Environmental Hearing Board

Adjudications and Opinions

1998

Volume II

COMMONWEALTH OF PENNSYLVANIA
George J. Miller, Chairman

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OF THE

ENVIRONMENTAL HEARING BOARD

1998

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1998.

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

1998 DECISIONS

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

POWER OPERATING COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 97-212-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** May 14, 1998

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion to dismiss is granted. An appeal challenging certain provisions in a compliance order is moot where the Department has since vacated the provisions of the order. The appeal does not fall within the "capable of repetition, yet evading review" exception to the mootness doctrine.

OPINION

This appeal concerns an October 1, 1997, compliance order issued by the Department of Environmental Protection (Department) to Power Operating Company, Inc. (Appellant), of Osceola Mills, PA. Paragraph A of the compliance order states that Appellant had violated section 4(a) of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1-1396.19a. (Surface Mining Conservation and Reclamation Act), 52 P.S. § 1396.4(a), and section 86.11 of the Department's regulations, 25 Pa. Code § 86.11, by using an "access road" to a mine which was not bonded under a surface mining permit; it directed Appellant

to cease using the road. Paragraph B of the compliance order states that Appellant violated section 87.110 of the Department's regulations, 25 Pa. Code § 87.110, by failing to properly handle acid-forming spoil (spoil) along the access road; it directed Appellant to properly bury the spoil.

On October 10, 1997, Appellant filed a notice of appeal challenging Paragraph A of the compliance order. According to its notice of appeal, Appellant did not violate section 4(a) of the Surface Mining Conservation and Reclamation Act or section 86.11 of the Department's regulations, because (1) the road is not an "access road" within the meaning of section 87.1 of the Department's regulations, 25 Pa. Code § 87.1; and (2) the use of the road did not amount to "surface mining activity" within the meaning of section 87.1 of the Department's regulations. Appellants also argue in their notice of appeal that implementation of Paragraph A of the compliance order would violate the Just Compensation Clauses of the United States and Pennsylvania Constitutions because the compliance order would effect a taking of Appellant's property.

The Board has issued one previous decision in this appeal: an opinion and order granting Appellant a supersedeas, with certain conditions, and denying a Department motion to dismiss the petition for supersedeas and underlying appeal. *See Power Operating Company, Inc. v. DEP*, 1997 EHB 1186.

The Department filed another motion to dismiss, on different grounds, and a supporting memorandum of law on March 16, 1998. Appellant filed a memorandum in opposition on April 10, 1998.[1] The Department did not file a reply.

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[1] Appellant's memorandum bore the title "Response to the Department's Motion to Dismiss Power's Amended Motion for Summary Judgment." That title is misleading in several respects, however. First, the document is not a response. Section 1021.70(e) of the Board's Rules of Practice and Procedure provides that responses "shall set forth in correspondingly-numbered paragraphs all

In its motion, the Department argues that it has vacated the portion of the compliance order Appellant challenges in its notice of appeal and, therefore, Appellant's appeal is moot. Appellant, meanwhile, contends that its appeal falls within an exception to the mootness doctrine because the Department's action is capable of repetition yet would otherwise evade review.

A matter before the Board becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome. *In re Gross*, 382 A.2d 1000 (Pa. 1980); *New Hanover Corporation v. DER*, 1991 EHB 1127. On January 16, 1998, the Department vacated Paragraph A of the compliance order. (Motion to dismiss, para. 4; Ex. A in support.) Since Appellant only challenged Paragraph A of the compliance order in its notice of appeal, the Department deprived the Board of the ability to provide effective relief by vacating Paragraph A. The only remaining question is whether Appellant's appeal falls within the "capable of repetition, yet evading review" exception to the mootness doctrine.[2] We conclude it does not.

Appellant insists that its appeal falls within the "capable of repetition, yet evading review" exception to the mootness doctrine because (1) the Department issued another order regarding the

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factual disputes and the reason the opposing party objects to the motion." But Appellant's "response" is not framed in correspondingly-numbered paragraphs; it is a mere memorandum of law and we will treat it accordingly. Nor is the Department's motion limited to requesting dismissal of Appellant's motion for summary judgment, as the memorandum's title implies. The Department has moved for dismissal of the entire appeal.

[2] Appellant also argues in passing that a Board ruling on the merits of its appeal would afford Appellant finality with respect to the issues in his appeal, and thus be "effective relief," precluding application of the mootness doctrine. But this argument does not stand close scrutiny. Finality attaches to virtually every Board determination on the merits of an appeal. We would eviscerate the mootness doctrine if we held that an appeal can survive a mootness challenge simply because a Board determination of the merits would give the parties finality.

road in 1994, but has not vacated the 1994 order; and (2) the Department could issue future orders regarding the road, and then withdraw them before a hearing on the merits. This argument is not persuasive, however.

We reject Appellant's argument that the fact that the Department issued the 1994 order shows that the Department is likely to issue another order prohibiting Appellant from operating its equipment on the road. A material difference exists between the Department's 1994 order and the order Appellant currently appeals. In our previous opinion and order in this appeal, we noted that the 1994 order directed Appellant to reclaim the roads or submit a permit revision within 30 days making the roads part of the permit. 1997 EHB at 1191. And we explained, "Prior to the issuance of the 1997 Order, Appellant could not have challenged the Department's order to cease operations at the site. It could have challenged only reclamation or submission of a permit revision. That is very different from cessation of operations." *Id.*

We also reject Appellant's argument that the mootness doctrine does not apply because the Department could still issue another order barring Appellant's equipment from the road. Apart from the 1994 order, Appellant points to nothing to show that the Department will issue another order prohibiting it from using the road. Indeed, Appellant never asserts that this contingency is likely; it simply says that there is "a very real possibility" that this may occur "since there is no legal impediment to such action." (Appellant's response, p. 5.) The fact that no legal impediment may exist to prevent future action does not, by itself, prevent the application of the mootness doctrine. In virtually every case dismissed on grounds of mootness--both before the Board and elsewhere--no legal impediment exists preventing repetition of the action or omission which is the subject of the case. However, the mootness doctrine still applies, absent some indication that the conduct is likely

to recur and could evade review at that time. Although Appellant contends that the Department could repeatedly issue and vacate orders with similar provisions, effectively denying Appellant an opportunity for review, there is no indication at this point that the Department intends to issue any subsequent order on the issue, much less multiple ones. If the Department issues such orders in the future, then vacates them, Appellants may have a more compelling case against application of the mootness doctrine. At this stage, however, that contingency is sufficiently remote that it will not prevent application of the mootness doctrine.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

POWER OPERATING COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 97-212-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 14th day of May, 1998, the Department's motion to dismiss is granted and Appellant's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No.97-212-C

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: May 14, 1998

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GEORGE M. LUCCHINO	:	
	:	
v.	:	**EHB Docket No. 95-185-R**
	:	**(Consolidated with 96-222-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and ROBINSON COAL COMPANY	:	**Issued: May 15, 1998**

ADJUDICATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A consolidated appeal to the Department's Stage I and Stage II release of mining bonds posted by the permit is dismissed because the permittee has met the regulatory standard for reclamation of the mined land. In order to satisfy the regulatory standard for Stage I bond release, the coal company must backfill and regrade to the approximate original contour and install drainage controls in accordance with the approved reclamation plan. In order to satisfy the regulatory standard for Stage II bond release, the coal company must replace the topsoil, revegetate the site in accordance with the approved reclamation plan and make certain that the reclaimed lands are not contributing suspended solids to stream flow or runoff outside the permit area in excess of the acts, regulations, or permit.

BACKGROUND

This consolidated appeal involves two notices of appeal filed by Appellant George M.

Lucchino objecting to the Department of Environmental Protection's (Department) approval of Stage I and Stage II bond release of Robinson Coal Company. We earlier dismissed some of Mr. Lucchino's objections in granting partial summary judgment in favor of the coal company. *See Lucchino v. DEP*, 1996 EHB 583. The Board conducted an eight day hearing and two separate site views.[1] After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. The Pennsylvania Department of Environmental Protection (Department) is the agency with the duty and authority to administer and enforce the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended,* 35 P.S. §§ 691.1-691.1001 (Clean Streams Law); the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended,* 52 P.S. §§ 1396.1-1396.31 (Surface Mining Act); 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 (rules and regulations) promulgated thereunder.

2. George M. Lucchino is the surface landowner of two adjoining parcels that are included in this surface mining permit (the McWreath II permit). (Joint Stipulation) He purchased a parcel of approximately 33 acres (Mr. Lucchino's rental property or Lucchino rental property) in 1968. (T. at 1302)[2] (Joint Stipulation, ¶ 4) In April 1991, he purchased a second parcel of

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[1] Following the hearing, Mr. Lucchino filed a motion for summary judgment. Mr. Lucchino contends that the bonds should be reinstated because reclamation was done after the expiration of the permit to mine coal. Based on a careful review of the motion and responses, we find the motion to be without merit.

[2] "T.__" refers to a page from the transcript of the merits hearing. "F.F.___" refers to a Finding of Fact.

approximately 25 acres, the former Blatz property (Blatz property). (T. at 696, 766) The properties are contiguous. (Appellant Ex. 1) The Blatz property was mined before Mr. Lucchino purchased it. (T. at 766)

3. Robinson Coal Company is the permittee of a surface coal mine located in Robinson Township, Washington County, commonly known as the McWreath II Mine. The McWreath II Mine is the subject of this consolidated appeal. (Joint Stipulation)

4. This site had been mined extensively in the past. (T. at 696)

5. Mr. Lucchino's property has been backfilled, regraded and revegetated. (Joint Stipulation)

6. Backfilling of Mr. Lucchino's property was completed in February, 1992. (Appellant Exhibit L-6, fourth page; T. at 574)

7. Topsoil was replaced and the property was planted during the Spring of 1992. (T. at 574)

8. The erosion controls were removed between July and August of 1993. (*Id.*)

9. Mr. William Shuss is the Department employee who recommended Stage I bond release. He did so after inspecting the property approximately 35 times. (T. at 1477-1478, 1493)

10. The Board recognized Mr. Shuss as an expert in reclamation. (T. at 1492) Mr. Shuss was a surface mining inspector for four years. He is presently a Blasting and Explosives Inspector with the Greensburg District Mining Office. (T. at 1478)

11. Over a period of several years Mr. Lucchino made various complaints to the Department regarding this permit. All of the complaints were investigated.

12. Mr. Lucchino's property has been reclaimed to approximate original contour. (T. at

1495)

13. The Lucchino property blends well with the surrounding area. There are no spoil piles, large rocks or large depressions. (T. at 1314, 1496-1497; site views)

14. Topsoil has been replaced on Mr. Lucchino's property in accordance with the approved reclamation plan. (T. at 1373)

15. Before Robinson Coal Company mined the property, Mr. Lucchino's rental property had unreclaimed spoil piles covered with grassland and scrub brush. (Commonwealth Ex. 4)

16. The land was designated for Industrial/Commercial uses. (Board Ex. 5)

17. Module 20 of the application to mine coal (application) required Robinson Coal Company to identify pre-mining and post-mining land uses of the permit area. (Board Ex. 5)

18. Module 20, section 1 of the application identifies the post-mining land use of the entire McWreath II permit as "predominantly pasture land or land occasionally cut for hay with the exception of a few small areas of forest land that will be returned to forest land. The pre-mining land uses of cropland, pasture land, and previously mined areas [designated as Industrial/Commercial] will be proposed to be reclaimed and revegetated to pasture land or land occasionally cut for hay." (Board Ex. 5)

19. Module 20 of the application contains a form entitled "Change in Land Use." It includes notarized statements from Mr. McWreath and Mr. Lucchino requesting a post-mining land use of pasture land or land occasionally cut for hay. (Board Ex. 5; Appellant Ex. 1) Mr. Lucchino admitted he signed the statement. (T. at 752)

20. Mr. Larry Jadyk is a Mining Specialist with the Department. He is based in the Greensburg District Mining Office. (T. at 1271)

21. Mr. Jadyk's responsibilities include inspecting mining sites for Stage II and Stage III bond release after a mining company submits completion reports. (T. at 1272)

22. Mr. Jadyk has performed approximately 450 bond release inspections. (T. at 1272)

23. Mr. Jadyk reviewed Robinson Coal Company's request for Stage II bond release. (T. at 1343)

24. Mr. Jadyk was recognized by the Board as an expert in mining reclamation. (T. at 1283)

25. Michael Hassett has been an Inspector Supervisor with the Greensburg District Mining Office for over 12 years. His duties include supervising surface mine conservation inspectors. (T. at 1204) In addition, he reviews the completion reports of the surface mine inspector and the forester and he must approve bond releases. (T. at 1205) Mr. Hassett also is involved with compliance issues. (T. at 1205)

26. The McWreath II mine was backfilled on or before August, 1993. (T. at 1489)

27. Mr. Lucchino's rental property has been backfilled, regraded and revegetated. (Joint Stipulation, ¶ 8) Mr. Lucchino's rental property has been reclaimed to approximate original contour. (T. at 1495) The Lucchino rental property was reclaimed, seeded and the collection ditches and sedimentation controls removed prior to Stage I bond release. (T. at 1493)

28. Mr. Lucchino is not objecting to the adequacy of the vegetation established on his rental property. (Joint Stipulation, ¶ 16) He considers the vegetative cover to be excellent. (T. at 859-860)

29. Mr. Jadyk inspected the Lucchino property 3 or 4 times prior to recommending Stage II bond release. (T. at 1284) These inspections occurred during the growing season. (T. at 1284)

30. Mr. Jadyk performed a Stage II bond release inspection on August 20, 1996. Mr. Jadyk and Mr. Shuss walked the entire McWreath II mine site. (T. at 1354) Mr. Lucchino walked a portion of the McWreath II mine site. (T. at 1354)

31. During the site inspection, Mr. Jadyk did not observe any sedimentation problems on the site. (T. at 1356-1357; Commonwealth Ex. 8) He did not see any erosion gullies. (T. at 1358; Commonwealth Ex. 8)

32. Actual soil samples which Mr. Jadyk took across Mr. Lucchino's reclaimed rental property show that Robinson Coal Company replaced over one foot of topsoil throughout the property. (T. at 1338-1339, 1341; Commonwealth Ex. 7) Robinson Coal Company has replaced soil on the Lucchino rental property in accordance with the approved reclamation plan. (T. at 1373)

33. Robinson Coal Company chisel plowed the mine site after the site was regraded and soils put down. (T. at 1101, 1363) Chisel plowing is a proper method of seed bed preparation. (T. at 1363)

34. Whether a site was mulched after seeding is not a consideration for a Stage II bond release request. (T. at 1364)

35. In order to be eligible for Stage II bond release the revegetation standard for a post-mining land use of pasture land and land occasionally cut for hay requires a permanent vegetative cover of grasses and legumes, with a minimum of 70% ground cover. (T. at 1347)

36. The McWreath II mine site has a greater than 70% permanent vegetative cover of grasses and legume species. (T. at 1355; Commonwealth Ex. 8). The ground cover was established in 1992. (T. at 1356)

37. Some water accumulates in low spots during wet times of the year. (T. at 1502)

These minor accumulations of water in low spots during wet times of the year do not prevent pasturing or cutting for hay. (T. at 1499, 1501-1502; Commonwealth Ex. 9; Commonwealth Ex. 10) The low spots do not contain water during the dry seasons. (T. at 1502)

38. Mowing and haying is performed in the dry seasons. (T. at 1503)

39. The low spots do not prevent mowing or haying. (T. at 1502)

40. Mr. Lucchino's rental property can be mowed. (T. at 1359) Mr. Lucchino has been mowing the property line, the fence line, an area behind his house and other areas. Mr. Lucchino was observed mowing his property at the time of the August, 1997 site view. He was able to mow the property without any apparent trouble. (T. at 1556; August 1997 site view)

41. Other affected landowners have their properties mowed and their hay baled. (T. at 1361)

42. The reclamation on Mr. Lucchino's rental property is the same as on the other McWreath II properties and blends well with surrounding areas. (T. at 1361, 1496)

43. Robinson Coal Company has established vegetation on Mr. Lucchino's rental property in accordance with the approved reclamation plan. (T. at 1373)

44. There is a seep from the hillside into a drainage ditch alongside the driveway of Mr. Lucchino's rental property. (T. at 1517)

45. The driveway seep does not flow to the stream. (T. at 1179)

46. Mr. Shuss established monitoring points alongside Mr. Lucchino's driveway to evaluate the driveway seep. (T. at 1182) The water quality varies between acidic and alkaline. (T. at 1518-1519; Commonwealth Ex. 22)

47. Inspector Shuss conducted a six month stream monitoring survey to determine if the

seep alongside Mr. Lucchino's property impacts Robinson Run. (T. at 1179, 1522) The seep has a negligible impact on Robinson Run. (T. at 1524) Mr. Shuss never saw water from the seep leave the permit boundary or flow to the stream. (T. at 1525) Mr. Shuss did not see red staining in the stream where the seep may have entered the stream. (T. at 1526)

48. There are no discharges leaving Mr. Lucchino's rental property contributing suspended solids to stream flow outside the permit area in excess of the regulations. (T. at 1313, 1356, 1374, 1525)

49. Robinson Coal Company's mining activities improved the surface configuration of the Lucchino rental property. Robinson Coal Company eliminated highwalls, depressions and the Operation Scarlift ditches, swales, and the flume. (T. at 1316)

DISCUSSION

Stage I Bond Release

The state standards for Stage I and Stage II bond release are set forth in Section 1396.4(g)(1) and (2) of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended,* 52 P.S. §§ 1396.1-1396.31 (Surface Mining Act) and in 25 Pa. Code § 86.174(a) and (b). In order to satisfy the regulatory standard for Stage I bond release, the coal company must backfill and regrade to the approximate original contour and install drainage controls in accordance with the approved reclamation plan. 25 Pa.Code § 86.174(a); *White v. DEP,* 1996 EHB 320; and, *Broad Top Township v. DEP,* 1991 EHB 214. Robinson Coal Company has met these standards. Mr. Lucchino stipulated that his property has been backfilled, regraded and revegetated. (F. F. No. 5) He objects that there are numerous depressions on his property and he desires that it be as "smooth as a table." (T. at 858)

The Department, after extensive investigation, concluded that the land can be used for pasturing or occasional hay cutting. In fact, Inspector Shuss testified that in his expert opinion the site is reclaimed to approximate original contour. (F.F. No. 12) The surface configuration was greatly improved after Robinson Coal Company's mining. Both Mr. Shuss and Mr. Jadyk testified that the site blends well with surrounding areas. This was also seen by the Board at both site views conducted in this case. (F.F. No. 13)

Neither the statute nor the regulations require that the land be as "smooth as a table." 52 P.S. § 1396.4(g)(1),(2); and, 25 Pa. Code § 87.1. The laws focus on returning the land surface to the pre-existing configuration, preventing the accumulation of water that would impede the post-mining land use, and blending the land surface with the surrounding properties. This was clearly accomplished by Robinson Coal Company in this instance. Thus, Robinson Coal Company has met the regulatory standards to obtain Stage I bond release.

Stage II Bond Release

In order to satisfy the regulatory standard for Stage II bond release, the coal company must replace the topsoil, and revegetate the site in accordance with the approved reclamation plan and meet the standards for success of revegetation. In addition, it must make certain that the reclaimed lands are not contributing suspended solids to stream flow or runoff outside the permit area in excess of the acts, regulations or the permit. 25 Pa. Code § 86.174(b)(2); and, *C&K Coal Company v. DER*, 1992 EHB 1261.

Mr. Lucchino strongly argues that Robinson Coal Company removed topsoil from his property to the Kozlowski property. The Kozlowski property was another property on the McWreath II mine site. Moving topsoil to this property is not a violation of the mining regulations. The

applicable regulation requires that stockpiled materials be stored on the permit area. 25 Pa. Code § 87.98. Since the Kozlowski property was another property on the McWreath II mine site, it was permissible to move topsoil to his property.

More importantly, the evidence shows that Robinson Coal Company returned more topsoil to Mr. Lucchino's rental property than was there originally. The Department took numerous samples of topsoil after Robinson Coal Company completed reclamation. (F.F. No. 32) Each sample shows there is at least one foot of topsoil. (F.F. No. 32) This amount of topsoil far exceeds the limited amount of topsoil on Mr. Lucchino's rental property prior to Robinson Coal Company's mining as evidenced by drill logs in Robinson Coal Company's permit application, an area on Mr. Lucchino's property unaffected by Robinson Coal Company's mining operations, and testimony given by Mr. William Bogar who performed work earlier on the site during operation Scarlift. (T. at 699, (1338-1341; Commonwealth Ex. 7)

Stage II bond release also requires the site to be revegetated in accordance with the approved reclamation plan and with the standards for success of revegetation. Mr. Lucchino stipulated that the site is revegetated and further testified that the vegetative cover meets the standards for Stage II bond release. (F.F. No. 28) These standards require a permanent vegetative cover of grasses and legumes, with a minimum of 70% ground cover. (F.F. No. 35) 25 Pa. Code § 87.155(b). The entire McWreath II mine site has a greater than 70% permanent vegetative cover of grasses and legumes. (F.F. No. 36; Commonwealth Ex. 8; site view)

The final requirement for Stage II bond release is that the reclaimed property must not contribute suspended solids to stream flow or runoff outside the permit area in excess of the acts, regulations or permit. Mr. Lucchino contends that the driveway seep on his rental property violates

this standard. However, the Department has extensively monitored this seep and has found no evidence that any discharge from the seep even leaves the permit area. (F.F. No. 47) It also does not contribute any suspended solids to stream flow or runoff. (F.F. No. 48) Mr. Lucchino's allegation is unsupported by any evidence in the record and certainly does not preclude the Department from approving a Stage II bond release. *Duncan v. DER,* 1989 EHB 459, 469.

Remaining Issues

Mr. Lucchino raised a host of other issues on which this Board heard testimony. These issues include the following violations alleged to have occurred during mining but were later corrected: property owner notification; topsoil removal; absence of signs and markers; mulch; trees disposed of on Mr. Lucchino's property; alleged local zoning violations; and, reclamation done after expiration of the permit to mine coal. This litany of alleged violations is irrelevant to these bond release appeals.

Finally, we would be remiss if we did not point out that the testimony and evidence at the hearing revealed that the Department committed an amazing amount of resources, including time, energy, and people over the past several years investigating Mr. Lucchino's various complaints concerning the mining operations on his property. The Department responded to Mr. Lucchino's complaints and requests with the utmost courtesy and diligence to ensure that Robinson Coal Company conducted its operations in accordance with the laws and regulations of this Commonwealth. The Department should be commended for the fair way it treated Mr. Lucchino, other members of the public, and the coal company.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and over Mr.

Lucchino's appeal to the Stage I and Stage II release of bonds on the McWreath II mine permit.

2. Alleged violations of the mining regulations or permit conditions which occurred when the site was being mined are not relevant to Stage I or Stage II bond release.

3. Stage I reclamation standards are met when the entire permit area or a portion of a permit area has been backfilled and regraded to the approximate original contour or approved alternative, and when drainage controls have been installed in accordance with the approved reclamation plan. 25 Pa. Code § 86.174(a).

4. Stage II reclamation standards are satisfied when topsoil has been replaced, revegetation has been established in accordance with the approved reclamation plan and the standards for the success of revegetation are met, and the reclaimed lands are not contributing suspended solids to stream flow or runoff outside the permit area in excess of the requirements of the acts, regulations or permit. 25 Pa. Code § 86.174(b).

5. The Department did not violate its discretion or commit an error of law when it approved the release of Stage I and Stage II bonds on the McWreath II permit.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GEORGE M. LUCCHINO	:	
	:	
v.	:	**EHB Docket No. 95-185-R**
	:	**(Consolidated with 96-222-R)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and ROBINSON COAL	:	
COMPANY	:	

ORDER

AND NOW, this15th day of May, 1998, Appellant's consolidated appeal is **dismissed.**

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 95-185-R
(Consolidated with 96-222-R)

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: May 15, 1998

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v.	:	**EHB Docket No. 97-143-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** May 15, 1998

OPINION AND ORDER ON
MOTION TO DISMISS OR, IN THE ALTERNATIVE,
A MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Department of Environmental Protection's Motion to Dismiss, or In the Alternative A Motion for Summary Judgment, is denied when the Department fails to prove it is entitled to judgment as a matter of law.

OPINION

This matter was initiated with the filing of Berwick Township's (Berwick) July 9, 1997 Notice of Appeal challenging the Department of Environmental Protection's (Department) June 9, 1997 letter in which the Department informed Berwick that it owed the Department $66,100.00 in stipulated penalties for violations of a May 19, 1992 Consent Order and Agreement (CO&A). The letter stated that this amount was for violations through the month of April 1997 and that penalties would continue to accrue until the matter was resolved.

Berwick raised the following issues in its appeal: 1) that the Department's action assessing Stipulated Penalties against the Township is arbitrary, capricious and an abuse of discretion because it has attempted to comply with the terms of the CO&A but has been unable to do so as a result of matters beyond its control; 2) that compliance with the CO&A was impossible because Berwick was prohibited from implementing the Official Plan Revision since it was not technically or economically feasible to implement and the Department recognized the situation; 3) that the Official Plan Revision adopted on August 25, 1992 was inadequate to serve the needs of Berwick and it was abandoned with the Department's concurrence; and 4) that the Department's assessment of the Stipulated Penalties is unreasonable in that the Department concurred that the Official Plan Revision was inadequate to serve Berwick's needs.

On January 15, 1998 the Department filed a motion to dismiss or, in the alternative, a motion for summary judgment. The Department contends: 1) that the Board does not have authority to entertain this appeal or grant the relief requested under the doctrine of administrative finality; 2) that Appellant waived its right to appeal Department decisions under the terms of the 1992 CO&A; and 3) that Appellant also waived its right to challenge the content and validity of the 1992 CO&A. For the following reasons, the Department asserts that Appellant is barred from pursuing this appeal under the doctrine of administrative finality: 1) the 1992 CO&A is a final order of the Department; 2) Appellant not only did not appeal the CO&A but in fact it waived its right to do so; and 3) Appellant negotiated the terms of the 1992 CO&A with the Department when both parties were represented by counsel. Furthermore, Appellant voluntarily and intentionally relinquished its rights by executing the 1992 CO&A which contained language that prevented this present appeal. The Department asserts that in the alternative it should be granted summary judgment, since there are no

material facts in dispute and the Department is entitled to judgment as a matter of law.

