the act, 35 P.S. § 750.8(b)(5); to submit such reports to DEP as it may require by order, 35 P.S. § 750.8(b)(8); to maintain standards for permits identical to those of DEP, 35 P.S. § 750.8(b)(9); and to institute suits in equity to prevent or restrain violations, 35 P.S. § 750.8(b)(7). Thus, DEP ordered the Borough only to take actions which the SFA already imposes as duties upon the local agency. Moreover, the standard manner of proceeding prescribed by the 2002 Order is neither particularly harsh nor has it been shown to be inappropriate for the circumstances.

Appellant argues that there was actually no practical solution for the discharge problem at the Koziel property because the only choices it had to resolve the violations were: (1) obtain an

injunction which ejected those engaging in the unpermitted discharge from their homes; or, (2) construct a sewage system that would adequately address sewage problems existing throughout the Borough. Appellant does not explain why it believes these two methods were its only possible means to address the discharge at the Koziel property.

The SFA actually provides a variety of enforcement tools for obtaining compliance with its provisions, including the power to enter upon lands for the purpose of conducting inspections necessary to carry out the provisions of the statute, 35 P.S. § 750.8(b)(5); to institute suits in equity to restrain or prevent violations, 35 P.S. § 750.12; to initiate criminal proceedings against property owners violating the SFA, 35 P.S. § 750.13; and to assess civil penalties for such violations, 35 P.S. § 750.13a. In reality, the Borough had many legal options short of seeking to eject persons from their homes.

In addition, while we applaud the Borough's recent efforts to develop a comprehensive solution to what appear to be extensive sewage discharge problems in the Borough, the 2002 Order was a response to the Borough's failure to take any effective action to address the Koziel complaint. There is nothing in the record showing that the Borough was precluded from taking direct actions to abate the discharge at the Koziel property while simultaneously engaging in the lengthier process of developing a Borough-wide solution to sewage discharge problems. Even if the Borough was contemplating the future construction of a sewage system, that does not excuse the Borough's ten-month failure to take any action to properly address the complaint.

In short, the question is whether the directives in the 2002 Order prescribed a reasonable and appropriate means of addressing the discharge at the Koziel property. The Borough has not demonstrated why such means were an arbitrary exercise of DEP's discretion to "order a local agency to undertake actions deemed by the department necessary to effectively administer" the

SFA in conformance with applicable regulations. 35 P.S. § 750.10(7).

DEP has proven the facts underlying the 2002 Order, that its order was authorized by applicable law, and that the order constitutes a reasonable exercise of the agency's discretion under the circumstances. Appellant has failed to demonstrate that it is entitled to any defense. Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BURNSIDE BOROUGH	:	
	:	
v.	:	**EHB Docket No. 2002-138-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 27th day of March, 2003, it is hereby ORDERED as follows:

1. The Department of Environmental Protection's Motion for Summary Judgment is granted, the appeal at EHB Docket No. 2002-138-C is dismissed, and the docket will be marked closed and discontinued.

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. 2002-138-C

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

Dated: March 27, 2003

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

For the Commonwealth, DEP:
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Regional Counsel
Northcentral Regional Office

For Appellant:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PHILADELPHIA WASTE SERVICES, INC.	:	
	:	
v.	:	**EHB Docket No. 2001-136-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 2, 2003**

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Department properly denied the appellant's application for a permit for a municipal waste recovery facility to be located within 300 yards of a park because the appellant failed to provide the Department with a waiver from the owner of the park of the 300-yard setback requirement of Act 101 and its implementing regulations. The permit application was for a new permit of a new municipal waste recovery facility despite the fact that the area proposed for the new facility had been permitted to another municipal waste operator before the adoption of the 300-yard setback required in Act 101. That operator abandoned its waste operation and failed to renew its permit at the time required by the Department's regulations following notice to that operator. Neither Act 101 nor the Department's regulations thereunder gave the appellant "grandfather" rights under these circumstances.

BACKGROUND

This appeal is from the denial by letter dated May 18, 2001, by the Department of Environmental Protection of the application of Appellant, Philadelphia Waste Services, Inc. for a municipal waste permit to operate a facility in Philadelphia County to separate recyclable materials from construction/demolition waste. The stated reasons for this denial were that the application did not demonstrate compliance with the Department's regulations or of the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, 53 P.S. §§ 4000.101- 4000.1904 (Act 101), relating to the prohibition of the operation of transfer facilities within 300 yards of a park and did not provide a written waiver of this requirement from the City of Philadelphia. In addition, the Department's letter noted that the application was deficient in six other respects. For these reasons the application was denied in accordance with Section 503 of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.503.

The Board denied the Department's motion for summary judgment on April 23, 2002. A hearing on the merits was held on December 2, 2002. At the commencement of the hearing Appellant's counsel withdrew the contention that Bartram's Garden Meadow is not a park. Bartram's Garden Meadow is located between Bartram's Garden and the proposed site for the facility. The hearing proceeded on the other issues raised in the notice of appeal and prehearing memoranda.[1] The record consists of a transcript of 191 pages, 10 exhibits including a stipulation of facts and exhibits. The final post-hearing brief of the parties was filed on March 10, 2003.

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[1] N.T. 4.

FINDINGS OF FACT[2]

1. Philadelphia Waste Services (PWS) is a Pennsylvania corporation with a registered corporate address of 2906 Eaglesville Road, Audubon, Pennsylvania 19407.[3]

2. The Department of Environmental Protection (Department) is an agency of the Commonwealth of Pennsylvania with the duty and authority to administer and enforce the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, *as amended,* 35 P.S. §§ 6018.101 – 6018.1003 (SWMA); the Municipal Reycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, No. 101, *as amended*, 53 P.S. §§ 4000.101 – 4000.1904 (Act 101); and the rules and regulations promulgated thereunder.[4]

3. On or about July 27, 1999, PWS submitted an application to the Department for a permit to construct and operate a construction and demolition transfer and processing facility at 1620 South 49th Street, Philadelphia, Pennsylvania (Site).[5]

4. By its application of July 27, 1999, PWS specifically applied for a municipal waste permit in order to operate a facility to separate recyclable materials from construction/demolition waste pursuant to 25 Pa. Code, Chapters 271, 279 and 283 of the Department's Municipal Waste Regulations.[6] The separated materials were to be processed and stored, while materials that could not be recycled were to be consolidated and loaded into transfer trailers for transportation

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[2] The notes of testimony are designated as "N.T."; the Joint Stipulation is designated as "J.S."; Findings of Fact are designated as "F.F. __"; the Appellant's exhibits are designated as "Ex. A-__", and the Department's as "Ex. C-__".

[3] J.S. #1.

[4] J.S. #2.

[5] J.S. #3.

[6] The proposed operation was to include wood chipping and tire shredding, as well as the

to a permitted off-site disposal facility. Those recyclable materials separated at the site would be sorted and chipped or baled for resale to off-site recyclers.[7]

5. By letter dated May 18, 2001, the Department denied PWS's permit application.[8]

6. The letter of May 18, 2001 from Ronald C. Furlan, P.E. to David Della stated "your application does not demonstrate compliance with 25 Pa. Code 279.202(a)(6)(i), relating to the prohibition of the operation of transfer facilities within 300 yards of a park, and 53 P.S. § 4000.511(a), relating to the prohibition of the permitting or operation of resource recovery facilities within 300 yards of a park. Nor does your application demonstrate compliance with 25 Pa. Code 279.202(a)(6)(ii) and 53 P.S. § 4000.511(d) relating to written waiver of the 300-yard prohibitions. Therefore, your application is not complete or accurate and does not comply with the requirements of 25 Pa. Codes 271.201(2) and 271.201(3)."[9]

7. On or about June 18, 2001, PWS filed an appeal of the Department's denial of its permit application with the Board. In its Notice of Appeal,[10] PWS raised the following issue that remains for the Board's decision:

> Appellant was not required to demonstrate compliance with 25 Pa. Code 279.202(a)6)(i) prohibiting the operation of a Construction and Demolition Waste Transfer Facility within 300 yards of a park, and 53 P.S. § 4000.511(a) relating to the prohibition of permitting or operating a Resource Recovery Facility within 300 yards of a park or to obtain a written waiver of the 300 yard prohibition under 25 Pa. Code § 279.202(a)(6)(ii) and 53 P.S. § 4000.511(d) because the site was a permitted solid waste treatment and recycling plant

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segregation of mixed sandy waste to recover resalable materials.

[7] J.S. #4; N.T. 69.

[8] J.S. #5.

[9] Ex. C-15.

[10] As amended by the withdrawal of the issues at the commencement of the hearing of whether Bartram's Garden Meadow is a park and whether this property has always been zoned G-2.

for the processing of municipal waste since April 14, 1985 and is, therefore, an exception under 25 Pa. Code § 279.202(a) and under 25 Pa. Code § 283.202 as an area that was permitted prior to April 9, 1988.

8. PWS contends that the following issue remains for the Board's consideration:

> The Department has not shown that the subject facility is within 300 yards of a park and PWS is therefore compliant with 25 Pa. Code § 283.202(b)(2) as it pertains to PWS's existing Resource Recovery Facility and is further compliant with the regulations for the establishment of a Construction and Demolition Waste Transfer Facility under 25 Pa. Code § 279.202(a)(6)(i), and no written waiver is required under 25 Pa. Code § 279.202(a)(6)(ii) and 53 P.S. § 4000.511(d).

9. The Department's Post-Hearing Brief contends that this issue was not raised in the Notice of Appeal and therefore cannot be considered by the Board.

10. Bartram's Garden, prior to 1981, consisted of 27 acres.[11]

11. The former Warner Concrete property is a triangular-shaped property, approximately 17 acres in size that was acquired by the City of Philadelphia in February, 1981, from the Warner Company for the sum of Two Hundred Eighty-Five Thousand and 00/100 Dollars ($285,000).[12]

12. On December 26, 1980, the Mayor of the City of Philadelphia signed an ordinance (Bill No. 423) authorizing the purchase of the former Warner Concrete property "for park purposes" and authorizing the Fairmount Park Commission to use the property for such purposes.[13]

13. On February 9, 1981, the Warner Concrete Company conveyed its property consisting of approximately 17 acres to the City of Philadelphia. The property is now known as Bartram's

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[11] J.S. #7.
[12] J.S. #8.
[13] J.S. #9.

Meadow. Bartram's Meadow is a park.[14]

14. Bartram's Meadow continues to be owned by the City of Philadelphia and continues to be under the jurisdiction of the Fairmount Park Commission. The Fairmount Park Commission leases the property to the non-profit John Bartram Association.[15]

15. The City of Philadelphia has not waived the 300-yard siting prohibition set forth in the Department's regulations and in 53 P.S. § 4000-511(a).[16]

16. On May 22, 1986, the Department issued Solid Waste Permit No. 101348 to ORFA of Philadelphia (ORFA) for the construction and operation of its waste facility. The permit contained no expiration date.[17]

17. The permit received by ORFA does not limit the permitted area or give restrictions on the permitted boundaries. The ORFA permit described the permit area only by longitude and latitude coordinates. The building presently on site and intended to be used by PWS was constructed by ORFA and had collection equipment for its waste processing and a tipping floor where trash trucks would enter and dump the trash.[18]

18. ORFA was engaged in a permitted business at the subject property which received municipal waste and household trash, sorted it, dried it, disinfected it and collected a fibrous material out of the waste which was bailed for purposes of marketing it as a recycled material.[19]

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[14] J.S. #10. Prior to the commencement of the hearing, PWS withdrew its contention that Bartram's Meadow is not a park. (N.T. 4)

[15] J.S. #11.

[16] J.S. #14.

[17] J.S. #15.

[18] N.T. 55-57; Ex. A-3.

[19] N.T. 15.

19. ORFA operated a short time before they closed down and the site was abandoned for many years.[20]

20. By letter dated April 11, 1988, the Department informed ORFA that "Section 271.211(f) provides that your existing permit now has an expiration date of April 9, 1993."[21]

21. ORFA did not submit a Permit Renewal Application to the Department.[22]

22. In and after 1997, before PWS acquired the property, at least two companies looked at the site with the intention of putting a permitting facility there: TPS[23] and Quorum Sanitech.

23. Quorum Sanitech intended to place a recycling center for construction demolition waste and a municipal waste transfer center at the site. The permit application was submitted in 1998 and then voluntarily withdrawn by the corporation.[24]

24. Sometime after 1998, Kalmbach Feeds, which later became Advanced Organics, operated a Permit-by-Rule facility which turned food waste (through a drying and grinding process) into pig feed.[25]

25. Stephen M. Socash, Chief of the Permit Section in the Department's Division of Municipal and Residual Waste, testified that the portion of 25 Pa. Code § 279.202(a) that states "Except for areas that were permitted prior to April 9, 1988, a transfer facility may not be operated as follows...", and similar phrases in other portions of the regulations dealing with other types of waste facilities, are "grandfather" clauses. These provisions which allow a facility permitted prior to April 9, 1988, to continue to operate after that date, even if the facility violates

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[20] N.T. 16-17.
[21] J.S. #16.
[22] J.S. #17.
[23] N.T. 12.
[24] N.T. 17-18.

the siting prohibitions added to the regulations on or after that date, so long as the permit that was in effect prior to April 9, 1988, remained in effect and the facility continues to operate.[26]

26. Mr. Socash further testified that any right to "grandfather" protection under Section 279.202(a) and similar "grandfather clause" sections elsewhere in the regulations ends if the permit that was in effect prior to April 9, 1988, expires and is not renewed.[27]

27. There is no evidence of record that the Appellant ever asked the Department to consider the permit application that is the subject of this appeal as anything other than an application for a new municipal waste facility and PWS does not claim to have made such a request.

28. James Wentzel, Chief of the Engineering Services Section in the Waste Management program of the Department's Southeast Regional office, testified that in determining whether the Appellant's permit application conformed with the siting requirements with regard to distance from a park, he measured from the permit area described in the application and determined that portions of Bartram's Meadow are within 300 yards of the boundary of the proposed permit area.[28]

29. In determining the distance between the proposed PWS facility and Bartram's Garden Meadow, Mr. Wentzel on behalf of the Department, used a U.S. Geological Service map and, using the scale on that map, he measured 900 feet/300 yards from PWS's property line which intersected portions of Bartram's Meadow.[29]

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[25] N.T. 18-19.
[26] N.T. 133-150.
[27] N.T. 133-150.
[28] N.T. 69-70.
[29] N.T. 70.

30. Stuart Clement, a witness presented by Appellant, confirmed that Appellant's proposed facility was within 300 yards of Bartram's Meadow.[30]

31. Portions of Bartram's Meadow are within 300 yards of the boundary of Appellant's proposed permit area.

DISCUSSION

PWS contends that the Department's action in denying its permit for a solid waste transfer facility was unlawful because under the Department's regulations at 25 Pa. Code § 279.202(a)(6) it is entitled to be "grandfathered" against the prohibition of the establishment of such a facility within 300 yards of a park.

Section 202(a) provides: "Except for areas that were permitted prior to April 9, 1988, a transfer facility may not be operated as follows..." Subsection (6)(i)(B) contains the prohibition against the issuance of a permit for a municipal waste transfer facility within 300 yards of a park. Subsection (6)(ii) provides that this prohibition may be waived:

> The current property owner of...a park...may waive the 300-yard prohibition by signing a written waiver. Upon receipt of the waiver, the Department will waive the 300-yard prohibition and will not use the prohibition as the basis for the denial of a new permit.

PWS argues that since the permit area in question was permitted to ORFA in 1986 for the operation of a waste facility, the 300-yard setback from a park requirement cannot be applied to PWS's permit application for the same permit area. It contends that even though ORFA discontinued its operations and failed to file a renewal application for continuance of its permit,

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[30] N.T. 40.

the area of ORFA's operations was permitted prior to April 9, 1988 so that the 300-yard setback requirement cannot be applied to PWS's 1999 permit application for the same permit area.

The Department contends, however, that the "grandfather" provision of this regulation applies only to operations that were permitted in 1988 and have continued in operation. The Department argues that the regulatory definition of "permit area" and "facility," indicate that the permit area is inextricably tied to the permit that defines its boundaries. Once a permit expires there can be no boundaries within which waste processing activities are approved by the Department. Accordingly, the Department contends that PWS's application in 1999 must be considered to be a new application subject to the 300-yard setback requirement. In support of this contention the Department points to the testimony of Mr. Socash of the Department that the regulations were intended only to protect an ongoing operation that had been permitted in 1988.

There can be no question that the 300-yard setback requirement bars the issuance of a new permit for a transfer station. Section 511(a) of Act 101[31] prohibits the issuance of such a permit as follows:

> The department shall not issue a permit nor allow the operation of ...a new resource recovery facility within 300 yards of parks or playgrounds existing prior to the date the department has received an administratively complete application for a permit for such facilities. This subsection shall not affect any...existing permitted facilities.

In addition, Section 511(d) of Act 101 provides for an exemption on consent of the property owner as follows:

> The current property owner under subsection (a) in which a new facility is proposed may waive the 300-yard prohibition by

[31] Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, 53 P.S. § 4000.511(a).

> signing a written waiver, and upon such request, the department shall waive the 300-yard prohibition and shall not use such prohibition as the basis for the *denial of a new permit.* (emphasis supplied)[32]

In *Borough of Glendon v. Department of Environmental Resources*,[33] the Commonwealth Court interpreted section 511(a) of Act 101 to mean that the prohibition applied to a new facility that had not been permitted prior to the adoption of Act 101 despite the appellant's contention that such a ruling would retroactively destroy his $3,500,000 worth of vested contract rights in a bond issue and incurred finance costs. The Commonwealth Court ruled that the application of the 300-yard setback requirement was not a retroactive application of the law because the appellant's application for a permit was still pending when Act 101 became effective.

PWS attempts to distinguish *Borough of Glendon* on the ground that the property in Glendon had never been previously permitted. It argues that the site for which its facility was proposed was not a new resource recovery facility because the Department issued a permit to ORFA for its resource recovery facility.

We think this distinction is without a difference in view of the language used in Act 101. PWS's proposed use of the old ORFA property is a proposal for a new resource recovery facility. The proposed facility would be new in the sense of a new owner and also a use for processing construction and demolition waste including wood chipping and tire shredding.[34] This is a new process compared to ORFA's previous recycling of household trash and other municipal waste to recover fibrous materials. Its operation presumably would require different permit conditions to

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[32] 53 P.S. § 4000.511(d).

[33] 603 A.2d 226 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 608 A.2d 32 (Pa. 1992).

[34] F.F. 4.

meet different operational aspects. The fact is that it cannot be considered as an "existing" permitted facility because ORFA abandoned the facility and failed to seek renewal of the permit in April 1993. As a result ORFA's permit terminated in April 1993.[35] The only use of the building and land at the previously permitted facility after ORFA abandoned its use of the property was pursuant to a general permit different from both the use made by ORFA and from PWS's proposed use.[36] In short, PWS's proposed resource facility would be a new facility within the meaning of Act 101, so that the Department properly applied the 300-yard offset requirement in denying the permit.

This interpretation of Act 101 must also be applied to the Department's regulation at 25 Pa. Code § 279.202(a)(1) and (6) in part because the Department's regulations cannot go beyond the authority provided by Act 101.[37] That Act would bar a permit for a new resource facility within 300-yards of a park without the consent of the adjoining park owner. Accordingly, the regulations must be interpreted to mean that the Department could not issue a permit for an entirely new resource recovery facility without a waiver of the setback requirement, simply because the Department some 14 years before had issued a permit for a waste facility to ORFA, when ORFA only operated under the permit for about a year and thereafter abandoned its use of the property.[38] We also think it significant that both the applicable provision of Act 101 and subsection 6(ii) of the Department's regulations at 25 Pa. Code § 279.202(a) provide that only on the receipt of a waiver from the owner of the park would the Department waive the 300-yard

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[35] F.F. 18, 19; N.T. 77-79.

[36] F.F. 20.