On February 17, 1998, Berwick filed a memorandum of law in opposition to the Department's motion and filed its answers on February 26, 1998. We will not consider Berwick's response for the purpose of ruling on the Department's motion. Under Board Rule 1021.73(d), 25 Pa. Code § 1021.73(d), a response to a dispositive motion shall be filed within 25 days of the date of service of the motion. Since the Department served a copy of its motion on Berwick's counsel on January 15, 1998, Berwick had until February 9, 1998 to file its response. Berwick, however, did not file its responding memorandum of law until February 17, 1998 and its answers to the motion until February 26, 1998 which is over a week after the documents were due. Consequently, Berwick's response is untimely. We consider an untimely response a failure to respond.

Motion to Dismiss

Material Factual Disputes

We will dismiss an appeal only where there are no material factual disputes and the moving party is clearly entitled to judgment as a matter of law. *Kutsey v. DEP*, 1997 EHB 129. As stated above, Berwick's untimely response is considered a failure to respond. Facts set forth in the Department's motion are deemed admitted by Berwick because it failed to file a timely response in which it specifically denied the Department's averments. Consequently, there are no disputes of material fact.

In May 1992, the Department and Berwick entered into a CO&A. At the time that the CO&A was executed, Berwick had submitted and the Department was reviewing a third proposed revision to Berwick's Sewage Facilities Plan. Berwick agreed that the CO&A was an Order of the Department entered pursuant to the Department's authority under Section 5 of the Clean Streams

Law (CSL) and Section 10 of the Sewage Facilities Act. Berwick agreed that Berwick's failure to comply with any term or condition of the CO&A would subject Berwick to all penalties and remedies provided for in the CSL and Sewage Facilities Act for failure to comply with an Order of the Department. Paragraph 3 of the CO&A required that Berwick would, in a timely manner, implement its revised Official Plan as approved by the Department in accordance with the schedule(s). The Official Plan revision and the accompanying schedules shall be considered to be part of the CO&A and shall be subject to all provisions of this CO&A including paragraph 9. The Official Plan, and the accompanying schedule, were approved by the Department's December 9, 1992 letter. The schedule contained in the approved Official Plan required that Berwick begin construction of its sewage treatment plant in July 1995. The date for beginning construction was established by the date of issuance of the Water Quality Part II Permit for construction of the sewage treatment plant and that permit was issued in July 1994. The Department informed Berwick of the violation and met with Berwick immediately after it had failed to meet the deadline to begin construction. Paragraph 9 of the CO&A set forth the stipulated civil penalty for violation of the CO&A at $ 100.00 per day per violation of the CO&A. Paragraph 20 states "any decision which the Department makes under the provisions of the CO&A shall not be deemed to be a final action of the Department and shall not be appealable to the EHB or to any court. Any objection which the Township (Berwick) may have to the decision will be preserved until the Department enforces this CO&A. At no time, however, may the Township (Berwick) challenge the content or validity of this CO&A, or challenge the Findings agreed to in this CO&A." The closing paragraph of the CO&A states, "... that the Township (Berwick) consents to the entry of this Consent Order and Agreement and the foregoing Findings as an Order of the Department; and that the Township (Berwick) hereby

knowingly waives its right to appeal this Consent Order and Agreement and the foregoing Findings, which rights may be available under Section 4 of the Environmental Hearing Board, the Act of July 13, 1988, P.L. 530, No. 1988-94, 35 P.S. § 7514, the Administrative Agency Law, 2 Pa. C.S. § 103(a); and Chapters 5A and 7A, or any other provision of law." Berwick admits in its Notice of Appeal that it did not begin construction of the sewage treatment plant as required by the Consent Order. Both the Consent Order itself, and the Department's approval of the official Plan made Berwick responsible for the feasibility of the proposal. In the process of reviewing Berwick's proposed Official Plan, the Department inquired about the feasibility of using spray irrigation at the golf course as a means of sewage disposal. Through the experts and consultants it retained, Berwick repeatedly assured the Department that the proposal was feasible. Berwick agreed that it would be liable for violations of the Consent Order caused, contributed to, or allowed by "any persons, contractors and consultants acting under or for the Township." Berwick's liability to pay civil penalties under Section 605 of the CSL is clear. The proper amount of the penalties Berwick is to pay is equally clear in this case because Berwick stipulated to the appropriate amount of $100.00 per day for each day of each violation.

Right to appeal the civil penalty

We find that Berwick has the right to appeal the civil penalty. The Board and Commonwealth Court have held that an appellant can contest with the amount of the penalty or the fact of the violation in the appeal from the civil penalty assessment regardless of whether the appellant failed to appeal an earlier compliance order. *White Glove, Inc. v. DEP*, EHB Docket No. 97-172-MG (Opinion issued April 28, 1998); *Kent Coal Mining Co. v. Department of Environmental Resources*, 550 A.2d 279,282 (Pa. Cmwlth. 1988). The Commonwealth Court has held that where

initial Department compliance orders are followed by civil penalty assessments based on the same alleged violations, the alleged violator is not barred from challenging the fact of the violation when he or she challenges the amount of the penalty by reason of a failure to appeal the compliance order. *Kent Coal Mining Co. v. Department of Environmental Resources,* 550 A.2d 279 (Pa. Cmwlth. 1988). In that case, the Appellant failed to appeal the Department's compliance order but appealed the facts of the violation addresssed in that order when the Department later assessed a civil penalty for the violation. The Court determined that the language of Section 18.4 of the Surface Mining Conservation and Reclamation Act (SMCRA)[1] and its corresponding regulation[2] permitted the Appellant to contest either the amount of the penalty or the fact of the violation in the appeal from the civil penalty assessment regardless of whether the Appellant failed to appeal the earlier compliance order. The Court reasoned that this practice should be permitted since the Deprtment "does not assess a civil penalty when it issues the compliance order, [and therefore] the alleged violator does not have the this possibly crucial information when deciding whether to appeal." *Id.* at 281. The Board applied this same reasoning in *White Glove* in which the violation was of the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *as amended,* 35 P.S. §§ 4001-4106, which contains the same language allowing a violator to contest the amount of the penalty or the fact of the violation. *White Glove, Inc. v. DEP*, EHB Docket No. 97-172-MG (Opinion issued April 28, 1998). We believe that this interpreation applies in this case because the Sewage Facilities

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[1] Section 18.4 of SMCRA, Act of May 31, 1945, P.L. 1198, *as amended,* 52 P.S. § 1396.22, reads, in pertinent part, that a person may "contest either the amount of the penalty or the fact of the violation...."

[2] 25 Pa. Code §86.202 reads, in pertinent part, that "[t]he person charged with the violation may contest the penalty assessment or the fact of the violation...." (emphasis added)

Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1 - 750.20(a) provides that, ".... If the person wishes to contest the penalty or the fact of the violation, ..." 35 P.S. § 750.13(c) Consequently, Berwick has the right to bring the appeal at this time.

Administrative Finality

Since there is no dispute regarding the facts, we must determine whether the Department is entitled to judgment as a matter of law. The doctrine of administrative finality precludes any collateral attack on an appealable action which was not challenged by a timely appeal. *See DER v. Wheeling-Pittsburgh Steel Corporation*, 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (1977), *cert. denied*, 434 U.S. 969 (1977); *Lower Paxton Township Authority v. DER*, 1994 EHB 1826. Under the doctrine of administrative finality, one who fails to exhaust his statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by his statutory remedy. *See DER v. Wheeling-Pittsburgh Steel Corporation,*348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd*, 473 375 A.2d 320 (1977), *cert. denied*, 434 U.S. 969 (1977); *Grand Central Sanitary Landfill v. DEP,* 1996 EHB 831.

The Department is not entitled to judgment as a matter of law. Berwick could not have raised the issues it raised in the notice of appeal prior to the Department's issuance of the letter stating the penalties. The issuance of the civil penalty occurred after the violation of the CO&A and could only happen after the parties agreed to the terms of the CO&A. Therefore, the doctrine of administrative finality can not apply.

Waiver of Rights

The Department contends that Berwick waived its right to appeal the Department's decision under the terms of the CO&A. The Department asserts that Berwick knowingly waived its right to

challenge the stipulated penalties when it negotiated the 1992 CO&A with the benefit of experienced counsel, and that the language set forth in Paragraph 20 and the closing paragraph of the CO&A is clear and unequivocal. According to the Department the demand letter for the stipulated civil penalties is exactly the type of decision contemplated by Paragraph 20.

We disagree with the Department on this issue. The language of Paragraph 20 states,

> Any decision which the Department makes under the provisions of this Consent Order and Agreement shall not be deemed to be a final action of the department, and shall not be appealable to the Environmental Hearing Board or to any court. Any objection which the Township may have to the decision will be preserved until the Department enforces this Consent Order and Agreement. At no time, however, may the Township challenge the content or validity of this Consent Order and Agreement, or challenge the Findings agreed to in this Consent Order and Agreement.

Consent Order, Paragraph 20. The language of Paragraph 20 may not be contradictory. A party may not challenge the decision until it is enforced according to the language. Berwick adhered to the terms of the CO&A and waited until the Department enforced the CO&A in the form of a $66,100 civil penalty. Since Berwick adhered to the terms of the CO&A regarding when it could bring the appeal and, as stated above, the fact that Berwick can appeal either the civil penalty or the fact of the violation under the Sewage Facilities Act, it has not waived its right to appeal the Department's decision under the terms of the CO&A.

Motion for Summary Judgment

When ruling on a motion for summary judgment the Board is authorized to render summary judgment, if the pleadings, depositions, answers to interrogatories and the admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Gambler v. DEP*, 1997 EHB 751. The Board must

read the motion for summary judgment in the light most favorable to the non-moving party. *Twnshp. of Doylestown v. DEP*, 1996 436.

The Department raised the same arguments for this motion as it raised for its motion to dismiss.

We also deny the Department's motion for summary judgment. The Department failed to prove that it is entitled to prevail on this motion for the same reasons as set forth earlier in this opinion. Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BERWICK TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 97-143-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 15th day of May, 1998, the Department of Environmental Protection's Motion to Dismiss, or in the alternative, Motion for Summary Judgment is DENIED.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: May 15, 1998

See following page for service list.

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WILLIAM T. PHILLIPY II
SECRETARY TO THE BOA

DAVID K. LEVDANSKY	:	
	:	
v.	:	**EHB Docket No. 98-058-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KELLY RUN SANITATION, Permittee	:	**Issued: May 15, 1998**

OPINION AND ORDER ON BURDEN OF PROCEEDING

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A third party appealing the Department of Environmental Protection's issuance of a permit to a landfill operator has the burden of proceeding. 25 Pa. Code § 1021.101(c)(2). The Board, although permitted to shift the burden of proceeding, will only do so in rare circumstances. Such rare circumstances are not present in this appeal.

OPINION

This appeal, filed by State Representative David K. Levdansky, concerns a permit issued by the Department of Environmental Protection (Department) to Kelly Run Sanitation, Inc. (Kelly Run). The permit allows Kelly Run to construct and operate a municipal waste landfill in Forward Township, Allegheny County. Representative Levdansky has filed ten separate objections to the Department's issuance of the Phase III permit.

The hearing on the merits is scheduled to commence on July 14, 1998 in Pittsburgh. On April 30, 1998 a pre-hearing status conference was held with counsel. One of the topics discussed at the status conference, and the subject of this opinion, is the burden of proceeding. It is the Board's normal practice that an appellant, in this case Representative Levdansky, has the burden of proof and the burden of proceeding in his appeal, pursuant to 25 Pa. Code § 1021.101(c):

> A party appealing an action of the Department shall have the burden of proof and burden of proceeding in the following cases **unless otherwise ordered by the Board** ...
>
> (2) When a party who is not the applicant or holder of a license or permit from the Department protests its issuance or continuation.
>
> (emphasis added)

However, as the rule provides, in certain circumstances, as provided by 25 Pa. Code § 1021.101(a), it is appropriate for the Board to shift the burden of proceeding[1] to another party, such as the Department:

> In cases where a party has the burden of proof to establish the party's case by a preponderance of the evidence, the Board may nonetheless require the other party to assume the burden of going forward with the evidence in whole or in part if that party is in possession of facts or should have knowledge of facts relevant to the issue.

In a recent case, on the Department's own motion, the Board shifted the burden of proceeding to the Department. See *People United to Save Homes v. DEP*, EHB Docket No. 95-232-R (Consolidated).[2] That case involved a detailed and massive attack on the adequacy and legal

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[1] The burden of proof does not shift. *Easton Area Joint Sewer Authority v. DER*, 1990 EHB 1307, 1319.

[2] The final post-hearing briefs in this matter have been filed and a decision by the Board is pending.

sufficiency of the Department's permit application review process concerning a revision to a coal mining permit. The Department argued persuasively that many of its employees involved in the review and issuance of the permit would have to testify two or three times if it did not first provide a comprehensive overview of the Department's permit application review process. The Department also alleged that the testimony would be disjointed and would not provide either a clear or accurate picture of the Department's permitting process. The Board, in that case, after careful consideration, agreed with the Department and granted its motion to shift the burden of proceeding over the vigorous objections of one of the appellants. At the hearing the procedure worked well. The Department was able to present detailed testimony about the permit application in a comprehensive fashion. The appellants also benefited in that they were able to cross-examine Department employees concerning salient points of their testimony to which appellants disagreed.[3] A further benefit was that it likely shortened the hearing by at least two days which resulted in a substantial savings in attorneys' fees and expenses to all involved.

Despite the benefits noted above the Board believes that shifting the normal burden of proceeding should not be done except in rare cases. Although it may be appropriate to do so in *some* complex cases such as the one listed above, it is not a step that should be taken lightly. As the Board has held, initial disparity in information may be resolved through discovery, "where parties may ferret out witnesses, documents and other evidence which may be known to other parties and germane to the case." *Ingram Coal Company v. DER*, 1995 EHB 231, 241.

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[3] Appellants in most instances, may not call Department employees as hostile witnesses or cross-examine them during their case-in-chief. *Wyant v. DER*, 1988 EH 986.

This appeal is also a more defined attack on the permit. Thus, all aspects of the permit review process are not at issue. The Department has not asked us to shift the burden of proceeding in this case; and in fact strongly objects to a shifting of the burden of proceeding.

Representative Levdansky is also represented by able and experienced counsel who is very familiar with the Department's actions in this case through discovery and through his years of practice in this field. This is not a situation involving a *pro se* plaintiff, which in some rare cases, may warrant a close examination as to whether the Board should exercise its discretion and shift the burden of proceeding.

Moreover, if we shift the burden of proceeding in this case the Department will have to necessarily anticipate areas of attack, that although raised, may actually be abandoned at the hearing. This would result in the presentation of evidence that is neither necessary to our final decision nor relevant. It would also result in increased expenses and fees to all parties.

Finally, by shifting the burden of proceeding we would deprive the Department of an opportunity to move for a non-suit at the conclusion of the appellant's case. *City of Harrisburg v. DER*, 1993 EHB 90. Although non-suits are rarely granted we should not summarily place a party in a situation where they are precluded from requesting relief to which they might, in theory, be entitled. *Nottingham Network of Neighbors v. DER*, 1996 EHB 4; *Ambler Borough Water Department v. DER* , 1995 EHB 11, 20-21.

We, therefore, conclude that we should not here, nor in the vast majority of appeals, shift the burden of proceeding.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID K. LEVDANSKY	:	
	:	
v.	:	**EHB Docket No. 98-058-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KELLY RUN SANITATION, Permittee	:	

ORDER

AND NOW, this 15th day of May, 1998, after consideration of the positions of the parties concerning the shifting of the burden of proceeding in this appeal, the Board declines to shift the burden of proceeding.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: May 15, 1998

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FRANK and DIANE SHAULIS, et al.	:	
	:	
v.	:	**EHB Docket No. 96-182-MR**
	:	**(Consolidated with 96-183-MR)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and J.P. MASCARO & SONS	:	**Issued: May 18, 1998**
INC., Permittee	:	

OPINION AND ORDER
ON PETITION FOR RECONSIDERATION

by Robert D. Myers, Administrative Law Judge

Synopsis:

A Petition for Reconsideration of an Order dismissing petitioner's appeal for failure to comply with a Board Order and precluding petitioner from presenting evidence in a related appeal is denied because the petitioner has not shown compelling and persuasive reasons for reconsideration of the Order.

OPINION

On December 3, 1997, the Board issued Pre-Hearing Order No. 2 scheduling these consolidated appeals for hearing on March 24, 25, and 26, 1998, and designating dates for the filing of pre-hearing memoranda. On February 4, 1998, five days before their pre-hearing memorandum was due, Shaulis filed a Motion to Compel Discovery and Motion to Extend Briefing Schedule. These motions referred to Interrogatories and Requests for Production of Documents served on J.P. Mascaro & Sons (Mascaro) by the Department of Environmental Protection (Department) on or

about September 12, 1996, and by Shaulis on or about November 8, 1996; and alleged that, except for some documents provided in July 1997, the discovery requests were still outstanding. Shaulis claimed that they needed the information and documents to prepare for hearing, requested an order compelling the responses and a rescheduling of the hearing.

The Department concurred with the motions on February 5, 1998, and, on February 6, 1998, Mascaro advised us that it had no objection to the motions and that "every effort will be made to complete the outstanding discovery requests as expeditiously as possible." On February 10, 1998, the Board issued an Order directing Mascaro to provide the outstanding discovery by March 11, 1998, and setting new dates for the hearing (June 2, 3, and 4, 1998) and the filing of pre-hearing memoranda (Shaulis, the first, to file by April 13, 1998).

On March 12, 1998, Mascaro filed with the Board two copies of a document entitled, "Response to Appellant's First Set of Interrogatories." The filing contained no cover letter to explain the purpose of the filing. However, it is not unusual for the Board to receive copies of discovery documents when there has been a discovery dispute. *See* 25 Pa. Code § 1021.111. The Board followed its customary procedure for the filing of discovery documents by creating a case folder for the material and by filing Mascaro's "Response to Appellant's First Set of Interrogatories" in that folder. The documents were not examined further.

On April 6, 1998, the Department filed a Motion to Compel alleging that Mascaro failed to provide the requested discovery material as required by the Board's February 10, 1998 Order. The Department requested that the Board order Mascaro to provide the material within 14 days and impose sanctions upon Mascaro "that the Board deems just and reasonable." On April 15, 1998, Shaulis filed a letter in response to the Motion indicating concurrence with the Motion, except that

Shaulis would have the Board dismiss Mascaro's appeal at EHB Docket No. 96-183-MR for failure to comply with the Board's Order. *Mascaro filed no response to the Department's Motion.*

Because Mascaro did not respond to the Department's Motion, the Board deemed the properly-pleaded facts in the Motion to be admitted. *See* 25 Pa. Code § 1021.70(f). Thus, the Board deemed as admitted the fact that Mascaro failed to comply with the Board's February 10, 1998 Order. On April 28, 1998, the Board issued an Order imposing sanctions upon Mascaro in the form of dismissing Mascaro's appeal at EHB Docket No. 96-183-MR and precluding Mascaro from presenting evidence at the hearing set for the Shaulis' appeal at EHB Docket No. 96-182-MR. The sanctions were deemed appropriate because of Mascaro's delinquency in responding to discovery, a failure that had already necessitated the cancellation of one hearing and threatened to force the cancellation of another, Mascaro's disobedience of the Board's February 10, 1998 Order, and Mascaro's failure to respond to the Department's Motion or otherwise explain its total disregard of the Board's Order.

On May 7, 1998, Mascaro filed the instant Petition for Reconsideration of the Board's April 28, 1998 Order. Mascaro avers in its Petition that, on March 11, 1998, Mascaro gave its "Response to Appellant's First Set of Interrogatories" to Federal Express for delivery to the Department and Shaulis. However, a Federal Express worker inadvertently sent the copies to the Board. The Board did not return the documents; therefore, Mascaro was not aware of the problem. Mascaro first realized that the material had not been received by the other parties when it read the Department's Motion on or about April 6, 1998. Mascaro's attempts to contact the Department and Shaulis before the Board ruled on the Department's Motion were unsuccessful. Mascaro did not learn about the mistake by Federal Express until April 30, 1998, two days after the Board issued its Order.

Mascaro argues that these circumstances constitute compelling and persuasive reasons for reconsideration of the Order. Mascaro also argues that the Board should not have dismissed Mascaro's appeal because the Department's Motion did not request such relief. Finally, Mascaro argues that, although the Shaulis letter requested dismissal of Mascaro's appeal, the Shaulis letter was not a proper motion, and, if it was, the Board did not allow Mascaro 15 days to respond to it. On May 12, 1998, the Department filed an Answer to Petition to Reconsider. Shaulis filed a responsive letter on May 15, 1998.

Reconsideration of a final order is within the discretion of the Board and will be granted only for compelling and persuasive reasons. The Board will find compelling and persuasive reasons for reconsideration where the crucial facts set forth in the petition are inconsistent with the findings of the Board, are such as would justify a reversal of the Board's decision, and could not have been presented earlier to the Board with the exercise of due diligence. 25 Pa. Code § 1021.124(a)(2).

First, Mascaro contends that the Board should reconsider its Order because a Federal Express worker inadvertently sent the "Response to Appellant's First Set of Interrogatories" to the Board. While this crucial fact might justify a reversal of the Board's decision, we are not convinced that it could not have been presented earlier to the Board with the exercise of due diligence. The Department served its Motion on Mascaro on April 3, 1998, *see* 25 Pa. Code § 1021.33 (date of service is the date the document is deposited in the United States mail), and Mascaro received it on or about April 6, 1998. The Motion avers that the Department and Shaulis did not receive Mascaro's discovery response. Thus, Mascaro knew on April 6, 1998 that there was a problem with the Federal Express delivery. Mascaro also knew that it had 15 days from April 3, 1998 to file a response to the Department's Motion, and that failure to do so would result in deemed admission of the properly-

pleaded facts in the Motion. *See* 25 Pa. Code §§ 1021.70(f) and 1021.72(c) (responses to discovery motions shall be filed within 15 days of the date of service). However, Mascaro did not file a response to explain that the "Response to Appellant's First Set of Interrogatories" had evidently *not* been sent via Federal Express to the other parties, and that Mascaro would investigate the matter further. Mascaro does not offer *any* reason in its Petition for Reconsideration for its failure to file a response to the Department's Motion. With the exercise of due diligence, Mascaro should have been able to present the crucial facts to the Board before now.

Mascaro next argues that the Board should not have dismissed Mascaro's appeal because the Department did not request such relief. This argument lacks merit because the Department's Motion asked that the Board impose sanctions upon Mascaro that the Board deems just and reasonable. Under 25 Pa. Code § 1021.125, the Board may impose sanctions upon a party for failure to abide by a Board order or a Board rule of practice and procedure. The sanctions may include dismissal of the appeal or orders precluding the introduction of evidence. *See* 25 Pa. Code § 1021.125. The Board regularly applies these sanctions when parties disregard our orders, whether or not requested to do so.

In this case, the Board decided that dismissal of Mascaro's appeal at EHB Docket No. 96-183-MR was an appropriate sanction. Indeed, even if Federal Express had delivered Mascaro's "Response to Appellant's First Set of Interrogatories" to the Department, that document is not responsive to the Department's First Request for Production of Documents and First Set of Interrogatories. Mascaro's response only addresses the discovery requests of Shaulis. Thus, to this date, Mascaro has not responded to the Department's discovery requests.

Finally, Mascaro argues that the Shaulis letter, which requested dismissal of Mascaro's

appeal, was not a proper motion, and, if it was, Mascaro was not given 15 days to file a response. We agree that the Shaulis letter is not a motion. It is a response to the Department's Motion. Under the Board's rules of practice and procedure, Mascaro could not file a reply to this response to a discovery motion, except with Board approval. *See* 25 Pa. Code § 1021.70(g). Moreover, as noted above, the Board has the power to impose sanctions *sua sponte*, and is not limited to considering what the parties propose.

Mascaro does not present any separate arguments with respect to the appeal at EHB Docket No. 96-182-MR which is still pending and in which Mascaro is precluded from presenting evidence. Nonetheless, we have reflected on this sanction, in light of the knowledge that Mascaro did attempt to respond to Shaulis' discovery requests, and have determined to keep it. Once again, it is Mascaro's dismal lack of diligence that prompts us. As noted, Mascaro knew on April 6, 1998 that the discovery responses had been misdirected. Yet, it took no effective action to correct the situation or to explain it to the Board.[1]

That lack of diligence is finally reflected in the filing of the Petition for Reconsideration. The Board's April 28, 1998 Order was sent to all parties by facsimile transmission and received on the date of issuance. Yet, Mascaro waited until May 7, 1998, nine days later, to file its Petition. While the filing was timely, ten days are allowed by our rules at 25 Pa. Code § 1021.124, it does not show a sensitivity to the limited time remaining before the hearing scheduled for June 2, 3, and 4,

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[1] In addition, we note that the "Response to Appellant's First Set of Interrogatories" is defective in several ways. Pa. R.C.P. No. 4006 requires that answers to interrogatories be verified and that objections be served within thirty days and be signed by the attorney making them. Mascaro's answers are not verified, and the objections are not served within thirty days and are not signed by counsel.

1998.

Because Mascaro has not shown compelling and persuasive reasons for reconsideration of the April 28, 1998 Order, the Petition for Reconsideration is denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANK and DIANE SHAULIS, et al.	:	
	:	
v.	:	**EHB Docket No. 96-182-MR**
	:	**(Consolidated with 96-183-MR)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and J.P. MASCARO & SONS INC., Permittee	:	

ORDER

AND NOW, this 18th day of May, 1998, the Petition for Reconsideration filed by J.P. Mascaro & Sons, Inc. is denied.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 96-182-MR
(Consolidated with 96-183-MR)

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: May 18, 1998

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

For the Commonwealth, DEP:
Lance H. Zeyher, Esquire
Northeast Region

For Frank and Diane Shaulis,
Thomas and Delores Walski and
Neighbors Involved for a Clean Environment:
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bap

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DEFENSE PERSONNEL SUPPORT CENTER	:	
v.	:	**EHB Docket No. 97-265-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUN COMPANY, INC., Intervenor	:	**Issued:** May 18, 1998

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Board sustains the appeal of a party to a remediation agreement from a regulatory decision of the Department which would require it to help finance an odor abatement study with another responsible party because the evidence in the stipulated record is insufficient to demonstrate that this task is required by the remediation agreement to prevent an unacceptable health or environmental risk.