[37] *Harmar Coal Co. v. Department of Environmental Resources,* 306 A.2d 308 (Pa. 1973)(a regulatory program which is inconsistent with an implementing statute is invalid).

[38] N.T. 12, 16-17.

prohibition "and will not use the prohibition as the basis for the renewal of a *new permit.*" (emphasis supplied) Since PWS sought a new permit for a new resource recovery facility, the Department was bound to apply the 300-yard setback requirement and deny the permit application.

The law of land use regulation with respect to nonconforming uses is in accord with this interpretation. While the Pennsylvania Constitution protects a property owner from the retroactive application of zoning regulations to prohibit his nonconforming use of the property as long as that use continues, the protection given to a nonconforming use is lost if the owner abandons the use.[39] Since ORFA abandoned its permitted use long before PWS's permit application was filed, PWS could not claim nonconforming use protection even under the general law of land use.

We also reject PWS's contention that the proposed facility could not be considered to be within 300 yards of a park because the Department's regulations do not define how this measurement is to be made. PWS claims that the measurement should have been made from the edge of the building on the former ORFA property and not from the edge of the property line.[40]

The Department's regulations should be interpreted to mean that the measurement is properly made from the property line of the proposed facility. The relevant siting prohibitions

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[39] *Philm Corporation v. Washington Township,* 638 A.2d 388 (Pa. Cmwlth. 1994); *Cicchiello v. Bloomsburg Zoning Board,* 617 A.2d 835 (Pa. Cmwlth.1992). The general rule is that a lawful nonconforming use establishes in the property owner a vested property right which cannot be abrogated or destroyed, unless it is a nuisance, is abandoned, or is extinguished by eminent domain. *PA Northwest Distributors, Inc. v. Zoning Hearing Board of the Township of Moon,* 526 Pa. 186 (Pa. 1991); *William A. Foreman v Union Township Zoning Board,* 787 A.2d 1099 (Pa. Cmwlth. 2001).

[40] Since we are deciding merits, we do not reach the Department's contention that this issue has been waived by failure to state it specifically in the Notice of Appeal.

discussed above provide that a waste facility may not be operated within 300 yards of a park. When these siting prohibitions are read together with the definitions of the terms "operate" and "permit area" in Section 271.1 of the regulations, 25 Pa. Code Section 271.1, it is clear that the relevant siting distances are to be measured from the boundaries of the permit area designated in the permit application.

The definition of "operate" in Section 271.1 reads:

> To construct a municipal waste management facility in anticipation of receiving solid waste for the purpose of processing or disposal; to receive, process or dispose of solid waste; to carry on an activity at the facility that is related to the receipt, processing or disposal of waste or otherwise affects the land at the facility; to conduct closure and post closure activities at a facility.

Thus, the relevant siting prohibitions provide that a waste facility may not affect land that is within 300 yards of park.

The definition of "permit area" in the same section of the regulations states "The area of land within the boundaries of the permit which is designated on the permit application maps as approved by the Department. The area includes the areas which are or will be affected by the municipal waste processing or disposal facility." Accordingly, the siting prohibition distances that apply to a given permit application must be measured from the boundaries of the permit area proposed in that application.

CONCLUSIONS OF LAW

1. The Department of Environmental Protection is an agency of the Commonwealth of Pennsylvania with the duty and authority to administer and enforce the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018.1003; the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 29, 1988, P.L. 556,

No. 101, *as amended*, 53 P.S. § 4000.101-4000.511(a) (Act 101); and the rules and regulations promulgated thereunder.

2. PWS's application for a permit was for a new municipal waste resource facility within the meaning of section 511(a) of Act 101, Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 29, 1988, P.L. 556, No. 101, *as amended*, 53 P.S. §§ 4000.511(a) and the Department's regulations at 25 Pa. Code § 279.202(a)(1) and (6).

3. Bartram's Meadow is a park within the meaning of section 511(a) of Act 101, and the Department's regulations at 25 Pa. Code § 279.202(a)(1) and (6). 53 P.S. § 4000.511(a).

4. The Department's interpretation of Act 101 and its regulations to require denial of the permit because of the failure of PWS to provide a waiver from the City of Philadelphia of the 300-yard setback requirement for the use of the existing land and building previously permitted to ORFA for a municipal waste resource facility was both reasonable and proper.[41]

5. The facility proposed by PWS's permit application was within 300 yards of the adjoining park measured from the boundary line of the proposed permit area.

6. The Department reasonably and properly interpreted its regulations to require measurement of the setback requirement from the boundary line of the facility.

7. The Department's denial of PWS's permit application was required by law and was reasonable and appropriate.

Accordingly, we enter the following:

---

[41] *Department of Environmental Protection v. North American Refractories Co.*, 791 A.2d 461 (Pa. Cmwlth. 2002).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PHILADELPHIA WASTE SERVICES, INC.	:	
	:	
v.	:	**EHB Docket No. 2001-136-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 2nd day of April, 2003, the appeal of Philadelphia Waste Services is **DISMISSED**. The docket will be marked closed and discontinued.

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. 2001-136-MG

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **April 2, 2003**

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JOHN GONSALVES	:	
	:	
v.	:	**EHB Docket No. 2001-249-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 18, 2003**

ADJUDICATION

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

Synopsis:

An appellant, having conceded that his permit to salvage sunken logs had been issued in error, has failed to explain why the Department abused its discretion in suspending the permit once it determined that an error had been made. Therefore, the appeal is dismissed.

FINDINGS OF FACT

1. The Commonwealth of Pennsylvania, Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and enforce the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1 *et seq.* ("Encroachments Act"); the Clean Streams Law, 35 P.S. §§ 691.1 *et seq.* ("Clean Streams Law"); the Flood Plain Management Act, 32 P.S. §§ 679.101 *et seq.*; Section 1908-A of the Administrative Code of 1929, 71 P.S. § 510-8; and the rules and regulations promulgated under those statutes. (Joint Stipulation of the Parties No. ("Stip.") 1.)

2. John Gonsalves ("Gonsalves") is an individual and the appellant in this action.

(Stip. 2.)

3. In the late 19th and early 20th centuries, logs were floated down the West Branch Susquehanna River (the "River") into a boom (a series of piers set on the river bottom and linked together), where they would remain until the sawmills processed them. (Stip. 3, 4.)

4. Some logs sunk to the bottom of the River. (Transcript page ("T.") 10.)

5. In March 1999, Gonsalves submitted an application for a permit under the Encroachments Act to the Department for a "submerged timber salvage" project in the River. (Stip. 6.) Gonsalves proposed to remove and sell the sunken logs. (T. 16; Commonwealth Exhibit ("C.Ex.") 1.)

6. On July 12, 1999, the Department issued Water Obstruction and Encroachment Small Project Permit No. E41-445 (the "Permit") to Gonsalves. (Stip. 7.)

7. The Permit authorized Gonsalves to (1) remove submerged logs from the River bed for approximately 12 miles upstream of the Hepburn Street dam in Williamsport, and (2) place fish habitat structures in the River based on an approved replacement schedule. (C.Ex. 2.)

8. Condition 3 of the Permit stated that the "permit does not give any property rights, either in real estate or material, nor any exclusive privileges, nor shall it be construed to grant or confer any right, title, easement, or interest in, to, or over any land belonging to the Commonwealth of Pennsylvania; neither does it authorize any injury to private property or invasion of private rights, nor any infringement of Federal, State, or Local laws or regulations... ." (T. 19-20; C.Ex. 2.)

9. Condition 4 of the Permit stated as follows:

> The work shall at all times be subject to supervision and inspection by representatives of the Department, and no changes in the maps, plans, profiles, and specifications as approved shall be made except with the written consent of the Department. The

> Department, however, reserves the right to require such changes or modifications in the maps, plans, profiles, and specifications as may be considered necessary. The Department further reserves the right to suspend or revoke this permit if in its opinion the best interest of the Commonwealth will be subserved thereby[.]

(C.Ex. 2.)

10. Condition 21 of the Permit stated: "If the Commonwealth determines that the logs removed at this location are property of the Commonwealth and that a royalty payment is required, the permittee shall submit such royalty payments upon notification from the Department[.]" (T. 20-21; C.Ex. 2.)

11. The Permit terminated by its own terms at the end of the third year, i.e. on December 31, 2002. (T. 21; C.Ex. 2.)

12. The Permit required Gonsalves to record and report the number of logs that he removed from the River. (T. 22; C.Ex. 2.)

13. Between August 1999 and April 2001, Gonsalves salvaged 175 logs from the River. (Stip. 10, 11; T. 22-23.)

14. Gonsalves contracted with an out-of-state company and sold and began delivering salvaged logs to them in 1999. (Stip. 12.)

15. Gonsalves substantially complied with the terms and conditions of the Permit. (Stip. 9.)

16. Over time, it became apparent that there were more logs and there was more interest in salvaging logs than the Department had originally anticipated. (Stip. 8; T. 10, 15, 23-29, 39-41, 53, 55-59; C.Ex. 6, 7.)

17. Based upon the increased scope of actual and anticipated salvaging operations, the Department's program staff, through the intervention of the Deputy Secretary, was able to

persuade legal counsel to research the log-ownership issue. (T. 59-63.)

18. The Department's legal staff prepared a memorandum that concluded that the Commonwealth has a claim to the sunken logs that is superior to the claim of the permittees, including Gonsalves. (T. 63.) The memo also concluded that Pennsylvania, unlike some other states, has no programs in place established to manage sunken logs. (T. 63.) The memorandum is not included in the record.

19. On September 21, 2002, Lawrence C. Tropea, Jr., Deputy Secretary for Water Management, sent a memorandum to the Department's Bureau of Watershed Management and Division of Waterways, Wetlands & Erosion Control that read as follows:

> This memorandum addresses loose logs located on Commonwealth submerged lands. By copy of this memorandum, I direct that the Department suspend reviewing and issuing new Chapter 105 permits for the removal of loose logs located on or in Commonwealth submerged lands unless the applicant demonstrates, to the Department's satisfaction, that they are the owner of the loose logs.
>
> Absent evidence that the applicant(s) are the owners of the loose logs, we believe that the Commonwealth holds the logs in trust under the public trust doctrine of the Pennsylvania Constitution. Additionally, the Commonwealth has an obligation to protect the natural resources and protect the Commonwealth waters and habitat from adverse impacts from loose log removal or disturbance.
>
> Additionally, and consistent with the actions to return pending applications, I direct that action be taken to suspend the existing Chapter 105 permits issued for loose log removal unless the permit holder can prove ownership of the logs.
>
> DEP will proceed to work with other Commonwealth resource agencies to perfect the Commonwealth's ownership interest and establish a process, and conditions, which could allow loose log removal while protecting the waters and habitat of the Commonwealth. Additionally, DEP will assist in determining whether royalty payments should be due for past or proposed log removal, or if legislation should be enacted.

> If you have any legal questions, please contact Mr. Mather or Ms. Murphy. Any technical or procedural questions should be directed to Ken Reisinger. [footnote omitted]

(C.Ex. 8.)

20. On September 28, 2001, the Department sent Gonsalves a letter that in the pertinent part read as follows:

> Pursuant to Condition 4 of the above-reference permit, the Department of Environmental Protection hereby suspends the Chapter 105 Small Projects Joint Permit issued to you on November 21, 2000, for the removal of sunken and submerged old growth timber logs from the West Branch Susquehanna River. The suspension is effective immediately.
>
> The Department has determined that the Commonwealth of Pennsylvania has a superior claim to ownership of logs located on Commonwealth submerged lands, except as to the lumber companies that originally cut the logs and used the Susquehanna River to transport them or their successors. Pennsylvania law does not currently address the question of whether and how the Department is to oversee these unique natural resources. The Department has concluded that its past practice of giving Chapter 105 authorization to private parties to remove submerged logs is inconsistent with the Department's public trust obligation to conserve and maintain the natural resources of the Commonwealth, as established by Article I, Section 27 of the Pennsylvania Constitution.
>
> Therefore, the Department has suspending your permit related to the removal for salvage of submerged logs from the waters of the Commonwealth, unless, and until you can demonstrate, to the Department's satisfaction, a valid claim of ownership of the submerged logs sought to be removed.

(C.Ex. 9.)

21. The permit suspensions were unrelated to any environmental concerns. (T. 33.)

DISCUSSION

The Department was not acting pursuant to a mandatory provision of a statute or regulation when it suspended Gonsalves's permit. Rather, the Department's authority to suspend

the Permit was discretionary. Therefore, the Board's duty in this case is to make a *de novo* determination of whether the Department abused that discretion. *Browning-Ferris Industries, et al. v. DEP*, Docket Nos. 2194 C.D. 2001 and 2291 C.D. 2001, slip op. at 6 (Pa. Cmwlth. March 13, 2002); *Warren Sand & Gravel Co. v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975). Whether the Department has abused its discretion turns on whether its action was reasonable and appropriate and otherwise in conformance with the law. *Smedley v. DEP*, 2001 EHB 131, 160. To be in conformance with the law, it may be necessary in some cases to show, among other things, that the action was "necessary" to aid in the enforcement of a statute. For example, under Section 20 of the Encroachments Act, 32 P.S. § 693.20, an order suspending a permit issued under the Act must be "necessary to aid in the enforcement of the provisions of [the] act". Where, as here, the Department suspends a permit, it bears the burden of proof. 25 Pa. Code § 1021.122(b)(3). Thus, the Department must establish by a preponderance of the evidence presented before the Board that it did *not* violate the law or abuse its discretion in suspending Gonsalves's permit. 25 Pa. Code § 1021.122(a) (preponderance of the evidence).

Although the Department bears the burden of proof, it is not required to imagine and then dispel every conceivable challenge to its action. As a matter of procedure, it is incumbent upon an appellant to explain why he believes that the Department abused its discretion. *See* 25 Pa. Code § 1021.52(e) (objection not raised by an appeal or amendment thereto generally waived); *Jay Township v. DER*, 1994 EHB 1724 (issues omitted from prehearing memorandum may be deemed waived); 25 Pa. Code § 1021.131(c) (an issue which is not argued in a post-hearing brief may be waived).

The essence of the Department's position in this appeal is that it never had the legal authority to issue the Permit in the first place. The suspension of the Permit "was a reasonable

and appropriate means to correct the Department's initial error of issuing the [Permit]." (DEP Brief p. 29.) Gonsalves does not dispute the Department's argument and, in fact, seems to agree with it. (Gonsalves Brief p. 5 ¶ 14.) Therefore, there is no dispute in this appeal that the Department erred by issuing the Permit.

The only question remaining, then, is whether the Department acted properly by suspending the Permit once it determined that it had been unlawfully issued. Again, on this point, Gonsalves offers no explanation that we can follow on why the suspension of an unlawfully issued permit was unreasonable or inappropriate. He has simply failed to provide us with any basis for upholding his appeal. Just as the Department need not imagine and dispel every conceivable challenge, it is not this Board's function to fashion factual or legal challenges for an appellant. *See Consol Pennsylvania Coal Co. v. DEP*, EHB Docket No. 2002-112- L (Opinion on Petition for Reconsideration March 10, 2003).

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject matter of the appeal; namely, a determination of whether the Department's suspension of the Gonsalves' permit was an abuse of discretion.

2. Although the Department bears the burden of proof in this appeal, 25 Pa. Code § 1021.122(b)(3), it is incumbent upon the appellant to explain why the Department abused its discretion.

3. Gonsalves, having conceded that his permit was issued in error, and failing to provide any explanation of why it was an abuse of discretion to suspend the unlawfully issued permit, has not provided this Board with any meaningful basis for sustaining his appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN GONSALVES	:	
	:	
v.	:	EHB Docket No. 2001-249-L
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 18th day of April, 2003, this appeal is DISMISSED.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: April 18, 2003

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

JAI MAI, INC.	:	
	:	
v.	:	**EHB Docket No. 2001-196-L**
	:	**(Consolidated with 2001-197-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PILOT TRAVEL CENTERS LLC, Intervenor	:	**Date Issued: April 29, 2003**

OPINION AND ORDER ON
MOTION TO DISMISS

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

Synopsis:

Absent new facts or special circumstances not shown to be present here, a permit transferee is barred by the doctrine of administrative finality from challenging the unchanged terms and conditions of the permits being transferred.

OPINION

The pertinent facts are not disputed. The Department issued a Water Quality Management Permit to Mahesh N. and Minaxi M. Trived, and an NPDES Permit to Mahesh Trived, in 1989. The Department transferred the unchanged Water Quality Management Permit and reissued the unchanged NPDES Permit to D.C. East, Inc. ("D.C. East") in 2001. D.C. East filed the appeals from the permits that are now before us. D.C. East challenged terms and conditions of the permits that had not changed since their original issuance.[1]

[1] Specifically, D.C. East challenged Standard Condition 15 and the omission of Standard Condition 4 in

By Order dated December 12, 2002, this Board approved the uncontested petition of Jai Mai, Inc. ("Jai Mai") to be substituted for D.C. East as the Appellant.[2] Therefore, Jai Mai stands in the shoes of D.C. East for purposes of these appeals. 25 Pa. Code § 1021.83(b); *Seder v. DEP*, 1999 EHB 782, 784.

The Department, joined by the Intervenor, has filed a motion to dismiss. The Department argues that Jai Mai's challenges are barred by the doctrine of administrative finality because Jai Mai is attempting to challenge permit terms that have not changed since the permits were originally issued in 1989. In opposition to the motion, Jai Mai's sole contention is that it should not be barred from pursuing its challenges because it was not aggrieved by the permit issuances in 1989.

Jai Mai points out that it had no connection to or interest in the permits when they were originally issued in 1989. Jai Mai was not aggrieved by the issuance of those permits, and it had no standing to challenge those permits at the time. Normally, the doctrine of administrative finality only bars a party who was aggrieved by an earlier administrative action from collaterally attacking that action in an appeal from a later action that essentially involves the same thing. *Winegardner v. DEP*, EHB Docket No. 2002-003-L, slip op. at 3 (September 17, 2002).

The Board has held, however, that there is an exception to this general principle in cases involving the transfer of a permit. Even though a permit transferee was not affected at the time of the original permit issuance, the transferee may not use the permit transfer as a vehicle to litigate unchanged terms and conditions of the permit. *Tri-State River Products v. DEP*, 1997 EHB 1061, 1068. The transferee is bound by the terms and conditions of the permit that became final when the permit was issued in the transferor's name. *Id.*, 1997 EHB at 1068-69. The

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the Water Quality Management Permit, and Special Condition 6 in the NPDES Permit.

[2] By virtue of yet another transfer of the unchanged permits, Jai Mai, Inc. is now the permittee.

transferee's intention to be bound by the preexisting terms and conditions "is implicit in the act of requesting a transfer of a specific permit with specific provisions. An entity dissatisfied with those terms and conditions has the option of applying for a new permit rather than a transfer." *Id.*, 1997 EHB at 1069 n. 4.

Tri-State is directly on point here. Jai Mai, which stands in the shoes of D.C. East, is merely attempting to challenge terms of the permit that have not changed since the permits were originally issued in 1989. Jai Mai is not challenging anything that is unique or particular to the act of the permit transfer itself. *See Barshinger v. DEP*, 1996 EHB 849 at 854, 860, and 862-63 (challenge allowed because transfer of permit included extension). *Cf. Goheen v. DEP*, EHB Docket No. 2002-077-L (February 4, 2003) and *Tinicum Township v. DEP*, EHB Docket No. 2002-101-L (September 18, 2002) (appeals from permit renewals). Nor has Jai Mai pointed to any changed circumstances or new facts that would prevent the application of administrative finality. *See Barshinger, supra*; *Riddle v. DEP*, EHB Docket No. 2000-230-MG, slip op. at 7 (March 25, 2002). *See generally Perkasie Borough Authority v. DEP*, EHB Docket No. 2001-267-K, slip op. at 10 (September 17, 2002) (whether administrative finality applies "is heavily dependent upon [an appeal's] procedural posture, its specific factual and legal background and the nature of the arguments made by the parties."). Accordingly, Jai Mai is barred from pursuing its challenges in this appeal by the doctrine of administrative finality, and the Department is entitled to judgment as a matter of law.[3]

For the foregoing reasons, we issue the Order that follows.