OPINION

This appeal filed on December 9, 1997, arises from a final decision of the Department on October 20, 1997 made pursuant to provisions of a Consent Order and Agreement (the 1996 Agreement) among Appellant, Defense Personnel Support Center, the Department of Environmental Protection (Department) and Sun Company, Inc. (Sun) dated September 24, 1996. (Exhibit 1) After this appeal was filed, the Appellant was renamed the Defense Supply Center of Philadelphia. It will

be referred to in this adjudication as the DSCP.

The effect of the Department's decision under the 1996 Agreement is to require DSCP to undertake with Sun an odor abatement study and design of a remediation facility (Odor Abatement Project) in an area of South Philadelphia under which there is a large petroleum contaminated plume in the ground water. (Exhibit 25) Portions of the plume underlie or adjoin facilities owned and operated by DSCP and Sun.

The Department believes that petroleum odors in the area of the Passyunk Homes area of South Philadelphia arise from the infiltration of this plume of petroleum contamination into the Passyunk Avenue Sewer, and that these odors would subject residents and workers in the area to unacceptable environmental and health risks. DSCP contends that it may not be required to undertake this study because it is not one of the enumerated, mandatory tasks required by the 1996 Agreement, and that this task is required to be undertaken by Sun alone under the provisions of an earlier Consent Order and Agreement (the 1993 Agreement) between the Department and Sun dated December 17, 1993. (Exhibit 2) DSCP also contends, based on a Draft Risk Assessment developed under the 1996 Agreement, that the odors do not create such a health or environmental risk.

We granted Sun's motion to intervene in this proceeding by order dated January 6, 1998. Sun has not filed any requests for findings of fact or conclusions of law or any brief as required of all parties by the Board's order of January 6, 1998.

Many of the background facts underlying this controversy are set forth in the 1996 Agreement which the parties have agreed not to contest in any proceeding brought to interpret the agreement to which the Department is a party. Under the terms of the 1996 Agreement, any appeal from a Department decision made under the agreement is to be decided on a stipulated record. The

parties have stipulated to a record consisting of 40 exhibits. In addition, the Department has submitted a drawing prepared by the Philadelphia Water Department (PWD Drawing) depicting the sewer system in the area of the southern portion of this plume and has made requests for findings of fact based on it to which DSCP has not objected.

Following a full and complete review of the record and the submissions of DSCP and the Department, we enter the following:

FINDINGS OF FACT

1. Numerous subsurface plumes of non-aqueous phase liquid (NAPL) petroleum (referred to collectively as "the Plume) have been discovered in a variety of locations in South Philadelphia. Most of these NAPL Plumes are under the property now occupied by Sun's Philadelphia Refinery Complex. (Exhibits 1, 2 and 17) NAPL is often referred to as "free product" which can be removed from the ground in its original form, as opposed to being dissolved into the ground water or absorbed onto soil.

2. Sun presently owns and operates the former Arco and the former Chevron refineries at its Philadelphia Refining Complex located on the east bank of the Schuylkill River, just north of its confluence with the Delaware River. (Exhibits. 1, 2 and 17)

3. DSCP is a military logistics base, formerly used for the manufacture of military uniforms and for other military supply roles. DSCP is located to the east of the Sun Refinery and just to the south of Oregon Avenue in South Philadelphia. (Exhibits 1, 19, Figures ES-1 to E53 and Exhibit 17)

4. Passyunk Homes is a low income housing project, located in a former military barracks complex, located to the east of the Sun Refinery and to the south of DSCP. The Schuylkill

Expressway separates Sun from DSCP, and DSCP from Passyunk Homes. (Exhibit 19, Figure ES-1)

Location of the Plumes

5. One large Plume is located under the southern portion of DSCP, the northern portion of Passyunk Homes and the portion of the Schuylkill Expressway that separates DSCP from Passyunk Homes and the eastern portion of the Sun Refining property. The Plume covers a substantial area. (Exhibits 17, 19, Figure ES-3)

6. This southern portion of the Plume covers an area that is traversed by the Packer Avenue Sewer. The Packer Avenue Sewer appears to serve a portion of the area underlain by the Plume, as well as additional areas to the south and east of the Plume. (PWD Drawing)

7. The Plume of contamination extends beneath a portion of the Passyunk Homes Property in the area of the Packer Avenue Sewer. (Exhibit 19, Figure 5-5)

The Sewer Systems

8. There is an extensive history of complaints from residents of the areas surrounding DSCP and Sun Refining about the presence of petroleum odors. The Department and the PWD have investigated these complaints of petroleum odors in relation to the sewer system as described more fully below.

9. South Philadelphia is served in part by the Packer Avenue "combined" sewer system. which collects both storm water and sanitary sewer flows into a single pipe and conveys them to the 26th Street Sewer interceptor.

10. During dry weather, a series of "interceptor" sewers collect the flow from each main trunk sewer and divert this flow to a sewage treatment plant for treatment and discharge into the Schuylkill and Delaware Rivers. Dry weather flow is diverted into the interceptor sewer by an

interceptor structure built into the main trunk sewer. A typical interceptor structure is illustrated at Figure 1-3 of Exhibit 25. (Exhibit 25, pp. 1-1, 1-2)

11. There are two main sewer trunks and one interceptor sewer in the vicinity of DSCP. These are the Packer Avenue Sewer, the Shunk Avenue Sewer, and the 26th Street Sewer. The Shunk Avenue Sewer and the Packer Avenue Sewer are combined sewers. The 26th Street Sewer is an interceptor sewer. (Exhibits 4, 25, Figure 1-1; PWD Drawing)

12. The Packer Avenue Sewer is a concrete box that ranges in size from approximately 7x7 feet to 8x11 feet along a two block section of Packer Avenue in the Passyunk Homes area to the south of DSCP. (Exhibit 25, pp. 1-1, 1-2; PWD Drawing)

13. Where the Packer Avenue Sewer reaches 26th Street, an interceptor structure diverts dry weather flows into a 48" diameter sewer line, known as the 26th Street Sewer, which flows northward along 26th Street. (Exhibit 25, Figure 1-1)

14. The Pollock Street Sewer runs under the Sun Refinery and is a continuation of the Packer Avenue Sewer. (PWD Drawing; Exhibit 19, ES-1, ES-2, ES-3)

15. During storm flow conditions, a portion of the flow passes to the Schuylkill River through the Pollock Street outfall. The portion of the Packer Avenue Sewer beyond the tide gate, between 26th Street and the Schuylkill River, is called the Pollock Street Sewer. (Exhibit 4, p. 3; PWD Drawing)

16. The eastern edge of Sun's Refinery borders on 26th Street. (Exhibit 17; Exhibit 25, Figure 1-1; PWD Drawing)

17. The Shunk Avenue Sewer flows from east to west, parallel to the Packer Avenue Sewer, but to the north of DSCP. The Shunk Avenue Sewer also discharges dry weather flows into

the 26th Street Sewer in the same manner as the Packer Avenue Sewer. (Exhibit 25, Figure 1-1; PWD Drawing)

18. The Plume area exists on the ground water table at a depth of about 20 feet below ground surface. At certain times of year, the water table rises above the bottom of the Packer Avenue Sewer in the area west of Passyunk Avenue. The hydrocarbons leak through the walls of the combined Packer Avenue Sewer at the toe of the sidewalk. The hydrocarbons vaporize and collect in the free space above the sewage. (Exhibit 25, pp. 1-2)

19. To minimize the effect on the Packer Avenue Sewer of intrusion of the Plume into portions of the sewer system west of 26th Street, Sun (or its predecessor) constructed control measures designed to keep petroleum vapors from migrating to the Packer Avenue Sewer. These included vapor barriers at the Packer/26th Street Sewer interceptor structure and a blower which exhausts air from the 26th Street Sewer. (Exhibit 4, p. 3; Exhibit 25, p. 1-1)

20. The Department believes that the origin of odors which have historically troubled the residential areas in the Packer Avenue Sewer drainage area is vapor intrusion into the Pollock Street Sewer and the 26th Street Sewer. (Exhibit 4, p. 4)

The Agreements

21. On December 17, 1993, Sun and the Department entered into a Consent Order and Agreement (the 1993 Agreement) which required Sun to conduct a two stage program of investigation and remediation relating to various Plumes of liquid NAPL concentrations of hydrocarbons. The 1993 Agreement was entered into under the Department's authority under the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001.

22. The Stage I program called for a detailed investigation of, and remedy selection for,

areas under the Sun Refinery Complex as well as the Jackson and Pollock Street Sewers, the 26th Street Sewer as well as four other city sewers. The Stage II program was to be initiated no later than May 30, 1994 and included remedial activities, among others, of the design, obtaining permits for and construction of remedial systems for, the Jackson and Pollock Street Sewers and the 26th Street Sewer. (Exhibit 2, pp. 10-15)

23. The goals of the remediation activities in Stage II of the 1993 Agreement were stated, among others, to be the elimination of NAPL infiltration, if any, into the Philadelphia City Sewer System, the elimination of all off-site migration of NAPL and removal, to the greatest extent practicable and feasible, of recoverable NAPL which may have migrated off-site. (Exhibit 2, p.15)

24. Progress reports made by Sun to the Department dated July 24, 1994 to August 2, 1996 reported on the installation of recovery systems and other remediation activities at the 26th Street Sewer and the Pollock Street Sewer. (Exhibits 27-34)

25. According to a progress report submitted by Sun to the Department, a meeting was held among representatives of Sun, DSCP and the Department on January 26, 1996 to discuss the feasibility of a joint study of the possible sources of the Plume under the DSCP, a joint study of the Plume's outer boundaries, and initiation of interim remediation measures. (Exhibit 32)

26. On August 5, 1996, the City of Philadelphia's Air Management Services conducted a vapor screening investigation of Passyunk Homes in areas closest to DSCP that were most likely, in the opinion of the investigators, to be impacted by the Plume. Their report stated that no volatile organic compounds (VOCs) were detected in the screened homes. (Exhibit 37)

27. Thereafter, on September 24, 1996, the DSCP, Sun and the Department entered into a Consent Order and Agreement (the 1996 Agreement) made under the Department's authority under

the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended,* 35 P.S. §§ 691.1 - 691.1001, the Land Recycling and Environmental Remediation Standards Act (Act 2), Act of May 19, 1995, P.L. 4, 35 P.S. §§ 6026.101 - 6026.908, the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended,* 35 P.S. §§ 680.1 - 680.17 and the rules and regulations thereunder. (Exhibit 1)

28. The 1996 Agreement is in the nature of a standstill agreement in that it provides for a joint program by Sun and DSCP, in cooperation with the Department, to address the hydrocarbon contamination Plume present in the "Affected Area," but assigns no responsibility as between DSCP and Sun for the creation of the Plume. Under the agreement, all parties reserve all rights to pursue such remedies as are available to them to make a final determination of liability for the contamination Plume. Indeed, either Sun or DSCP may terminate the 1996 Agreement after a comprehensive environmental risk assessment for the "Affected Area" and upon Department approval of a final engineering design for free phase hydrocarbon recovery before being committed to the "optional tasks" relating to the construction and operation of a free phase recovery system. (Exhibit 1)

29. The extent of the "Affected Area" is stated by the 1996 Agreement to be determined through future investigations as scheduled in two sets of "milestones" described as "mandatory tasks" and "additional milestones." (Exhibit 1, pp. 8, 14-15)

30. The 1996 Agreement provides a mechanism for resolving disputes as to how the costs of the tasks undertaken under the agreement are be allocated. (Exhibit 1, pp. 10-11, 17-25)

31. Paragraph 4 of the 1996 Agreement provides that Sun and DSCP "working in cooperation with and under the supervision of the Department, shall plan and implement a program

with the following goals:". These include the delineation of the full extent of the Plume and the removal of the free phase hydrocarbon from the Plume. The goals also include the development of a risk assessment study and such additional remediation as may be required by the standards under the Land Recycling Act. (Exhibit 1, pp. 9-10)

32. Paragraph 4.f. of the 1996 Agreement also states as a goal:

> To ensure that the present and future residents of and workers in the Affected Area are protected from any unacceptable health and environmental risks that may be associated with the Plume, both during the implementation of this agreement and in the future. (Exhibit 1, p. 10)

33. Paragraph 8 of the 1996 Agreement also sets forth a schedule of milestones for five "mandatory tasks". Three of these had been completed by Sun at the time the 1996 Agreement was signed. The other two tasks involved the design of a free phase hydrocarbon recovery system and the development of a final risk assessment report. Projects related to sewer odors are not included among the "mandatory tasks" set forth in the schedule. (Exhibit 1, p. 14)

34. Paragraph 8 of the 1996 Agreement also sets forth a schedule of "Additional Milestones" for tasks to be completed if neither Sun nor DSCP exercise their right of optional termination under paragraph 21 of the 1996 Agreement. These three tasks called for the construction and the commencement of operation of the free phase hydrocarbon recovery system. (Exhibit 1, p. 15)

35. No part of the 1996 Agreement clearly states whether tasks other than the "mandatory tasks" may be required of either Sun or DSCP over their objection. Paragraph 6.b. of the 1996 Agreement provides in relevant part as follows:

> Technical Oversight Committee. Sun, DSCP and the Department will each appoint one representative to a Technical Oversight Committee. The Technical Oversight Committee may create subcommittees, which shall have representation from each party, to oversee individual projects within the scope of this agreement. The TOC is established for the purposes of allowing the three parties to this agreement to discuss: 1) the technical adequacy of proposals concerning hydrogeological investigations, 2) the technical adequacy of proposals for remediation or other work that may be required to implement the goals of this agreement, and 3) the need for and the technical adequacy of proposals for other work which may be required to achieve the goals of this Agreement. The TOC will attempt to reach consensus on all decisions within the scope of its jurisdiction. If consensus is not achieved, then the Department will decide for the TOC. If either Sun or DSCP disagrees with a decision of the TOC then the dispute resolution procedures set forth in Paragraph 9.c. of this Consent Order and Agreement shall be used. (Emphasis supplied) (Exhibit 1, p. 12)

36. The reference to paragraph 9.c. in the provision quoted above is a drafting error. The applicable dispute resolution procedures are contained in paragraph 10 of the 1996 Agreement.

37. Paragraph 6.a. of the 1996 Agreement also establishes an Oversite Committee to monitor the overall progress of activities being undertaken to achieve the requirements and goals of the agreement to monitor compliance with schedules and to recommend changes in specific activities or practices so that counter-productive activity is eliminated and opportunities to improve overall action under the agreement are identified, discussed and implemented. (Exhibit 1, pp. 11-12)

38. By contrast, paragraph 24 of the 1996 Agreement states:

> Modifications. No changes, additions, modifications, or amendments of this Consent Order and Agreement shall be effective unless they are set out in writing and signed by all parties hereto. (Exhibit 1, p. 33)

39. The 1996 Agreement has not been amended or modified by a writing as described in paragraph 24 of the 1996 Agreement.

40. At the time the 1996 Agreement was negotiated and signed, the full extent of the Plume was unknown, and the source of the Plume was likewise unclear. (Exhibit 1, ¶¶H, I and J) In particular, the parties did not know whether the Plume extended under Passyunk Homes, where the Packer Avenue Sewer is located. (Exhibit 1, ¶J)

Events Leading to the Request for an Odor Control Study

41. The Packer Avenue Sewer underlies a portion of, and is adjacent to, the Packer Homes area. (Exhibit 25, pp. 1-2, Figure 1-1)

42. Prior to the execution of the 1996 Agreement, Sun and its predecessors constructed control measures designed to keep petroleum vapors which were entering other portions of the sewer system from migrating into the Packer Avenue Sewer. These control measures included vapor barriers at the Packer/26th Street Sewer interceptor structure (Exhibit 25, Figure 1-2) and a blower which exhausts air from the 26th Street Sewer. (Exhibit 4, pp. 3, 27-34, 36)

43. Despite these control measures, residents in the Packer Avenue Sewer drainage area continued to complain about petroleum odors. (Exhibit 4, pp. 3-4)

44. By March 4, 1997, the Department became virtually certain that the hydrocarbon Plume was impacting the Packer Avenue Sewer and that little more need be done to prove this. This statement was made in a letter to Sun as part of the Department's comments on a draft work plan prepared by Sun's consultant, Camp Dresser and McKee, for an odor study to be performed on the Packer Avenue Sewer System. (Exhibit 36)

45. On March 10, 1997, the Department's David Burke and representatives of PWD

conducted a vapor survey of various manholes and storm water inlets along the Packer Avenue Sewer. Significant vapor concentrations existed as described in his memorandum report dated March 11, 1997. Mr. Burke noted that a recognizable petroleum odor was present. (Exhibit 8)

46. On March 11, 1997, PWD workers performed a sewer walk and observed petroleum infiltration into the Packer Avenue Sewer at eight locations beneath Passyunk Homes property. At that time, petroleum odors, both within the sewer space and in the streets, were noticeable to the nose and to field instruments. In addition, the workers involved in the survey confirmed that there were no petroleum seeps along the southern side of the sewer line. (Exhibit 9)

47. In the sewer walk the eight specific points where infiltration was observed to occur was into the Packer Avenue Sewer. These were all located under or adjacent to the Passyunk Homes Property squarely within the known extent of the Plume. (Exhibit 9, Figure 1)

48. On April 2, 1997, Sun sent a letter to DSCP in furtherance of conversations held in March, 1997 describing a joint odor control program through the construction of sewer vents at manholes along the Packer Avenue Sewer on their respective properties. It sought DSCP's concurrence with this plan before presenting it to the Department and the PWD. The letter stated that it was Sun's understanding that this work was requested by the Department and was covered by the 1996 Agreement. (Exhibit 10)

49. On April 18, 1997, the Department sent a letter to DSCP and Sun requesting that they jointly develop a project to address the infiltration problem in the Packer Avenue Sewer. The record contains no evidence that this was intended as a decision of the Technical Operating Committee. (Exhibits 11, 12)

50. During April, 1997, DSCP and Sun exchanged information on a possible design for

odor control with DSCP taking the view that Sun's venting proposal was not a workable solution. (Exhibits 20, 21)

51. The record contains no evidence that DSCP had agreed to perform the Odor Abatement Project at this time.

52. By letter dated August 28, 1997, Sun asked DSCP to acknowledge that the then unfinished Camp Dresser and McKee study on odor control was a 1996 Agreement task and to agree to fund it on a 50-50 basis as called for by the 1996 Agreement. (Exhibit 24)

53. By letter dated September 8, 1997, DSCP replied that this project was not governed by the 1996 Agreement, but was more appropriately managed under the 1993 Agreement. (Exhibit 5)

54. By letter dated September 11, 1997, the Department made a regulatory determination under paragraph 10.d. of the 1996 Agreement that the Odor Abatement Project falls under the 1996 Agreement because it is intended to protect the health of residents and workers and because the Department has determined that the primary source of the odors in the Packer Avenue Sewer is petroleum infiltration from the Plume. (Exhibit 6)

55. DSCP invoked dispute resolution procedures under the 1996 Agreement on September 21, 1997, and the Department reaffirmed its decision on October 20, 1997. (Exhibits 3, 4 and 7) This appeal followed.

Miscellaneous

56. Benzene is one of the chemicals in the Plume. Benzene is a known human carcinogen. (Exhibit 39)

57. In January, 1998, after this appeal was filed, a Draft Risk Assessment Study

performed by Malcolm Pirnie was submitted. It concluded that the Plume did not present any likely non-carcinogenic health risks and that estimated cancer risks were less than, or at the lower end of, the acceptable risk range. This is not a final study as required by the 1996 Agreement. (Exhibit 39)

DISCUSSION

DSCP contends that the Department abused its discretion by deciding that the Odor Abatement Project (Exhibit 25) is one that is subject to the requirements of the 1996 Agreement. It asks the Board to find that projects related to sewer odors are not included among the mandatory enumerated tasks required by the 1996 Agreement and that this agreement requires that any changes, additions, modifications or amendments to that agreement are to be in writing and signed by all the parties. It also asks us to find, as we have, that the parties have not executed any written changes, additions, modifications or amendments to amend the agreement so as to specifically require the Odor Abatement Project to be conducted as one of the mandatory tasks enumerated in the agreement.

The Department contends that the Odor Abatement Project is required by the 1996 Agreement because committees set up under the agreement to achieve the goals of the agreement, including the Technical Oversite Committee, have the power to add additional mandatory tasks for the parties to undertake in order to meet the goals of the agreement. It further contends that those committees and the Department determined that the performance of this task was to be done under the 1996 Agreement in order to achieve those goals. It also claims that DSCP is bound by the decision of these committees and may not now take a contrary position. The Department also argues that the Board has no jurisdiction over this appeal.

The Board Has Jurisdiction

We reject the Department's contention that the Board has no jurisdiction over this appeal

because the Department's decision obviously has an adverse effect on the Appellant. *Borough of Ford City v. DER*, 1991 EHB 1969, 25 Pa. Code § 102.2. We also reject the Department's argument that the April 18, 1997 letter (Exhibit 12) was a final appealable decision, so that this appeal came too late. The letter of April 18, 1997 does not include any language indicating that it is a final decision or that a right to appeal arises from it. Subsequent correspondence indicates that the April 18, 1997 letter was not a final decision. (Exhibits 21, 24) Furthermore, paragraph 10.4. of the 1996 Agreement provides rules and procedures with respect to appeals to the Environmental Hearing Board regarding disputes over final regulatory decisions under the 1996 Agreement. (Exhibit 1, pp. 25-26) DSCP followed those procedures exactly and the Department then issued a final decision in writing as required by paragraph 10.d.(3) of the 1996 Agreement. The 1996 Agreement specifically provides that such a final decision is then appealable to the Board within 30 days of issuance. (Exhibit 1, p. 26, paragraph 10.d.(5))

Interpretation of the 1996 Agreement

Our interpretation of the 1996 Agreement leads us to reject DSCP's contention that the only mandatory tasks under the agreement are those enumerated in the schedule established under paragraph 8 of the agreement. (Exhibit 1, p.14) While that paragraph provides for the performance of "mandatory tasks under this agreement" to be performed in accordance with the schedule set forth in that section, other tasks may be imposed on DSCP or on Sun by the committees established under the 1996 Agreement. Paragraph 6.a. of the agreement establishes an Oversite Committee consisting of representatives of the three parties to monitor the overall progress of activities being undertaken to achieve the requirements and goals of this agreement, to monitor compliance with schedules and to recommend changes in specific activities or practices so that counter-productive activity is

eliminated and opportunities to improve overall action under the agreement are identified, discussed and implemented. The Technical Oversite Committee established under paragraph 6.b., consisting of representatives of all three parties, has the authority to consider the technical adequacy of proposals for remediation or other work that may be required to implement the goals of this agreement as well as the need for and technical adequacy of proposals for other work which may be required to achieve the goals of this agreement. In the event an agreement cannot be reached by the members of the Technical Oversite Committee, the Department is empowered by paragraph 6.b. to decide the issue.

Decisions made by either of these committees or the Department are guided by other provisions of the agreement. Paragraph 3 of the agreement states that, as set forth in the agreement, Sun and DSCP shall implement a joint program in cooperation with the Department to address the hydrocarbon contamination presence in the "Affected Area". The "Affected Area" is defined by paragraphs 1 and 2 of the 1996 Agreement as the ultimate geographical extent of the Plume and of the area that may be affected by the Plume. (Exhibit 1, ¶¶1 and 2) The area surrounding the Passyunk Homes where the odor control study is to be conducted is clearly within the "Affected Area."

The interpretation of the agreement is also affected by paragraph 4 of the 1996 Agreement which provides that Sun and DSCP, working in cooperation with and under the supervision of the Department, shall plan and implement a program with certain specified goals. The first three of these goals is specifically embodied in the schedule of mandatory tasks. Among the other three goals is a goal to "insure that the present and future residents of and in the "Affected Area" are protected from any unacceptable health and environmental risk that may be associated with the

Plume." Another provision of the 1996 Agreement which bears on the interpretation on the point of what tasks are covered by the agreement is contained in paragraph 21 which permits an optional termination by Sun and DSCP after certain events occur. One of those events is described by paragraph 21 as follows:

> Termination of this Consent Order and Agreement shall become effective only after all outstanding schedules and obligations approved by the Technical Oversite Committee are fully complied with, and all disputes between the parties concerning decisions made under this Consent Order and Agreement prior to services of the Notice of Termination have been finally resolved.

This provision tends to indicate an agreement by the parties that the Technical Oversite Committee has the power to approve tasks in addition to the mandatory tasks.

The provision that we think is decisive in the proper interpretation of the 1996 Agreement lies in paragraph 6.b. which gives the Technical Oversite Committee jurisdiction over the need for, and technical adequacy of, proposals for other work which may be required to achieve the goals of the agreement. This section provides that if a consensus decision cannot be reached in this committee by the parties, then the Department will decide for the Technical Oversite Committee. We think this provision means that if the Technical Oversite Committee cannot reach a consensus agreement on tasks in addition to the mandatory tasks, then the Department may decide the issue provided that the task is designed to address the hydrocarbon contamination present in the "Affected Area" as provided in paragraph 3 of the agreement and is reasonably necessary to meet the goals set forth in paragraph 4 of the agreement.

Decisions by the Department under the agreement are referred to by paragraph 6.c. and 10.d.

as "Regulatory Decisions" of the Department." Paragraph 6. c. specifically provides that in making any final regulatory decision the Department shall be guided by applicable law and by principles of fairness and common sense. This grant of regulatory decision making power in an area of what tasks are to be conducted under the agreement indicates that the parties intended that additional tasks could be assigned to the parties by a regulatory decision of the Department if a consensus could not be reached by the Technical Oversite Committee under the provisions of paragraph 6.b.

In interpreting the 1996 Agreement, we believe that this agreement is somewhat different than most commercial contracts in that the Department, having regulatory jurisdiction over the Plume, is a party to the agreement and both Sun and DSCP are potentially responsible for remediating the Plume. As set forth in the findings of fact in the 1996 Agreement, Sun is the owner of the refinery facilities which overlie the Plume of contamination at which Sun has operated storage tanks and pipelines for the handling of petroleum feed stocks and products. DSCP is a potentially responsible party because in its operations since the 1920's petroleum products have been stored in tanks located in various places on the DSCP property and releases of hydrocarbons have occurred on the DSCP property. (Exhibit 1, ¶¶C.-G.) While the Agreement recites that investigations to date have not determined the exact source or sources of the Plume (Exhibit 1, ¶K.) and the Malcolm Pirnie's NAPL Plume Study to DSCP suggests that the source of the Plume is the Sun Refinery Complex, the fact remains that a large portion of the Plume underlies a part of the DSCP facility and there is a possibility that some portion of the Plume has been contributed by spills of petroleum products on the DSCP property. Accordingly, it is not unexpected that the 1996 Agreement gives the Department the authority to require the parties to conduct some additional tasks to investigate and design remedial facilities to counter risks created by the Plume.

The Applicability of the 1993 Agreement

DSCP argues that the Department has disregarded an alternate and reasonably more appropriate vehicle to address sewer odors which is the 1993 Agreement with Sun alone. It points out that the Department has admitted that the 1993 Agreement was intended, in part, to address infiltration and odor issues in the Pollock/Packer Sewer to the extent that issues were clearly attributable to sources at the refinery. (Exhibit 4, p. 6) However, the Department points out in its decision that it believes that the source of the infiltration into the sewer near 23rd and Packer Streets is not related to the Sun Refinery because Sun has installed vapor gates that are designed to substantially limit the movement of hydrocarbon vapors across the regulator structure into the Pollock/Packer Sewer and to isolate the air space in the western part of the sewer under the refinery from the air space in the eastern part (east of 26th Street). Once these vapor gates were installed and operational, odors occurring in the sewer in the areas east of the regulator are likely to be caused by some source that is east of the regulator. The observed infiltration near 23rd and Packer is the only known source and this is proximate to the contamination Plume under the DSCP property. We think it was reasonable for the Department to view this as changed circumstances which tipped the balance of assigning the Odor Abatement Project to the 1996 Agreement rather than the 1993 Agreement. (Findings of Fact 43-44; Exhibit 4, pp. 6-7)

We also reject DSCP's contentions that the Sun Refinery is the sole source of the contaminants and that it will be bound to subsidize Sun's remediation obligations. While DSCP may be correct that much of the contamination Plume came from the Sun Refinery, that is a matter which it presumably considered before entering into the 1996 Agreement. In addition, all of the dollars spent under the 1996 Agreement to further the goals of the Agreement are subject to reapportionment

as between Sun and DSCP in accordance with the dispute resolution provisions of that agreement. If DSCP is correct that the Sun facilities are the sole source of the Plume, the costs of the Odor Abatement Project will have to be borne by Sun alone.

Finally, we do not reach the question as to whether or not the DSCP might be required by the Technical Oversite Committee or the Department to actually perform a remediation of the odor problem in the Packer Avenue Sewer area under the 1996 Agreement. The mandatory tasks which were contemplated by the 1996 Agreement were those of study and remediation design. The optional tasks of the 1996 Agreement were actual construction and operation of remedial facilities. It may well be that the parties did not contemplate that they could be required under the 1996 Agreement to actually construct or operate whatever remedial facility may be designed to counter the sewer odor problem in the Packer Avenue Sewer.

Evidence of Health or Environmental Risk

DSCP contends that even if this interpretation is given to the 1996 Agreement, there is no evidence that there is any unacceptable health or environmental risk on which the Department's decision might be based. DSCP points to the absence of volatile organic vapors in the Passyunk Homes (Exhibit 37) and to the Draft Risk Assessment Study prepared by Malcolm Pirnie which was submitted after this appeal was filed. That draft study concluded that the Plume does not present any likely noncarcinogenic health risk and that estimated cancer risks are less than, or at the lower end of, the acceptable risk range. (Exhibit 39, p. 6-1)

The Department makes three responses to these contentions. It says first that the Department acted before the Risk Assessment Study was submitted and that it is entitled to act on a "precautionary principle" in which the existence of an unacceptable risk must be assumed when

there is evidence of exposure to harmful materials and there is not enough information to rule out the likelihood of harmful effect. The Department says that benzene is one of the chemicals in the Plume and that it is a known human carcinogen. It further argues that vapors from the Plume have been found in the Packer Avenue Sewer System so that there is evidence of exposure to vapors from the Plume. It therefore argues that this precautionary principle allows a regulatory authority to act where complete scientific certainty is unavailable if the risk of not acting may lead to serious or irreversible damage.

Secondly, the Department points out that the Draft Risk Assessment is still a draft document. Accordingly, it is not conclusive evidence that there is no acceptable health risk.

Thirdly, the Department argues that even if there is no health risk there is an unacceptable environmental risk presented by the petroleum odors. The Department says that South Philadelphia is a heavily populated urban environment and that petroleum odors circulating throughout the sewer lines and wafting into the streets pose an unsettling and disturbing condition to the residents. It points out that aesthetic irritations are environmental conditions and are subject to regulations as nuisances.

DSCP points out that the City of Philadelphia documented the lack of risk to residents of Packer Homes based on a VOC study conducted in August, 1996 (Exhibit 37). DSCP views the current draft of the Comprehensive Health Risk Assessment performed for the United States Army Corps of Engineers as one of the mandatory tasks under the 1996 Agreement as demonstrating that there is no current unacceptable risk to people living or working in the area of concern. (Exhibit 39, p. 6-1)

We believe that the Department has the burden of proof on the issue of whether or not

residents of, and workers in, the "Affected Area" may be subject to any unacceptable health or environmental risk that may be associated with the Plume. As a general matter, the Board's Rule of Procedure at 25 Pa. Code § 1021.101(a) places the burden of proof on the party asserting the affirmative of an issue to establish it by a preponderance of the evidence. None of the more specific rules for distributing the burden of proof contained in other subsections of this rule would apply to this case.

The stipulated record in this case is simply insufficient to support the Department's conclusion that there is an unacceptable health or environmental risk to which residents or workers in the area might be subject. We appreciate the Department's position that the Draft Risk Assessment Study performed by Malcolm Pirnie is still a draft and is being reviewed by the Environmental Protection Agency and other concerned groups. However, Malcolm Pirnie is a reliable environmental engineering firm with capability in risk assessment so that it is likely that the study is a fair assessment and unlikely that the results of the study will be completely reversed. While we find that benzene is one of the chemicals in the Plume and that benzene is a known human carcinogen, this does not mean that either residents or workers are being exposed to it in an amount sufficient to create either an unacceptable health or environmental risk. Applying the decision standard of fairness and common sense required by paragraph 6.c. of the 1996 Agreement, we conclude that there is insufficient evidence of an unacceptable health or environmental risk.

The Department's position cannot be sustained on the argument that the odors are a nuisance which the Department is entitled to address in an enforcement action. While the record indicates that vapors from the Plume were detected on the streets adjoining the sewer lines and that individuals noticed these odors, that evidence alone is not sufficient to prove an unacceptable environmental risk

within the meaning of the 1996 Agreement. Of course, the Department does have authority to require abatement of those responsible for malodors and the authority to take action against nuisances. We only hold that the limited evidence contained in the present stipulated record is insufficient to sustain the Department's position that odors in the "Affected Area" create a risk which the Department can require DSCP to address under the 1996 Agreement. Of course, the Department has reserved its rights under the 1996 Agreement to institute whatever abatement action it may choose to bring and present the evidence it has to support such an abatement order. In the case of the present record, however, that evidence does not exist in a way that would permit the Department to require DSCP to move forward with the Odor Abatement Project under the 1996 Agreement.

Accordingly, we make the following:

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this dispute because the Department's decision of October 20, 1997 (Exhibit 4) was a final action of the Department as provided by paragraph 10.d. of the 1996 Agreement.

2. Under the 1996 Agreement, the Department had authority to require the performance of additional mandatory tasks of a nature of investigation or remedial design in the event there was a disagreement within the Technical Oversite Committee with respect to whether additional work of this nature was required.

3. The Department's regulatory decision requiring DSCP to join with Sun in the Odor Abatement Project was, in the light of all of the evidence, including the subsequently submitted Draft Risk Assessment Study, not supported by the evidence.

4. The Department has failed to carry its burden of proof that the Odor Abatement

Project is necessary to insure that the present and future residents of, and future workers in, the "Affected Area" are protected from an unacceptable health or environmental risk that may be associated with the Plume.

5. The Department's decision that the Odor Abatement Project was required by the 1996 Agreement therefore was erroneous in law and an abuse of discretion. *See, Tinicum Township v. DEP*, 1997 EHB 1119, 1133.

6. The Department remains free under the 1996 Agreement to pursue whatever enforcement action it may choose to bring against either Sun or DSCP under the authorities granted it by law to require that the Odor Abatement Project be completed or such other remedial action as it may deem proper.

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DEFENSE PERSONNEL SUPPORT CENTER	:	
	:	
v.	:	**EHB Docket No. 97-265-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SUN COMPANY, INC., Intervenor	:	

ORDER

AND NOW, this 18th day of May, 1998, the appeal of the DSCP is sustained and the Department's final decision dated October 20, 1997 under paragraph 10.d. of the 1996 Agreement is set aside.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: May 18, 1998

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

For the Commonwealth, DEP:
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Southeast Region

For Appellant:
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Elek Fenyes, Esquire
Philadelphia, PA

For Intervenor:
Edward J. Ciechon, Esquire
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rk

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TELECOPIER 717-783-4738

HEIDELBERG HEIGHTS SEWERAGE COMPANY	:	
v.	:	**EHB Docket No. 97-150-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** May 19, 1998

OPINION AND ORDER ON MOTION FOR JUDGMENT ON THE PLEADINGS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

An appeal from a Department of Environmental Protection's (Department) order directing the owner of a privately owned sewage system to take all steps necessary to operate the sewage treatment plant in accordance with its permits is dismissed. The decision not to require a township to acquire the facility is a matter of prosecutorial discretion and is not reviewable by the Board. The Department does not need to consider the recipient's financial inability to comply with an order when issuing the order, as a party's ability to comply with a Department order is not relevant to an appeal limited to a determination of the validity and content of the order.

OPINION

On July 18, 1997, Heidelberg Heights Sewerage Company (HHSC) filed an appeal from the Department's June 16, 1997 order issued pursuant to Sections 5, 316 and 610 of the Clean Streams

Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 - 691.1001 (Clean Streams Law), and Section 1917-A of the Administrative Code of 1929. The order directs HHSC to take all steps necessary to operate the sewage treatment plant in accordance with the NPDES and the Water Quality Management Permits. Specifically, HHSC is ordered to implement all improvements in accordance with all permits, to commence all modifications identified in the Water Quality Management permit within 90 days of the date of receipt of the order, the improvements shall be operational within 180 days of receipt of the order, and HHSC shall submit written status reports to the Department.

On February 9, 1998 the Department filed a motion for judgment on the pleadings. The Department contends that it is entitled to judgment on the pleadings because HHSC's Notice of Appeal does not identify specific objections to the factual basis of the Department's order, it does not raise any material factual issues, and its does not state any valid legal defense or objection to the Department's order.

On March 3, 1998 HHSC filed a response and accompanying memorandum. HHSC contends its notice of appeal raises material factual issues and does state a valid legal defense and objection. A motion for judgment on the pleadings is in the nature of a demurrer and is used to determine whether a cause of action, as pled, exists at law. *Bensalem Twsp. School District v. Commonwealth*, 544 A.2d 1318, 1321 (Pa. 1988); *see also, Kerr v. Borough of Union City*, 614 A.2d 338 (Pa. Cmwlth. 1992), *appeal denied*, 627 A.2d 181 (Pa. 1993); *James B. White v. DEP*, 1996 EHB 320. A motion for judgment on the pleadings, like a motion for summary judgment, may be granted when no material facts are in dispute and a hearing is pointless because the law is clear on the issue. *Winton Consolidated Companies v. DER*, 1990 EHB 860.

In ruling on this motion, the Board must consider as pleadings the appeal, the motion for judgment on the pleadings, and HHSC's answer to the motion. *See, Agmar Sewer Company, Inc. v. DEP*, 1997 EHB 433. Board Rule 1021.70(e), 25 Pa. Code § 1021.70(e), requires an appellant to respond to a motion for judgment on the pleadings with an answer that sets forth "all factual disputes and the reason the opposing party objects to the motion." If there are no disputed issues of material fact or the reasons the party objects to the motion are legally insufficient, the motion can be granted.

Initially, we will consider whether there are any material factual disputes. Based on the information provided in this case, there are no material factual disputes. HHSC's response failed to comply with Board Rule 1021.70(e) which states, "A response to a motion shall set forth in correspondingly-numbered paragraphs all factual disputes and the reason the opposing party objects to the motion." 25 Pa. Code § 1021.70(e). Furthermore, the Pennsylvania Rules of Civil Procedure state, "A responsive pleading shall admit or deny each averment of fact in the preceding pleading or any part thereof to which it is responsive. A party denying only a part of an averment shall specify so much of it as is admitted and shall deny the remainder. Admissions and denials in a responsive pleading shall refer specifically to the paragraph in which the averment admitted or denied is set forth." Pa. R.C.P. Rule 1029(a). In addition, the Rules of Civil Procedure state, "Averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication. A general denial or a demand for proof, except as provided by subdivisions (c) and (e) of this rule, shall have the effect of an admission." Pa. R.C.P. Rule 1029(b). Although the format of HHSC's response consisted of numbered paragraphs, it did not specifically admit or deny the averments raised by the Department. Therefore, the averments made

by the Department are deemed admitted since they were not denied specifically. Consequently, all of the facts in the Department's motion are deemed admitted.

Therefore, the undisputed facts of this case are as follows. On June 16, 1997 the Department issued an order pursuant to Sections 5, 316 and 610 of the Clean Streams Law and Section 1917-A of the Administrative Code directing Appellant to, among other things, modify its sewage treatment plant in accordance with HHSC's Water Quality Management Permit No. 3994404. On July 18, 1997 HHSC filed a notice of appeal requesting review of the June 16, 1997 Order. HHSC did not serve any requests for discovery upon the Department. On November 3, 1997 the period allowed for discovery elapsed pursuant to Pre-hearing Order No.1. Paragraphs 3.1 through 3.24 and 3.30 of HHSC's Notice of Appeal assert a defense of financial inability to comply with the Department's Order. Paragraphs 3.25 through 3.29 assert that the Department refused to pursue its legal authority to have Heidelberg Township take over HHSC's sewage system. The Township does not own the treatment plant. HHSC is the owner of the Heidelberg Heights Sewerage Treatment Plant. Paragraph 3.31 of the notice of appeal states that HHSC has performed any and all necessary acts within its control to comply with the requirements of the Department.

On February 9, 1997 the Department filed its motion for judgment on the pleadings. In the motion the Department alleges that HHSC did not assert a valid defense or objection in its entire notice of appeal (Paragraphs 3.1 through 3.31).

Having determined that there are no disputes of material facts and having set forth the facts in this matter, we will now decide whether the Department is entitled to judgment as a matter of law.

Paragraphs 3.1 through 3.24 and 3.30 - Financial ability

The Department contends that HHSC's Notice of Appeal asserts a defense based on its

inability to acquire funding from Pennvest. The Department argues that financial inability to comply is not a valid objection or defense to a Department order, that an appeal from the issuance of an order serves only to evaluate the validity and content of the order, that the recipient's economic conditions are not a factor in the Department's statutorily governed decision to issue an order and that financial inability is not a defense to an order in an appeal before the Board.

Again, we agree with the Department and grant its motion on this issue. The Department is not obligated to consider economic conditions in issuing an order. In *Ramey Borough v. Commonwealth, Department of Environmental Resources*, 351 A.2d 613 (Pa. 1975) the Board upheld a Department order directing a borough to construct and operate a waste-water treatment facility. The Commonwealth Court affirmed the Board's decision on appeal. On subsequent appeal to the Pennsylvania Supreme Court, that court held that the Clean Streams Law does not limit the orders which may be issued by the Department only to orders to municipalities which can afford to take the necessary corrective measures. The court stated that a municipality's economic condition is not a major factor in the Department's statutorily governed decision to issue an order under the Clean Streams Law. *Id.* at 615. Furthermore, the court stated, the ability to comply with an order, for technological or economic reasons, may be relevant in a proceeding to enforce an order. *Id.* at 615. However, the court went on to say that the appeal from the issuance of the order serves only to determine the validity and content of the order. *Id.* at 615. (emphasis added)

The Board has utilized this reasoning in cases before it. In *Altoona City Authority v. DER*, 1991 EHB 1381, the Department filed a motion for judgment on the pleadings in an appeal from an order for the cleanup of waste disposal pits. The Board, citing *Ramey*, granted the motion stating that the portion of Altoona City Authority's appeal alleging that the Department

abused its discretion by failing to consider the economic impact of its order must be dismissed because the Department was under no obligation to consider the economic impact of the order. *Id.* at 1390.

In another instance, the Board granted the Department's motion for judgment on the pleadings involving an appeal from an order directing the Agmar Sewer Company, Inc. and Fred W. Sheaman, trading as Agmar Estates, to among other things, cease and prevent the discharge of untreated sewage from Agmar's sewage treatment plant, repair a culvert and restore two-hundred linear feet of stream channel. *Agmar Sewer Company, Inc.*, 1997 EHB 433. There appellants raised the objection that they were financially unable to comply with the order, and the Board found that the Department was under no obligation to consider the economic effect of its order on the party to whom the order was issued.

In the instant appeal HHSC also raised the issue of its financial inability to comply with the order issued. As noted above, the Department is not required to consider the economic impact of an order when it issues that order. While financial inability to comply with an order may be relevant in an appeal from the enforcement of an order, here HHSC is not challenging enforcement of an order but rather the issuance of that order. Its financial inability to comply is not a valid objection at this stage of the proceedings. Therefore, judgment on the pleadings is warranted with respect to this issue and is granted to the Department.

Paragraphs 3.25-3.29

In Paragraphs 3.25-3.29 HHSC asserts: 1) that it has offered the facility to Heidelberg Township and any other party willing to purchase it; 2) that the Department has the authority to force the Township to take over HHSC's system; 3) that Pennvest has agreed to transfer the

funds under "Loan II" to the Township in order for the construction of the necessary work; 4) that the Department refused to pursue its legal authority to have the Township take over HHSC's system; and 5) that any violations of the system alleged by the Department could have been and can be corrected by Pennvest's allowing "Loan II" to close.

The Department contends HHSC's assertion that the Department refused to pursue its legal authority to have Heidelberg Township take over HHSC's sewer system is not an adjudicatory action and is beyond the scope of review of this appeal. The Department asserts HHSC's assertion is not relevant to the content and validity of the order.

Under the Clean Streams Law, the Department "may order a municipality to acquire, construct, repair, alter, complete, extend or operate a sewer system and/or treatment facility." 35 P.S. § 691.203(a). Although the Department has the discretion to require a township to acquire a facility, in this instance it decided not to pursue this option. Clearly, the Department exercised its prosecutorial discretion. Consequently, the Department's decision not to force the township to acquire the facility is not subject to judicial review because it was not adjudicatory in nature. Therefore, the Board is not in a position to question why the Department did not require the township to take over the facility.

Paragraph 3.31

HHSC asserts in Paragraph 3.31 of its notice of appeal that it has performed any and all necessary acts within its control to comply with the requirements of the Department.

The Department contends HHSC's allegation that it performed any and all acts within its control to comply with the Department's requirements is not a valid objection or defense to a Department order. Thus, the Department counters, such an assertion may be an appropriate

defense to contempt, however, it is not relevant to whether the Department abused its discretion when issuing an order pursuant to Section 610 of the Clean Streams Law.

We agree with the Department. A person's ability to comply with a Department order may be relevant in a proceeding to enforce that order, but in an appeal to the Board of the order itself the subject matter of the appeal is limited to a determination of the validity and content of the order. *Ramey Borough v. DER*, 351 A.2d at 615. HHSC's assertion that it has attempted to comply with the requirements is not relevant in a proceeding such as this where the order was issued pursuant to Section 610 of the Clean Streams Law. Consequently, we grant the Department's motion on this issue.

Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HEIDELBERG HEIGHTS SEWERAGE COMPANY	:	
v.	:	**EHB Docket No. 97-150-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW this 19th day of May, 1998 the Department of Environmental Protection's motion for judgment on the pleadings is granted and the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: May 19, 1998

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

For the Commonwealth, DEP:
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Northeast Regional Counsel

For Appellant:
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HEIDELBERG HEIGHTS SEWERAGE CO.
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kh/bl

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CNG TRANSMISSION CORPORATION, and PENN FUEL GAS, INC.	:	
v.	:	**EHB Docket No. 97-169-MR (Consolidated with 97-170-MR)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and N.E. HUB PARTNERS, L.P., Permittee	:	**Issued: May 26, 1998**

OPINION AND ORDER
ON JOINT PETITION TO CERTIFY ISSUE
FOR IMMEDIATE INTERLOCUTORY APPEAL

by Robert D. Myers, Administrative Law Judge

Synopsis:

A Joint Petition to Certify Issue for Immediate Interlocutory Appeal is denied where the issue is only *potentially* a controlling question of law, where there is *not* substantial ground for difference of opinion on the matter, and where an immediate appeal would not necessarily advance the ultimate disposition of the case.

OPINION

On April 7, 1998, the Board issued an Opinion and Order denying summary judgment to CNG Transmission Corporation and Penn Fuel Gas, Inc. (collectively, Appellants) on their appeal of the Department of Environmental Protection's (Department) issuance of Gas Well Permit Nos. 37-117-20168 and 37-117-20169 (Permits) to N.E. Hub Partners, L.P. (Permittee). The Permits allow Permittee to drill two salt cavern gas storage wells in Farmington Township, Tioga County,

Pennsylvania.

One of the questions addressed in the Board's decision was whether the Department issued the Permits without complying with 25 Pa. Code § 78.81(d)(2). This is a regulation which requires that casing for a well drilled through a gas storage reservoir or a reservoir protective area be installed according to a procedure approved by the Department and established by mutual agreement between the well operator and the gas storage reservoir operator. On this particular question, we held that Appellants were not entitled to summary judgment because the evidence before the Board raised a *genuine issue of material fact* as to whether there was mutual agreement between Permittee and CNG Transmission Corporation, the gas storage reservoir operator, with regard to the casing installation procedure.

Appellants filed a Petition for Reconsideration asking the Board to reexamine whether the Department failed to comply with 25 Pa. Code § 78.81(d)(2). Appellants asserted that, contrary to the Board's determination, it was *undisputed* that Permittee and CNG Transmission Corporation never reached mutual agreement on a casing installation procedure; therefore, Appellants were entitled to judgment as a matter of law under 25 Pa. Code § 78.81(d)(2). Appellants also asserted that any evidence showing that CNG Transmission Corporation refused to agree on a casing installation procedure because of animus towards Permittee was irrelevant.

In denying reconsideration, the Board explained that the language of 25 Pa. Code § 78.81(d)(2) requires that the well casing for the two salt cavern gas wells here *shall be installed* according to a procedure *established by* the well and reservoir operators. In other words, 25 Pa. Code § 78.81(d)(2) imposes a duty on the well operator *and the reservoir operator* to establish an installation procedure by mutual agreement. Thus, evidence which suggests that CNG Transmission

Corporation *agreed* with Permittee's casing installation procedure, but refused to formalize the agreement because of animus towards Permittee, *is relevant* to the Board's review of the Department's action under 25 Pa. Code § 78.81(d)(2). The Board denied reconsideration because the parties dispute whether there was agreement on the procedure.[1]

On May 7, 1998, Appellants filed the instant Joint Motion to Certify Issue for Immediate Interlocutory Appeal (Joint Motion). Pursuant to 42 Pa.C.S. § 702(b) and Pa. R.A.P. 1311, Appellants ask the Board to amend its April 7, 1998 Order to certify that the Board's decision on 25 Pa. Code § 78.81(d)(2) "involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this matter." (Joint Motion at 1.) For the following reasons, we decline to do so.[2]

Pa. R.A.P. 1311 states that an appeal may be taken by permission from any interlocutory order of the Board which states that the order (1) involves a controlling question of law (2) as to which there is substantial ground for difference of opinion, and (3) an immediate appeal from the order may materially advance the ultimate termination of the matter. *See* 42 Pa.C.S. § 702(b). Where the interlocutory order does *not* contain this statement, a party may ask the Board to amend the interlocutory order to include it. Pa.R.A.P. 1311(b). The Board will exercise its discretion in deciding whether to amend the order. *Mercy Hospital of Pittsburgh v. Pennsylvania Human*

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[1] The Board also noted that there was an obvious dispute as to whether the Department approved Permittee's casing installation procedure as required by 25 Pa.Code § 78.81(d)(2).

[2] On May 22, 1998, the Department and Permittee filed a Joint Response in opposition to Appellants' Joint Motion.

Relations Commission, 451 A.2d 1357 (Pa. 1982). In making that decision, the Board will consider whether the law is unsettled and whether judicial economy would be served by allowing the appeal. *Empire Sanitary Landfill, Inc. v. DER*, 1994 EHB 1419.

Whether the Department issued the Permits in question here without complying with 25 Pa. Code § 78.81(d)(2) is *potentially* a controlling question of law. The issue would *not* control the outcome of the appeal if the Commonwealth Court ruled against Appellants. In that case, because Commonwealth Court is not a finder of fact, the court would have to remand the appeal to the Board to take evidence and to determine, as a matter of fact, whether there was animus between CNG Transmission Corporation and Permittee, whether CNG Transmission Corporation actually found Permittee's casing installation procedures to be adequate, and whether Permittee made a good faith attempt to reach a mutual agreement with CNG Transmission Corporation. If the Board found that the evidence supported such findings, then Appellants would have the right to appeal those findings to Commonwealth Court. If Appellants did so, then Commonwealth Court would have to address this same issue again. For the sake of judicial economy, we believe that the Board should hear the evidence and resolve the factual disputes before appellate review is sought.

In addition, we do not believe that there is a *substantial ground* for difference of opinion on the interpretation of 25 Pa. Code § 78.81(d)(2). Even though our interpretation of 25 Pa. Code § 78.81(d)(2) is the first of record, it does not follow automatically that the law is unsettled, or that there exists a "substantial ground" for difference of opinion. *Chester Residents Concerned for Quality Living v. DER*, 1993 EHB 1645. Here, there is little support in the regulatory language for Appellants' interpretation of 25 Pa. Code § 78.81(d)(2). *See Chester Residents.* As we stated previously, the regulation clearly imposes on CNG Transmission Corporation a legal duty to

establish casing installation procedures by mutual agreement with Permittee. Appellants' interpretation of the regulation does not recognize any such obligation on the part of the reservoir operator. There is simply *no* ground for this difference of opinion.

Finally, an immediate appeal would not materially advance the ultimate disposition of this appeal. These cases present three very significant and fact-dependent issues. An immediate appeal of only one of them would not be dispositive of the cases and, in all likelihood, would result in a remand in any event.