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[3] The Department mistakenly characterizes the doctrine of administrative finality as a doctrine that deprives the Board of subject matter jurisdiction. We have opted, however, to treat its motion to dismiss as a motion for summary judgment, which has no impact on the result.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAI MAI, INC.	:	
	:	
v.	:	**EHB Docket No. 2001-196-L**
	:	**(Consolidated with 2001-197-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PILOT TRAVEL CENTERS LLC, Intervenor	:	

ORDER

AND NOW, this 29th day of April, 2003, these consolidated appeals are **DISMISSED.**

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: April 29, 2003

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PENNSYLVANIA TROUT, TROUT UNLIMITED—PENNS WOODS WEST CHAPTER and CITIZENS FOR PENNSYLVANIA'S FUTURE	:	
v.	:	**EHB Docket No. 2002-251-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ORIX-WOODMONT DEER CREEK VENTURE, Permittee	:	**Issued: April 30, 2003**

OPINION AND ORDER ON MOTION FOR RECONSIDERATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Permittee has failed to demonstrate sufficient reasons justifying the Board's reconsideration of its interlocutory Order extending pre-hearing deadlines and rescheduling the hearing from May to September. Reconsideration of an interlocutory Order is inappropriate in the vast majority of rulings issued by the Board.

Discussion

The reconsideration of an interlocutory order requires a demonstration "that extraordinary circumstances justify reconsideration of the matter."[1] A party seeking reconsideration of an interlocutory order must meet the same criteria as for reconsideration of final orders with the

additional requirement that special circumstances exist which warrant the Board taking the extraordinary step of revisiting an interlocutory order.[2] Permittee Orix-Woodmont Deer Creek Venture's (Orix-Woodmont) Motion for Reconsideration fails to make this demonstration.

The Appellants, Pennsylvania Trout, Trout Unlimited — Penns Woods, West Chapter, and Citizens for Pennsylvania's Future (Appellants or Penn Future), on October 15, 2002 appealed the Pennsylvania Department of Environmental Protection's (Department) issuance of a Water Obstruction and Encroachment Permit (Permit) for Orix-Woodmont's proposed shopping center and office complex ("a mixed use commercial center" according to the Permit) in Harmar Township, Allegheny County, Pennsylvania. Less than two weeks later, Orix-Woodmont filed a Motion seeking to expedite discovery and requesting that the Board schedule the Appeal for a hearing as early as February, 2003. The Motion was opposed by Penn Future contending that such a schedule would not allow it to adequately prepare its case.

The Board, following a conference call and pre-hearing conference with counsel and a review of the Motion and Responses, set the case for hearing in May 2003. It was scheduled for these dates with the clear understanding that all discovery could be smoothly completed by ***all*** parties. Unfortunately that has not been the case. Without detailing the many discovery disputes the parties have been unable to amicably resolve on their own, the Board has been required to intercede various times. The Board after reviewing Penn Future's Motion to Extend Discovery and Expert Report

---

1 25 Pa. Code Section 1021.151(a).
2 *Harriman Coal Corporation v. DEP*, 2002 EHB 1, 3; *Conrail, Inc. v. DEP*, 1999 EHB 773; *Throop Property Owner's Assoc. v. DEP*, 1998 EHB 701; *Associated Wholesalers, Inc. v. DEP*, 1998 EHB 23.

Deadlines concluded that the parties are simply not prepared for a hearing in May 2003.[3] More importantly, based on a review of the actual discovery responses filed by Orix-Woodmont and after several conference calls with counsel we are convinced that rushing to a hearing in May could result in the denial of Penn Future's due process rights. Since we earlier had advised the parties that our next available hearing dates were in the Fall of 2003 we postponed the hearing and rescheduled it to commence on September 30, 2003.

As we repeatedly advised counsel in our numerous conference calls, it is the Board's duty to ensure that all parties' rights to a fair hearing are protected. Part and parcel to the right to a fair hearing is the right to conduct adequate discovery. "The Board is the forum for protecting the due process rights of the parties. As such, it is imperative that the process is fair to all parties."[4] Repeatedly, counsel for Penn Future has been forced to engage in a "paper chase" requiring our intervention to obtain answers and documents that should have been produced. Many of the objections to Penn Future's discovery requests advanced by Orix-Woodmont are based on what would be a very expansive interpretation of the attorney-client privilege and attorney work product doctrine. Counsel for Orix-Woodmont is certainly free to advocate these positions. However, it must be recognized that raising such arguments necessarily delays the preparation of the case for hearing. We agree with Penn Future that the legal tactics employed in discovery by the Permittee have resulted in delaying the ultimate resolution of this Appeal. This is especially true when we have rejected most of these discovery objections. As it is the party requesting an expedited hearing,

---

3 *Pennsylvania Trout v. DEP and Orix-Woodmont*, Dkt. No. 2002-251-R, Order issued March 11, 2002.
4 *Pennsylvania Trout v. DEP and Orix-Woodmont*, Dkt. No. 2002-251-R, Opinion and Order issued November 13,

we are surprised that Orix-Woodmont has engaged in such tactics which have only resulted in postponing the very hearing it has requested.

The revised schedule fashioned by the Board should enable the parties to conduct and complete all necessary discovery and adequately prepare their case for hearing. This is required by both the Board's Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure which envision the broad exchange of information prior to a hearing. Our Order of March 11, 2002 extending pre-hearing deadlines and postponing the hearing approximately five months was consistent with Board procedures and practice and absolutely necessary under the circumstances of this case.

2002, page, 5.

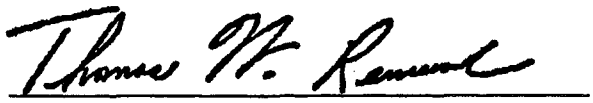
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNSYLVANIA TROUT, TROUT UNLIMITED—PENNS WOODS WEST CHAPTER and CITIZENS FOR PENNSYLVANIA'S FUTURE	:	
v.	:	**EHB Docket No. 2002-251-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ORIX-WOODMONT DEER CREEK VENTURE, Permittee	:	

ORDER

AND NOW this, 30th day of April, 2003, Permittee, Orix-Woodmont's Motion for Reconsideration is **denied**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: April 30, 2003

EHB Docket No. 2002-251-R

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAF

MAX STARR AND MARTHA STARR	:	
	:	
v.	:	**EHB Docket No. 2002-049-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 5, 2003**

OPINION AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

By the Board

Synopsis:

The Board grants the Department's Motion for Summary Judgment and dismisses this appeal from an order asserting violations of the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.* for the unpermitted disposal by Appellants of over five million waste tires on their property. The Department has proven the violations by Appellants and demonstrated its authority to issue the order. The Board finds that the terms of the order are reasonable and appropriate under the circumstances. Appellants have not demonstrated the existence of any genuine issue of material fact and have not raised any legitimate defenses to the order.

OPINION

The subject of this appeal is an order, dated January 25, 2002 (the 2002 Order), issued by the Department of Environmental Protection (DEP) to Appellants Max and Martha Starr pursuant, *inter alia*, to the Solid Waste Management Act (SWMA)[1] and Section 1917-A of the

[1] Act of July 7, 1980, P.L. 380, as amended, 35 P.S. § 6018.101 *et seq.*

Administrative Code.[2] The 2002 Order determines that the Starrs violated the SWMA by their disposal of over five million waste tires on their property in Greenwood Township, Columbia County (the Site) in the absence of any permit to dispose of waste. The order directs the Starrs to properly remove the waste tires according to a fixed schedule and, in the interim, to comply with certain conditions designed to reduce the hazards to public safety and the environment created by the piles of waste tires located at the Site.[3]

Presently before the Board is DEP's motion for summary judgment seeking dismissal of the appeal. The motion is supported by affidavits, deposition transcripts, exhibits and admissions. Appellants timely filed opposition to the Motion in which they recited various contentions from their Notice of Appeal but did not offer evidence genuinely controverting the material facts supporting DEP's Motion. DEP filed a reply brief in further support of its Motion on February 13, 2003. We find that there are no genuine issues of material fact and that DEP is entitled to judgment as a matter of law; we will accordingly grant the motion and dismiss this appeal.

I. Factual Background

This is the third appeal to come before the Board concerning Appellants' unpermitted disposal of millions of waste tires at the Site. A brief review of the prior actions concerning the Site will provide a context for the 2002 Order and the current appeal.

A. The 1987 Order and the 1991 Board Adjudication

The first appeal was initiated over fifteen years ago following DEP's issuance of an administrative order to Mr. Starr in May 1987. *See Starr v. DEP*, 1991 EHB 494, 494-95; DEP Motion, at ¶¶ 7-8 and exhibit S. The 1987 order determined that Mr. Starr was operating a solid

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[2] Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17.

[3] We have issued one prior opinion in this matter which denied a petition by Appellants for reconsideration of two discovery motion orders and a motion for leave to amend Appellants' notice of appeal. *See Starr v. DEP*, Dkt. No. 2002-049-C, 2002 Pa. Envirn. LEXIS 57 (EHB, Sept. 18, 2002).

waste storage and disposal facility without a permit in violation of the SWMA, and that the conditions at the Site constituted a public nuisance. Mr. Starr was ordered to immediately cease accepting tires at the Site and to submit a closure plan describing the manner in which the tires would be properly disposed. *Starr*, 1991 EHB at 495. Starr appealed, arguing that DEP did not have authority to issue the 1987 order because the tires he had accumulated were not "waste" within the meaning of the SWMA; Starr also contended that, even if the tires were waste, a permit was not required because the tires were neither "disposed" nor "stored" as those terms are defined by the SWMA. *Id.* at 495-96.

After conducting a hearing on the merits, the Board found that between 1981 and 1986 Mr. Starr had accumulated several million waste tires from commercial tire dealers who paid him to dispose of their discarded tires. Mr. Starr had transported the discarded tires by truck to the Site where he randomly dumped the waste tires onto the surface of the ground, eventually accumulating the tires into three piles. The Board also found that Mr. Starr had never received a permit or approval from DEP for the storage or disposal of waste tires at the Site. *Starr*, 1991 EHB at 496-97. Rejecting Starr's argument that the tires were not waste because they purportedly had economic value, and his contention that he had not "disposed" of the tires at the Site, the Board sustained the 1987 Order. *Starr*, 1991 EHB at 498-503. The Board's adjudication was subsequently affirmed. *Starr v. DER*, 607 A.2d 321 (Pa. Cmwlth. 1992).

B. The 1995 Order and 1996 Consent Adjudication

Three years after the conclusion of the litigation surrounding the 1987 Order, DEP issued a second administrative order to the Starrs in June 1995. *See* DEP Motion, at ¶ 9 and Exh. T; *see also Starr v. DEP*, 1996 EHB 313, 314. The 1995 Order required the Starrs to remove for recycling, processing or disposal the more than five million accumulated waste tires which continued to remain at the Site; the order fixed a schedule for removal of the waste tires in

progressively increasing amounts over the course of a ten year period, with all tires to be removed from the Site by July 2005. *See* DEP Motion, at exhibit T. An appeal of the 1995 order was resolved by a Consent Adjudication, approved by the Board, in which the Starrs agreed that they were operating a waste tire disposal facility without a permit and that the disposal of waste tires at the Site constituted unlawful conduct and a public nuisance. *See* DEP Motion, at ¶ 9 and exhibit D (Consent Adjudication, Dkt. No. 95-143-C, approved April 17, 1996).

The 1996 Consent Adjudication required the Starrs to remove and properly dispose at least 72 tons of waste tires (approximately equal to 7,200 tires) from the Site, per month, during the period from June 1996 through July 1999. The Starrs were also required to implement vector controls and fire prevention measures at the Site, and to provide financial assurance mechanisms for securing compliance with the Consent Adjudication. *See* 1996 Consent Adjudication, at ¶¶ 2-4, 8-11, 15-16. With the exception of its financial assurance provisions, the 1996 Consent Adjudication expired by its terms in June 1999. *Id.* at ¶ 14.[4]

C. The 1999 Consent Order and Agreement

Following expiration of the tire removal and nuisance control provisions of the 1996 Consent Adjudication, the parties negotiated and entered into a Consent Order and Agreement (COA). DEP Motion, at ¶ 21 and exhibit A (COA, dated September 7, 1999). The 1999 COA reasserted the underlying factual premises and legal determinations set forth in the 1996 Consent Adjudication and the Board's 1991 Adjudication. *See* 1999 COA, at ¶¶ A through T. The quantity fixed by the 1999 COA for the Starrs' tire removal obligations was contingent on the construction of a proposed waste tire recycling facility in southern Pennsylvania. If the proposed facility was built by early 2000, the Starrs were required to remove 500 tons of waste tires per

[4] The 1996 Consent Adjudication obligated the Starrs to continue to maintain a financial assurance instrument in the amount of $300,000 through June 2002. The financial instrument would continue to provide security in the event of a fire or other environmental catastrophe at the Site. *See* 1996 Consent Adjudication, at ¶ 15.

month from the Site between July 2000 and December 2001; if the facility was not built, the Starrs were required to remove 216 tons of waste tires per month from the Site during that same period. In the interim between September 1999 and July 2000, 72 tons of waste tires were to be shredded monthly and either stored at the Site or properly disposed elsewhere. *Id.* at ¶¶ M, 3.

D. The 2002 Order and the Current Appeal

Expiration of the tire removal, vector control and fire hazard provisions of the 1999 COA in December 2001 led to this third appeal by the Starrs with respect to the Site. On January 25, 2002, DEP issued the order which forms the subject of this appeal. DEP Motion, at ¶ 25 and exhibit F (the 2002 Order). Like the prior actions, the 2002 Order determines that Appellants have violated the SWMA and created a statutory nuisance by their unpermitted disposal of what continues to number more than five million waste tires at the Site. The order directs Appellants to remove all waste tires from the Site for recycling, processing or disposal at properly-approved facilities according to an established graduated schedule until all waste tires have been removed. And Appellants are again directed to implement vector controls designed to reduce public health hazards posed by the Site, to perform measures to reduce the fire hazard, and to provide financial instruments for security. *See* 2002 Order, at ¶¶ A through M and 1-10.

The Starrs appealed the 2002 Order on February 26, 2002. Their Notice of Appeal (NOA) does not challenge the order's primary factual basis. Indeed, according to the NOA the Site still contains nearly six million waste tires. *See* NOA, at ¶¶ 9, 24, 26. Nor does the NOA controvert DEP's determination that the Starrs' conduct violates the SWMA. Instead, Appellants primarily recite the story of an alleged breach of contract for the purchase of waste tires at the Site purportedly entered into in 1999 by the Starrs and private entities who are not party to this appeal. NOA, at ¶¶ 1-50, 65-72, 77-78. *See generally Starr*, 2002 Pa. Envirn. LEXIS 57, at *5 - *11 (describing content of Notice of Appeal).

E. Material Facts Relevant to the 2002 Order

The Starrs are individuals with a principal place of business in Millville, PA and are the owners of the property located at Eagle Road, R.R. # 3, in Benton, Greenwood Township, Columbia County which constitutes the Site at issue in this appeal. (DEP Motion, at ¶ 2, Affidavit of Martha Starr, at ¶ 2). Between 1981 and 1986, the Starrs collected discarded tires from various commercial tire dealers and took those waste tires to the Site where the wheels were removed and the tires were randomly dumped onto the surface of the ground. The tires were dumped in three disposal areas, two large areas adjacent to one another and a smaller pile across the valley. As of 1991, there were approximately 5.9 million tires in the two large piles. Mr. Starr sold some of the tires brought to the site for reuse, however, of all the waste tires accumulated by the Starrs no more than one out of three had left the Site as of 1991. *Starr*, 1991 EHB at 496-98 (Findings of Fact ¶¶ 3, 7-11, 15-16); *see also* 1996 Consent Adjudication, at ¶¶ F to H; 1999 COA, at ¶¶ C to F and 2.

Of the more than six million waste tires dumped at the Site by the Starrs between 1981 and 1986, there currently remain situated at the Site over five million waste tires. (Affidavit of Martha Starr, at ¶¶ 2-3; Appellants' Response, at ¶ 4).[5] Thus, the waste tires currently at the Site have been there for at least 15 years. (Martha Starr Affidavit, at ¶ 3). The tires continue to be located in three areas. There is a large U-shaped pile and several smaller piles located to the east of Eagle Road, a large rectangular-shaped pile area located to the west of Eagle Road, and a third smaller area consisting of numerous individual piles located near Johnson Road. Each of the three areas covers several acres—Mr. Starr estimated that the waste tires cover a total of 10 to 14

[5] Given the enormous quantity of waste tires piled at the Site, there is naturally some discrepancy in the parties' estimates of the total amount. Martha Starr estimates 60,000 tons of waste tires are currently still at the Site which would amount to about 6 million waste tires. Affidavit of Martha Starr, at ¶ 2. Appellants' NOA concurs with the six million figure. NOA, at ¶ 26. DEP estimates the amount at 5.8 million waste tires. (DEP Motion, at ¶ 4). Given the agreement in the parties' assertions that there are at least five million waste tires currently at the Site which were originally disposed there by the Starrs between 1981 and 1986, we have utilized that figure throughout this opinion.

acres; each individual tire pile has a surface area greater than 2,500 square feet and ranges from eight to twelve feet high. (Affidavit of Patrick Brennan, at ¶ 1-8 and exhibit J; Transcript of Max Starr Deposition, July 22, 2002, at 38-39; *id.*, August 13, 2002, at 42).

Appellants admit that they have never received a permit or approval from DEP to dispose of waste tires at the Site. (Appellants' Response, at ¶ 11). The Board has determined on two prior occasions that disposal of the waste tires at the Site required a permit pursuant to the SWMA and that the Starrs' disposal of the waste tires at the Site, in the absence of a permit, constituted violations of the SWMA and a statutory nuisance. *Starr*, 1991 EHB at 504-05, *aff'd*, 607 A.2d 322-25; 1996 Consent Adjudication, at ¶¶ S, V.

Piles of accumulated waste tires pose a serious fire hazard. Such fires can generate thick clouds of smoke containing harmful air emissions and can contaminate the land and water with waste oils and liquids from the runoff of melting tires. Waste tire piles can also create breeding habitat for mosquitoes, including those mosquito species that vector the West Nile virus. As such, waste tire piles can present serious hazards to public health and safety and the environment. (Affidavit of James E. Miller, at ¶ 28-29; Affidavit of John W. Ryder, at ¶¶ 1-8).

On January 25, 2002, DEP issued the 2002 Order to the Starrs. In the 2002 Order DEP determined, *inter alia*, that approximately 5.8 million waste tires originally disposed at the Site between 1981 and 1986 continue to remain at the Site; that the Site constitutes a "disposal facility" as defined by Section 103 of the SWMA, 35 P.S. § 6018.103; that the Starrs have never received a permit to dispose of solid waste at the Site; that the conditions at the Site constitute a public nuisance; and that the unpermitted disposal of solid waste and the conditions of the Site constitute violations of Sections 301, 302, 501, 601, 603, and 610 of the SWMA, 35 P.S. §§ 6018.301, -302, -501, -601, -603 and 610. *See* 2002 Order, at ¶¶ A through M.

Accordingly, DEP ordered the Starrs to "remove all waste tires from the Site for recycling, processing or disposal to a facility" permitted or approved by DEP. The order directed the Starrs to remove the waste tires according to the following schedule: 200 tons per month during the period from February 2002 through December 2002; 250 tons per month during 2003; 300 tons monthly in 2004; 350 tons monthly in 2005; and 400 tons per month from January 2006 until such time as all waste tires and waste tire shreds are removed. *Id.* at ¶¶ 1-2. In addition, the Starrs are required to: (1) implement vector controls, including periodic spraying for mosquitoes; (2) maintain fire suppression equipment and contracts, control vegetative growth, and comply with the tire storage regulations at 25 Pa. Code § 299.160 to reduce the fire hazard posed by the accumulated waste tires; (3) maintain adequate erosion and sedimentation control measures at the Site; (4) provide financial assurance in the amount of $300,000 to secure performance of the obligations imposed by the order; and, (5) procure liability insurance sufficient to cover the cost of remediation of the Site in the event of an environmental catastrophe. *Id.* at ¶¶ 3-10.

II. Discussion

A. Standard of Review

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. The Board may grant a motion for summary judgment where the pleadings, depositions, answers to interrogatories, admissions of record and affidavits show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Pa. R. Civ. P. 1035.2; *County of Adams v. DEP*, 687 A.2d 1222, 1224 n.4 (Pa. Cmwlth. 1997); *Holbert v. DEP*, 2000 EHB 796, 807-08. When deciding summary judgment motions, we view the record in the light most favorable to the nonmoving party. *Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 1162, 1164.

DEP bears the burden of proving the 2002 Order was properly issued. 25 Pa. Code §

1021.122(b)(4). Specifically, DEP must prove the existence of the facts supporting the order, demonstrate that the order was authorized by applicable law, and show that it is a reasonable and appropriate exercise of the agency's discretion. *See, e.g.*, *Starr*, 607 A.2d at 324; *Tire Jockey Services, Inc. v. DEP*, No. 2001-155-K, 2002 Pa. Envirn. LEXIS 78, at *42 (EHB, Dec. 23, 2002); *Starr*, 2002 Pa. Envirn. LEXIS 57, at *14-*15.

B. The 2002 Order Was Properly Issued

The material facts underlying the 2002 Order are undisputed. Appellants concede that they collected millions of discarded tires from commercial tire dealers and transported those waste tires to the Site where the tires were dumped onto the surface of the ground. They also concede that over five million waste tires accumulated at the Site from 1981 to 1986 continue to remain at the Site. There is no dispute that the Starrs were required to have a permit pursuant to the SWMA before they could lawfully dispose of solid waste at the Site, and the Starrs have admitted that they never received a permit from DEP to dispose of the waste tires at the Site.

Nor is there any question concerning DEP's authority to issue the order pursuant to the SWMA. The 2002 Order was issued by DEP pursuant, *inter alia*, to the authority granted to the agency by the SWMA and Section 1917-A of the Administrative Code. Under the SWMA, DEP "shall have the power" to issue orders to implement the purposes and provisions of the statute. 35 P.S. § 6018.104(7). DEP "may issue orders" to persons "as it deems necessary to aid in the enforcement of the provisions" of the SWMA. 35 P.S. § 6018.602(a).[6]

The waste tires situated at the Site are solid waste within the meaning of the SWMA. *See Starr*, 607 A.2d at 323-24; *see also Commonwealth v. Packer*, 798 A.2d 192, 196-97 (Pa. 2002) (discarded whole used tires are waste within meaning of the SWMA); *Booher v. DER*, 612 A.2d

[6] Section 1917-A of the Administrative Code expressly grants DEP authority to order nuisances, including statutory nuisances, to be "abated and removed." 71 P.S. §§ 510-17(1), (3).

1098, 1101-02 (Pa. Cmwlth. 1992) (same). The tires have been "disposed" at the Site. *Starr*, 607 A.2d at 324 (definition of "disposal" in SWMA "clearly contemplates the keeping of the tires in discrete piles directly on the ground within the confines of Starr's property").[7] And the Starrs are operating a solid waste disposal facility in the absence of any permit. *See* 35 P.S. § 6018.103 (defining "facility" as "all land . . . where municipal or residual waste disposal . . . takes place"). It is unlawful for any person to dump or deposit any solid waste onto the surface of the ground unless a permit for the dumping of such solid waste has been obtained from DEP; the SWMA also prohibits the operation of a solid waste disposal facility without a permit from DEP. 35 P.S. §§ 6018.610(1), (2), (4). In sum, DEP has proven the material facts supporting the 2002 Order and demonstrated its statutory authority to issue the order.

Appellants attempt to create an ostensible issue of material fact by challenging DEP's assertions that the Starrs have received complaints regarding mosquitoes at the Site, and that they have not taken proper measures to reduce mosquitoes and control vegetative growth around the tire piles. Essentially, Appellants are arguing that the nuisance-related conditions at the Site are not as serious as DEP contends. Even accepting the Starrs' assertions as true brings them no aid because they raise no challenge to the occurrence of the fundamental SWMA violations. DEP is not required to prove that the Site is a common law nuisance. The Site is deemed a statutory nuisance as a result of the Starrs' SWMA violations. 35 P.S. § 6018.601 ("any violation of any provision of the [SWMA] . . . shall constitute a public nuisance"). Moreover, Appellants do not contest the fact that accumulated waste tires pose a serious fire hazard and can create breeding sites for mosquitoes, including those species which carry the West Nile virus. In light of the risks

[7] The containment of the waste tires at the Site for over 15 years also fits within the statutory presumption of "disposal" in Section 103 of the SWMA. Containment of any waste in excess of one year constitutes disposal unless rebutted by clear and convincing evidence to the contrary, 35 P.S. § 6018.103 (definition of "storage"), and the Starrs have not presented any such evidence.

to public health and the environment posed by the Site, DEP has adequately proven the need for implementation of vector control and fire hazard prevention measures.

We must also examine whether the directives in the 2002 Order are a reasonable means of securing compliance with the SWMA. DEP has the discretion to issue orders "as it deems necessary to aid in the enforcement of the provisions" of the SWMA. 35 P.S. § 6018.602(a). The 2002 Order compels Appellants to take action in three ways: (1) arrange for removal of the waste tires for processing, recycling or disposal according to a fixed time schedule; (2) implement applicable vector controls and fire hazard prevention measures; and (3) maintain financial assurance for Appellants' performance and liability insurance covering potential environmental catastrophes at the Site. We are satisfied that the remedial measures imposed by the 2002 Order are a reasonable and appropriate exercise of DEP's discretion under the circumstances.

Appellants have estimated that there remain approximately 60,000 tons of waste tires at the Site. These tires have been at the Site for at least 15 years. Appellants were first ordered by DEP to properly remove all waste tires from the Site in 1987, and the litigation over the 1987 Order was concluded in 1992. Thus, Appellants have been under an obligation to properly remove the waste tires at the Site for over ten years; during that time little progress seems to have been made in reducing the number of unlawfully disposed waste tires at the Site. The 2002 Order requires removal of a total of 2,200 tons in 2002; 3,000 tons in 2003; 3,600 tons in 2004; 4,200 tons in 2005; and 400 tons per month from January 2006 until all waste tires are removed. If the Starrs faithfully perform this schedule, by the end of 2005 they will have only removed 13,000 of the approximately 60,000 tons of waste tires still at the Site. If they remove 4,800 tons per year in 2006 and thereafter, the job will not be complete until 2016. Given the length of time that has already passed since the first order was issued to Appellants to remedy their SWMA violations, it

can not be plausibly argued that this removal schedule is unduly burdensome or aggressive.

The 2002 Order requires spraying treatment for mosquito control between April and October of each calendar year until all waste tires are removed. Inspections for vectors must be performed twice monthly. To reduce the potential fire hazard, Appellants shall maintain adequate fire suppression equipment and contracts, meet the requirements of the tire storage regulations, see 25 Pa. Code § 299.160, and control vegetative growth at the Site. Appellants have not challenged the reasonableness of these requirements and the Board finds that the vector controls and fire prevention measures are both necessary and appropriate.

The financial assurance and liability insurance components of the 2002 Order are also necessary and appropriate. The Starrs are required to maintain a bond, letter of credit or similar instrument in the amount of $300,000 to secure their performance obligations under the order. Appellants must also obtain liability insurance covering potential environmental catastrophes, *e.g.* a serious fire, occurring at the Site. These are standard protective measures intended to insure the violations will be remedied, or that any environmental harm to the site is properly remediated, despite the associated risks. With respect to the propriety of the $300,000 amount, the Starrs have not presented any relevant evidence that the amount selected by DEP is unreasonably high; on the contrary, the Starrs contend that the cost of properly disposing all of the waste tires at a landfill would be significantly higher. *See* Affidavit of Martha Starr, at ¶ 23. We therefore defer to DEP's assessment of an amount sufficient to secure the potential cost of removing the waste tires at the Site in the event of Appellants' total default of their obligations.

In challenging the reasonableness of the 2002 Order, the Starrs raise essentially two arguments. First, Appellants attack the validity of the order because they contend they are physically and financially unable to comply with the order. Appellants assert that because they

are elderly and not in good health, they are physically unable to comply with the tire removal schedule imposed by the 2002 Order. The Starrs also contend that they do not have the financial means to comply with the order. In support of this contention, they offer evidence of the cost to dispose of the waste tires at an approved landfill and general assertions in two affidavits concerning their financial assets.

However, the Commonwealth Court and the Board have held that the particular appellants' financial, physical or other supposed inability to comply with an order is not a defense to the validity of a DEP order in a Board proceeding. *See Ramey Borough v. DER*, 466 Pa. 45, 49 (1976); *Kidder Township v. DER*, 399 A.2d 799, 801-02 (Pa. Cmwlth. 1979). The Starrs' personal ability to comply with the 2002 Order may be relevant in a proceeding to enforce the order, *e.g.* in the context of a petition to enforce the order before the Commonwealth Court. This appeal proceeding, however, is limited to a determination of the validity of the order or, in effect, to establishing the Starrs' legal duty to act.

In *Ramey*, the Pennsylvania Supreme Court addressed this precise question. The appellant in *Ramey* had appealed a DER order issued pursuant to the Clean Streams Law, 35 P.S. § 691.1. *et seq.*, which directed the borough to construct and operate a wastewater treatment facility. The borough attacked the validity of the order because it contended that it was financially impossible for the borough to comply. 466 Pa. at 47. Acknowledging that the borough was economically depressed, the Court nevertheless rejected the appellant's argument stating: "Our inquiry at this juncture . . . is not to determine whether Ramey can afford to build such a treatment plant." *Id* at 48. The Court elaborated:

> The Act provides a procedure by which appeals may be taken to attack the validity or content of DER orders. . . . The Clean Streams Law gives the DER broad discretion in issuing orders "necessary to implement the provisions of the act." Nothing in the Act limits the DER to issuing orders only to municipalities

> which can afford to take the corrective measures necessary. . . . *The ability of a municipality to comply with a DER order, for technological or economic reasons, may be relevant in a proceeding to enforce a DER order. This is not such an action however. The appeal from the issuance of the order serves only to determine the validity and content of the order.*

Ramey Borough, 466 Pa. at 48-49 (footnotes and citations omitted) (emphasis added).

The Board has consistently adhered to the rule prescribed by the *Ramey Borough* Court when reviewing DEP orders. *See, e.g., Heidelberg Heights Sewerage Company v. DEP*, 1998 EHB 538, 541-43 (financial inability of an order recipient to comply with an order is not a valid objection in context of proceeding challenging issuance of order); *Agmar Sewer Company, Inc. v. DEP*, 1997 EHB 433, 437-39 (same). *See generally Whitemarsh Disposal Corporation, Inc. v. DEP*, 2000 EHB 300, 330-35. Thus, the Starrs' personal physical or financial ability to comply with the 2002 Order is simply not relevant to our inquiry in this appeal.[8]

Appellants present their second argument in a circumlocutory manner. They first narrate much of the material set forth in their Notice of Appeal concerning a contract for the purchase of waste tires at the Site which they allegedly entered into in 1999, and a loan/grant program which is administered by the Department of Community and Economic Development (DCED). Briefly, the Starrs allege that, in September 1999, a manufacturer, Dodge-Regupol Inc. (DRI), and a processor, Recycling Technologies, Inc. (RTI), agreed to purchase large volumes of the waste tires at the Site for use in manufacturing recycled-rubber products. Appellants allegedly relied on

[8] Even assuming, *arguendo*, that the Starrs' physical ability to comply with the 2002 Order were relevant, the argument is illogical given that the order naturally does not direct the Starrs, *personally*, to physically load and transport the waste tires to a processing, recycling or disposal facility. Similarly, the Starrs' contention that they are financially unable to comply with the 2002 Order conflicts with the order's actual requirements. Appellants must remove the waste tires to processing, recycling *or* disposal facilities. They are not required to dispose of all the waste tires at a landfill—contrary to the representations underlying their financial-inability argument. While Appellants allege that they have attempted to locate buyers for the waste tires and provide a list of companies they have approached, see Affidavit of Martha Starr, at ¶ 5, they provide no information concerning the price they sought for the sale of the tires to processors/recyclers, or the current market rates being paid by processors/recyclers for waste tires such as those at the Site. If the Starrs are concerned about their financial ability to pay for the disposal of the Site's waste tires at a landfill, their obvious recourse would be to undercut the market for the supply of waste tires to processors/recyclers. It is contrary to law for Appellants to evade their legal obligation to cure their SWMA violations in order to try and reap a better deal on a sale of the waste tires to processors/recyclers.

the contract with DRI/RTI when they entered into the 1999 COA and accepted its provisions for tire removal. However, in March 2001 DRI/RTI disavowed any contractual agreement with the Starrs and refused to purchase waste tires from the Site. Appellants also allege that a grant/loan program related to development of facilities for recycling waste tires into useable products was not properly administered by the DCED because DCED administrators should have included a requirement in a March 2000 loan agreement with DRI which would have compelled DRI to purchase shredded waste tires from the Site. Finally, Appellants describe disputes with DEP over performance of the 1999 COA which were resolved in Commonwealth Court litigation. *See* Appellants' Memorandum, at 4-12; *see also Starr*, 2002 Pa. Envirn. LEXIS 57 at *5-*11.

Although the Starrs acknowledge that the 1999 COA is not at issue in this appeal, they insist that events surrounding the 1999 COA should be considered because these events allegedly evidence a deliberate attempt by DEP to frustrate the Starrs' efforts to sell the tires at the Site to processors/recyclers and thereby expeditiously remove the tires and cure their SWMA violations. The Starrs jump from their questioning of DEP's good faith to argue that the most effective means of removing the waste tires from the Site is by selling the tires to processors/recyclers. They then make an effort to relate all of this material to the 2002 Order by arguing that the order is unreasonable because, instead of issuing the 2002 Order, DEP should be assisting the Starrs with the sale of the waste tires at the Site.

In Appellants' view, DEP's overall policy choices with respect to the cleanup of the Site are an ineffective means of enforcing the SWMA and protecting the environment. According to Appellants, rather than issue an order to the Starrs, DEP should be pressuring DRI to perform its alleged contract with the Starrs for the purchase of waste tires, and it should be lobbying the Legislature for statutory provisions that would compel recipients of loan/grants for waste tire

recycling facilities to purchase waste tires at the Site. The Starrs argue that DEP's decision to issue an order, as opposed to taking some other action designed to help the Starrs sell the waste tires, was flawed and therefore the 2002 Order itself should be deemed unreasonable. However, none of these series of allegations, contentions, arguments and history creates an issue of material fact whether *this particular Order* is authorized by the SWMA, aids in the enforcement of the SWMA, or is reasonable.

The Department has demonstrated that there are no genuine issues of fact regarding whether DEP has proven the facts underlying the 2002 Order, that the Order was authorized by applicable law, that the Order aids in the enforcement of the SWMA, and that DEP's action here was reasonable and appropriate to deal with the situation of waste tires at the facility. DEP is entitled to judgment as a matter of law and, accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MAX STARR AND MARTHA STARR	:	
	:	
v.	:	**EHB Docket No. 2002-049-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 5th day of May, 2003, it is hereby ORDERED as follows:

1. The Department of Environmental Protection's Motion for Summary Judgment is granted, the appeal at EHB Docket No. 2002-049-C is dismissed, and the docket will be marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

Dated: May 5, 2003

The concurring opinion of Administrative Law Judge Michelle A. Coleman is attached.

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MAX STARR AND MARTHA STARR	:	
	:	
v.	:	**EHB Docket No. 2002-049-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

CONCURRING OPINION OF ADMINISTRATIVE LAW JUDGE MICHELLE A. COLEMAN

I join in the Board opinion but I write separately to further explain my rationale for rejecting Appellants' second argument with respect to the reasonableness of the 2002 Order. The Starrs argue that the 2002 Order should be deemed unreasonable because DEP's decision to issue an order—as opposed to taking some other action designed to help the Starrs sell the waste tires—was flawed. In my view, this argument fails to comprehend the nature of the Board's role in reviewing DEP enforcement orders. "As a quasi-judicial body, the [Environmental Hearing Board] is not intended to play a policy-making role." *Browning-Ferris Industries, Inc. v. DEP*, No. 2194 C.D. 2001, 2003 Pa. Commw. LEXIS 149, at *9 (Pa. Cmwlth. March 13, 2003).[9] The Board's review of the validity and content of the 2002 Order does not extend to a determination of whether DEP's overall policy choices with respect to the Site and its cleanup are the most

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[9] In *DEP v. North American Refractories Company*, 791 A.2d 461 (Pa. Cmwlth. 2002), the Court explained:

> Although traditional agencies with unitary structures may use adjudication as a mechanism for lawmaking, when the legislature invests an actor with adjudicative authority only, courts may not infer that the legislature intended the adjudicative actor to use its authority to play a policy-making role. Rather, the more plausible inference is that the legislature intended to delegate the adjudicative actor "the type of nonpolicy-making adjudicatory powers typically exercised by a *court* in the agency-review context." *Martin*, 499 U.S. at 154.

Id. at 465-66.

effective means of enforcing the SWMA. Our review of the reasonableness of DEP's exercise of discretion concerns the content of the 2002 Order—we examine the nexus between the measures prescribed in the order and the asserted violations and determine whether the measures are an effective means of resolving the violations, abating the nuisance and remediating the environmental harm. We do not review the reasonableness of DEP's decision to issue an administrative order, as opposed to, say, lobbying the Legislature or pressuring third parties to purchase the waste tires at the Site; such decisions are within the agency's policy-making authority. If Appellants believe that DEP's policy for addressing the cleanup of the Commonwealth's waste tire piles should be changed in some way, their recourse is to petition their elected representatives or make their views known to the agency through public comment or other similar procedures.

In addition, DEP may issue orders "as it deems necessary to aid in the enforcement" of the SWMA. 35 P.S. § 6018.602(a). Thus, the agency's decision whether or not to take enforcement action pursuant to the SWMA, and its selection of the type of enforcement action to employ, are within its prosecutorial discretion and are not reviewable by the Board. *Montenay Montgomery Limited Partnership v. DEP*, 1998 EHB 302, 307-08; *see also Riddle v. DEP*, Dkt. No. 98-142-MG, 2002 Pa. Envirn. LEXIS 19, at *39 n.48 (EHB, March 25, 2002) (DEP's choice of enforcement tool is within its prosecutorial discretion and is not second-guessed by the Board); *M.W. Farmer Co. v. DEP*, 1998 EHB 1306, 1315 (DEP decision to suspend storage tank certification, as opposed to issuing notice of violation, was within its prosecutorial discretion and was not reviewable). I am not convinced that the Board should second-guess DEP's decision to issue an order in response to the Starrs' violations of the SWMA as opposed to taking some other form of action which the Starrs find more amenable because it would benefit them financially.

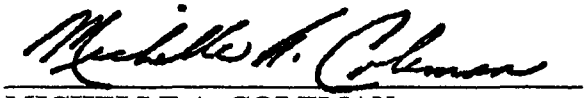
The Starrs' argument also fails to comprehend the type of relief that the Board has the power to provide in this appeal. Appellants having concluded that issuing orders directing them to remove the waste tires from the Site is an ineffective means of curing their SWMA violations and remediating the Site, the Starrs ask the Board to: "suspend all enforcement actions against the Starrs by virtue of the Solid Waste Management Act." NOA, at 23. But while the Board may substitute its discretion for DEP and modify the content of the 2002 Order, the Board "is not statutorily authorized to exercise judicial powers in equity." *Pequea Township*, 716 A.2d at 686; *see also Marinari v. DER*, 566 A.2d 385, 387 (Pa Cmwlth. 1989). The Starrs are effectively requesting the Board to issue an injunction to DEP indefinitely prohibiting the agency from exercising its power and duty to enforce the SWMA; such a mandate would at a minimum involve judicial powers in equity that the Board does not possess.