Accordingly, Appellants' Joint Petition is denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CNG TRANSMISSION CORPORATION, and PENN FUEL GAS, INC.	:	
v.	:	**EHB Docket No. 97-169-MR**
	:	**(Consolidated with 97-170-MR)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and N.E. HUB PARTNERS, L.P., Permittee	:	

ORDER

AND NOW, this 26th day of May, 1998, it is ordered that Appellants' Joint Motion to Certify Issue for Immediate Interlocutory Appeal is **denied.**

ENVIRONMENTAL HEARING BOARD

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: May 26, 1998

See next page for a service list.

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

GEORGE M. LUCCHINO	:	
	:	
v.	:	**EHB Docket No. 96-114-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LUZERNE LAND CORPORATION, Permittee	:	**Issued: May 27, 1998**

OPINION AND ORDER ON PETITION FOR AWARD OF COSTS AND ATTORNEY'S FEES

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A permittee who has prevailed in an appeal brought by an individual third-party appellant must demonstrate that the appeal was brought in bad faith in order to recover costs and attorney's fees under Section 4(b) of the Surface Mining Act and Section 307(b) of the Clean Streams Law. Where the requirement of demonstrating bad faith was handed down by the Board subsequent to the filing of the petition for fees and costs, and where the record is insufficient to demonstrate whether the appeal was brought in bad faith, we shall allow the permittee to supplement its petition with regard to the issue of bad faith and the appellant shall have an opportunity to respond to this matter.

OPINION

Before the Board is a Petition for Award of Costs and Attorney's Fees filed by Luzerne Land Corporation (Luzerne) against George M. Lucchino pursuant to Section 4(b) of the Surface Mining

Conservation and Reclamation Act (Surface Mining Act), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. § 1396.1 *et seq.*, at § 1396.4(b), and Section 307(b) of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.1 *et seq.*, at § 691.307(b). The petition seeks to recover costs and attorney's fees incurred by Luzerne in defending an appeal filed by Mr. Lucchino in May 1996. In the appeal, Mr. Lucchino objected to the Department of Environmental Protection's (Department) approval of an application by Luzerne to remove coal incidental to construction activities at a site in Robinson Township, Westmoreland County. In an Opinion issued on January 31, 1997, the Board dismissed the appeal for lack of standing. *Lucchino v. DEP*, 1997 EHB 123. This petition followed.

Authority for Awarding Attorney's Fees and Costs

Section 4(b) of the Surface Mining Act provides the Board with authority to award attorney's fees:

> The Environmental Hearing Board, upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to this section.

52 P.S. § 1396.4(b). Section 307(b) of the Clean Streams Law contains identical language, with the exception that it refers to ". . . proceedings pursuant to this act." 35 P.S. § 691.307(b).

In *Alice Water Protection Association v. DEP*, 1997 EHB 840, we first examined the question of whether a *permittee* may recover attorney's fees and costs under Section 4(b) of the Surface Mining Act and Section 307(b) of the Clean Streams Law from an unsuccessful third-party *appellant*. There, the Board held that a permittee seeking to recover attorney's fees and costs from an appellant must meet the four-part test set out by the Commonwealth Court in *Big B Mining Co.*

v. Department of Environmental Resources, 624 A.2d 713 (Pa. Cmwlth. 1993)[1] *and* must demonstrate that the appeal was brought in bad faith. *Alice Water*, 1997 EHB at 851. Thus, in order to be eligible to collect costs and attorney's fees from Mr. Lucchino, Luzerne must demonstrate the following:

1) A final order has been issued.

2) The applicant for fees and costs is the prevailing party.

3) The applicant for fees and costs has achieved some degree of success on the merits.

4) The applicant for fees and costs has made a substantial contribution to a full and final determination of the issues.

5) The appeal was brought in bad faith.

Final Order

One may not petition for an award of costs and fees until a final order has been issued. *Jay Township v. DEP*, 1987 EHB 36, 44. In its Opinion of January 31, 1997, the Board issued an Order which dismissed Mr. Lucchino's appeal for lack of standing. A dismissal of an appeal with prejudice is a final order. Therefore, Luzerne has met the first criterion for awarding attorney's fees and costs.

Prevailing Party

The second criterion is that Luzerne must be the prevailing party. This status is to be measured at the time the final order is entered. *Township of Harmar v. DEP*, 1994 EHB 1107, 1113. Since Luzerne's motion to dismiss the appeal was granted, it is the prevailing party in this matter.

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[1] *appeal denied*, 633 A.2d 153 (Pa. 1993).

Therefore, the second criterion is met.

Success on the Merits

The third criterion is that the applicant has achieved some degree of success on the merits. This requires success of a substantive nature, that is, success on one of the central issues of the case, rather than a purely procedural victory. *Township of Harmar*, 1994 EHB at 1113.

While it is clear that one who prevails in litigating an appeal has achieved success on the merits, *Harmar Township*, 1994 EHB 1107, the question arises as to whether success on the merits has been achieved when an appeal is dismissed for lack of standing. Does a dismissal for lack of standing constitute success on the *merits* for the prevailing party?

Based on the facts of this matter and the law in this jurisdiction regarding dismissal of a case, we conclude that Luzerne has achieved success on the merits by the dismissal of Mr. Lucchino's appeal.

In *Halm Instrument Co. Sigma Engineering Service, Inc.*, 42 F.R.D. 416 (W.D. Pa. 1967), the Federal District Court for the Western District of Pennsylvania ruled, "It is certain in this Circuit that a dismissal without qualification operates as an adjudication on the merits." *Id.* at 418. In *Brown v. Cooney*, 442 A.2d 324 (Pa. Super. 1982), the Pennsylvania Superior Court, relying on the *Restatement of Judgments* § 49, Comment a (1942), summarized the distinction between a judgment on the merits and one which is not on the merits:

> A judgment for the defendant is not on the merits where it is based merely on rules of procedure rather than on rules of substantive law. If the judgment determines that the plaintiff has no cause of action, it is on the merits; but, if it determines only that the plaintiff is not entitled to recover in the particular action, it is not on the merits.

442 A.2d at 326.

In deciding whether a dismissal of an action is an adjudication on the merits, the courts appear to focus on whether the plaintiff's action may be refiled or whether it is barred from being further litigated. Even where courts have ruled that a dismissal based on standing does not constitute an adjudication on the merits, it is in response to the question of whether the action may be refiled if the plaintiff obtains standing in the future.[2] In *Haefner v. City of Lancaster*, 566 F. Supp. 708, 710 (E.D. Pa. 1983), the District Court ruled that dismissal of a plaintiff's action as untimely was an adjudication on the merits because it foreclosed the plaintiff from refiling his complaint.

When the Board dismisses an appeal for lack of standing, this dismissal bars the appellant from refiling his appeal at a later date (outside the thirty-day appeal period), even if the appellant is able to demonstrate at that later date that he has acquired the necessary standing.

Moreover, unlike other types of dismissals on procedural grounds, such as for untimely filing or failure to respond to a Board order, a dismissal for lack of standing requires the Board to consider the *substantive* portion of an appellant's case. In ruling that an appellant lacks standing, the Board makes a determination that there is no merit to his claim that he has suffered the injury alleged.

On these grounds, we find that Luzerne has prevailed on the merits and, thus, has met the third criterion for an award of attorney's fees and costs.

Substantial Contribution to a Full and Final Determination

The fourth element of the *Big B Mining* standard is that the applicant for costs and attorney's

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[2] For instance, in *Brown* the court held that a dismissal based on the plaintiff's lack of capacity to sue was not a judgment on the substance of the plaintiff's cause of action. However, the court made this ruling in determining whether the cause of action was extinguished by the dismissal. Since it determined the cause of action was not extinguished, it reasoned the dismissal did not constitute a judgment on the merits. *Brown*, 442 A.2d 324.

fees must have made a substantial contribution to a full and final determination of the issues. We find that this factor has been met.

It was due solely to the efforts of Luzerne that the appeal was dismissed on the basis of standing. The motion to dismiss for lack of standing and supporting brief were filed by Luzerne. The Board relied on the arguments raised in the motion, as well as Luzerne's deposition of Mr. Lucchino, in determining whether Mr. Lucchino had the requisite standing to bring the appeal. Based on this, we conclude that Luzerne made a substantial contribution to the Board's final determination in this matter.

Bad Faith

As noted earlier, in order for a permittee to recover attorney's fees and costs from a third-party appellant, it must demonstrate that the appeal was brought in bad faith. *Alice Water*, 1997 EHB at 851. In examining the issue of whether an appeal has been brought in bad faith, we must keep in mind that an individual holds an absolute constitutional right to petition the government for redress of his grievances. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). An individual's right to petition the courts is not without some limitation, however. The right to petition the courts does not protect abuse of the judicial process through the initiation of baseless litigation. *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891 (2d Cir. 1981). As we held in *Alice Water*, "Where it is clear that there is no basis for an appeal or that the intent of the appeal is to harass or embarrass, a permittee will be entitled to recover attorney's fees and costs, provided that the remaining criteria for an award have also been met." *Id.* at 852.

By his own admission, Mr. Lucchino was not directly impacted by the coal removal he was protesting. *Lucchino*, 1997 EHB at 126. Although his appeal was filed in opposition to the

Department's approval of Luzerne's application for the incidental removal of coal, Mr. Lucchino testified that this was not the *purpose* of his appeal. Rather, he testified that he was challenging the action of Department officials who, he charged, had "decided to write their own legislation." *Id.* at 125. However, Mr. Lucchino also testified that he brought the appeal because he believed his constitutional rights had been violated by the Department and he wanted to insure that the Department followed its regulations. *Id.*

Whether Mr. Lucchino's appeal was brought in bad faith cannot be determined from the record before us. It is the burden of the party seeking attorney's fees to prove that all of the factors justifying an award have been met. However, the requirement of proving bad faith on the part of a third-party appellant had not yet been considered and handed down by the Board at the time Luzerne's petition for attorney's fees and costs had been filed. Because the record demonstrates that Mr. Lucchino's appeal may have been brought in bad faith, we shall permit Luzerne to supplement its petition to address this issue and Mr. Lucchino to respond to Luzerne's supplemental filing.[3] Following the submission of this supplemental petition and response, should the Board determine that further evidence is necessary to decide this issue, it may require the taking of additional testimony.

We, therefore, enter the following order:

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[3] Should additional discovery be required by either party in order to prepare its supplemental filing, that party may file a motion with the Board allowing further discovery.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GEORGE M. LUCCHINO	:	
	:	
v.	:	**EHB Docket No. 96-114-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LUZERNE LAND CORPORATION	:	

ORDER

AND NOW, this 27th day of May, 1998, we enter the following order:

1) The petitioner, Luzerne Land Corporation, is granted leave to file a supplement to its petition for award of costs and attorney's fees addressing the issue of bad faith, as set forth in this Opinion, on or before **July 14, 1998.**

2) The respondent, George M. Lucchino, shall file an answer to Luzerne's supplemental petition on or before **August 4, 1998.**

3) The Department of Environmental Protection may file a response to the supplemental petition on or before **August 4, 1998.**

4) A ruling on Luzerne's petition for award of costs and attorney's fees is stayed pending receipt of the parties' supplemental filings.

EHB Docket No. 96-114-R

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: May 27, 1998

c: See service list attached

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

Commonwealth, DEP:
Southwest Region
Attn: Diana Stares, Esq.

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Pittsburgh, PA

For Permittee:
Stanley R. Geary, Esq.
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Pittsburgh, PA

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WILLIAM T. PHILLIPY II
SECRETARY TO THE BOAI

JAMES LEE AND LEE OIL COMPANY	:	
	:	**EHB Docket No. 98-035-C**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** June 4, 1998

OPINION AND ORDER ON PETITION FOR RECONSIDERATION

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A petition for reconsideration is denied. Reconsideration of an interlocutory order is appropriate only where "extraordinary circumstances" are present, and a defect in a motion to dismiss cannot be cured through a petition for reconsideration.

OPINION

This appeal was initiated with the February 26, 1998, filing of a notice of appeal by James Lee and Lee Oil Company (collectively, "Appellants") of Frewsburg, NY. The notice of appeal challenges a December 26, 1997, declaration of bond forfeiture the Department issued to Allegro Oil & Gas (Allegro) of Jamestown, NY. The Department declared the bonds forfeit because Allegro allegedly failed to comply with a Department order directing it to plug certain wells it owned and operated in Sharon Township, Potter County, PA. In their notice of appeal, Appellants assert that the Department erred by declaring the bonds forfeit because it refused to plug the wells and refused

to allow Appellants to plug them. Appellants also ask that the Board return the bond money to them.

We have issued only one previous opinion and order in this case: a May 6, 1998, decision denying a Department motion to dismiss. In its motion, the Department argued that Appellants' appeal was untimely because it was filed more than 30 days after they received written notice of the declaration of forfeiture. We held that the Department was not entitled to dismissal because "[i]t never addressed what relationship, if any, exists between Allegro and Appellants, or when, if ever, the *Pennsylvania Bulletin* published notice of the Department's action." *James Lee v. DEP*, EHB Docket No. 98-035-C (Opinion issued May 6, 1998) p. 4.

On May 15, 1998, the Department filed a petition for reconsideration and memorandum of law in support. In its petition and memorandum, the Department argues that we erred by denying its motion to dismiss because (1) with the exception of third-party appeals where notice is published in the *Pennsylvania Bulletin*, appellants must ordinarily file their appeals with the Board within 30 days of written notice or publication in the *Pennsylvania Bulletin*--whichever comes first; (2) the *Pennsylvania Bulletin* did not publish notice of the December 26, 1997, declaration of bond forfeiture; and (3) Appellants failed to file their appeal within 30 days of receiving written notice of the declaration of forfeiture.

Appellants did not file a response to the petition for reconsideration.

The Department is correct when it argues that, where notice of a Department action is not published in the *Pennsylvania Bulletin*, a third party must appeal within 30 days of receiving actual or constructive notice for the appeal to be timely. *See, e.g., New Hanover Township v. DER*, 1991 EHB 1234; *Paradise Township Citizens Committee, Inc. v. DER*, 1992 EHB 668. However, that alone does not persuade us that reconsideration is appropriate here, or that we erred in our previous

opinion when we concluded that the Department failed to establish that it was entitled to dismissal.

Section 1021.123 of the Board's rules, 25 Pa. Code § 1021.123, provides that a petition for reconsideration of an interlocutory order must demonstrate that "extraordinary circumstances" are present before the Board will reconsider a decision. To show that "extraordinary circumstances" exist, the petition must meet the criteria for reconsideration of final orders, and, in addition, show that special circumstances are present which justify the Board taking the extraordinary step of reconsidering an interlocutory order. *Miller v. DEP*, EHB Docket No. 95-234-C, (Opinion issued March 31, 1997). Section 1021.124(a) of the Board's rules, 25 Pa. Code § 1021.124(a), provides that the Board will reconsider final orders for "compelling and persuasive reasons," including:

> (1) The final order rests on a legal ground or factual finding which has not been proposed by any party.
>
> (2) The crucial facts set forth in the petition
>
> (i) Are inconsistent with the findings of the Board.
>
> (ii) Are such as would justify a reversal of the Board's decision.
>
> (iii) Could not have been presented earlier to the Board with the exercise of due diligence.

25 Pa. Code § 1021.124(a). Therefore, for the Department to show that it is entitled to reconsideration of its motion to dismiss, the Department had to show that reconsideration would satisfy the criteria listed above and--in addition--that special circumstances are present which justify the Board revisiting an interlocutory order.

The Department has failed to show that the circumstances here fall within the criteria for reconsideration of final orders under section 1021.124, much less that the circumstances are

"extraordinary" under § 1021.123. The Department does not argue that our decision denying its motion to dismiss rested on legal grounds or factual findings not proposed by any party. Nor does it maintain that any of the other provisions of section 1021.124(a) apply. Instead, the Department simply seeks to have us revisit its motion to dismiss considering certain information that it neglected to include in the motion: namely, that the *Pennsylvania Bulletin* did not publish notice of the modification.

We have previously held that a party may not use reconsideration to cure a defect in its motion for summary judgment. *See Adams Sanitation Company, Inc. v. DEP*, 1994 EHB 1482. We see no reason to treat a motion to dismiss any differently. As we noted in our opinion on the motion to dismiss, a moving party bears the burden of proving that it is entitled to the relief requested. *Green Thornbury Committee v. DER*, 1995 EHB 294. If the Department wanted us to consider that the *Pennsylvania Bulletin* did not publish notice of its action, the Department should have made that averment in its motion to dismiss. Having failed to do so, it cannot cure that defect through a petition for reconsideration.

Accordingly, we deny the Department's petition for reconsideration.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES LEE AND LEE OIL COMPANY	:	
	:	**EHB Docket No. 98-035-C**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 4th day of June, 1998, the Department's petition for reconsideration is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: June 4, 1998

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

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Northwest Regional Counsel

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

DAVID K. LEVDANSKY	:	
	:	
v.	:	**EHB Docket No. 97-058-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KELLY RUN SANITATION, INC., Permittee	:	**Issued: June 5, 1998**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The present controversy stems from a permit modification to an existing permit authorizing the construction and operation of a municipal waste landfill. Where a legislator seeks to raise issues in his notice of appeal in his capacity as a state representative, he lacks standing to do so because his interest is not direct, immediate and substantial. However, where a legislator seeks to raise issues in his notice of appeal in his capacity as an individual landowner and he demonstrates that he has standing, he may raise these issues. At this stage of the proceeding, we find that the Appellant has standing to raise issues involving noise, odor, groundwater contamination and improper closure. Issues not raised in a pre-hearing memorandum are waived.

BACKGROUND

On February 6, 1997, the Department of Environmental Protection (Department) issued a major modification to Permit No. 100663 (permit) held by Kelly Run Sanitation, Inc. (Kelly Run). The permit authorized the construction and operation of a municipal waste landfill located in

Forward Township, Allegheny County, Pennsylvania. State Representative David K. Levdansky filed a notice of appeal on March 6, 1997 which raised ten separate objections to the Department's issuance of the Phase III permit.

Both Kelly Run and the Department have each filed motions for summary judgment and supporting briefs (collectively, motions).[1] The parties base their motions on, *inter alia*, the deposition testimony of Representative Levdansky, which the parties submitted with their respective motions. Representative Levdansky filed a response and supporting brief to the motions and both Kelly Run and the Department filed replies. Kelly Run and the Department both assert that Representative Levdansky lacks standing to pursue the various issues raised in his notice of appeal and he has failed to produce evidence sufficient to create genuine issues of material fact.

Summary judgment may be entered as a matter of law whenever there is no genuine issue of any material fact. Pa.R.C.P. 1035.2(1). In order to prevail on a motion for summary judgment, the moving party must show through interrogatories, answers, deposition transcripts, pleadings, affidavits and responses to requests for admissions that the facts support the motion and no material facts are in dispute. *See* Pa.R.C.P. 1035.1-1035.5; *Reading Anthracite Company v. DEP*, 1997 EHB 581. When deciding motions for summary judgment, the record must be viewed in the light most favorable to the nonmoving party, and all doubts as to existence of material fact must be resolved against the moving party. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995); *Kane Gas Light and Heating Company v. DEP*, 1997 EHB 451. Summary judgment is appropriate only in the clearest of cases

[1] The motions would have been more appropriately filed separately as a Motion to Dismiss based on lack of standing and a Motion for Summary Judgment based on lack of evidence to go to a hearing.

which are free from doubt. *Martin v. Sun Pipe Line Company*, 666 A.2d 637, 639 (Pa. 1995); *Hayward v. Medical Center of Beaver County*, 608 A.2d 1040 (Pa. 1992). We find that there are genuine issues of material fact that preclude the granting of summary judgment in this case. We will therefore focus on the issue of standing.

DISCUSSION

Representative Levdansky is a member of the State House of Representatives and the House Conservation Committee. (Depo. at 7, 11)[2] He serves the 39th legislative district, which includes the location of the landfill in Forward Township. (Depo. at 7) According to his deposition testimony, Representative Levdansky lives "[s]omewhere between 300 and 500 yards" from the landfill. (Depo. at 23) When Representative Levdansky was asked by the Department's counsel to name whose interests he was representing in this appeal, he testified, "Principally I'm here as an individual, secondarily filing this appeal as a public official." (Depo. at 119)

We first address the parties' contention that Representative Levdansky lacks standing to sue solely in his capacity as a legislator. Representative Levdansky testified that his constituents have voiced the following concerns to him in his capacity as a public official: odor; dust; noise; air emissions; groundwater contamination; hours of operation; how much Kelly Run is contributing to the treasury of Forward Township; quantity of waste; and, types of waste. (Depo. at 42)

In order for Representative Levdansky to have standing to challenge the Department's action, he must demonstrate a direct, immediate and substantial interest in the litigation challenging that

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[2] "Depo. at ___" refers to a page from the deposition transcript of Representative Levdansky. Kelly Run submitted the deposition transcript as Exhibit C of its motion; the Department submitted the deposition transcript as Exhibit A of its motion.

governmental action. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). An interest is "direct" if the matter complained of caused harm to the party's interest. *Id.* An "immediate" interest is one with a sufficiently close causal connection to the challenged action. *Id.* A "substantial" interest is an interest in the outcome of the litigation which surpasses the abstract common interest of all citizens seeking compliance with the law. *Id.*

The Commonwealth Court has applied the *William Penn* test to a legislator seeking to participate in a matter by virtue of his status as a legislator. *Wilt v. Beal*, 363 A.2d 876 (Pa. Cmwlth. 1976). The legislator sought to enjoin actions proceeding from an administrative determination by the Secretary of Public Welfare and the State Treasurer. The Court held that legislators, as legislators, are only granted standing when specific powers unique to their functions under the Constitution are diminished or interfered with. The Court determined that "[s]ome other nexus must then be found to challenge the allegedly unlawful action." *Id.* at 881.

The Board has held that a legislator has no personal stake in the outcome of the appeal where he is seeking to intervene in his capacity as a state representative and his interest is not direct, immediate and substantial. *Concord Resources Group of Pennsylvania, Inc. v. DER*, 1992 EHB 1563. While Representative Levdansky is permitted to participate as an *amicus curiae* in the capacity of a state legislator, his position as a legislator does not confer upon him any special status in proceedings before the Board; he must demonstrate an interest beyond any citizen's general interest. *Id.*

We do find, however, that Representative Levdansky has a sufficient interest in the permit modification to pursue this appeal in the capacity of an individual landowner. We have held that residents of a community surrounding a proposed industrial facility who demonstrate a direct,

immediate and substantial interest in the issuance of a permit have standing to pursue an appeal. *S.T.O.P. Inc. v. DER*, 1992 EHB 207. As previously mentioned, Representative Levdansky lives in close proximity to the landfill. When asked how has he been impacted by the issuance of the permit modification, Representative Levdansky stated that the principal physical impacts to him as a property owner included noise and odor. He also raised issues concerning groundwater contamination and improper closure.

Kelly Run and the Department assert that Representative Levdansky has not demonstrated a direct impact on him with respect to these issues. At this stage of the proceeding, we find that Representative Levdansky has sufficiently demonstrated that as a landowner living in close proximity to the landfill, he has standing to challenge these issues.

In objection 1 of his notice of appeal, Representative Levdansky asserts that the Department improperly approved deletions to the existing facility permit conditions. He alleges, in objection 2 of his notice of appeal, that the Department failed to fulfill the public notice requirements regarding the deletion of existing enforceable permit conditions. In his deposition, Representative Levdansky could not identify *any* deletions to the existing facility permit conditions that the Department improperly approved. (Depo. at 61-62, 64-65, 92) Moreover, an affidavit submitted by the Regional Waste Manager for the Department's Southwest Regional Office states that *no* conditions were deleted when the Department issued the permit modification to the Permittee. (Department's Motion, Exhibit B)

In responding to the Department's Interrogatories 1, 2 and 4, which requested information relating to objections 1 and 2 in the notice of appeal, Representative Levdansky referred to Executive Order 1996-5. Executive Order 1996-5 establishes procedures for the Department and the

Department of Transportation to conduct a municipal waste facilities review program. Executive Order 1996-5 explicitly states that:

> [t]his order is intended only to improve the internal management of executive agencies and *is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the Commonwealth*, its agencies, its officers, or any person.

(Executive Order 1996-5, ¶ 5(b)) (emphasis added).

By its own terms, Executive Order 1996-5 precludes enforcement by private individuals. Furthermore, Representative Levdansky did not raise this allegation in his notice of appeal; therefore, it is waived. *Pennsylvania Game Commission v. Department of Environmental Resources*, 555 A.2d 812 (Pa. 1989).

In objections 5, 6 and 7 of his notice of appeal, Representative Levdansky alleges that the Department improperly issued the permit in violation of 25 Pa. Code §§ 273.120 and 273.202(a)(3). The relevant part of Section 273.120 states:

> (b) If the proposed permit area overlies extractable mineral deposits and the applicant does not own or lease the mineral deposits, the applicant shall submit a written plan showing that the minerals providing support will not be mined as long as municipal waste remains on the site.

Section 273.202, states, in pertinent part, that municipal waste landfills are prohibited:

> (a)(3) In coal bearing areas underlain by recoverable or mineable coals, unless the operator of the facility demonstrates and the Department finds, in writing, that the operator owns the underlying coal, or has entered an agreement with the owner of the coal to provide support.

Representative Levdansky contends that the Department's issuance of the permit violates these regulations since it failed to require Kelly Run to guarantee that mineral deposits will not be mined and because the landfill will be operating over a coal bearing area without an agreement from

the owner of the coal to provide support. Representative Levdansky also asserts that the Department failed to require Kelly Run to provide an adequate subsidence prevention program to stabilize the surface above previously mined areas of the landfill.

Often, a party raises issues in the notice of appeal that are subsequently abandoned. It is in the pre-hearing memorandum that the party finalizes the theories that may be raised at the hearing on the merits. *Midway Sewerage Authority v. DER*, 1991 EHB 1445, 1473. Issues omitted from a pre-hearing memorandum are waived. *Jay Township v. DER*, 1994 EHB 1724. Since Representative Levdansky omitted any mention of objections 5, 6 and 7 in his pre-hearing memorandum, these issues are waived and we need not decide whether he has standing to raise these issues.

Accordingly, the following order is entered:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID K. LEVDANSKY	:	
	:	
v.	:	**EHB Docket No. 97-058-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KELLY RUN SANITATION, INC., Permittee	:	

ORDER

AND NOW, this 5th day of June, 1998, the motions for summary judgment filed by the Permittee and the Department are **granted** as to objections 1 and 2 of the Appellant's notice of appeal. The Appellant's allegation with respect to Executive Order 1996-5 is waived. Objections 5, 6 and 7 are waived because the Appellant failed to include them in his pre-hearing memorandum. The motions are **denied** in all other respects.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: June 5, 1998

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

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Bruce M. Herschlag, Esq.