Questioning DEP's policy decision to issue the 2002 Order, Appellants ask the Board to direct DEP to: "coordinate any future grants or loans pursuant to the Industrial Sites Environmental Assessment Act to insure [sic] that the funds are used to process tires from the Commonwealth's Priority Tire Pile List in proportion to the tires on that List"; and, "to issue a waste tire processing permit to the Starrs." NOA, at 23-24.[10] The administration of a grant/loan program pursuant to the Industrial Sites Environmental Assessment Act is clearly outside the scope of this appeal of an order issued pursuant to the SWMA. Similarly, the appeal does not challenge the denial of a permit application; indeed, it is undisputed that the Starrs have not submitted any application currently pending before DEP.

At bottom, Appellants are questioning DEP's policy decision to issue the 2002 Order in

[10] Appellants also request the Board to "direct that the Office of the Attorney General and the Office of the Auditor General conduct an investigation of commonwealth funding as it relates to tire remediation." NOA, at 23-24. The Board does not have the statutory authority to direct the Attorney General or Office of the Auditor General to take any action whatsoever. *See* 35 P.S. § 7514(a) ("The board has the power and duty to hold hearings and issue adjudications . . . on orders, permits, licenses or decisions of [the Department of Environmental Protection]").

the first place, and they consequently ask the Board to direct DEP to take some other type of action. I do not believe it falls within the Board's purview to review a DEP policy decision of this kind.



MICHELLE A. COLEMAN
Administrative Law Judge
Member

Dated: May 5, 2003

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CITY OF ERIE	:	
	:	
v.	:	**EHB Docket No. 2003-018-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ERIE CITY WATER AUTHORITY, Permittee	:	**Issued: May 7, 2003**

OPINION AND ORDER ON MOTION TO WITHDRAW APPEAL

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Pursuant to Plan A of the Optional Third Class City Charter Law the executive power of the City of Erie shall be exercised by the Mayor. Since the Mayor neither authorized nor approved the filing of a Notice of Appeal before the Environmental Hearing Board, the Motion to Withdraw Appeal filed by the Erie City Solicitor is granted.

Discussion

Presently before the Board is a Motion to Withdraw Appeal (Motion) filed by of Erie Solicitor Paul Curry.[1] The Motion is opposed by Attorney Joseph Tinko, a lawyer practicing in Meadville, Pennsylvania, who also claims to represent the City of Erie pursuant to a resolution of

[1] Although the end result of the Motion is dispositive we do not believe it is a dispositive motion as envisioned by our Rules. 25 Pa. Code § 1021.94.

Erie City Council and an Employment Agreement between his law firm and Erie City Council.[2] Attorney Tinko has filed a Notice of Appeal and an Amended Notice of Appeal naming the City of Erie as Appellant. Basically, the Notice of Appeal and Amended Notice of Appeal "seek a review of the issuance of a Public Water Supply Permit for Operation, Permit Number 2502502, to the [Permittee] Erie City Water Authority on December 10, 2002 for the operation of a fluoridation facility at the Sommerheim Water Treatment Plant located in Millcreek Township, Erie County, Pennsylvania."[3]

The parties have filed extensive briefs discussing whether a private law firm paid by a third party and retained by Erie City Council may file without approval and authorization of the Mayor on the City of Erie's behalf a Notice of Appeal before the Pennsylvania Environmental Hearing Board.[4]

The City of Erie is designated as a City of the Third Class under Pennsylvania Municipal Law.[5] Its citizens have chosen the stronger mayor type government which is embodied in Plan A of the Optional Third Class City Charter Law.[6] Specific sections set forth that the legislative power of the city shall be exercised by Erie City Council[7] made up of seven members while the executive power of the city shall be exercised by the mayor.[8]

Plan A of the Optional Third Class City Charter Law thus provides for the clear separation of legislative and executive power in the offices of City Council and the Mayor. The

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[2] Under the terms of the Employment Agreement a third party, the Erie County Citizens for Safe Drinking Water, has evidently agreed to compensate Attorney Tinko and his law firm for their fees and expenses.

[3] Amended Notice of Appeal, Paragraph 4.

[4] Attorney Tinko has filed a separate Notice of Appeal (and Amended Notice of Appeal) on behalf of the City of Erie and James B. Potratz. Mr. Potratz, according to the second paragraph of the Amended Notice of Appeal "is a ... person ... who works in the city of Erie and who owns real estate in the city of Erie" located on Buffalo Road and East 20th Street. In the second Appeal the Appellants "seek a review of the issuance of a Public Water Supply Permit for Operation, Permit Number 2502503, to the Erie Water Authority on February 21, 2003 for the operation of a fluoridation facility at the Chestnut Street Water Treatment Plant located in Erie County, Pennsylvania." *City of Erie and Potratz v. DEP and Erie City Water Authority*, Dkt. No. 2003-084-R (filed April 7, 2003).

[5] 53 P.S. § 35101 *et. seq.*

[6] 53 P.S. §§ 41101- 41625.

Third Class City Code does not have this separation of power and duties. For example, under the Third Class City Code, Council is comprised of the Mayor and four councilmen.[9] Another provision states that the Mayor shall be the president of Council and a member thereof and shall have the same rights and duties including the introduction of bills and making of motions as pertain to councilmen. This should be contrasted with Plan A of the Optional Third Class City Charter Law which specifically provides that each branch of government shall have separate powers.

The Motion filed by Erie City Solicitor Paul Curry contends that the initiation of a lawsuit including the filing of an Appeal before the Environmental Hearing Board is specifically entrusted to the executive branch through the office of the Mayor by the City Solicitor. In Erie, the City Solicitor is appointed by the Mayor on the advice and consent of Erie City Council. The Third Class City Code specifically sets forth the duties and responsibilities of the City Solicitor:

> The city solicitor ... shall commence and prosecute all and every suit or suits, action or actions, brought by the city, or on account of any of the estates, rights, trusts, privileges, claims, or demands, of the same, as well as defend all actions or suits against the said city or any officer thereof, wherein or whereby any of the estates, rights, privileges, trusts, ordinances, or acts of the city or any department thereof, may be brought in question before any court. He shall have like duties before any administrative agency or other judicial or quasi-judicial body. He shall do all and every professional act incident to the office which he may be lawfully authorized and required to do by the mayor, or by any ordinance or resolution of the council.[10] (emphasis added)

The Mayor of the City of Erie, the Honorable Richard E. Filippi, has not directed nor authorized the City Solicitor to appeal the issuance of the permit issued by the Department of Environmental Protection. Therefore, Attorney Curry contends the Notice of Appeal should not

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[7] 53 P.S. § 41407.
[8] 53 P.S. § 41411.
[9] 53 P.S. § 36002.

have been filed on behalf of the City of Erie. Moreover, as City Solicitor of the City of Erie, and at the direction of the Mayor, Attorney Curry wishes to withdraw the Appeal.

Attorney Tinko points to a provision of the Third Class City Code which states that "Council may, at its discretion, retain special counsel for particular proceedings or matters of the city and fix his compensation by resolution"[11] to support his position that he represents the City of Erie in this Appeal. However, we believe that this provision can not be read in a legal vacuum but must be read in conjunction with Section 36603. To interpret it in the way advocated by Attorney Tinko would not only strip Section 36603 of any meaning but it would allow City Council in this case to wield the executive power of the City of Erie in clear contravention of Section 36603[12] and Section 41411.[13] We agree with Erie's City Solicitor that the provision authorizing council to retain special counsel applies to cases where a conflict of interest exists or some specialized counsel, such as bond counsel, is needed for a specific project.

Attorney Tinko's reliance on the Employment Agreement is similarly misplaced. Erie City Council can not bootstrap its argument by entering into a contract with a private lawyer if they legally can not circumvent the executive power of the Mayor of Erie to file all litigation on the City of Erie's behalf. To hold otherwise would result in a mad dash to the courthouse to file an action first. This is certainly not what is envisioned by Option A of the Third Class City Charter Law and the Third Class City Code.[14] If the individual members of Erie City Council wish to exercise the executive power of the City of Erie their route is simple – one of them can win the next mayoral election. In the meantime, passing a resolution and executing an employment agreement with a private attorney does not enable City Council to wield the

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[10] 53 P.S. § 36603.
[11] 53 P.S. § 36610.
[12] 53 P.S. § 36603.
[13] 53 P.S. § 41411.
[14] We also believe our reasoning is supported by the fact that the City of Erie has adopted Plan A of the Optional Third Class City

executive power of the City of Erie. The filing of litigation on the City of Erie's behalf is the province and responsibility of Mayor Fillippi through City Solicitor Curry's office. We will issue an Order accordingly.[15]

Code and the provision cited by Attorney Tinko is found *only* in the Third Class City Code.

[15] At our request, the parties briefed the issue of whether Erie City Council should be substituted for the City of Erie. After receiving the briefs, it is clear this is not a case where the requirements allowing substitution are met. 25 Pa. Code § 1021.83.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITY OF ERIE	:	
	:	
v.	:	**EHB Docket No. 2003-018-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ERIE CITY WATER AUTHORITY, Permittee	:	

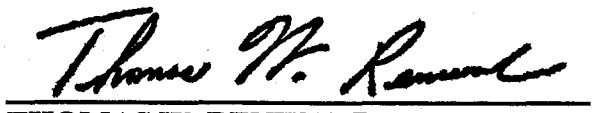
ORDER

AND NOW, this 7th day of May, 2003, the Motion to Withdraw Appeal by City of Erie Solicitor Paul Curry 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: May 7, 2003

c: **DEP Bureau of Litigation**
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JACK BOGGS & FALLING SPRING TECHNOLOGIES, LLC	:	
v	:	**EHB Docket No. 2003-026-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 13, 2003**

OPINION AND ORDER ON MOTION TO DISMISS

By Michael A. Krancer, Administrative Law Judge, Chairman

Synopsis:

The Board dismisses an appeal from a letter issued by the Department to a township sewage enforcement officer ("SEO") where the letter is the Department's pre-permit application comments on the design specifications of a proposed alternate sewage disposal system, the letter states that the Department "believes" that the proposal "may be" deficient and directs neither the applicant nor the SEO to do anything. The letter is not a final appealable action over which the Board has jurisdiction.

Factual and Procedural Background

Before us is the Department of Environmental Protection's ("Department") Motion to Dismiss Appellants', Jack Boggs and Falling Spring Technologies ("Boggs"), Notice of Appeal, on the basis that the Board lacks jurisdiction because the action appealed is not a final action of the Department. The appeal is of a letter, dated December 20, 2002, from the Department to Jonathan Piper, the SEO for Metal Township, Franklin County (the "Letter"). The Letter concerns Boggs' submission for approval of a proposed alternative sewage disposal system on

property located in Metal Township, Franklin County. The Letter states in full as follows:

> The Department of Environmental Protection has reviewed the proposal for an alternate sewage disposal system consisting of the AB Soil System using an Ecoflow Biofilter. The property in question is located at 12835 Creek Road. The Department is submitting these comments pursuant to the requirements of 25 Pa. Code § 73.72(f).
>
> The Department believes the submission may be deficient because it does not appear to demonstrate that the requirements of 25 Pa. Code § 73.72 have been satisfied. The Department, of course, is willing to consider any additional information submitted by the applicant to demonstrate that this system satisfies all regulatory requirements. In addition, it may be possible for the system to receive approval as an experimental system if the requirements of 25 Pa. Code § 73.71 are met and documented.
>
> As you are aware, pursuant to 25 Pa. Code § 72.25, it is the municipality's responsibility to take final action on the application by either granting or denying the permit.

(Department's Motion to Dismiss, Exhibit 1).

Boggs appealed the Letter to the Board by Notice of Appeal filed on February 3, 2003. The Department filed the instant Motion to Dismiss on February 26, 2003. The Appellants' filed their response absent an accompanying memorandum of law on March 25, 2003.[1] The Department filed its reply on April 3, 2003.[2]

The Department argues that the Board lacks jurisdiction to hear this appeal. It argues that the Letter merely provided comments to the Township, and therefore, is not a final action or

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[1] 25 Pa. Code § 1021.94(d) requires that responses to dispositive motions to be accompanied by a memorandum of law or brief. 25 Pa. Code § 1021.94(d). Appellants' counsel neglected to comply with that requirement.

[2] Prior to the December 20, 2002 Letter, which is the basis of the instant appeal, the Department issued a letter, dated September 23, 2002, to the Metal Township SEO which stated that Appellants' submission for a proposed alternate sewage disposal system "is deficient" for reasons enumerated in that letter. Appellants appealed the September 23, 2002 letter which appeal was docketed at EHB Docket No. 2002-266-K. The appeal was dismissed as moot after the Department issued a letter revoking the September 23, 2002 letter. *See Boggs v. DEP*, Docket No. 2002-266-K (Opinion issued February 12, 2003).

determination appealable to the Board. The Department also asserts that only the Township, not the Department, can deny Boggs' application and the proper forum for an appeal in the case of a denial by the SEO is a hearing before the local agency not the Board. The Appellants respond that the Department's letter is in fact a final determination in that its comments have prevented issuance of a permit by the Township SEO.

Standard of Review

> As we recently stated in *County of Berks v. DEP*, EHB Docket No. 2002-286-K:
>
> > The Board evaluates motions to dismiss in the light most favorable to the non-moving party. *Ainjar Trust v. DEP*, 2000 EHB 505, 507; *Wheeling and Lake Erie Railway v. DEP*, 1999 EHB 293, 295. The Board treats motions to dismiss the same as motions for judgment on the pleadings: a motion to dismiss will be granted only where there are no material factual disputes and the moving party is clearly entitled to judgment as a matter of law. *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1281.

County of Berks v. DEP, EHB Docket No. 2002-286-K, slip op. at 5 (Opinion issued February 4, 2003) *quoting Donny Beaver and Hidden Hollow Enterprises, Inc., t/d/b/a Paradise Outfitters v. DEP*, EHB Docket Nos. 2002-096-K/2002-15-K, slip op. at 6 (Opinion issued August 8, 2002); *Accord Felix Dam Preservation Society v. DEP*, 2000 EHB 409, 420-21.

Discussion

The scope of the Board's jurisdiction is detailed in the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511 *et seq.* ("EHB Act"). The EHB Act provides that "[t]he Board has the power and duty to hold hearings and issue adjudications under 2 PA.C.S. CH. 5 SUBCH. A (relating to practice and procedure of Commonwealth agencies) on orders, permits, licenses or decisions of the Department." 35 P.S. § 7514(a). The Act further provides that "no action of the Department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the Board." 35 P.S. § 7514(c). "Action" is defined as:

> An order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification.

25 Pa. Code § 1020.2(a).

Recently, we stated in *County of Berks,* where we quoted *Donny Beaver,* slip op. at 8-9, as follows:

> A review of the caselaw reveals certain principles which guide the determination of whether a particular DEP action is appealable. Although formulation of a strict rule is not possible and the "determination must be made on a case-by-case basis," *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121, the Board has articulated certain factors which should be considered. These include: the specific wording of the communication; its purpose and intent, the practical impact of the communication; its apparent finality; the regulatory context; and, the relief which the Board can provide. *See Borough of Kutztown*, 2001 EHB at 1121-24.
>
> In particular, the Board has distinguished between descriptive and prescriptive communications—*i.e.* those which merely observe conditions, inform the recipient of alleged violations, or advise of the agency's interpretation of applicable law, and, those which direct the recipient to perform a specific course of conduct, or impose an obligation which subjects the recipient to liability or changes the status quo to the detriment of personal or property rights. Thus, for example notices of violation which merely list the violations observed, advise of the possibility of future enforcement action, or inform the recipient of the procedures necessary to achieve compliance, are not appealable actions. *See, e.g., Fiore v. DER*, 510 A.2d 880, 882-84 (Pa. Cmwlth. 1986); *Sunbeam Coal Corporation v. DER*, 304 A.2d 169, 170-71 (Pa. Cmwlth. 1973); *Lower Providence Tp. Municipal Authority v. DEP*, 1996 EHB 1139, 1140-41; *M.W. Farmer Company v. DER*, 1995 EHB 29, 30; *The Oxford Corporation v. DER*, 1993 EHB 332, 333-34. But a notice of violation which orders the recipient to take some specific action affecting its personal or property rights has been held appealable. *See, e.g., S.H. Bell Company v. DER*, 1991 EHB 587, 588-90.

County of Berks, slip op. at 6.

Upon examination of the Letter, the applicable statutory and regulatory background and the particular circumstances surrounding the rendering of the Letter, all as measured by the guidelines most recently restated in the *County of Berks* case, we are convinced that the Letter

issued by the Department is not appealable.

The statutory and regulatory framework under the Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20a (Sewage Facilities Act or SFA), and its regulations, provides that municipalities, through their SEOs, are responsible for issuing permits for alternate sewage disposal systems like the one involved in this appeal.[3] *See* 35 P.S. §§ 750.7(b) and 750.8. The subject of the approval process for on-lot sewage systems and/or experimental or alternate sewage systems is covered in the regulations by 25 Pa. Code §§ 72.22, 72.25, 73.71 and 73.72. Under these provisions, a person wishing to install a proposed experimental or alternate system, such as Boggs in this case, submits the preliminary design plans and specifications of such to both the local SEO and the Department *before submitting an application for a permit.* 25 Pa. Code §§ 72.25(d), 73.71(b)(experimental systems); 73.72(b)(alternate systems). The Department is charged with determining if classification as an experimental or alternate system is appropriate and with providing review comments to the sewage enforcement officer. 25 Pa. Code §§ 73.71(f)(experimental systems); 73.72(f)(alternate systems). The regulations provide at 25 Pa. Code § 73.72(f) that "[p]rior to issuing the permit for an alternative sewage disposal system, the sewage enforcement officer shall consider the comments of the Department." 25 Pa. Code § 73.72(f). *See also* 25 Pa. Code § 72.71(i)(same provision as to experimental systems).

The Letter states on its face that "[t]he Department is submitting these comments pursuant to the requirements of 25 Pa. Code § 73.72(f)." As such, the Letter is provided at a time even before the actual permit application for the alternate system is filed with the SEO.

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[3] An alternate sewage system is defined by the regulations as a "method of demonstrated onlot sewage treatment and disposal not described in this part." 25 Pa. Code § 73.1.

While the timing of the letter or the permitting context just discussed is not determinative, those factors in concert with the actual language of the Letter direct the conclusion that the Letter in this case is not a final action of the Department.[4] The Letter states that the Department "***believes*** the submission ***may*** be deficient" and "is willing to consider additional information." In addition, the Department indicates in the letter "it ***may*** be possible for the system to receive approval as an experimental system." The specific language of the Department's letter to the SEO is tentative. The Department's use of the word "believes" and phrases such as "may be deficient" and "may be possible" make it clear that it has made no final determination. The letter contains nothing more than qualified findings and suggestions that additional information may be helpful. *See Sandy Creek Forest, Inc. v. DER*, 505 A.2d 1091, 1093 (Pa. Cmwlth. 1986)(qualified findings, simple requests or suggestions and legal interpretations are indicative of a nonappealable act). The letter does not deny or reject the proposed alternate sewage disposal system, it merely gives information about the status of Boggs' proposal.