For the Permittee
Clifford B. Levine, Esq.
Ronald C. Gahagan, Jr., Esq.
James M. Ginocchi, Esq.
Donald M. Lund, Esq.
THORP REED & ARMSTRONG
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E-Z SHIP RECYCLING, INC.	:	
	:	
v.	:	**EHB Docket No. 97-142-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 5, 1998**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Department's Motion for Summary Judgment is granted and the Appellant's Motion for Summary Judgment is denied in this appeal of a permit revocation under the Solid Waste Management Act. Where the Department discovers that the Appellant was operating two unlicensed waste tire facilities which it did not disclose in its permit application for a facility to process and store waste tires, the Department may revoke the permit issued for the latter. Where the violations occurred in areas covered by the Department's Southwest Regional Office, the Department is not required to consult with the Northwest Regional Office, where the permit site is located, before revoking the permit.

OPINION

Appellant is E-Z Ship Recycling, Inc., (E-Z Ship) which on December 3, 1996 obtained a general permit from the Department of Environmental Protection (Department) to store and

process waste tires and tire-derived materials at a facility in Lancaster Township, Butler County. The Department issued the permit pursuant to the provisions of the Solid Waste Management Act.[1] On June 10, 1997, the Department revoked the general permit. E-Z Ship filed a timely appeal and both the Department and E-Z Ship have filed motions for summary judgment.

The Department contends that E-Z Ship lied on its application when it indicated it was not operating any other waste tire facilities. In fact, the Department contends E-Z Ship was operating two unlicensed waste tire processing and storage facilities: one in Export and one in Charleroi. The Department moves for summary judgment on the basis that the Department must deny a permit to an applicant who has engaged in unlawful conduct, and whose application fails to demonstrate that the unlawful conduct has been corrected. *Concerned Residents of the Yough, Inc. v. DER*, 639 A.2d 1265 (Pa. Cmwlth. 1994). In other words, at the same time E-Z Ship was waiting for the Department to approve its permit to recycle tires it was engaging in such conduct at undisclosed locations.

E-Z Ship, clearly subscribing to the theory that the best defense is a good offense, has also moved for summary judgment. E-Z Ship's operations in Butler County were under the jurisdiction of the Department's Northwest Regional Office.[2] E-Z Ship contends that it sought permission to operate tire recycling facilities in the Southwest Region but permission was never granted. It further contends that the Department was aware of its Export operation as early as

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[1] Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101 - 6018.1003.

[2] The Department administers many of its field operations through a regional model. It thus has divided the state into 6 regions. The Northwest Regional Office is located in Meadville. The Southwest Regional Office is located in Pittsburgh.

February 1997 but took no action at that time. Instead, according to E-Z Ship, the Department, through its Southwest Regional Office persuaded it to sign an Amended Consent Order and Agreement to bale tires more quickly at its Lancaster Township facility. E-Z Ship charges that the Department's Southwest Regional Office took the position that the site approvals pending in its region could not be issued until E-Z Ship signed a new Consent Order agreeing to bale the remaining tires at Lancaster Township by an earlier deadline. According to E-Z Ship's President, obtaining these approvals was absolutely necessary in order for E-Z Ship to survive in business. Therefore, E-Z Ship agreed to the new expedited schedule.

Two days after E-Z Ship executed the Amended Consent Order and Agreement, a Department inspector paid a second visit to the Export tire facility. Five days later, on June 10, 1997, the Department revoked E-Z Ship's general permit because of its operation of the Export tire facility. This revocation was allegedly done by the Department at the urging of the Southwest Regional Office. The Northwest Regional Office was not consulted prior to revocation of the permit by the Department.

The revocation of the permit allegedly resulted in E-Z Ship going out of business. E-Z Ship contends that the Department's failure to consult with and obtain input from the Northwest Regional Office, which input would have been favorable to E-Z Ship, constitutes action by the Department that is arbitrary, capricious, and an abuse of discretion. Moreover, E-Z Ship contends that it is not the practice or the custom of the Department to require applicants to update their permit application while the application is pending.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories and admissions of record, together with the affidavits and expert reports, if any,

show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.1, 1035.2, *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997) *White Glove, Inc. v. DEP*, EHB Docket No. 97-172-MG (Opinion issued April 28, 1998); *People United to Save Homes v. DEP*, EHB Docket No. 97-262-R (Opinion issued April 6, 1998). In reviewing a motion for summary judgment, we must examine the record in the light most favorable to the nonmoving party, and all doubts as to the existence of a material fact must be resolved against the moving party. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995); *Wood v. DER*, 1994 EHB 347, 358-59; *County of Schuylkill v. DER*, 1991 EHB 1, 6. We will dismiss an appeal only where the Department shows that it is entitled to judgment as a matter of law. *Borough of Ambler v. DEP*, EHB Docket No. 97-211-MG (Opinion issued April 15, 1998) at 5; *Lehigh Twp. v. DEP*, 1995 EHB 1098, 1113. In other words, summary judgment may be entered only in those cases where the right is clear and free from doubt. *Martin v. Sun Pipe Line Company*, 666 A.2d 637 (Pa. 1995).

Turning to E-Z Ship's Motion for Summary Judgment we disagree that the Department is necessarily required to consult the regional office with primary jurisdiction over the activities of the permittee before revoking a permit. Although this might raise a question of fact if the conduct at issue was only in that region and only known by that regional office, that is clearly not the case here. Instead, the conduct in question (operating unlicensed waster operations) *occurred* in the Southwest Region and was discovered by inspectors in the Southwest Region. There was thus no requirement of the Department's Solid Waste Management Chief located in Harrisburg to consult

the Northwest Region before taking appropriate action. E-Z Ship cites no case that supports this contention nor could we locate any.

E-Z Ship also contends that the Department does not, by either practice or custom, require an applicant to update its application while the application is pending. We need not reach this issue. It is undisputed that E-Z Ship operated two unlicensed tire recycling facilities while it was waiting to obtain a permit for its facility in Lancaster Township. The Department certainly has the right to expect that E-Z Ship would not engage in such activities without a permit or authorization. Therefore, E-Z Ship's position is without merit.

Stripped to its core, and despite the valiant efforts of Appellant's able counsel to muddy the legal waters, it is crystal clear that the Department is entitled to summary judgment based on Appellant's failure to disclose its unauthorized tire recycling operations in Export and Charleroi. E-Z Ship argues that the tire recycling operations conducted in Charleroi are irrelevant because the Department did not discover this operation until June 18, 1997 - eight days after it had revoked the permit. As the Department correctly points out, in assessing the reasonability of the Department's action, the Board must determine whether or not the Department abused its discretion or committed an error of law. Because the Board's review is *de novo*, the Board may consider evidence not before the Department when the agency took its action; the Board must consider all relevant evidence presented to it. *Warren Sand and Gravel Co. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975); *City of Harrisburg v. DEP*, 1996 EHB 1518; *Oley Township v. DEP*, 1996 EHB 1098.

As part of its application for a general permit, E-Z Ship was required to identify all places where it generated, processed, transported and stored, treated or disposed of solid waste. Solid

waste includes waste tires pursuant to the Solid Waste Management Act. E-Z Ship identified its other waste management locations as "none." Nevertheless, while its application was pending E-Z Ship operated unlicensed waste tire processing and storage facilities in both Export and Charleroi.

The Solid Waste Management Act defines "unlawful conduct" to include any person that operates a solid waste storage or processing facility without a permit, any person that transports solid waste to a storage or processing facility that lacks the necessary permits from the Department, and any person that causes or assists in the violation of any provision of the Act. 35 P.S. §§ 6018.610(2), (6), and (9).

It is unlawful for anyone to process, store or bale waste tires without a permit. A long line of Board decisions have held that discarded tires constitute "waste" within the meaning of the Solid Waste Management Act. *Bailey*, 1995 EHB at 1254; *Starr v. DER*, 1991 EHB 494, *aff'd* 607 A.2d 321 (Pa. Cmwlth. 1992); *Booher v. DER*, 1991 EHB 987, *aff'd* 612 A.2d 1098(Pa. Cmwlth. 1992); *Envyrobale Corporation v. DER*, 1994 EHB 1714. E-Z Ship's storage and processing of waste tires in Export and Charleroi without authorization or a permit from the Department, along with transporting waste tires to these locations, constitutes violations of Section 301 and 501 of the Solid Waste Management Act 35 P.S. §§ 6018.301 and 6018.501, and unlawful conduct pursuant to Sections 610 (2), (6) and (9) of the Solid Waste Management Act, 35 P.S. §§ 6018.610(2), (6), and (9).

Section 602(a) provides as follows:

> The Department may issue orders to such persons ... as it deems necessary to aid in the enforcement of the provisions of this act. Such orders may include ...

suspending or revoking permits ...

35 P.S. § 6018.602(a)

Further, Section 503(c) provides:

> In carrying out the provisions of this act, the Department may ... revoke any permit ... if it finds that the applicant, permittee or licensee has failed or continues to fail to comply with any provision of this act ...

35 P.S. § 6018.503(c)

Since E-Z Ship was engaged in unlawful conduct, the Department properly revoked its permit. The Department was under no duty to consult with the Northwest Regional Office before revoking the permit. The unlawful conduct took place in the Southwest Region. Moreover, just because a permittee may have an exemplary record in one region of the state does not excuse unlawful conduct in another region of the state. We find no issues of genuine material fact in this case that could possibly show an abuse of discretion or error of law by the Department.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

E-Z SHIP RECYCLING, INC.	:	
	:	
v.	:	**EHB Docket No. 97-142-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 5th day of June, 1998, after review of the cross-motions for summary judgment, it is ordered as follows:

1) Appellant, E-Z Ship Recycling, Inc.'s Motion for Summary Judgment is **denied.**

2) The Department of Environmental Protection's Motion for Summary Judgment is **granted.** E-Z Ship Recycling, Inc.'s appeal is **dismissed.**

ENVIRONMENTAL HEARING BOARD

/s/ George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

EHB Docket No. 97-142-R

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: June 5, 1998

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Southwest Region

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAF

POTTS CONTRACTING COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 97-236-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HL&W COAL COMPANY, Permittee	:	**Issued:** June 8, 1998

OPINION AND ORDER ON MOTION FOR JUDGMENT ON THE PLEADINGS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion for judgment on the pleadings is denied when the moving party fails to demonstrate it is entitled to judgment as matter of law. A pro se appellant must serve copies of all filings it submits to the Board on the opposing parties.

OPINION

This matter was initiated with Potts Contracting Company, Inc.'s (Potts Contracting) October 27, 1997 Notice of Appeal concerning Underground Coal Mining Permit No. 54951305 and NPDES Permit No. Pa0223620. Although the original submission was a letter requesting a 60 day extension to file an appeal, Potts Contracting's representative, Joyce Potts Lengel, Vice-President, asked that the Board accept the letter as an appeal which the Board did. On October 30, 1997 the Board received a letter dated October 28, 1997 which Joyce Potts Lengel described as a "back up letter of appeal" to ensure compliance before the expiration of the 30 day appeal period. In the October 28,

1997 letter Ms. Lengel stated that the appeal concerned two Department actions: 1) the October 3, 1997 issuance of an Underground Coal Mining Permit No. 54951302 to H.L.&W. Coal Company (H.L.&W), and 2) the October 7, 1997 denial of Permit Application No. 54881303R to Potts Contracting Company, Inc. On October 30, 1997, Attorney James D. Watt, filed a "Prophalactic" Notice of Appeal for Potts Contracting Company, Inc..[1] In that appeal Attorney Watt stated that the Department's action for review by the Board was the granting "of permits to Alphabet Co. - H.L.&W.Coal Company, 14 Maple St., Pine Grove, Pa. 17963, #54951302 & Pa. 0223620" (Notice of Appeal p. 1) and that the objection to the action was there was pending litigation concerning usurpation of corporate opportunity regarding the permits in Schuylkill County. On October 30, 1997 the Board issued an order directing Potts Contracting Company, Inc. to perfect its appeal by filing specific objections to the Department action. The Board served the order on Attorney Watt and Joyce Potts Lengel. On November 10, 1997 Joyce Potts Lengel filed a "supplemental information by order" in which she set forth more specific objections. The Board considered this additional information sufficient to perfect the appeal. By a November 18, 1997 letter the Board advised Potts Contracting that corporations must be represented by legal counsel. After a request for an extension, on February 11, 1998 Attorney James J. Munnis entered a Notice of Appearance on behalf of Potts Contracting.

On March 4, 1998 HL&W Coal Company filed a Motion for Judgment on the Pleadings and an accompanying memorandum.[2] HL&W contends that it is entitled to judgment on the pleadings

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[1] The Board dismissed the appeal by Attorney Watt in a May 14, 1998 order when he failed to adequately respond to a rule to show cause.

[2] HL&W's memorandum is titled as a "Memorandum of Points and Authorities in Support of Permittee's Motion for Summary Judgment or On the Pleadings." We will consider HL&W's

because there were no specific objections lodged to the Department's action granting a permit to HL&W. HL&W claims that the only assertion made was that there was a pending court action regarding the alleged usurpation of a corporate opportunity which was dismissed with prejudice and not appealed in a timely manner. HL&W also asserts that Potts Contracting failed to serve it and the Department with a copy of the November 10, 1997 amendments to the appeal.

On March 19, 1998 Potts Contracting filed its response and accompanying memorandum. Potts Contracting contends that HL&W is not entitled to judgment because genuine issues of material fact exist and it is not entitled to judgment as a matter of law because the underlying litigation is still pending since the lower court's decision was timely appealed.

On March 30, 1998 HL&W filed a Motion to Strike Response of Potts Contracting and an accompanying memorandum.[3] HL&W reiterated that Potts Contracting's appeal has failed to state specific facts or objections.

A motion for judgment on the pleadings is in the nature of a demurrer and is used to determine whether a cause of action, as pleaded, exists at law. *Bensalem Twsp. School District v. Commonwealth*, 544 A.2d 1318, 1321 (Pa. 1988); *see also, Kerr v. Borough of Union City*, 614 A.2d 338 (Pa.Cmwlth. 1992), *appeal denied*, 627 A.2d 181 (Pa. 1993). A motion for judgment on the pleadings, like a motion for summary judgment, may be granted when no material facts are in dispute and a hearing is pointless because the law is clear on the issue. *Winton Consolidated Companies v. DER*, 1990 EHB 860.

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motion as one for a judgment on the pleadings because the motion itself has that title and it is the motion which is the controlling document.

[3] The Board will consider this motion as a reply to Potts Contracting's response to the motion for judgment on the pleadings.

As we stated in *Heidelberg Heights Sewerage Company v. DEP,* EHB Docket No. 97-150-C (Opinion and order issued May 19, 1998) in ruling on this type of motion, the Board must consider as pleadings the appeal, the motion for judgment on the pleadings, and the answer to the motion. *See also Agmar Sewer Company, Inc. v.DEP*, 1997 EHB 433. Board Rule 1021.70(e), 25 Pa. Code § 1021.70(e), requires an appellant to respond to a motion for judgment on the pleadings with an answer that sets forth "all factual disputes and the reason the opposing party objects to the motion." If there are no disputed issues of material fact or the reasons the party objects to the motion are legally insufficient, the motion can be granted. This is a change from prior practice and is the result of the adoption of new rules on September 5, 1995 prior to which only the notice of appeal could be considered as a pleading. *Agmar Sewer Company, Inc. v. DEP*, 1997 EHB 433

Motion

We deny HL&W's motion for judgment on the pleadings because it is not entitled to judgment on the basis of law. The Board issued an order on October 30, 1997 for the perfection of the appeal with the submission of specific objections to the Department's action by November 14, 1997. Attorney Watt and Joyce Potts Lengel were both sent this order. Joyce Potts Lengel, at that time acting pro se apparently, filed an amended appeal with specific objections on November 10, 1997. An assistant counsel for the Board contacted Attorney Watt about the notice of appeal he filed on October 28, 1997 in the name of Potts Contracting and Attorney Watt stated that Potts Contracting had not authorized him to file this appeal. During that same phone conversation the Board also directed him to file a letter explaining his role in this case. To date, however, Attorney Watt has failed to file the letter. Since Attorney Watt was not authorized to file the appeal, Potts

Contracting's original appeal and subsequent amendment are controlling.[4] With the amendment, specific objections became part of the Notice of Appeal. Consequently, we must reject HL&W's contention that it is entitled judgment on the pleadings because Potts Contracting failed to state specific objections in its notice of appeal. Thus, we must deny HL&W's motion on this issue.

Service

HL&W also raised the issue that Potts Contracting failed to serve it and the Department with a copy of the amendments to its appeal.

Board Rule 1021.32(a) states,

> Pleadings, submittals, briefs and other documents filed in proceedings pending before the Board, when filed or tendered to the Board, shall be served upon participants in the proceeding. The service shall be made by delivering in person, or by mailing, properly addressed with postage prepaid.

25 Pa. Code § 1021.32(a). Potts Contracting was required by the Board rule to serve the other parties with a copy of the November 10, 1997 amendments. Since Potts Contracting, however, was acting without counsel at the time and the Board itself overlooked that Potts Contracting's officer failed to serve the other parties with the filing, we will be lenient on Potts Contracting for failure to comply with the Board's rule and only require that they serve a copy of the amendments to the appeal as soon as possible.

Accordingly, we enter the following order.

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[4] By Board letter dated November 18, 1997 Judge Coleman reminded Potts Contracting that under Board Rule 1021.22 corporations are required to be represented by an attorney. After several extensions Potts Contracting obtained counsel who filed his notice of appearance on February 11, 1998.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

POTTS CONTRACTING CO., INC.	:	
	:	
v.	:	**EHB Docket No. 97-236-C**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and HL&W COAL COMPANY	:	
Permittee	:	

ORDER

AND NOW this 8th day of June, 1998 it is ordered that

1) HL&W Coal Company's motion for judgment on the pleadings is denied; and

2) Potts Contracting is directed to serve the other parties with a copy of the November 10, 1997 amendments to the appeal.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: June 8, 1998

See following page for service list.

c: **DEP Bureau of Litigation**
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kh/bl

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

DUQUESNE LIGHT COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 97-259-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and ANTHRACITE REGION INDEPENDENT POWER PRODUCERS ASSOCIATION, Intervenor, and INTER-POWER/AHLCON PARTNERS, L.P., Intervenor	:	**Issued:** June 8, 1998

OPINION AND ORDER ON PETITION FOR RECONSIDERATION

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

Appellant filed a Petition for Reconsideration stating that the Board mistakenly concluded that Appellant's response to a motion to dismiss was untimely, and incorrectly believed that Intervenor, Inter-Power/AHLCON Partners, filed a motion to dismiss prior to the Board's dismissal of this appeal. The Board has reviewed the record and has determined that there are no documents to support Appellant's assertions. We have reconsidered our previous opinion and considered Appellant's response to the motion to dismiss. However, there are no legal grounds on which to defeat the Motion to Dismiss.

OPINION

This appeal stems from the Environmental Quality Board's (EQB) final rule to amend

Chapters 121 and 123 of Title 25 of the Pennsylvania Code (entitled "Nitrogen Oxide Allowance Requirements"). In February, 1998 the Department filed a motion to dismiss alleging that this Board lacks jurisdiction over the appeal because Duquesne has not challenged a Department action and has not identified any Department actions in its Notice of Appeal.[1] Inter-Power/AHLCON Partners, L.P. also filed a motion to dismiss in which it raised similar allegations including that this Board lacks jurisdiction, that the claim was not ripe for adjudication, that Duquesne lacks standing to appeal, that the appeal is in part untimely, and that the relief requested is beyond the jurisdiction and authority of the Board. On April 28, 1998 the Board issued an Opinion and Order granting the motions and dismissing the appeal on the grounds that the Board lacks jurisdiction over pre-enforcement challenges to EQB regulations. In the opinion, we made a reference to Duquesne's late filing of a response and Inter-Power/AHLCON's motion.

Duquesne filed a Petition for Reconsideration of the Board's decision on May 7, 1998. Duquesne contends that the Board erred when it refused to consider Duquesne's response to the Department's motion and when it considered Inter-Power's Motion to Dismiss.

The Department filed its response on May 15, 1998 in which it asserts that Duquesne's petition should be denied. The Department contends that Duquesne's attempt to create jurisdiction in the Board by arguing that the Department's participation in the EQB's rulemaking process amounted to an "action" of the Department must fail because the law is clear that pre-enforcement review is not within the Board's authority.

---

[1] Anthracite Region Independent Power Producers Association (Anthracite) and Inter-Power/AHLCON Partners, Inc. L.P. filed Petitions to Intervene, both of which were granted. Attached to Inter-Power's petition to intervene was a petition to dismiss.

Intervenors, Inter-Power/AHLCON and Anthracite, filed their responses on May 18, 1998. Both assert that Duquesne failed to present compelling or persuasive reasons for the Board to reconsider its April 28, 1998 Opinion and Order and that the Board lacks subject matter jurisdiction over this appeal.

Under Board Rule 1021.124, "a petition for reconsideration of a final order shall be filed within 10 days of the date of the final order. Reconsideration is within the discretion of the Board and will be granted only for compelling and persuasive reasons. ..." 25 Pa. Code § 1021.124(a). Following the issuance of the opinion, Duquesne timely filed the petition currently before the Board. After reviewing the case file, as well as the notes of the conference call, we find nothing in the record which supports Duquesne's assertions that Judge Coleman granted an extension for the filing of the response to the motions to dismiss and furthermore, nothing indicates that Inter-Power/AHLCON Partners, L.P. did not file a motion to dismiss when it filed its petition to intervene on February 25, 1998. In fact, Inter-Power/AHLCON Partners, L.P. stated that it was filing its motion as if it already was a party, assuming that its petition to intervene would be granted. Consequently, when the Board granted the petition to intervene it recognized the motion to dismiss. However, in spite of all of this, we are persuaded by Mr. Downey's affidavit and the arguments advanced by Mr. Cassidy that Duquesne may have been misled by statements made during the March 13, 1998 conference call. We have considered Duquesne's response to the motion to dismiss prior to rendering this opinion.

While the arguments made by Duquesne are well constructed and artfully presented, we are not convinced that our previous opinion was in error. The EQB has the authority to promulgate regulations, while the Department has the duty to administer and enforce those regulations. Absent

evidence to the contrary, we interpret the disputed language in 25 Pa. Code § 123.114 and 115[2] as sections of the regulations which specifically detail the enforcement duties of the Department. In spite of these assertions by Duquesne, it is well established law that the Board lacks jurisdiction over pre-enforcement challenges to EQB's regulations and this is the basis of Duquesne's appeal. The Board affirms our original decision that we lack jurisdiction over pre-enforcement challenges to EQB regulations.

Accordingly, we enter the following order.

---

[2] Memorandum of Duquesne Light Company, Inc. in Opposition to the Motion of the Pennsylvania Department of Environmental Protection to Dismiss Appeal p.7

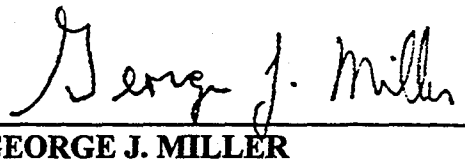
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DUQUESNE LIGHT COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 97-259-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ANTHRACITE REGION INDEPENDENT POWER PRODUCERS ASSOCIATION, Intervenor, and INTER-POWER/AHLCON PARTNERS, L.P., Intervenor	:	

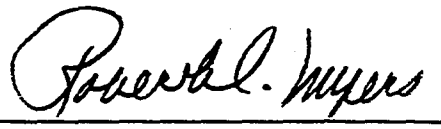
ORDER

AND NOW, this 8th day of June, 1998, after a careful and detailed review of the file on this case, we affirm our Order of April 28, 1998.

ENVIRONMENTAL HEARING BOARD

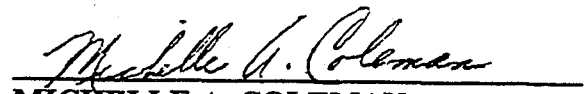


GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: June 8, 1998

c: **DEP Bureau of Litigation**
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TELECOPIER 717-783-4738

WILLIAM T. PHILLIPY I
SECRETARY TO THE BOA

READING ANTHRACITE COMPANY	:	
	:	
v.	:	**EHB Docket No. 95-196-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, PORTER ASSOCIATES, INC., Permittee, and KOCHER COAL COMPANY, INC., Intervenor	:	**Issued:** June 19, 1998

OPINION AND ORDER ON APPELLANT'S PETITION FOR LEAVE TO FILE APPEAL NUNC PRO TUNC

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A petition for leave to file an appeal nunc pro tunc is denied. The Board will not grant leave to file an appeal nunc pro tunc on the basis that the published notice was inadequate where the petitioner waited at least 73 additional days after receiving actual notice before filing his petition.

OPINION

The factual backdrop of this appeal has been set forth in detail in our February 17, 1998, opinion and order. The appeal was initiated with the September 11, 1995, filing of a notice of appeal by Reading Anthracite Company (Reading). Reading challenges the Department of Environmental Protection's (Department) renewal of an anthracite surface mining permit (permit renewal) under the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §1396.1-1396.19a (Surface Mining Act). The permit renewal authorizes Porter Associates, Inc. (Porter) to operate a surface mine and dispose of coal refuse and fly ash or bottom

ash (collectively, ash) on a site (site) in Porter Township, Schuylkill County.

Kocher Coal Company (Kocher) joined the proceedings on April 4, 1996, when the Board granted a Kocher petition to intervene. Kocher had agreed to purchase the site in a May 1, 1967, contract with Reading.

Prior to issuing the permit renewal, the Department took a number of other actions with respect to the site. On June 25, 1990, the Department issued a surface mining permit (permit) to Kocher. On January 23, 1991, it modified the permit, pursuant to a Kocher request, to allow ash disposal at the site. And, on October 3, 1991, the Department granted a request to transfer the modified permit (permit transfer) to Porter, in accordance with an agreement between Porter and Kocher.

The Board has issued four previous opinions in this appeal. We denied a motion to dismiss filed by Kocher and a motion for summary judgment/motion to limit issues filed by Porter. *See Reading Anthracite Company v. DEP*, 1997 EHB 581. We granted in part and denied in part a Kocher motion for summary judgment and a Porter motion for summary judgment/motion to limit issues. *See Reading Anthracite Company v. DEP*, EHB Docket No. 95-196-C (Opinion issued February 17, 1998). And we denied Kocher and Reading's petitions for reconsideration of our February 17, 1998, opinion and order. *See Reading Anthracite Company v. DEP*, EHB Docket No. 95-196-C (Opinions issued March 11 and 12, 1998).