Furthermore, the Letter makes no demands and imposes no liability upon Boggs nor does it direct the municipality or the SEO to take any particular course of action or inaction. The purpose of the letter is to give Boggs an opportunity to provide additional information for

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[4] The Department argued that the Letter is not appealable because, under the SFA, the Department is not the permitting authority, the municipality is the permitting authority and/or in the event that the SEO denies a permit, the SFA provides for an appeal to the municipality, not the Board. *See* 35 P.S. § 750.16 (Any person aggrieved by an action of a local agency or sewage enforcement officer in granting or denying a permit shall have the right within thirty days after receipt of notice of the action to request a hearing before the local agency). While it is true that under the SFA, the Department is not the permitting authority and the municipality is, and that if the SEO denies a permit, the SFA provides for an appeal to the municipality, those factors, either separately or taken together, do not by themselves mandate the conclusion that the Letter is not an appealable action under the Environmental Hearing Board Act.

consideration in the Department's evaluation of the proposed alternate sewage system. The Department even goes a step further and suggests that the proposed system may qualify as an experimental system if certain requirements are met and documented. However, nowhere in the letter does the Department require Boggs to take any action. In fact, Boggs may choose not to submit additional information at which time the Department may make a final determination that the proposed system is acceptable or deficient.

Thus, there is a convergence of factors in this case which render the particular Letter here nonappealable. The Letter comes at a time which is before the permit application stage, before the permit issuing authority has passed on whether to issue the permit, and the language of the Letter is not determinative, prescriptive, final nor does it direct either Boggs or the SEO to do anything.

Having determined that the Letter is not appealable, the Board has no jurisdiction over this appeal. Accordingly, we enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JACK BOGGS & FALLING SPRING TECHNOLOGIES, LLC	:	
	:	
v.	:	**EHB Docket No. 2003-026-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 13, 2003**

ORDER

AND NOW, this 13th day of May, 2003, the Department of Environmental Protection'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

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: May 13, 2003

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

For the Commonwealth, DEP:
Martin R. Siegel, Esquire
Southcentral Regional Counsel

For Appellant:
Khervin D. Smith, Esquire
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Annville, PA 17033

* Judge Coleman did not participate in the deliberations or decision in this matter.

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CLEARVIEW LAND DEVELOPMENT CO., CITY WIDE SERVICES, INC. AND RICHARD R. HELLER	:
v	: **EHB Docket No. 2001-191-K** : **(Consolidated with 2001-192-K and** : **2001 -193-K)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	: **Issued: May 13, 2003**

ADJUDICATION

By: Michael L. Krancer, Administrative Law Judge, Chairman

Synopsis:

The Board dismisses an appeal from a civil penalty assessment issued to Appellants by the Department for operating a municipal/residual waste transfer facility and/or disposing of municipal/residual waste without a permit in violation of the SWMA. The Department met its burden and proved that the underlying violations occurred via the application of collateral estoppel for violations which were the subject of a previous Commonwealth Court injunction trial. The Department also proved the violations occurred on two subsequent occasions which were not the subject of the Commonwealth Court trial. The civil penalty the Department imposed was authorized and the amount of the penalty was reasonable and appropriate.

BACKGROUND

This is an appeal from a civil penalty assessment issued to Appellants, Clearview Land

Development Company ("Clearview"), City Wide Services, Inc. ("City Wide") and Richard R. Heller ("Heller") by the Department of Environmental Protection ("Department) for operating a municipal/residual waste transfer facility and/or disposing of municipal/residual waste without a permit in violation of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018.1003 ("SWMA").

Clearview is the owner of the approximately 40-acre tract of land in Darby Township, Delaware County upon which the violations involved here occurred (the"Site"). Clearview formerly operated a landfill on the Site which was closed in the early 1970's. City Wide is a waste hauling business located on the Site. Heller was an officer of both Clearview and City Wide and is currently a City Wide employee. Heller's parents were the owners of Clearview and City Wide.

The Site has a long history of environmental violations. The landfill originally operated at the Site was ordered to close in 1973 due to its illegal operation. Following closure of the landfill, Richard Heller took over as president of City Wide and began operating a trash hauling business. In the late 1990's the Department began receiving complaints about the Site. The Department began conducting regular inspections during which it discovered that Appellants were processing leaf waste and municipal waste and disposing of waste such as tires, municipal waste and construction and demolition waste in violation of the SWMA. Since the Clearview Landfill was closed in 1973, neither Clearview, City Wide nor Heller have ever obtained a permit from the Department to transfer, store, collect, transport, process, dispose of, and/or deposit waste of any type at the Site.

After several years of warnings and recommendations that the Appellants cease their unlawful activities and clean up the Site, the Department sought an injunction ordering

Appellants to immediately and permanently cease the processing, dumping, disposing or burning of all solid waste at the Site, to cease authorizing or otherwise allowing the processing, dumping, disposing or burning of solid waste at the Site, and requiring Appellants to remove all solid waste from the premises. In February of 2001 a hearing was held before the Commonwealth Court. The Appellants were found to be in violation of the SWMA and ordered to clean up the waste that had been disposed of on and around the Site.

On August 2, 2001 the Department issued a Civil Penalty Assessment ("Civil Penalty") to the Appellants in the amount of $59,500.00 for substantially the same violations which were subject of the Commonwealth Court proceeding. Each Appellant filed a separate appeal on or about August 23, 2001 and the three cases were consolidated at EHB Docket No.2001-191-K.

The basis for the Appellants appeal was that the Department erred in its "Findings" as outlined in the Civil Penalty Assessment and the Department erred in disregarding certain facts when it assessed its Civil Penalty. Specifically, Appellants asserted that the Department erred by: basing the Civil Penalty Assessment on violations which had been corrected and no longer existed; disregarding the fact that Appellants had been issued a junkyard permit by the Township of Darby which allowed for the sorting of recyclables at the Site; assessing a Civil Penalty against Richard Heller who was a mere tenant with no relationship to Clearview; and in citing Appellants for failure to remove tires that were located on property not owned by Appellants.

This matter was the subject of one prior Board Opinion and Order. In *Clearview Land Development Corporation, et al. v. DEP*, Docket No. 2001-191-K (Consolidated with 2001-192-K and 2001-192-K)(Opinion issued May 16, 2002), the Board denied the Department's Motion In Limine which sought to apply the doctrine of collateral estoppel to establish the violations alleged in the Department's Civil Penalty Assessment. The Board denied the Motion primarily

on the basis that the relief being sought was dispositive in nature and not the proper subject of a motion in limine. Moreover, the Board concluded that some of the evidence regarding the underlying alleged offenses may be relevant in determining whether the penalty amount was reasonable. The Board will have occasion to deal with the collateral estoppel theory again here in this Adjudication.

Judge Michael L. Krancer presided over the trial of this matter which was conducted on June 19, 2002, July 3, 2002, July 8, 2002 and July 19, 2002. Judge Krancer also participated in a site-view on August 2, 2002. Filing of post-hearing briefs was completed on January 10, 2003, and the matter is now ripe for adjudication. The record consists of the 1,041 page hearing transcript and eighty exhibits. After careful review of the record, the Board makes the following findings of fact.

FINDINGS OF FACT

I. The Parties

1. The Department is the agency with the duty and authority to administer and enforce the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, No. 97, as amended, 35 P.S. §§ 6018.101-6018.1003 ("SWMA"); the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.1 et seq. ("CSL"); Section 1917-A of the Administrative Code of 1929, The Act of April 9, 1929, P.S. 177, as amended, 71 P.S. § 510-17 ("Administrative Code"); and the rules and Regulations promulgated pursuant to each. (Commonwealth Exhibit ("C")-73, C-74).

2. Clearview Land Development Co. ("Clearview") is a Pennsylvania corporation that owns approximately 40 acres of property adjacent to Darby Creek on the boundary of Philadelphia and Delaware County in Darby Township, Delaware County ("the Site"). The Site

has a mailing address of 83rd and Buist Avenue, Philadelphia, PA 19142. (C-1, C-73, C-74; Hearing Transcript ("Tr.") 6/19, p. 16; Tr.7/8, p. 173).

3. City Wide Services, Inc. ("City Wide") is a Pennsylvania corporation engaged in the collection and transportation of waste with a mailing address of Avenue A and Darby Creek, Sharon Hill, PA 19079, and a registered office at 285 S. 63rd St., Philadelphia, PA. City Wide's offices and garage are located on the Site. City Wide is a tenant of Clearview. (A-4;C-73, C-74; Tr. 7/8, pp. 13-16, 198).

4. Mr. Richard R. Heller ("Heller") has a mailing address of 312 Woodridge Lane, Wallingford, PA 19086. Heller served as an officer of Clearview through the late 1980's. In May of 1980 Heller took over all interests in City Wide. Heller was president of City Wide Services and remains involved in the company today as an employee. Heller supervised daily operations at the Site during the period of April 14, 1997 through April 2, 2001. (C-73, C-74; Tr. 7/8, pp. 16, 199-207).

5. Heller was responsible for the day-to-day operations of City Wide and responsible for the Clearview property during the period of April 1997 through April 2001. During Department inspections Heller held himself out as the individual responsible for operations and directing activities at City Wide and on the Site. He collected rent from tenants and paid taxes for the Site. He accompanied Department employees on inspections and participated in meetings regarding violations at the Site. He signed inspection reports and directed the cleanup of certain violations. (Tr. 6/19, pp. 44, 56, 113, 128-129, 187; Tr. 7/19, pp. 17-18, 52-54, 68, 104, 217; C-15, C-16, C-17, C-51, C-52, C-53).

II. The Site

6. Clearview was formed by Heller's parents and operated as a landfill on the Site

until 1973. Heller's parents were the sole shareholders of Clearview. (Tr. 7/8, pp.10-12, 179; Tr. 7/19, pp. 80-81).

7. The Site was illegally operated as a landfill during the early 1970's. In 1973, by Order of the Delaware County Court of Common Pleas and the Commonwealth Court of Pennsylvania, the landfill was directed to cease disposing of waste and to close. (C.73, 74).

8. After the landfill operation came to an end in 1973, Heller took over operation of City Wide. City Wide leased a portion of the Site for its offices, garage and trucks. City Wide maintains its operations at the Site today. (Tr. 7/8, pp. 13-16, 198-201).

9. Several tenants exist on the Clearview property other than City Wide. They include, Bob O'Donnell Drum Company, Enforcement Towing, Piotti Construction, Suburban Waste Removal and H&H Disposal. (Tr. 7/19, pp. 31-33).

10. The entrance to the Site is on 84th Street in Philadelphia. (Tr. 6/19, p.18; C-72)

11. The Site is bordered on two sides by Darby Creek and there is heavy vegetation on the two other sides. (Tr. 7/3, p. 37, C-4).

12. The Site has two tipping floors, one of which is located north of the City Wide offices adjacent to Darby Creek, referred to as the southwest pad or the pad to the north of the office. The other is located in the northeastern portion of the Site next to City Wide's garages and south of the O'Donnell Drum facility. (Tr. 6/19, pp. 20-21; C-5, C-8, C-11, Tr. 7/3, p. 26).

III. Department Inspections of the Site

13. In the late 1990's the Department discovered that an unauthorized transfer facility might have been operating at the Site. (Tr. 6/19, p. 275).

14. James Grabusky is currently employed by the Department as a Watershed Manager. Prior to being employed as a Watershed Specialist, Mr. Grabusky was employed as a

Solid Waste Specialist. His duties in that position included conducting inspections of waste generating and/or management facilities. He conducted five inspections of the Site between October 1997 and October 1998; he prepared reports detailing those inspections. Mr. Grabusky's first visits to the Site were conducted with a former Department employee, Mr. Tom Storrer. Mr. Storrer was the inspector just prior to Mr. Grabusky taking over the duties of inspector. (Tr. 6/19, pp. 14-16; C-5; C-6; C-8; C-11; C-14; C-15; C-16).

15. On April 14, 1997, Mr. Storrer conducted an inspection of the Site and discovered a pile of putrescent municipal household waste on the concrete pad adjacent to Mr. Bob O'Donnell's drum recycling facility ("northeast pad"). In addition, on a second tipping floor, piles of municipal waste, including construction/demolition waste, and residual waste tires were observed on a second concrete pad adjacent to Darby Creek ("southwest pad"). He also observed municipal waste, including construction/demolition waste, and residual waste tires were observed along the embankment of Darby Creek adjacent to the southwest pad. A small pile of construction/demolition waste was observed on the ground near the northeast pad. (C-5).

16. On April 17, 1997, Mr. Storrer conducted an inspection of the Site. Construction/demolition waste was observed on the ground in a low-lying area northeast of the former Hercules Hose and Coupling facility and the former Enforcement Towing facility. (C-6).

17. On April 25 the Department issued a Notice of Violation (NOV), to Heller/City Wide. The NOV cited City Wide for violations observed during the April 14, 1997 and April 17, 1997 inspections, specifically that it had transported, deposited and stored municipal waste without a permit in violation of the SWMA and 25 Pa. Code § 271.101(a). (C-7).

18. On October 27, 1997, Mr. Grabusky and Mr. Storrer conducted an inspection of the Site. Waste, including tires, a mattress, dimension lumber, a car seat, metal Styrofoam was

observed on the southwest pad. In addition, solid waste was observed on the ground in a low-lying area on the eastern portion of the Site. Mr. Grabusky recommended that City Wide cease and desist from dumping or allowing the dumping of waste material on the property, that the waste material be properly disposed of within 30 days of the inspection, and that disposal receipts be forwarded to the Department within 35 days. (Tr. 6/19, p. 33; C-8; C-9; C-10).

19. On May 5, 1998, Mr. Grabusky conducted an inspection of the Site and discovered municipal waste including glass, dimensional lumber, metal, and plastic bags of putrescent municipal waste, and residual waste tires on the southwest pad. The same solid waste was observed along the embankment of Darby Creek adjacent to the southwest pad, and on the ground in a low-lying area on the eastern portion of the Site. Mr. Grabusky again recommended that City Wide cease and desist from dumping or allowing the dumping of waste material on the property and that the waste material be properly disposed of within 30 days of the inspection and that disposal receipts be forwarded to the Department within 35 days. (Tr. 6/19 pp. 37-38; C-11; C-12; C-13).

20. On May 12, 1998, Mr. Grabusky conducted an inspection of the Site and observed waste on top of the elevated concrete tipping floor. The majority of waste consisted of plastic bags of municipal waste, but also included tires, glass, dimension lumber and metal. Odors and flies were present. Waste was also observed in a low lying area in the eastern portion of the property Also, the same solid waste observed during the May 5, 1998 inspection remained on the southwest pad. Additional municipal waste had also been deposited on the southwest pad. A significant amount of fill material had been placed on top of the closed landfill. No waste material was observed in the fill. (Tr. 6/19, pp. 43-45; C-14).

21. On June 8, 1998, Mr. Grabusky conducted an inspection of the Site at which

Heller was present. The waste previously observed on top of the southwest pad had been removed. Waste including tires, lumber, metal and shingles was observed on the bank between the tipping floor and Darby Creek. Waste including tires and construction and demolition waste was partially buried on a bank at the edge of a low lying area on the eastern portion of the Site. Mr. Grabusky recommended that the waste be removed and disposal receipts be forwarded to the Department. (Tr. 6/19, pp. 47-48, C-15).

22. On October 2, 1998 Mr. Grabusky conducted an inspection of the Site with Heller and several other Department employees. Small amounts of municipal waste were commingled with source-separated recyclables being stored on the southwest pad. Waste including tires, lumber, metal and shingles was observed on the bank between the southwest pad and Darby Creek. In addition, a large amount of clean fill was observed on top of the closed landfill. It was recommended that a plan be submitted to the department indicating how the stockpiling and removal of fill on top of the closed landfill would be operated to maintain the landfill closure. (Tr. 6/19, pp. 50-51; C- 16).

23. Benjamin Williams is currently employed by the Department as a Water Supply Management Specialist. In June of 1998, Mr. Williams was a Solid Waste Specialist in the Southeast Region. He was responsible for monitoring activities at the Site. He conducted sixteen inspections of the Site between November 1998 and May 2001; he prepared reports for each of those inspections. (Tr. 6/19, pp. 95-96; C-17; C-21; C-23; C-24; C-25; C-26; C-27; C-30; C-35; C-36; C-37; C-38; C-40; C-51; C-52; C-53).

24. On November 16, 1998, Mr. Williams conducted an inspection of the Site with Heller and observed a Glenolden Highway Department vehicle and a Sharon Hill Borough vehicle depositing leaves directly on the southwest pad. In addition, a large pile of leaf waste

was observed on the southwest pad. Mr. Williams also observed municipal waste along the embankment of Darby Creek adjacent to the southwest pad. Numerous piles of fill containing used asphalt, brick, cement, dirt and ash were observed on top of the landfill. (Tr. 6/19, pp. 98-99, 102-104; C-17; C-18; C-19).

25. On October 16, 1998 the Department sent a letter from Gary Bonner, Solid waste Supervisor, to James Lynch, counsel for Richard Heller. The letter indicated that the transfer of leaves proposed by Mr. Heller would require a transfer facility permit from the Department. However, the letter also indicated that if leaves were placed directly into another vehicle rather than being deposited on the ground no permit would be needed. (Tr. 6/19, p. 104; C-20).

26. On September 23, 1999, Mr. Williams and two other individuals conducted an inspection of the Site. A pile of construction/demolition waste was observed on top of the landfill. The pile consisted of dimension lumber, metal and shingles. (Tr. 6/19, pp. 105-106; C-21).

27. On December 28, 1999, Mr. Williams and Myron Suchodolski, a Department employee, conducted an inspection of the Site. Heller was on site during the inspection but did not accompany them. A pile of leaf waste was observed on the southwest pad. Municipal waste was observed along the embankment of Darby Creek adjacent to the southwest pad. (Tr. 6/19, pp. 108-110; C-23).

28. On May 30, 2000, Mr.Williams and Mr. Suchodolski conducted an inspection of the Site. Heller was on site but did not participate in the inspection. A pile of leaf waste was observed on the southwest pad. Municipal waste was observed along the embankment of Darby Creek adjacent to the southwest pad. Numerous piles of dirt were observed around the top of the landfill. It was recommended that the leaves and waste be removed and that disposal receipts be

forwarded to the Department. (Tr. 6/19, pp.111-112; C-24).

29. On June 16, 2000, Mr. Williams, Mr. Suchodolski and a third Department employee conducted an inspection of the Site. A pile of leaf waste was observed on the southwest pad. It was recommended that the leaves be removed from the tipping pad and the waste be removed from the bank of Darby Creek adjacent to the tipping pad. (Tr. 6/19, p. 112; C-25).

30. On June 24, 2000, Mr. Williams conducted an inspection of the Site. A pile of leaf waste was observed on the southwest pad. Waste tires were observed in a wetland area along the eastern portion of the Site. (Tr. 6/19, p.113-114; C-26).

31. On June 28, 2000, Mr. Williams and Mr. Suchodolski conducted an inspection of the Site. A pile of leaf waste was observed on the southwest pad. On the northeast side of the property in the wetlands waste tires were observed. Several piles of ash waste were observed on top of the landfill. The ash material was dark gray and contained molten pieces of plastic, metal, wire rubber and charred wood. (Tr. 6/19, pp.115-119; C-27; C-28; C-29).

32. On June 29, 2000, Mr. Williams, Mr. Suchodolski and a third individual conducted an inspection of the Site. A pile of leaf waste was observed on the southwest pad. The piles of ash waste on top of the landfill and the waste tires in the wetland area along the eastern portion of the property that were observed during the June 28, 2000 inspection remained on Site. Samples of the ash piles were taken. It was recommended that the leaves, tires and ash be removed from the Site and that receipts for disposal be obtained. (Tr. 6/19, pp. 119-124; C-30; C-31; C-32; C-33; C-34).

33. On July 6, 2000, Mr. Williams and two other Department employees conducted an inspection at the Site. A pile of leaf waste was observed on the southwest pad. The waste

tires observed during June 29, 2000 inspection remained in the wetland area along the eastern portion of the Site. The Ash material observed during the previous inspection appeared to have been removed. It was recommended that the leaves and waste tires be removed and that receipts for their disposal be obtained. (Tr. 6/19, p.124; C-35).