In its notice of appeal, Reading averred that:

(1) it still owns the site;

(2) it gave Kocher the right to occupy the site as part of the May 1, 1967, contract, but never gave Kocher the right to allow others to conduct surface mining activities or operate an ash disposal facility on site;

(3) Kocher identified itself--not Reading--as the owner of the site on the consent to enter form submitted with the original surface mining permit application;

(4) neither the original surface mining permit application nor the Department's later actions show that Reading gave Porter the right to mine coal, or consented to Porter's use of the site for surface mining activities or ash disposal.

Our February 17, 1998, opinion and order narrowed the issues in the appeal, however. There, we granted in part and denied in part Kocher's motion for summary judgment and Porter's motion for summary judgment/motion to limit issues. We granted the motion with respect to Reading's allegation that the Department erred by approving the permit renewal without Porter having obtained Reading's consent to enter the site. The doctrine of administrative finality, we explained, barred Reading from making this challenge because Reading failed to appeal either the permit or the permit transfer within 30 days of the *Pennsylvania Bulletin* publishing notice of the actions. However, we denied the motion with respect to Reading's claim that the Department erred by issuing the permit renewal because Reading never consented to ash disposal activities at the site. Porter and Kocher argued that the doctrine of administrative finality barred Reading from raising the issue in an appeal of the permit renewal because Reading could have raised the issue previously, in an appeal of the permit modification. Although the permit modification did address ash disposal activities on site, we held that Porter and Kocher had failed to establish that the doctrine of administrative finality applied because they did not demonstrate that the permit modification was final with respect to Reading. After explaining that a third-party appeal is timely if filed within 30 days of the *Pennsylvania Bulletin* publishing notice of the action, we concluded: "Since there is no indication here that the *Pennsylvania Bulletin* ever published notice of the permit modification, Porter and

Kocher have failed to prove that Reading failed to file a timely appeal of the modification, and the administrative finality doctrine does not apply." *Reading Anthracite Company v. DEP*, EHB Docket No. 95-196-C (Opinion issued February 17, 1998) p. 14.

On May 4, 1998, Reading filed a petition for leave to file an appeal nunc pro tunc, as well as a supporting memorandum of law. In its petition, Reading argues that the Board should grant it leave to file an appeal nunc pro tunc to raise a version of the argument that we dismissed in our February 17, 1998, opinion and order: namely, that the Department erred by issuing the permit renewal without Porter having obtained Reading's consent to enter the site.[1] According to Reading, it is entitled to appeal nunc pro tunc because:

> (1) notice published in the *Pennsylvania Bulletin* of the Department actions did not contain sufficient information to put Reading on notice that its property was involved;
>
> (2) where a person applies for a surface mining permit to mine land on another's property, the Department must require the applicant to supply a contract, title, or other documentation showing that he has a right to enter the property;
>
> (3) Kocher fraudulently listed the source of the title as "unknown" on the consent to enter form submitted with the permit transfer request;
>
> (4) the consent to enter form filed with the permit transfer application did not contain sufficient information to put Reading on notice that its property was involved; and,
>
> (5) although Kocher signed a landowner consent agreement as part of the permit

---

[1] Although our February 17, 1998, opinion explained that this issue should have been raised previously, with respect to either the permit or the permit transfer, Reading does not indicate which of these two Department actions it intends to appeal nunc pro tunc. Since the appeal at the instant docket number, EHB Docket No. 95-196, relates to Reading's appeal of the renewal, Reading should have filed new notices of appeal to the permit and permit transfer, along with petitions to file an appeal nunc pro tunc, rather than simply filing a petition to appeal nunc pro tunc at this docket number. For purposes of resolving Reading's petition, however, we have ignored these procedural irregularities. They do not affect our disposition of the petition.

transfer request and identified the source of its title as "unknown," the Department failed to require that Kocher produce documentation showing how it acquired title to the property.

On May 12, 1998, Porter filed a memorandum of law opposing Reading's petition. In its memorandum, Porter argues that Reading should not be allowed to file an appeal nunc pro tunc because:

> (1) to prevail on a request to appeal nunc pro tunc on the theory that published notice was inadequate, one who receives actual notice after publication of notice in the *Pennsylvania Bulletin* must show that he filed his appeal within 30 days of receiving actual notice; and,
>
> (2) even assuming the *Pennsylvania Bulletin* did not publish adequate notice of the Department's previous actions, Reading had actual notice of those actions by at least September 11, 1995, when it filed its appeal of the permit renewal.

On May 26, 1998, the Department and Kocher filed separate letters indicating that they joined in Porter's memorandum of law opposing Reading's petition.

Section 1021.55(f) of the Board's rules, 25 Pa. Code § 1021.55(f), governs nunc pro tunc appeals. It provides: "The Board upon written request and for good cause shown may grant leave for filing of any appeal nunc pro tunc, [sic] the standards applicable to what constitutes good cause shall be the common law standards...." In this regard, the Commonwealth Court has held that nunc pro tunc appeals before the Board "will be allowed only where there is a showing of fraud, breakdown in the administrative process or unique and compelling factual circumstances establishing a non-negligent failure to file a timely appeal." *Falcon Oil v. Department of Environmental Resources*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992). The Commonwealth Court has also held that, where a petitioner requests to file an appeal nunc pro tunc because the published notice of an action is inadequate, leave to file is inappropriate if the petitioner subsequently received actual notice yet

still sat on his rights. *See Grimaud v. Department of Environmental Resources*, 638 A.2d 299 (Pa. Cmwlth. 1994). The Court noted, "Where, as here, the parties sat on their rights for almost six months *after* learning about the DER's issuance of the NPDES permit before filing their petition for allowance of appeal nunc pro tunc, their argument that individual notice would have made a difference lacks merit." *Grimaud*, 638 A.2d at 303.

Reading's petition for leave to file an appeal nunc pro tunc lacks merit for the same reason the Commonwealth Court found fatal to the petition in *Grimaud*: Reading's conduct after receiving actual notice makes it seem unlikely that adequate public notice would have made a difference. Even assuming that the notice published in the *Pennsylvania Bulletin* was inadequate, and that Reading did not have actual notice on September 11, 1995 (when Reading filed its notice of appeal to the permit renewal), or September 15, 1997 (when the parties submitted an exhaustive stipulation of facts[2]), or February 17, 1998 (when we issued our decision on Kocher's motion for summary judgment and Porter's motion for summary judgment/motion to limit issues), Reading clearly had actual notice by March 12, 1998, when we issued our opinion and order on its petition for reconsideration of our February 17, 1998, opinion and order. Nevertheless, Reading failed to file its petition for leave to file an appeal nunc pro tunc until 73 days later, on May 4, 1998. Since Reading sat on its rights for much longer than 30 days after receiving actual notice of the actions it now seeks to challenge, we find it difficult to accord much weight to Reading's argument that publication of adequate notice would have made a difference.

Accordingly, we deny Reading's petition for leave to file an appeal nunc pro tunc.

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[2] The stipulation of facts included, among other things, copies of Module 5 of the permit application, the permit, the permit modification, the landowner consent form and permit transfer application, and the Department's approval of the permit transfer.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

READING ANTHRACITE COMPANY	:	
	:	
v.	:	**EHB Docket No. 95-196-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, PORTER ASSOCIATES, INC., Permittee, and KOCHER COAL COMPANY, INC., Intervenor	:	

ORDER

AND NOW, this 19th day of June, 1998, it is ordered that Reading's petition for leave to file an appeal nunc pro tunc is denied.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: June 19, 1998

c: **DEP Bureau of Litigation:**
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Wilkes-Barre, PA

For Intervenor:
Charles E. Gutshall, Esq.
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

EAGLESHIRE CORPORATION and CHARLES F. ERICKSON	:	
v.	:	**EHB Docket No. 96-224-MR (Consolidated with 96-225-MR)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 19, 1998**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

by Robert D. Myers, Administrative Law Judge

Synopsis:

Summary judgment is granted in a bond forfeiture case based on administrative finality where Appellants failed to appeal the issuance of a permit and failed to appeal the issuance of compliance orders, a civil penalty assessment, and a permit suspension which served as the basis for the bond forfeiture. Summary judgment is also granted where the Appellant claimed that the Department failed to provide proper notice of the bond forfeiture, but the Appellant did not produce evidence of facts essential to the appeal of that issue.

OPINION

On October 24, 1996, Eagleshire Corporation (Eagleshire) filed a Notice of Appeal with the Board challenging the Department of Environmental Protection's (Department) September 23, 1996 forfeiture of a $67,227.20 Letter of Credit collateral bond. Eagleshire had posted the bond on a site

in Paint Township, Somerset County, under SMP No. 56921601 (Permit). In the Notice of Appeal, Eagleshire asserts, essentially, that it operates a tipple[1] on the site, and the Department has no authority to require a surface mining permit for a tipple. Eagleshire's appeal was docketed at EHB Docket No. 96-224-MR.

Charles F. Erickson (Erickson), the President of Eagleshire and Guarantor to the Letter of Credit, also filed a Notice of Appeal on October 24, 1996. In addition to the issues raised by Eagleshire, Erickson contends that the Department failed to give him proper notice of the bond forfeiture. Erickson's appeal was docketed at EHB Docket No. 96-225-MR. The two appeals were consolidated at the parties' request on October 10, 1997.

Initially, the parties attempted to resolve the issues raised on appeal through settlement negotiations. When their efforts failed, the matter was scheduled for hearing. Prior to hearing, however, the Department filed a Motion for Leave to File a Motion for Summary Judgment and to Continue the Scheduled Hearing. Eagleshire and Erickson (Appellants) had no objection to this motion, and the Board allowed the Department to file the present Motion for Summary Judgment (Motion) and supporting Memorandum of Law. On May 15, 1998, Appellants filed an Answer and New Matter and a Memorandum of Law in response to the Department's Motion. On June 3, 1998, the Department filed a Reply to that response. The Department's Motion sets forth the following allegations of fact.

The Department issued the Permit to Eagleshire on June 28, 1995, and Appellants did not file an appeal. On December 12, 1995, the Department issued Compliance Order No. 95-3-118

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[1] A "tipple" is a place where, or an apparatus by which, coal cars are loaded or emptied. *Webster's Ninth New Collegiate Dictionary*, 1237 (1989).

because of Eagleshire's failure to comply with the Permit's surface water monitoring requirements. On December 20, 1995, the Department issued Compliance Order No. 95-3-121 because of Eagleshire's failure to comply with Compliance Order No. 95-3-118. On March 18, 1996, the Department issued an Assessment of Civil Penalty related to Compliance Order No. 95-3-121. On April 5, 1996, the Department suspended Eagleshire's Permit and informed Eagleshire that the Department intended to forfeit the bonds posted on the site. Eagleshire did not appeal any of these Department actions. (Motion at paras. 4-5, 7-8, 11-12, 15-17, 20-21, 24, 27-29.)

On April 15, 1996, the Department issued Compliance Order No. 96-3-047 because Eagleshire failed to maintain the water quality of the final treatment pond on the site. On April 23, 1996, the Department issued Compliance Order No. 96-3-053 because Eagleshire failed to comply with Compliance Order No. 96-3-047. Eagleshire did not appeal these Department actions. (Motion at paras. 30-31, 34-35, 38-39, 43-44, 47.)

On July 17, 1996, the Department issued Compliance Order No. 96-3-105 because Eagleshire failed to adequately maintain collection ditch CD-2. On July 24, 1996, the Department issued Compliance Order No. 96-3-111 because Eagleshire failed to comply with Compliance Order No. 96-3-105. Eagleshire did not appeal these Department actions. (Motion at paras. 48-49, 52-53, 56-58, 61-62, 65.)

On August 21, 1996, the Department issued Compliance Order No. 96-3-132 because Eagleshire discharged water from a breach in collection ditch CD-2 and from the final treatment pond which did not meet applicable water quality standards. On August 29, 1996, the Department issued Compliance Order No. 96-3-135 because Eagleshire did not comply with Compliance Order No. 96-3-132. Eagleshire did not appeal these Department actions. (Motion at paras. 66-67, 70-71,

74-76, 79-80, 83.)

Based on the violations of law identified above, the Department declared the collateral bond forfeited on September 23, 1996.[2]

I.

The Department asserts in its Motion that it is entitled to judgment as a matter of law under the doctrine of administrative finality because Appellants never appealed the issuance of the Permit and because Eagleshire never appealed the subsequent compliance orders, civil penalty assessment, and permit suspension. Appellants admit that they never appealed the Permit issuance, the compliance orders, the civil penalty assessment, and the permit suspension. However, Appellants argue that it was not necessary to do so because the Department had no authority to issue the Permit for a mere tipple operation.

The doctrine of administrative finality focuses on the failure of a party aggrieved by an administrative action to pursue a statutory appeal remedy. *Lucky Strike Corporation v. DEP*, 1997 EHB 787. In *Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765, 767 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977), the Commonwealth Court explained the doctrine as follows:

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

---

[2] It is interesting to note that, on November 21, 1996, January 10, 1997, and March 20, 1997, after the bond forfeiture, the Department assessed civil penalties in connection with the various compliance orders, and Eagleshire did not appeal any of those assessments.

In this case, Appellants did not appeal the Permit issuance, the compliance orders, the civil penalty assessment, or the permit suspension. Each of these was an appealable action. Because Appellants filed no appeal, the violations of law set forth therein are final and unassailable in bond forfeiture proceedings. 35 P.S. § 7514(c). When there are violations of law, like those here, the Department is not only justified, but has a mandatory duty to forfeit the bonds. *Snyder v. Department of Environmental Resources*, 588 A.2d 1001 (Pa. Cmwlth. 1991); *Lucky Strike Corporation.* Accordingly, the Department is entitled to judgment as a matter of law.[3]

II.

The Department also seeks summary judgment with respect to Erickson's claim that he is Guarantor to the Letter of Credit and did not receive notice of the bond forfeiture. The Department avers that it does not possess any documentation which indicates that Erickson is Guarantor to the Letter of Credit. (Motion at para. 105.) In addition, none of the bonding instruments provides that Erickson receive notice of a bond forfeiture. (Motion at para. 101-02.) Thus, there appears to be no basis for Erickson's claim.

In his response to the Department's Motion, Erickson asserts that he posted a Certificate of Deposit in the amount of the Letter of Credit. However, Erickson offers no evidence to support this assertion. Although Erickson submitted an affidavit in opposition to the Motion, his affidavit does not address the Letter of Credit at all.[4] (*See* Affidavit of Charles F. Erickson, Jr.) In addition, the

---

[3] Appellants cannot avoid summary judgment by arguing that the Department had no authority to issue the Permit. The time to challenge the Department's authority to issue the Permit was within 30 days of issuance of the Permit. It is too late now to raise that argument.

[4] Erickson does not even address the notice issue in his Memorandum of Law in opposition to the Motion.

Department is correct that the bonding instruments do not require the Department to notify Erickson of a bond forfeiture. (Motion, Affidavit of Robert Slatick, Exhibits 1 & 2.)

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.C.P. No. 1035.2(2). Because Erickson has produced no evidence to show that he is Guarantor to the Letter of Credit or to show that he was entitled to receive notice of the bond forfeiture, we enter summary judgment in favor of the Department.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EAGLESHIRE CORPORATION and CHARLES F. ERICKSON	:	
v.	:	**EHB Docket No. 96-224-MR (Consolidated with 96-225-MR)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 19th day of June, 1998, the Motion for Summary Judgment filed by the Department of Environmental Protection is granted.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 96-224-MR
(Consolidated with 96-225-MR)

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: June 19, 1998

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

THROOP PROPERTY OWNER'S ASSOCIATION, et al.	:	
v.	:	**EHB Docket No. 97-164-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, Permittee	:	**Issued: June 19, 1998**

OPINION AND ORDER ON MOTION TO STRIKE AND MOTION FOR PARTIAL SUMMARY JUDGMENT

by Robert D. Myers, Administrative Law Judge

Synopsis:

A Motion to Strike affidavits submitted in opposition to a motion for summary judgment under Pa. R.C.P. No. 4019(i) is denied. First, Pa. R.C.P. No. 4019(i) precludes testimony *at a hearing* where the witnesses were not identified during discovery, and no hearing has been scheduled here. Second, the rules of discovery allow parties to supplement their discovery answers any time prior to hearing, Pa. R.C.P. No. 4007.4, and the party here clearly indicated in the discovery responses that the answers were incomplete and would have to be supplemented.

A Motion to Strike one paragraph from an affidavit because it would be inadmissible under the "best evidence rule" is denied. The "best evidence rule" does not apply where the accuracy of the evidence is not disputed and where the original document is in the hands of the opposing party.

A Motion to Strike two exhibits because they allegedly had not been properly authenticated

is denied. One of exhibits is not in dispute, and the other does not require authentication because it is a deposition exhibit.

A Motion for Partial Summary Judgment is granted in part and denied in part. First, the Motion alleges that Appellants lack standing to challenge *Permittee's* public notice of a landfill expansion under 25 Pa. Code § 271.141 because Appellants were not harmed by the public notice. Summary judgment is denied on this issue because the record, viewed in the light most favorable to the nonmoving party, shows that the alleged defects in the public notice did harm Appellants. However, summary judgment is granted with respect to the *Department's* public notice because Appellants did not show that they were harmed by it.

Second, summary judgment is entered in favor of Permittee where Appellants evidently claim that, contrary to 25 Pa. Code § 271.201(a)(6), Permittee's landfill expansion is not mentioned in the municipal waste plans of counties other than the host county. Appellants' Notice of Appeal does not raise this issue.

Finally, the Motion alleges that the Board lacks jurisdiction to interpret and enforce a 1989 Agreement pertaining to Permittee's landfill. Summary judgment is denied on this question because the actual issue raised in Appellants' Notice of Appeal is whether the Department properly considered public comments about the 1989 Agreement under 25 Pa. Code § 271.143. Certainly, the Board has jurisdiction to review the Department's action under 25 Pa. Code § 271.143.

OPINION

On July 30, 1997, Throop Property Owner's Association (Fred Soltis, President), Andy Kerecman, and Sharon Soltis-Sparano (collectively, Appellants) filed a Notice of Appeal with the

Board challenging the Department of Environmental Protection's (Department) June 10, 1997 issuance of a Major Permit Modification (Modification) to Keystone Sanitary Landfill (Permittee) under Solid Waste Permit No. 101247. The Modification allows Permittee to pursue Phase II Site Development at its landfill in Dunmore and Throop Boroughs, Lackawanna County. In their Notice of Appeal, Appellants contend, *inter alia*, that the Department improperly issued the Modification because: (1) the public notices published by Permittee and the Department were inaccurate, incomplete, and misleading;[1] (2) the host county plan does not address the landfill expansion;[2] and (3) the Department did not properly consider public comments about a 1989 agreement between Permittee, Throop Borough, and Throop Property Owner's Association.[3]

On March 31, 1998, Permittee filed the present Motion for Partial Summary Judgment (Motion) and a supporting Memorandum of Law. Permittee claims that it is entitled to summary judgment with respect to the above three issues because: (1) Appellants did not suffer any harm as a result of the alleged deficiencies in the public notices; therefore, Appellants lack standing to challenge them; (2) Appellants lack standing to complain that the expansion is not mentioned in county plans *other than* the host county plan; and, (3) the Board lacks jurisdiction to interpret and enforce the 1989 agreement, and, moreover, the Borough of Throop has not been joined as an indispensable party.

On April 27, 1998, Appellants filed their Response and a Memorandum of Law in opposition

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[1] *See* 25 Pa. Code §§ 271.141-271.142.

[2] *See* 25 Pa. Code § 271.201.

[3] *See* 25 Pa. Code § 271.143.

to the Motion. On May 14, 1998, Permittee filed a Memorandum of Law in reply to Appellants' Response, Supplemental Documents in support of the Motion, and a Motion to Strike Exhibits 10, 11 and 12 and Portions of Exhibit 8 of Appellants' Response (Motion to Strike). On May 29, 1998, Appellants filed an Answer in opposition to the Motion to Strike. We shall first consider Permittee's Motion to Strike.

I. Motion to Strike

In the Motion to Strike, Permittee asks the Board to strike: (1) Exhibit 11 of Appellants' Response, which is the affidavit of Appellants' counsel, Charles W. Elliott, Esquire; and (2) portions of Exhibit 8 of Appellants' Response, specifically the affidavits of Bob Bolus, Joseph Palumbo, and Larry Hartshorn. Permittee contends that these affidavits should be stricken under Pa. R.C.P. No. 4019(i) because Appellants failed to identify the individuals as witnesses in Appellants' Response to Permittee's First Set of Interrogatories and Request for Production of Documents (Response to Interrogatories).

Pa. R.C.P. No. 4019(i) states that "[a] witness whose identity has not been revealed as provided in this chapter shall not be permitted to testify on behalf of the defaulting party *at the trial of the action.*" Pa. R.C.P. No. 4019(i) (emphasis added.) First, this appeal has not yet been scheduled for hearing. Second, the discovery rules allow parties to supplement responses to discovery requests; indeed, a request to supplement prior responses may be made *at any time prior to trial.* Pa. R.C.P. No. 4007.4. Here, Appellants state clearly in their Response to Interrogatories that the responses are necessarily incomplete because of time constraints, and that Appellants reserve the right to supplement any and all responses. (Motion, Exhibit A; Response to Interrogatories at 9 and 11.) Therefore, we will not strike the affidavits from Appellants' Response.

Next, Permittee asks that the Board strike Paragraph 4 of Elliott's affidavit pursuant to Pa. R.C.P. No. 1035.4 because it is inadmissible as evidence under the best evidence rule. Paragraph 4 of Elliott's affidavit states as follows:

> 4. I have personally reviewed the application for the 1997 major permit modification for the Keystone Sanitary Landfill, Inc. facility. This review was conducted both at the regional offices of the Department of Environmental Protection and at the offices of the permittee's counsel. To the best of my knowledge, the 1989 Agreement between Keystone Landfill, Inc., the Throop Property Owner's Association, and the Borough of Throop was only submitted as part of the Form 45, "Protection of Capacity" form, which is attached to the "Appellants' Response to 'Keystone Sanitary Landfill, Inc.'s Motion for Partial Summary Judgment'" as Exhibit 12.

(Appellants' Response, Exhibit 11, para. 4.)

Pa. R.C.P. No. 1035.4 states that, with respect to a motion for summary judgment, supporting and opposing affidavits shall set forth facts as would be admissible in evidence. Although the Board is not bound by the technical rules of evidence, 25 Pa. Code § 1021.107, the Board has applied the "best evidence rule" in its proceedings. *Wood v. DER*, 1994 EHB 347, 374-75; *Al Hamilton Construction Co. v. DER*, 1992 EHB 1366. The "best evidence rule" limits the method of proving the terms of a writing to the presentation of the original writing, where the terms of the instrument are material to the issue at hand, unless the original is shown to be unavailable through no fault of the proponent. *Al Hamilton Construction Co.*, 1992 EHB at 1369. The "best evidence rule" does not apply unless the party challenging the evidence disputes the accuracy of the evidence. *Id.*

The best evidence of Form 45 is the original document which is not in Appellant's possession but is in the possession of the Department. Moreover, Permittee does not dispute the accuracy of the copy of Form 45 attached to Elliott's affidavit and identified as Exhibit 12. In fact, the affidavit of Joseph E. Dexter, filed in support of the Motion, states that the 1989 Agreement (a copy of which

is attached as an exhibit) was filed with the Department as part of the application. It is that Agreement that is relevant to this appeal and there is no dispute about its content.

Finally, Permittee asks that the Board strike Exhibits 10 and 12 of Appellants' Response because they have not been authenticated and, as a result, are not admissible in evidence. As already noted, Exhibit 12 is Form 45 and is not in dispute. Exhibit 10 is an August 29, 1996 letter from the Department's Mark R. Carmon to Appellant Kerecman. It is an exhibit to Kerecman's deposition and was identified in that document. The authentication of documents submitted in summary judgment proceedings applies only to documents referred to in supporting affidavits. Thus, it is not applicable to Exhibit 10.

II. Motion for Partial Summary Judgment

A. Public Notice

Permittee argues in its Motion that Appellants lack standing to challenge the public notices published by Permittee and the Department. We shall first examine whether Appellants have standing to challenge *Permittee's* June 1996 public notice in the *Scranton Times*. Appellants assert that Permittee's public notice misled the public because it referred to Permittee's application as Phase II Site Development under Permit No. 101247 instead of a Major Permit Modification. Permittee contends that, even if the language in the notice misled *the public*, Appellants themselves were not harmed.

The municipal waste regulations at 25 Pa. Code § 271.141(a) require a permit applicant to publish notice of the filing of the application "once a week for 3 consecutive weeks ... in a newspaper of general circulation in the area where the facility or proposed facility is located." This type of public notice is mandated by many environmental statutes as an additional requirement to

the notice published by the Department in the *Pennsylvania Bulletin*.[4] The obvious purpose is to inform local citizens, who are likely to experience the greatest impact from the permitted activity, that an application has been filed.

Among other things, the published notice is to state that the Department will accept comments from the public during a 60-day period running from the date of the publication. 25 Pa. Code § 271.143(a) provides that the Department "may" conduct a public hearing on the application "whenever there is significant public interest or the Department otherwise deems a hearing to be appropriate." If a public hearing is held, the Department is required to prepare a summary of the comments, to provide responses thereto and cite the supporting reasons.

The right of the public to comment and be heard under these regulations is consequential. It may convince the Department to hold a public hearing and force the Department to respond in writing to every issue raised at the hearing. In the process, the Department will have to focus on the citizen concerns and satisfy itself that the permit, in its final form, addresses those it finds to be legitimate. The Department is not required to adopt the comments, but it is required to consider them. *Somerset County Commissioners v. DEP*, 1996 EHB 351. The end result is bound to be a better Department action because it will be based on an expanded review.

Another benefit was addressed in our opinion in *Envirotrol, Inc. v. DER*, 1993 EHB 1495, 1503-04. While it dealt with hazardous waste, it applies also to municipal waste.

> The public notice and comment provisions serve an important purpose in the hazardous waste permitting program. Residents in many communities become

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[4] *See, e.g.*, 35 P.S. § 691.307 (Clean Streams Law), 35 P.S. § 721.11 (Safe Drinking Water Act), 52 P.S. § 1396.4(b) (Surface Mining Conservation and Reclamation Act), 52 P.S. § 3310(a) (Noncoal Surface Mining and Reclamation Act).