34. On July 14, 2000, Mr. Williams conducted an inspection of the Site. He observed a pile of leaf waste on the southwest pad. He also observed tires in the wetland area as during previous inspections. It was recommended that the tires and leaves be removed and that receipts of disposal be obtained. (Tr. 6/19, pp. 125-126; C-36).

35. On August 16, 2000, Mr. Williams and Mr. Suchodolski conducted an inspection of the Site. They observed a pile of used, painted brick and block. Also there were several piles of concrete with exposed metal and rebar. A small amount of yard waste remained on the southwest pad. (Tr. 6/19, pp.126-127; C-37).

36. On November 15, 2000, Mr. Williams and Mr. Suchodolski conducted an inspection of the Site. Heller was on site during the inspection and signed the report. Approximately ten to fifteen cubic yards of leaf waste was observed on the southwest pad. Mr. Richard Heller stated that he was transporting leaf waste to the Site and was storing the material on the concrete pad until it could be transported to a recycling facility. It was recommended that he cease accepting leaf waste and that the waste already on site be removed and receipts be obtained. (Tr. 6/19, pp. 128-129; C-38; C-39).

37. On February 20, 2001, Mr. Williams and Mr. Suchodolski conducted an inspection of the Site. Heller accompanied them on the inspection and signed the report. A pickup truck load of leaves and a large pile of waste commingled with scrap metal was observed on the southwest pad. Approximately six piles of construction/demolition waste containing

wood, painted block, plaster and metal were observed on the top of the landfill. In addition, approximately one hundred waste tires were observed in the wetland area along the eastern portion of the Site. (Tr. 6/19, pp.130-135; C-40; C-41; C-42; C-43; C-44; C-45; C-47; C-48; C-49).

IV. Commonwealth Court Proceeding

38. In 1998 the Department instituted a suit in equity in the Commonwealth Court of Pennsylvania against Heller, Clearview and City Wide ("Respondents/Appellants") to enforce the SWMA. On or about June 21, 1999, the Department filed an Amended Complaint alleging that the defendants were storing, processing, dumping and disposing of waste at the Site in violation of the Solid Waste Management Act and conducting earthmoving activities in violation of the Clean Streams Law. (C-73).

39. On February 27, 2001, an injunction trial was held in the Commonwealth Court of Pennsylvania on the Department's Amended Complaint in Equity. James Grabusky and Benjamin Williams testified as to the same inspections and violations detailed in reports from April 14, 1997 through February 20, 2001 that are in evidence in this appeal. (Tr. 6/19, pp. 136-137; C-78).

40. On February 28, 2001, the Commonwealth Court of Pennsylvania granted the Department's petition for a permanent injunction against the Respondents/Appellants to restrain their violations of the Solid Waste Management Act and the Clean Streams Law. The Commonwealth Court made the following findings in support of its Order:

> a. Respondents/Appellants have engaged in the unpermitted processing of solid waste at the Clearview Landfill Site in violation of Sections 201(a) and 610 of the SWMA, 35 P.S. §§ 6018.201(a), and 6018.610, and 25 Pa. Code § 271.101.
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> b. Respondents/Appellants have engaged in the unpermitted

disposing of solid waste on the tipping floors or surface of the ground at the Clearview Landfill Site in violation of Sections 201(a) and 610 of the SWMA, 35 P.S. §§ 6018.201(a), and 6018.610, and 25 Pa. Code § 271.101.

c. Respondents/Appellants have engaged in the unpermitted processing and/or disposing of "leaf waste" at the Clearview Landfill Site, which constitutes the operation of an unpermitted transfer station or disposal facility in violation of Sections 201(a) and 610 of the SWMA, 35 P.S. §§ 6018.201(a) and 6018.610, and 25 Pa. Code § 271.101.

d. Respondents/Appellants have stockpiled construction and demolition waste on top of the Clearview Landfill Site, which constitutes the operation of an unpermitted processing or disposal facility in violation of Sections 201(a) and 610 of the SWMA, 35 P.S. §§ 6018.201(a) and 6018.610, and 25 Pa. Code § 271.101.

e. Respondents/Appellants have stockpiled construction demolition waste on top of the Clearview Landfill Site, which constitutes earthmoving activities, without any erosion or sedimentation controls, or any approved erosion and sedimentation control plan, a violation of 25 Pa. Code § 102.4(b) and Section 611 of the CSL, 35 P.S. § 691.611.

(C-50).

41. The Commonwealth Court Ordered the following:

a. Respondents Richard M. Heller, Clearview Land Development, Inc., and City Wide Services, Inc., are permanently enjoined from processing or disposing of waste at the Clearview Landfill Site, or allowing the processing or disposing of waste at the site, including, but not limited to the following: burning, dumping and disposing of waste on the surface of the ground; and sorting or processing waste on the tipping floors or surface of the ground.

b. Within thirty (30) days of the date of this order, Richard M. Heller, Clearview Land Development, Inc., or City Wide Services, Inc., shall remove all waste from the Site and provide the Department with documentation verifying disposal of this waste in compliance with SWMA. This waste includes, but is not limited to, the following:

i. All loose waste along the section of Darby Creek stream bank that is adjacent to the tipping floor.

ii. All yard waste, leaf waste, and/or compost on the tipping floor.

iii. All waste tires on the Site. This includes, but is not limited

to, the pile located in the wetland area northeast of the garage that was shown to Mr. Richard M. Heller on June 28, 2000.

iv. All material on the top of the landfill that is not clean fill. this includes, but is not limited to, unused asphalt, concrete containing exposed metal, and ash.

v. All source separated recyclable materials that have been stored on the site for a period of time greater than one year.

c. Richard M. Heller, Clearview Land Development, Inc. and City Wide Services, Inc. shall immediately cease deposition of any fill material on top of the closed landfill.

d. Within thirty (30) days of the date of this order, Richard M. Heller, Clearview Landfill Development, Inc., or City Wide Services, Inc. shall grade off any uncontaminated soil remaining on top of the closed landfill, and revegetate the area with a quick germinating, fast-growing vegetative cover capable of stabilizing the soil surface from erosion.

e. A nonexclusive fine of $300.00 per day is assessed for each day that Richard M. Heller, Clearview Landfill Development, Inc., and City Wide Services, Inc. fail to comply with this Order.

(C-50).

V. Inspections Following the Commonwealth Court Proceeding

42. On March 9, 2001, Mr. Williams, Mr. Suchodolski and Frank DeFranceseo conducted an inspection of the Site to check on action taken following the Commonwealth Court's February 28, 2001 order. Heller was on site but did not go along on the inspection. Heller signed the inspection report. The small pile of leaf waste observed during the February 20, 2001 inspection remained on the southwest pad. The large pile of municipal waste commingled with metal, observed during the February 20, 2001 inspection, had been partially segregated. One pile of construction/demolition waste observed during the February 20, 2001 inspection remained on top of the landfill. The remaining five piles of construction/demolition waste that

were observed during the February 20, 2001 inspection appeared to have been graded into the ground surface on top of the landfill. Solid waste including, but not limited to, a truck cap, propane tanks, metal, and wood, was observed in the wetland area along the eastern portion of the Site. The tires, which had previously been observed in the wetland area, were no longer present. (Tr. 6/19, pp. 140-141; C-51).

43. On April 2, 2001, Mr. Suchodolski and Mr. Williams conducted another follow-up inspection of the Site. Heller was on site and signed the inspection report although he did not go along on the inspection. Two small piles of solid waste commingled with metal were observed on the northeast pad. A small pile of metal and municipal waste and four waste automobiles were observed on top of the landfill. In addition, the solid waste, including a truck cap, propane tanks, metal and wood, observed during the March 9, 2001 inspection remained in the wetland area along the eastern portion of the Site. (Tr. 6/19, pp.141-142; C-52).

VI. The Civil Penalty Assessment

44. The Department issued a Civil Penalty Assessment on August 2, 2001. In issuing the penalty assessment the Department determined that: (1) in the late 1990's the Appellants had began operating an unpermitted solid waste transfer station at the Site, activities at which included the transfer, storage, processing, collection disposal and/or deposit of waste; (2) that the activites conducted by the Appellant's required a permit under the SWMA; (3) that Appellant's had been repeatedly advised that a permit was required for its operation; and (4) that at no time had the Appellants "obtained a permit from the department to transfer, store, collect, transport, process, dispose, and/or deposit waste, of any description, at the Site." (Tr. 6/19, pp. 283-285; C-63).

45. The Civil Penalty Assessment describes the activities being conducted at the Site

as observed in the series of inspections performed by the Department from April 1997 to April 2001. It cites the Appellants for operation of a municipal and/or residual waste transfer facility without a permit from the Department in violation of 35 P.S. §§ 6018.201(a), 6018.301, 6018.302, 6018.501(a), 6018.610(2), 6018.610(4), and 6018.610(9); and for disposal of municipal and/or residual waste on the surface of the ground without a permit from the Department in violation of 35 P.S. §§ 6018.201(a), 6018.301, 6018.302, 6018.501(a), 6018.610(1), 6018.610(4), and 6018.610(9). The Department further determined that this unlawful conduct subjected the Appellants to a claim for civil penalties under the SWMA, 35 P.S. § 6018.605. (C-63).

46. The Civil Penalty Assessment ordered the Appellants to pay a penalty in the amount of $ 59,500.00 for the violations of the SWMA identified between April 1997 and April 2001. (C-63).

47. Myron Suchodolski is employed by the Department as a Compliance Specialist for the solid waste management program; he has been employed by the Department for five years and has held his current position for the last three years. During the course of his duties as compliance specialist Mr. Suchodolski accompanied inspectors to the Site. His duties as a Compliance specialist include assessing and drafting civil penalty assessments. He was responsible for calculating the amount of the civil penalty ("Penalty") assessed against the Appellants. (Tr. 7/3, pp. 14-16, 49-50; C-63).

48. In preparing and calculating the Penalty, Mr. Suchodolski reviewed all the inspection reports in the Department's file relating to the Site and utilized the Department's Technical Guidance Document No. 250-4180-302 from the Bureau of Land Recycling and Waste Management titled Calculation of Civil Penalties ("Guidance Document"). The criteria in

the Guidance Document reflect the criteria established in accordance with Sections 104 and 605 of the SWMA. (Tr. 7/3, pp.50-52; C-64).

49. Mr. Suchodolski decided to assess a penalty for thirty-two violations observed on nineteen separate days—the inspections of the Site from October 27, 1997 through April 2, 2001. He did not assess a penalty for violations observed on April 14, 1997, April 17, 1997, April 22, 1997, May 2, 1997 or June 29, 2000. He examined each of the factors described in the Guidance Document with respect to the violations, and applied those factors which were relevant. (Tr. 7/3, pp. 62-69; C-65; C-66; C-67).

50. Examining the "Degree of Severity" factor, Mr. Suchodolski, after reviewing the criteria for the different categories, determined that the degree of severity for each violation was low (as opposed to moderate or severe). The range of penalty amounts suggested by the Guidance Document for a "Low Severity" violation is from $1,000 to $5,000; Mr. Suchodolski selected and applied the lowest figure in the proposed range ($1,000) for each violation. (Tr. 7/3, 63-64; C-65; C-66; C-67).

51. He also examined the degree of willfulness for each violation. The Guidance Document provides four categories of willfulness—accidental, negligent, reckless and willful—and recommends no penalty for an accidental violation, a range of $500 to $5,000 for negligent, $5,000 to $12,500 for reckless, and from $12,500 to the statutory maximum of $25,000 for a willful violation. Mr. Suchodolski initially decided to characterize each of the violations as "reckless." He determined the violations were reckless because with regard to many of the violations Mr. Heller was given notice that the activities were violations and upon re-inspection the same violations were observed repeatedly. The total calculation utilizing the reckless characterization was $200,000. Mr. Suchodolski felt this was excessive. He wanted to be fair

and assess only what he thought was necessary to achieve compliance so he decided to utilize the "negligent" characterization. He selected figures ranging from $500 to $1500 in the suggested monetary range for the negligent category, $500-$5,000. (Tr. 7/3, pp. 65-69; C-65; C-66; C-67).

52. Mr. Suchodolski decided not to assess any amount for the "Costs Incurred by the Commonwealth" factor, and he decided the other factors were irrelevant. Each violation was thus ascribed penalties as indicated in Appendix A. The total penalty assessed was $59,500.00. (Tr. 7/3, pp. 67-69; C-63; C-65; C-66; C-67).

VII. Additional Findings

53. Mr. Heller admitted that he accepted leaves and that they were deposited on the tipping floor on a regular basis. He also admitted that recyclables would be separated from municipal trash and the trash would later be taken to a licensed disposal site. (Tr. 7/8, pp. 52-55, 111).

54. Mr. Heller admitted that he was told that the depositing of leaves on the tipping floor was a violation. (Tr. 7/8, p. 72, 109).

55. City Wide was issued a permit for a junkyard/transfer station from Darby Township. (Tr. 7/8, p. 24; A-5).

56. Since the Clearview Landfill was closed in 1973, neither Clearview, City Wide nor Heller have ever obtained a permit from the Department to transfer, store, collect, transport, process, dispose of, and/or deposit waste of any type at the Site. (Tr. 6/19, Pp. 172, 229-250).

DISCUSSION

I. Standard of Review

In a SWMA civil penalty assessment case the Department bears the burden of proof. 25 Pa. Code § 1021.122(b). To prevail the Department must prove by a preponderance of the evidence that: (1) the underlying violations giving rise to the assessment in fact occurred; (2) the

penalty imposed is lawful; and (3) the amount of the penalty assessed for the violations is reasonable and appropriate. *Tire Jockey Services, Inc. v. DEP*, EHB Docket No. 2001-155-K, slip op. at 43 (Opinion issued December 23, 2002); *see, e.g.*, *Stine Farms and Recycling, Inc.* v. *DEP*, 2001 EHB 796, 811-13; *see also Brandywine Recyclers v. DEP*, 1993 EHB 629 (analyzing the question of violation of the SWMA separately from the question of the reasonableness of the penalties assessed).

II. The Civil Penalty Assessment

The present case involves an appeal from a civil penalty assessment issued by the Department pursuant to the SWMA. Section 605 of the SWMA provides:

> In addition to proceeding under any other remedy available at law or in equity for a violation of any provision of this act, any rule or regulation of the department or order of the department or any term or condition of any permit issued by the department, the department may assess a civil penalty upon a person for such violation. Such a penalty may be assessed whether or not the violation was willful or negligent.

35 P.S. § 6018.605. As indicated above, in order to uphold the civil penalty assessed against Clearview, City Wide and Heller the Department had to demonstrate that the underlying violations occurred, the penalty was lawful and the amount of the penalty was reasonable. *Tire Jockey Services, Inc. v. DEP*, EHB Docket No. 2001-155-K, slip op. at 43. The Department has established by a preponderance of the evidence that the civil penalty assessment should be sustained.

The civil penalty assessment details forty-four violations observed by the Department at the Site over twenty-four separate inspections between April 14, 1997 and April 2, 2001. (C-63). The violations fall into one of two categories: (1) operation of a municipal and/or residual waste transfer facility without a permit from the Department in violation of 35 P.S. §§ 6018.201(a),

6018.301, 6018.302, 6018.501(a), 6018.610(2), 6018.610(4), and 6018.610(9); or (2) disposal of municipal and/or residual waste on the surface of the ground without a permit from the Department in violation of 35 P.S. §§ 6018.201(a), 6018.301, 6018.302, 6018.501(a), 6018.610(1), 6018.610(4), and 6018.610(9). A penalty of $59,500.00 was assessed for thirty-two violations observed over nineteen inspections.

The Underlying Violations

Initially, the Department must establish that the underlying violations of the penalty assessment actually occurred. The Appellants were cited as follows:

Date	Operation of a Municipal and/or Residual Waste Transfer Facility Without a Permit	Deposit of Municipal and/or Residual Waste on the Surface of the Ground Without a Permit
10/27/97	$1500	$1500
5/5/98	$2000	$1500
5/12/98	$1500	$1500
6/8/98		$1500
10/2/98	$1500	$1500
11/16/98	$2000	$1500
9/23/99		$1500
12/28/99	$2000	$1500
5/30/00	$2000	
6/16/00	$2000	
6/24/00	$2000	$1500
6/28/00	$2000	
7/6/00	$2000	$1500
7/14/00	$2000	$1500
8/16/00	$2000	$1500
11/15/00	$1500	
2/20/01	$1500	$2000
3/9/01	$1500	$2000
4/2/01	$2000	$2000

(C-63, C-65, C-66, C-67).

The Department asserts that by virtue of the doctrine of collateral estoppel the Board is bound by the Commonwealth Court's findings of February 28, 2001 in the suit in equity. Specifically, the Department argues that the Appellants are collaterally estopped from contesting that the activities the Department points out are violations and that the Appellants are the violators. Consequently, the Department asserts that the only matters to be resolved are the frequency of the violations and the reasonableness of the penalty. Appellant's counsel did not address this argument in its post-hearing brief. Appellants merely argue that the Department failed to meet its burden of establishing by a preponderance of the evidence that they were responsible for the underlying violations.

The doctrine of collateral estoppel:

> prevents the assertion of issues previously addressed in prior litigation. (citation omitted) Collateral estoppel applies when: the identical issue has been litigated to final judgment; the party against whom the doctrine is asserted was a party to the prior action; and that party had a full and fair opportunity to litigate the issue. (citation omitted) All three prongs must be met for collateral estoppel to apply.

Moles v. Borough of Norristown, 780 A.2d 787, 792; *See also P.U.S.H. v. DEP*, 2000 EHB 1309, 1320. (determination of a fact in a prior action is deemed conclusive between the parties in a subsequent action involving different causes of action if the fact or issue (1) is identical; (2) was actually litigated in the prior action; (3) was essential to the judgment; and (4) was material to the adjudication); *Mason v. Workmen's Compensation Appeal Board (Hilti Fastening Systems Corp.)*, 657 A.2d 1020, 1023 (Pa. Cmwlth. 1995); *Fiore v. Department of Environmental Resources*, 508 A.2d 37 (Pa. Cmwlth. 1986); *Lucchino v. DEP*, 1999 EHB 214.

We think that the doctrine of collateral estoppel does apply in this circumstance to

establish all of the illegal conduct asserted in the Department's Order, at least up until the time of the Commonwealth Court trial. That would cover all of the dates covered in the Department's Order except for the last two dates of alleged illegal conduct, *i.e.*, March 9, 2001 and April 2, 2001.

We have reviewed the trial transcript from the Commonwealth Court injunction trial which was introduced as an exhibit at our trial. (Ex. C-70). The transcript is 174 pages in length. Its shows that the Department introduced 53 exhibits, including the same inspection reports and photographs associated therewith it introduced at our trial.[1] It is obviously clear that the parties are the same as in the Commonwealth Court injunction trial. Also, the issues and facts faced and ruled upon by the Commonwealth Court in its injunction trial are identical to the issues we heard in the penalty trial. Indeed, the Department's bases for both the Commonwealth Court action and this action are the same. Moreover, the cases the Department presented before the Commonwealth Court and the Board were virtually the same. The same witnesses testified regarding identical observations at the Site. The evidence presented by the Department to establish the violations was identical. [2] In both actions the issues were whether the Appellants were operating a transfer facility without a permit and/or disposing of waste without a permit in violation of the SWMA.

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[1] Specifically, the inspection reports of April 14, 1997, April 17, 1997, October 27, 1997, May 5, 1998, May 12, 1998, June 8, 1998, October 2, 1998, November 16, 1998, September 23, 1998, December 28, 1999, May 30, 2000, June 16, 2000, June 24, 2000, June 28, 2000, June 29, 2000, July 6, 2000, July 14, 2000, August 16, 2000, November 15, 2000, and February 20, 2001. Ex. C-70, p. 3-5.

[2] James Grabusky and Benjamin Williams testified at both hearings. At each hearing the witnesses testified from the inspection reports generated from Site visits on October 27, 1997, May 5, 1998, May 12, 1998, June 8, 1998, October 2, 1998, November 16, 1998, September 23, 1999, December 28, 1999, May 30, 2000, June 16, 2000, June 24, 2000, June 28, 2000, July 6, 2000, July 14, 2000, August 16, 2000, November 15, 2000, and February 20, 2001. The testimony provided at each hearing was virtually identical. (C-78, FF 14 - 37).

The Clearview parties had a full and fair opportunity to litigate the allegations against them in the Commonwealth Court injunction trial. They were represented by the same counsel in the Commonwealth Court trial as in our trial. The transcript reveals not only that they had a full and fair chance to litigate the allegations against them, but also that they in fact did so. They cross-examined Department witnesses and presented copious testimony of Mr. Heller in defense of the Department's claims.

However, they were unsuccessful in that litigation and the Commonwealth Court issued a final order on February 28, 2001 in which it determined that all of the Appellants/Respondents were liable for violations of the SWMA.[3] After the litigation was completed, the Commonwealth Court made the following findings:

> a. Respondents/Appellants have engaged in the unpermitted processing of solid waste at the Clearview Landfill Site in violation of Sections 201(a) and 610 of the SWMA, 35 P.S. §§ 6018.201(a), and 6018.610, and 25 Pa. Code § 271.101.
>
> b. Respondents/Appellants have engaged in the unpermitted disposing of solid waste on the tipping floors or surface of the ground at the Clearview Landfill Site in violation of Sections 201(a) and 610 of the SWMA, 35 P.S. §§ 6018.201(a), and 6018.610, and 25 Pa. Code § 271.101.

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[3] Appellants' raised in their reply an argument that Heller could not be held liable because there was no evidence that he had responsibility or control over the activities alleged to be violations and there was question with regard to his role in Clearview and City Wide during the relevant period. Although this was not raised in Appellants' post-hearing brief we will briefly address it. Appellants' argument fails for two reasons. First, the Commonwealth Court has already determined that all three Appellants were liable for the underlying violations; the specific language in the court's order evidences this. Thus, the doctrine of doctrine of collateral estoppel prevents litigation of the issue.

Second, aside from being collaterally estopped from arguing the issue, there is sufficient evidence to establish Heller's liability. Heller was the individual on site regularly during the Department's inspections directing activities on the Site. He was the person who represented himself to the Department as the one in charge. He was responsible for directing clean up of a number of violations including the ash on the top of the landfill, the tires in the wetlands, and the waste along the embankment. He also signed several of the inspection reports and accompanied Department employees on inspections. Heller's involvement at the Site in this capacity demonstrates that he had control and responsibility sufficient to be held liable. *See Herzog v. DEP*, 645 A.26 1381 (Pa. Cmwlth. 1994)(individual held liable for violations under a participation theory where the individual directed activities on site).

c. Respondents/Appellants have engaged in the unpermitted processing and/or disposing of "leaf waste" at the Clearview Landfill Site, which constitutes the operation of an unpermitted transfer station or disposal facility in violation of Sections 201(a) and 610 of the SWMA, 35 P.S. §§ 6018.201(a) and 6018.610, and 25 Pa. Code § 271.101.

d. Respondents/Appellants have stockpiled construction and demolition waste on top of the Clearview Landfill Site, which constitutes the operation of an unpermitted processing or disposal facility in violation of Sections 201(a) and 610 of the SWMA, 35 P.S. §§ 6018.201(a) and 6018.610, and 25 Pa. Code § 271.101.

e. Respondents/Appellants have stockpiled construction demolition waste on top of the Clearview Landfill Site, which constitutes earthmoving activities, without any erosion or sedimentation controls, or any approved erosion and sedimentation control plan, a violation of 25 Pa. Code § 102.4(b) and Section 611 of the CSL, 35 P.S. § 691.611.

(C-50).

Based upon its findings the court ordered the following:

a. Respondents Richard M. Heller, Clearview Land Development, Inc., and City Wide Services, Inc., are permanently enjoined from processing or disposing of waste at the Clearview Landfill Site, or allowing the processing or disposing of waste at the site, including, but not limited to the following: burning, dumping and disposing of waste on the surface of the ground; and sorting or processing waste on the tipping floors or surface of the ground.

b. Within thirty (30) days of the date of this order, Richard M. Heller, Clearview Land Development, Inc., or City Wide Services, Inc., shall remove all waste from the Site and provide the Department with documentation verifying disposal of this waste in compliance with SWMA. This waste includes, but is not limited to, the following:

i. All loose waste along the section of Darby Creek stream bank that is adjacent to the tipping floor.

ii. All yard waste, leaf waste, and/or compost on the tipping floor.

iii. All waste tires on the Site. This includes, but is not limited to, the pile located in the wetland area northeast of the garage that was shown to Mr. Richard M. Heller on June 28, 2000.

iv. All material on the top of the landfill that is not clean fill. This includes, but is not limited to, unused asphalt, concrete containing exposed metal, and ash.

v. All source separated recyclable materials that have been stored on the site for a period of time greater than one year.

c. Richard M. Heller, Clearview Land Development, Inc. and City Wide Services, Inc. shall immediately cease deposition of any fill material on top of the closed landfill.

d. Within thirty (30) days of the date of this order, Richard M. Heller, Clearview Landfill Development, Inc., or City Wide Services, Inc. shall grade off any uncontaminated soil remaining on top of the closed landfill, and revegetate the area with a quick germinating, fast-growing vegetative cover capable of stabilizing the soil surface from erosion.

e. A nonexclusive fine of $300.00 per day is assessed for each day that Richard M. Heller, Clearview Landfill Development, Inc., and City Wide Services, Inc. fail to comply with this Order.

(C-50).

It is evident in reviewing the Department's Amended Complaint, the Commonwealth Court injunction trial transcript, and the Commonwealth Court's findings that such findings were material and essential to its eventual adjudication of that injunction litigation. Indeed, the adjudication or disposition by the Commonwealth Court follows directly from its having made the findings it did.

Moreover, it is clear that the Commonwealth Court's findings correlate to the very same activities alleged by the Department to be violations between April 14, 1997 and February 20, 2001 in the instant civil penalty assessment litigation. The "processing of solid waste" to which the court referred includes the piles of municipal and or residual waste including household waste, construction/demolition waste, residual waste tires, dimensional lumber, and leaf waste observed on the tipping floors and at times commingled with source-separated recyclables during

the inspections on April 14, 1997, April 22, 1997, May 2, 1997, October 27, 1997, May 5, 1998, May 12, 1998, October 2, 1998, November 16, 1998, May 30, 2000, June 16, 2000, June 24, 2000, June 28, 2000, June 29, 2000, July 6, 2000, July 14, 2000, August 16, 2000, November 15, 2000 and February 20, 2001.[4]

The "unpermitted disposing of solid waste on the tipping floors and the surface of the ground" to which the Court referred include: the construction/demolition waste and tires observed along the Darby Creek embankment and adjacent to the tipping pads on April 14, 1997; the construction/demolition waste observed on April 17, 1997; the construction/demolition waste remaining in the low-lying area on April 22, 1997; the tires, dimensional lumber, metal, shingles along the embankment of Darby Creek and the waste in the low-lying area on October 27, 1997; the waste along the Darby Creek embankment and the in the low-lying area on May 5, 1998, May 12, 1998; the waste along the Darby Creek embankment and the waste in the low-lying area including tires on June 8, 1998 and October 2, 1998; waste along the Darby Creek embankment on November 16, 1998, September 23, 1999, December 28, 1999 and May 30, 2000; and waste tires in the low-lying area on June 24, 2000, June 29, 2000, July 6, 2000, July 14, 2000 and February 20, 2001.[5]

The "unpermitted processing of leaf waste" to which the court referred includes piles of leaf waste observed on the tipping floor on December 28, 1999, May 30, 2000, June 16, 2000, June 24, 2000, June 28, 2000, June 29, 2000, July 6, 2000, July 14, 2000, August 16, 2000,

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[4] These are derived from the Complaint in Equity filed in the Commonwealth Court, the inspection reports in evidence, the testimony regarding the inspections contained in the transcript of the February 27, 2001 Commonwealth Court hearing and the Commonwealth Court's order of February 28, 2001. *See Phillips v. DER*, 1994 EHB 1266, 1274 (utilizing complaint in equity to derive specific findings).

[5] *Id.*

November 15, 2000 and February 20, 2001. The "stockpiled construction/demolition waste" to which the court referred includes the construction and demolition waste observed on the top of the landfill on September 23, 1999, August 16, 2000 and February 20, 2001.[6]

In light of the identity of parties and issues in the Commonwealth Court injunction trial and here, that the Clearview parties were afforded an opportunity to, and in fact did, fully and fairly litigate those issues before at the Commonwealth Court injunction trial, that the Commonwealth Court's findings were essential to its judgment in the case before it, Appellants here are collaterally estopped from litigating their liability for the violations from April 14, 1997 through February 20, 2001 contained in the civil penalty assessment.[7]

The Commonwealth Court trial did not cover the two last dates of alleged unlawful conduct, i.e., March 9, 2001 and April 2, 2001. We have no problem concluding on the basis of the evidence presented to us that the Department has shown that the Appellants engaged in the illegal conduct as charged on those days.

On March 9, 2001 the Department assessed penalties for operating a transfer facility in violation of the SWMA for the presence of leaf waste on the concrete pad, and for disposing of waste upon the surface of the ground in violation of the SWMA for the presence of municipal

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[6] *Id.*

[7] The Board denied the Department's Motion In Limine which sought to apply the doctrine of collateral estoppel to the case in the manner that we do so now. That motion came well after the deadline for dispositive motions had passed. As we noted in that decision, we declined on that motion to get to deeply involved in the question of collateral estoppel as the Department asked for that doctrine to be applied primarily because such relief would have been dispositive in nature, along the lines of a summary judgment motion, and not the appropriate use of a motion in limine. *See Clearview Land Development Corporation, et al. v. DEP*, Docket No. 2001-191-K (Consolidated with 2001-192-K and 2001-192-K)(Opinion issued May 16, 2002), slip op. at 4-6. In light of the denial of the motion in limine, we did go on to have four days of trial in this matter and, as we have, noted, the Commonwealth Court had already heard much of what we heard. It appears now that had a timely motion for summary judgment been brought on the collateral estoppel issue that such a motion would have been granted and all counsel,

waste and construction/demolition waste on the top of the landfill. These violations were originally observed on February 20, 2001 and the Department alleged here that these violations remained unabated on the Site on March 9, 2001. The February 20, 2001 incidents have been determined by the Commonwealth Court at its trial to be violations and we adhere to that finding. Furthermore, we find credible the testimony that the same conditions existed at the site on March 9, 2001. Thus, we find that the Department has successfully shown that the violations charged on March 9, 2001 occurred.

On April 2, 2001 the Department assessed penalties for two small piles of solid waste commingled with metal on the tipping floor and waste, including a truck cap, propane tanks, metal and wood remaining in the wetland area along the eastern portion of the site. This waste in the wetland had been observed during the March 9, 2001 inspection. We find credible the testimony that this waste was still present on April 2, 2001 and, thus, the Department has successfully proven this violation of the SWMA on April 2, 2001. With regard to the waste commingled with metal on the tipping floor, the processing or storage of waste at a location other than the place of generation constitutes a transfer facility. Operation of a municipal and/or residual waste transfer facility without a permit from the Department is a violation of 35 P.S. §§ 6018.201(a), 6018.301, 6018.302, 6018.501(a), 6018.610(2), 6018.610(4), and 6018.610(9). The record establishes that the waste in question was not generated by City Wide but brought to the site on its trucks and that City Wide did not have a permit to operate a transfer facility. Therefore, we find that the Appellants were operating a transfer facility in violation of the SWMA.

Having now determined that the underlying violations detailed in the civil penalty

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the parties, and the Board, would have spent far less time at trial.

assessment occurred and that the Appellants are liable we are left to address whether the penalty is lawful and reasonable.

The Lawfulness of the Penalty Amount

The Department has proven that the Appellants were operating a municipal and/or residual waste transfer facility and/or disposing of municipal and/or residual waste on the surface of the ground without a permit in violation of the SWMA. 35 P.S. §§ 6018.201(a), 6018.301, 6018.302, 6018.501(a), 6018.610(1), 6018.610(2), 6018.610(4) and 6018.610(9). According to the SWMA, the Department may assess a maximum of $25,000 per offense, each day a violation continues constitutes a separate offense. 35 P.S. § 6018.605. The Department assessed a penalty of $ 59,500 for thirty-two separate offenses. Thus, the penalty assessed is lawfully within the amount permitted by the statute.

The Reasonableness of the Penalty

The final question to be answered is whether the Department's penalty is reasonable and appropriate. In preparing and calculating the penalty in this case, the Department utilized and applied its Technical Guidance Document No. 250-4180-302 from the Bureau of Land Recycling and Waste Management titled Calculation of Civil Penalties ("Guidance Document"). As we recently noted in *Keinath v. DEP*, Docket No. 2001-253-MG (Opinion issued January 31, 2003), we are not bound by the mathematical formula that the Department used to calculate the penalty, but are guided by the factors enumerated by the statute". *Id.* slip op. at 10. *See also Phillips v. DER*, 1994 EHB 1266 (Board is not bound to defer to a penalty calculated by DEP internal guidance, guidelines or civil penalty matrix). Obviously, also, our decision in *Dauphin Meadows v. DEP*, 2000 EHB 521, in which we held that a guidance document is not a legally binding regulation that has the force of law and the Department cannot rely on a mere guidance

document in arriving at its determination, directs that we are not to be bound by an unpublished technical guidance document, in this case the Guidance Document just mentioned.

The Solid Waste Management Act requires that the Department consider the following when assessing a civil penalty thereunder:

> In determining the amount of the penalty, the department shall consider the willfulness of the violation, damage to air, water, land or other natural resources of the Commonwealth or their uses, cost of restoration and abatement, savings resulting to the person in consequence of such violation, and other relevant factors.

35 P.S. § 6018.605. The residual and municipal waste regulations provide instruction to the Department regarding factors to consider when assessing a civil penalty. 25 Pa. Code §§ 271.411-414 (municipal waste regulations); 25 Pa. Code §§ 287.411-414 (residual waste regulations).

The record shows that the Department carefully and thoughtfully considered the factors outlined in the SWMA and its regulations. The Department was temperate and measured in its application of the statutory and regulatory factors to this case. We think that the Department's assessment of the violation as low severity was reasonable, especially in light of the fact that there was no evidence that these violations created a potential for environmental damage or harm to the public so it seems reasonable, logical and appropriate that it assigned these violations to the lowest penalty amount.

We think that the Department's treatment of the conduct as negligent in terms of willfulness was also reasonable given the circumstances of this case. Indeed, in our view, the Department provided the Clearview parties with the benefit of the doubt on the willfulness

consideration.[8] Many of the violations could reasonably have been classified as "reckless."[9] The evidence clearly established that even after numerous warnings that certain activities required a permit and suggestions that waste be removed from the Site, the Appellants allowed violations to continue. Specifically, the continued processing of waste including municipal waste, leaf waste and construction/demolition waste alone warrant a "reckless" classification. The violations continued even after Appellants' attorney wrote to the Department for clarification of the leaf waste processing violations and Appellants were notified in writing that their activities were unlawful. Significantly, even after the Commonwealth Court proceeding in which the Appellants were ordered to cease and desist from activities that violated the SWMA and to clean up the Site, the violations continued.

The Department forebeared completely from assessing any penalties for violations observed on April 14, 1997, April 17, 1997, April 22, 1997, May 2, 1997 or June 29, 2000. In addition, it considered but did not assess a penalty amount for "costs incurred by the Commonwealth."

All of this renders Appellants' argument that the penalty amount is excessive as difficult to appreciate. In any event, the Appellants argue that the penalty should have been lower because certain violations were eventually cleaned up, specifically, the tires in the wetland, the waste along the Darby Creek embankment and the waste on top of the landfill. They also argue that the tires in the wetland for which a penalty was assessed were not on their property and that

[8] The Department initially calculated the penalty utilizing the "reckless" classification with regard to willfulness, which resulted in a penalty amount of $200,000. The Department upon deciding the $200,000 assessment was excessive applied the more lenient "negligent" characterization in an effort to assess a fair but effective penalty. (F.F. 47).

[9] The Department's Guidance Policy defines a "Reckless" violation as a violation resulting from the disregard of an obvious risk or regulatory responsibility, the existence, nature, and possible consequences of which were known, or of which prior warning or notice had been given. (C-64).

they had a permit from the township to operate a transfer station. We find these arguments unimpressive both in isolation and in the context of the Department's having granted the Clearview parties every benefit of the doubt in calculating the actual penalty. While it is true that some violations were cleaned up those violations were allowed to continue in many cases for months even after several warnings given by the Department. With regard to the tires, the Commonwealth Court has already determined that the Appellants were liable; the court's order directed them to clean up the tires in the wetland specifically. Moreover, the existence of the Township issued permit does not excuse noncompliance with State law, especially considering the Department's warnings.

In view of the circumstances presented here, the $59,500.00 penalty amount assessed for the thirty-two violations which occurred between October 27, 1997 and April 2, 2001 is reasonable and appropriate.

CONCLUSIONS OF LAW

1. The Department is the agency with the duty and authority to administer and enforce the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, No. 97, as amended, 35 P.S. §§ 6018.101-6018.1003 ("SWMA"); the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.1 *et seq.* ("CSL"); Section 1917-A of the Administrative Code of 1929, The Act of April 9, 1929, P.S. 177, *as amended*, 71 P.S. § 510-17 ("Administrative Code"); and the rules and Regulations promulgated pursuant to each.

2. The Department had the authority to assess a civil penalty under § 605 of the SWMA for operation of a municipal and/or residual waste transfer facility without a permit in violation of 35 P.S. §§ 6018.201(a), 6018.301, 6018.302, 6018.501(a), 6018.610(2), 6018.610(4), and 6018.610(9); and for disposal of municipal and/or residual waste on the surface

of the ground without a permit in violation of 35 P.S. §§ 6018.201(a), 6018.301, 6018.302, 6018.501(a), 6018.610(1), 6018.610(4), and 6018.610(9).

3. The Department must prove by a preponderance of the evidence that the underlying violations of law giving rise to the civil penalty assessment in fact occurred, that the penalty imposed is lawful and, that the amount of the penalty is reasonable and appropriate.

4. In this case, the collateral estoppel applies to establish the fact that the alleged violations up until the time of the Commonwealth Court injunction hearing was held because the parties at the Commonwealth Court injunction trial were the same as in the instant trial; the matters tried before the Commonwealth Court were the same as those at issue in this case; the appellants here were provided a full and fair opportunity to litigate the allegations against them in the Commonwealth Court trial; and the Commonwealth Court's findings were material and essential to its eventual adjudication reached by the Commonwealth Court.

5. Department proved in the trial of this matter that the alleged violations which were not subject of the Commonwealth Court injunction trial in fact occurred.

6. The amount of the penalty assessed was lawful as well as reasonable and appropriate.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEARVIEW LAND DEVELOPMENT CO., CITY WIDE SERVICES, INC. AND RICHARD R. HELLER	:	
v	:	**EHB Docket No. 2001-191K**
	:	**(Consolidated with 2001-192-K and 2001 193-K)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 13, 2003**

O R D E R

AND NOW, this 13th day of May, 2003, it is hereby ORDERED as follows:

1. The appeals of Clearview Land Development Co., docketed at EHB Docket No. 2001-191-K, City Wide Service Inc., docketed at EHB Docket No. 2001-192-K and Richard R. Heller, docketed at EHB Docket No. 2001-193-K are hereby dismissed.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
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Administrative Law Judge
Member

Dated: May 13, 2003

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

For the Commonwealth, DEP:
Anderson Hartzell, Esquire
Southeast Regional Counsel

For Appellants:
James Asher Lynch, III, Esquire
66 West Eagle Road, Suite 100
Havertown, PA 19083

* Judge Coleman did not participate in the deliberations or decision in this matter.