> apprehensive when they discover that a facility in their area has requested authorization to handle "hazardous waste." They may be unsure of the types of waste the facility will handle, the reason the waste is regarded as hazardous, the potential threat the waste may pose, or the measures that the facility plans to employ to protect the community. They may have other questions. The public comment provisions provide the public with a vehicle to make their concerns known to the Department and ensure that the Department will address all the significant concerns expressed. *Given the contentious and emotionally-charged environment in which many hazardous waste permit proceedings take place, this exchange of information is crucial. It serves an essential cathartic and educational purpose, one which would be frustrated were the public not given an opportunity to comment on amendments to permit applications.* (Emphasis added.)

It is axiomatic that, in order to reap the benefits underlying the public comment policy, the notice to the public must be crafted so as to inform the ordinary citizen of what is being sought in the application and then published in a newspaper likely to reach those targeted citizens. We admonished the Department in *Hansloven v. DER*, 1992 EHB 1011, 1023, that the "requirement of public notice is the foundation for public involvement in the permit issuance process, as mandated by the Legislature. As such, it is too important to be left to the discretion of the applicant without any but the most cursory [Department] oversight." The particular newspaper was at issue in *Hansloven* but the content of the notice is just as critical.

The notice involved here was published in *The Scranton Times* on June 5, 12 and 19, 1996, and Appellants make no complaint about the choice of newspaper. They do complain about the content, however. The size of the notice, attached as an exhibit to Permittee's Motion, is substantial -- 4¼" x 6", and contains a good deal of information. It refers to the filing of an application for the "Phase II Site Development of Permit No. 101247" consisting of a "186 acre double lined municipal solid waste disposal sanitary landfill and related support stormwater, wastewater, and gas management facilities" to be located "along the easterly flank of the property included in the PaDEP

Permit No. 101247 in the Boroughs of Dunmore and Throop, Lackawanna County." The notice goes on to state that the Phase II Site Development is predicated on providing continuous service to the landfill's customer base and "does not contain a request to increase the present average daily, nor maximum daily tonnage of municipal solid waste." Three locations are designated for public review of copies of the application and details of the comment period are given.

Despite the apparent openness of this published notice, Appellants claim that it is misleading and deliberately so. The notice failed to disclose that the application was for a major permit modification to include additional acreage that "nearly doubled the waste disposal area in size," calling it, instead, a Phase II Site Development on the same acreage as before involving only small changes to the existing permit. Permittee denies that there was anything misleading about the notice but argues, as noted above, that Appellants were not harmed because they learned the details of the application before the public hearing and had the opportunity to present their comments to the Department. Accordingly, they have no standing to challenge the content of the notice.

In order to have standing to contest a government action, one must have a substantial , direct, and immediate interest in the controversy. *Sprague v. Casey*, 520 Pa. 38, 550 A.2d 184 (1984). A party has a "substantial" interest so long as he has an interest which surpasses the common interest of all citizens in seeking compliance with the law. A party has a "direct" interest so long as he was harmed by the challenged action or order. A party has an "immediate" interest so long as there is a causal connection between the action or order complained of and the injury suffered by the party asserting standing. *Empire Coal Mining & Development, Inc. v. DER*, 623 A.2d 897, *appeal denied* 629 A.2d 1384 (Pa. Cmwlth. 1993). Where public notice is concerned, we have held that a party who had actual knowledge of the filing of an application in sufficient time to protect his interest has

no standing to challenge alleged deficiencies in the public notice. *Hopewell Township v. DER*, 1995 EHB 680; 1996 EHB 956. We will examine the record to see whether Appellants also are barred by actual knowledge, keeping in mind that, on a motion for summary judgment, the record must be reviewed in the light most favorable to the nonmoving party. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995.)

Appellant Sparano testified that, after reading Permittee's June 13, 1996[5] public notice, she did not think that Permittee's application involved a landfill expansion. (Sparano Deposition at 83.) Approximately one week later, Sparano spoke with Appellant Kerecman about the notice and learned otherwise. (Sparano Deposition at 83.) Appellant Kerecman testified that he called the Department after reading the notice and questioned Community Relations Coordinator, Mark R. Carmon, about Permittee's application. Carmon evidently indicated to Kerecman that Permittee's application involved some sort of landfill expansion. (Sparano Deposition at 82; Kerecman Deposition at 24.)

On August 5, 1996, Kerecman and Sparano together sought clarification from Carmon by submitting to him Questions and Comments regarding the "expansion." (Response, Exhibit 9.) Carmon responded in a letter dated August 29, 1996 and stated that Permittee was only applying for expansion of the "permitted disposal area" and was not applying for expansion of the landfill itself. (Response, Exhibit 10.) However, a day or two before a September 27, 1996 public hearing, Sparano and Kerecman were examining the Department's records and learned that Permittee's application involved *not only* adding 186 acres to the "permitted disposal area," *but also* adding 86

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[5] While Sparano used this date, the proof of publication states that the notice was published on June 5, 12 and 19, 1996. She probably saw the June 12, 1996 publication. The discrepancy, however, is immaterial.

acres to the overall permit area. (Sparano Deposition at 80-81, 83-84.) Because Carmon had given them false information and because the Department made them wait two or three weeks to see Department records, Sparano and Kerecman came to believe that Permittee and the Department were conspiring to keep the truth from the public. (Sparano Deposition at 81-84; Kerecman Deposition at 24.)

Permittee would have the Board deny Sparano and Kerecman standing to challenge the public notice because Sparano and Kerecman ultimately overcame the alleged defects in the public notice, because they were able to discover the truth despite the alleged misinformation disseminated by Carmon, and because they could participate to some extent in the September 27, 1996 public hearing. While we agree that these two individuals had actual knowledge of the contents of the application, we are not convinced at this point that they had it in sufficient time to protect their interests. Their knowledge was complete only a day or two before the public hearing, giving them very little time to prepare -- and very little time to arouse other people as well. Sparano testified that, without any *official* notice or documentation that Permittee was seeking to expand the landfill, she could not, with confidence, discuss the matter with her neighbors. (Sparano Deposition at 85.)

Kerecman also testified to the difficulty in getting people in the community to realize that the application involved an expansion. (Kerecman Deposition at 114.) As a result, the public hearing was sparsely attended and only five or six people spoke. Yet, this is a landfill that has generated intense controversy in the past, including appeals to this Board (EHB Docket Nos. 87-185-W, 88-028-W, 88-114-W, 88-320-W) which were terminated after the parties entered into the 1989 Agreement.

While, to our knowledge, this Board has never addressed the proposition, it appears to us to

be common knowledge that strong public opposition frequently influences whether an applicant proceeds with a project such as a landfill and whether the Department approves it. Lack of such opposition suggests to Department officials that the proposal is acceptable to those most likely to be impacted by it. This is especially true with respect to a facility that was highly controversial in the past.

We believe, therefore, that Appellants Sparano and Kerecman have alleged sufficient harm to give them standing to challenge the content of the public notice. We admonish them, however, that they must prove their harm at the hearing on the merits.

We must also address whether Appellant Throop Property Owner's Association has standing to challenge Permittee's public notice. An association has standing, as a representative of its members, where at least one of its members would have standing to appeal the challenged action. *Pennsylvania Social Services Union v. Department of Public Welfare*, 699 A.2d 807 (Pa. Cmwlth. 1997); *Del-Aware Unlimited, Inc. v. DER*, 1984 EHB 178. The record here indicates that Frederick Soltis, president of the association, had actual knowledge of the contents of the application but, like Sparano and Kerecman, had difficulty convincing members of the association that it requested a major permit modification. The affidavit of Joseph Barron states that he is a member of Throop Property Owner's Association; saw Permittee's public notice and did not think that Permittee's application involved a major permit modification; and if he had known otherwise, he would have attended the public meeting, voiced his opposition, and provided comments to the Department. (Response, Exhibit 8; Barron Affidavit.) Based on our discussions concerning Sparano and Kerecman, we conclude that Throop Property Owner's Association was harmed by the allegedly deficient public notice. Therefore, we deny Permittee's Motion with respect to the standing of

Throop Property Owner's Association to challenge Permittee's public notice.

Permittee's Motion also claims that Appellants lack standing to challenge the *Department's* public notice. However, we note that, in their Notice of Appeal, Appellants do not state any specific objection to the *Department's* public notice. Moreover, in their Response to Permittee's Motion, Appellants do not address the *Department's* public notice in any way. It appears to us that Appellants have abandoned any challenge to the *Department's* public notice. Therefore, we enter summary judgment in favor of Permittee on that issue.

B. Other County Plans

Permittee next argues that Appellants lack standing to contend that its landfill expansion is not mentioned in the municipal waste plans of counties *other than the host county*. Appellants claim in their Response to the Motion that they *do* have standing to make such a challenge under 25 Pa. Code § 271.201(a)(6). However, we note that this issue is not raised in Appellants' Notice of Appeal; therefore, it is deemed waived. 25 Pa. Code § 1021.51(e). The Notice of Appeal states only that the "Host County Plan" does not address an expansion. (Notice of Appeal.) Therefore, we enter summary judgment in favor of Permittee on this issue.

C. 1989 Agreement

Finally, Permittee argues that the Board lacks jurisdiction to interpret and enforce the 1989 Agreement between Permittee, the Borough of Throop, and Throop Property's Owner's Association. Moreover, Permittee contends that the Borough of Throop is an indispensable party to any action where it is necessary to interpret and enforce the 1989 Agreement, and the Borough of Throop has not been joined here.

On April 17, 1998, the Board addressed the "1989 Agreement" issue in an Opinion on

Appellants' Motion for Order Compelling Deponent to Answer Questions.[6] We explained that, in this appeal, Appellants are not asking the Board to interpret and enforce the 1989 Agreement. "Rather, Appellants are asking the Board to review the Department's action to determine whether the Department properly considered the 1989 Agreement in issuing the permit modification. The Board certainly has jurisdiction to review the Department's action." *Throop Property Owner's Association v. DEP*, EHB Docket No. 97-164-MR (Opinion issued April 17, 1998), slip op. at 3.

We continue to believe that the Department's action is the focus of our inquiry here, and that the Board has jurisdiction to review that action. In their Notice of Appeal, Appellants raise the "1989 Agreement" issue in connection with 25 Pa. Code § 271.143. Appellants claim that the Department violated this regulation because the Department did not address public comments pertaining to the 1989 Agreement. The Department is obliged under 25 Pa. Code § 271.143 to consider written comments received at a public hearing held in connection with an application for a major permit modification. The Department is also obliged to prepare a summary of the comments received, and a response to them, and to provide copies of the summary to those who submitted comments. 25 Pa. Code § 271.143(c). As stated previously, the Board certainly has jurisdiction to review the Department's action pursuant to the regulation. Accordingly, Permittee's request for entry of summary judgment on this issue is denied.[7]

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[6] Because Permittee filed the present Motion on March 31, 1998, the Motion does not take into account our discussion of the 1989 Agreement in the April 17, 1998 Opinion.

[7] In Permittee's Reply to Appellants' Response to the Motion, Permittee asks the Board to enter summary judgment in its favor because Appellants have not presented evidence to show that the Department failed to properly consider public comments on the 1989 Agreement. However, Permittee did not make this argument in its Motion; therefore, Appellants have not actually had an opportunity to respond to it.

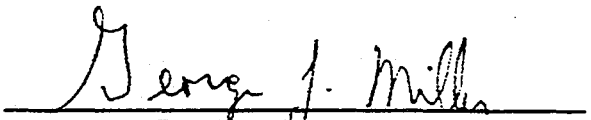
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THROOP PROPERTY OWNER'S ASSOCIATION, et al.	:	
v.	:	**EHB Docket No. 97-164-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, Permittee	:	

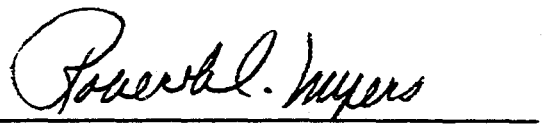
ORDER

AND NOW, this 19th day of June, 1998, Permittee's Motion to Strike is denied. It is further ordered that Permittee's Motion for Partial Summary Judgment is granted in part and denied in part as set forth in the foregoing opinion.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: June 19, 1998

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY II
SECRETARY TO THE BOA

PETER BLOSE	:	
	:	
v.	:	**EHB Docket No. 98-034-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and SEVEN SISTERS MINING COMPANY INC., Permittee	:	**Issued: June 19, 1998**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Before the Board is the Permittee's motion requesting the Board either to dismiss a third party appeal for lack of standing or grant summary judgment because there are no material facts in dispute. A person who uses a surface creek and its watershed for recreational purposes on a regular basis has standing to challenge the issuance of a coal surface mining permit which could threaten the use of that creek and its watershed. Due to the factually specific nature of the Appellant's contention regarding the effectiveness of clay seals and because the Permittee failed to demonstrate that it is clearly entitled to summary judgment on this issue, the motion for summary judgment is denied in part. Where the Board cannot grant any relief which would redress the Appellant's concern regarding dwelling barriers due to the fact that the permit already provides for dwelling barriers, the motion for summary judgment is granted.

BACKGROUND

This case involves a third party appeal by Peter Blose of the Department of Environmental Protection's (Department) issuance of coal surface mining permit No. 0390113 (Permit) to Seven Sisters Mining Company, Inc. (Seven Sisters).[1] The mine is located in Burrell and Southbend Townships, Armstrong County and is commonly known as the Laurel Loop Mine.

Mr. Blose filed a notice of appeal, a petition for temporary supersedeas and petition for supersedeas on February 26, 1998.[2] Mr. Blose subsequently filed a motion requesting an expedited hearing on the merits and withdrawing four of the six objections listed in his notice of appeal. By Order dated May 12, 1998, the Board granted Mr. Blose's motion by limiting the issues and scheduling a hearing on the merits for July 1 and 2, 1998.

Currently before the Board is Seven Sisters' motion for summary judgment. It contends that the Board should either dismiss the appeal for lack of standing or grant summary judgment because there are no material facts in dispute. The Department filed a response generally concurring with the arguments presented by Seven Sisters, and Mr. Blose filed a response opposing Seven Sisters' motion.

DISCUSSION

The Board is empowered to grant summary judgment where the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits and expert reports, if

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[1] Seven Sisters filed a notice of appeal regarding special condition 6 of the permit on March 3, 1998 at EHB Docket No. 98-041-R.

[2] The original notice of appeal contained five objections to the issuance of the permit. Mr. Blose filed an amended notice of appeal with an additional objection on March 23, 1998.

any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.1, 1035.2; *Township of Florence v. DEP*, 1996 EHB 1399. Summary judgment is appropriate only where the right is clear and free from doubt. *Martin v. Sun Pipe Line Company*, 666 A.2d 637 (Pa. 1995); *Hayward v. Medical Center of Beaver County*, 608 A.2d 1040 (Pa. 1992); *White Glove, Inc. v. DEP*, EHB Docket No. 97-172-MG (Opinion issued April 28, 1998). In reviewing a motion for summary judgment, the Board must examine the record in the light most favorable to the nonmoving party; all doubts as to the existence of a material fact must be resolved against the moving party. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995); *People United to Save Houses v. DEP*, EHB Docket No. 97-262-R (Opinion issued April 6, 1998).

At Mr. Blose's request, the issues in this case have been limited to the following objections listed in his notice of appeal:

> 2) Phase II of the permit allows mining of the highly acidic Lower Kittaning coal seam with marginal overburden conditions in close proximity to Crooked Creek. This is a recreational stream entering Crooked Creek Park and used for swimming, boating and fishing by the public. The Crooked Creek watershed currently includes over 39 miles of streams degraded by acid mine drainage as of March, 1996 according to the DEP Degraded Watershed List. Special permit conditions for Laurel Loop require clay seals to prevent acid mine drainage. According to the Pennsylvania 1996 Water Quality Assessment (Section 305b Federal Clean Water Act) use of such clay seals is not acceptable "'unless it can be demonstrated by the permit applicant that the chances of successful AMD [acid mine drainage] prevention greatly outweigh the risk of failure.'" (emphasis added). Weighing the small amount of coal to be mined at Laurel Loop against the potential for degradation of a recreational stream results in a failure to meet this high standard. Issuing the permit under these conditions is a clear abuse of discretion by the [Department].
>
> 4) The permit is in violation of the Surface Mining and Conservation and Reclaimation [sic] Act, 52 P.S. [§] 1396.1, et seq.; The Clean Streams Law Act, 35 P.S. [§] 691.1 et seq. and the regulations promulgated pursent [sic] to those acts.

In order to have standing to appeal, one must have a substantial interest which will be

directly and immediately affected by the decision which has been appealed. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975); *Pohoqualine Fish Association v. DER*, 1992 EHB 502. A "substantial" interest is an interest in the outcome of the litigation which surpasses the abstract common interest of all citizens seeking compliance with the law. *Id.* An interest is "direct" if the matter complained of caused harm to the party's interest. *Id.* An "immediate" interest is one with a sufficiently close causal connection to the challenged action. *Id.*

Seven Sisters contends that Mr. Blose lacks standing to challenge the issuance of the permit since he lacks a substantial interest in the subject matter of the litigation. The Board has held that a person who uses a surface stream for fishing or recreation on a regular basis has standing to challenge a Department permit that threatens that use. *Belitskus v.* DEP, 1997 EHB 939, 951. Mr. Blose's deposition, answers to interrogatories and affidavit all indicate that he has used Crooked Creek for swimming, boating, "floating," fishing and canoeing on a regular basis for the past forty years. Mr. Blose therefore has a substantial interest directly and immediately affected by the agency action which is the subject mater of this appeal. The fact that Mr. Blose shares this interest with a large number of people does not detract from his interest. *Del-Aware Unlimited, Inc. v. DER*, 1985 EHB 869, 875. Since Mr. Blose's recreational use of Crooked Creek and the Crooked Creek watershed is dependent on the quality of the water. he has a substantial interest in preventing degradation which could adversely affect his use of the Creek. *See Pohoqualine Fish Association v. DER*, 1992 EHB 502. We therefore deny Seven Sisters' motion for summary judgment as it relates to the issue of standing.

In objection 2 of the notice of appeal, Mr. Blose argues that the clay seals which the permit requires Seven Sisters to install will not be adequate to prevent acid mine drainage from causing

degradation to Crooked Creek and the Crooked Creek watershed. Seven Sisters asserts that Mr. Blose cannot satisfy his burden of proof since he will not be able to offer any expert testimony supporting his contention and he is not qualified to testify about the potential for acid mine drainage or the adequacy of the clay seals. The Board has held that the lack of expert testimony alone is not a sufficient basis to grant summary judgment. *Weiss v. DEP*, 1996 EHB 1565, 1567.

Mr. Blose indicates that he intends to call the Department's hydrogeologist regarding several Department documents, including excerpts from the Department's Engineering Manual for Coal Mining Operations, that supposedly support Mr. Blose's contention. Therefore, due to the factually specific nature of his contention and viewing the facts in the light most favorable to Mr. Blose, we cannot determine, prior to the hearing, that there is no material issue of fact. Mr. Blose should be afforded the opportunity to elicit testimony regarding the potential for acid mine drainage as a result of using clay seals. Seven Sisters has failed to demonstrate that it is clearly entitled to summary judgment on this issue. *DePaulo v. DEP*, 1997 EHB 137,149; *DEP v. Crown Recycling and Recovery Inc.*, 1997 EHB 169, 182. Because a hearing is necessary to determine whether clay seals are effective, Seven Sister's request for summary judgment on this issue is denied.

At his deposition and in his response to the motion, Mr. Blose explained the basis for objection 4 of the notice of appeal. Mr. Blose contends that Seven Sisters will not feasibly accomplish its mining activities if it does not mine within 300 feet of several dwellings. Mr. Blose asserts that as a result, Seven Sisters is in violation of both 25 Pa. Code § 86.37(a)(2), which requires applicants to demonstrate that mining activities can be feasibly accomplished, and 25 Pa. Code 86.37(a)(5)(v), which prohibits mining within 300 feet from any occupied dwelling. (Appellant's Deposition at 109-111; Appellant's Response to the Motion at ¶ 21)

Under Section 4(a) of the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, 35 P.S. § 7514(a), the Board has jurisdiction to review orders, permits, licenses or decisions of the Department. In order for the Board's jurisdiction to apply, there must be some Department action which affects the appellant's "personal or property rights, immunities, duties, liabilities or obligations" to form the subject matter of our adjudication. 25 Pa. Code § 1021.2; *Goodall v. DEP*, EHB Docket No. 97-210-R (Opinion issued February 18, 1998); *Miller v. DEP*, 1997 EHB 21. As Mr. Blose acknowledged during his deposition, the permit in question does not allow mining within 300 feet of any dwelling. (Appellant's Deposition at 109-110) Since the Department has not taken any action to allow the activity that is the basis for objection 4, the Board cannot grant any relief which would redress Mr. Blose's concern. The motion for summary judgment is therefore granted with respect to this issue.

Accordingly, the following order is entered:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PETER BLOSE	:	
	:	
v.	:	**EHB Docket No. 98-034-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and SEVEN SISTERS MINING COMPANY INC., Permittee	:	**Issued: June 19, 1998**

ORDER

AND NOW, this 19th day of June, 1998, it is ordered that the Permittee's motion for summary judgment is **denied** with respect to the issue of standing and objection 2 of the notice of appeal. The motion is **granted** with respect to objection 4 of the notice of appeal.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 98-034-R

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: June 19, 1998

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

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Southwestern Region

For Appellant:
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Apollo, PA

For Permittee:
Harry F. Klodowski, Esq.
Taralyn T. Trimpey, Esq.
Stephen C. Smith, Esq.
Pittsburgh, PA

jlp

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CENTRAL BLAIR COUNTY SANITARY AUTHORITY	:	
v.	:	**EHB Docket No. 97-276-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TOWNSHIP OF LOGAN, Permittee	:	**Issued: June 22, 1998**

OPINION AND ORDER
ON MOTION TO DISMISS

by Robert D. Myers, Administrative Law Judge

Synopsis:

A Motion to Dismiss is granted where the Department's letter which serves as the basis for the appeal is not an appealable action.

OPINION

On May 16, 1997, Central Blair County Sanitary Authority (Appellant) submitted to the Department of Environmental Protection (Department) an application for renewal of National Pollutant Discharge Elimination System (NPDES) Permit No. PA0032557 (Permit), which Appellant holds with respect to the Logan Township sewage treatment facility in Antis Township, Blair County. On June 10, 1997, the Department returned the application because the Department had learned that Northern Blair Sewer Authority may divert some its sewage flow from the Logan Township facility to the Tyrone Borough treatment plant. In a letter to Appellant, the Department

explained that such a diversion would affect the design flows stated in the application as well as the design flows stated in the Logan Township Official Sewage Facility Plan (Act 537 Plan). The Department informed Appellant that it may resubmit the application when the municipal allocations and the design flows are finalized.

Appellant filed a Notice of Appeal with the Board challenging the Department's June 10, 1997 decision to return the application. Appellant maintained therein that: (1) the Department's decision was based on nothing more than an alleged communication that Northern Blair Sewer Authority "may" divert some sewage flow to another treatment plant; (2) Northern Blair Sewer Authority may *never* decide whether it will divert sewage flow to another treatment plant; and, therefore, (3) Appellant may *never* be able to resubmit its application. The appeal was docketed at EHB Docket No. 97-141-R.

On July 7, 1997, Appellant resubmitted the application without making any changes to the application or to the Logan Township Act 537 Plan. This time, the Department accepted the application as administratively complete and agreed to process it. As a result, Appellant withdrew the appeal at EHB Docket No. 97-141-R.

In conducting its review of the application, the Department found that the projected figure for average annual flows in the application was .55 million gallons per day (mgd), but the figure in the Logan Township Act 537 Plan was .72 mgd. By letter dated November 21, 1997, the Department notified Appellant that the Department could not issue a NPDES permit where the flows in the application differed from those in the municipality's Act 537 Plan. The Department stated in

the letter that it had contacted Thomas Levine of Richard H. Bulger, Jr. & Associates[1] about revising the flows in the Act 537 Plan. The Department also stated that, in accordance with the Money Back Guarantee Program,[2] the clock tracking the time elapsed for Department review of the application had been stopped.

On December 19, 1997, Appellant filed a Notice of Appeal with the Board challenging the Department's action in the November 21, 1997 letter. Appellant asserts therein that the letter constitutes a *denial* of Appellant's NPDES permit renewal application. Appellant claims that the *denial* was improper because it was based on the fact that Northern Blair Sewer Authority "may" divert its sewage flow to another treatment plant at some unknown point in the future. Moreover, the *denial* will put scheduled plant upgrades, approved by the Department, on hold indefinitely.

On April 22, 1998, the Department filed the present Motion to Dismiss (Motion) and a supporting Memorandum of Law. The Department argues that the November 21, 1997 letter is *not a denial* of the permit. Rather, the letter merely informs Appellant about the Department's obligation under the law and puts Appellant's application on hold until the Act 537 Plan is revised. As such, it is not an appealable action.

On May 18, 1998, Appellant filed an Answer to the Department's Motion and a Memorandum of Law in opposition thereto. On June 4, 1998, the Department filed a Reply

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[1] According to the Memorandum of Law filed by Appellant, Levine is Appellant's engineer. (Appellant's Memorandum of Law at 2.)

[2] The Money Back Guarantee Program requires that the Department review NPDES permit applications within 290 days from the date of submission. However, the time is tolled where the Department is waiting for information from the applicant. (Department's Memorandum of Law at 2, n.2.)

Memorandum of Law.

The question of appealability is a jurisdictional one. We must decide whether the Board has jurisdiction to review the Department's action in the November 21, 1997 letter. Section 4(a) of the Environmental Hearing Board Act[3] gives the Board jurisdiction over "orders, permits, licenses or decisions" of the Department. The Board's Rules of Practice and Procedure refer to these collectively as "actions" and define the term "action" 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." 25 Pa. Code § 1021.2(a). The Board has commented on this definition as follows:

> [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.

Phoenix Resources, Inc. v. DER, 1991 EHB 1681, 1684. Indeed, the Department's review process always involves a certain amount of interplay between the Department and the person who has submitted an application to the Department. *New Hanover Corporation v. DER*, 1989 EHB 1075. Therefore, until the Department has approved or disapproved an application, the Board will not intrude upon the review process. *Id.*

The appealability of a particular Department letter is dictated by the language of the letter

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[3] Act of July 13, 1988, P.L. 530, 35 P.S. § 7514(a).

itself. *Conrail, Inc. v.* DEP, EHB Docket No. 97-198-MR (Opinion issued May 12, 1998); *Eagle Enterprises v. DER*, 1996 EHB 1048. Department letters which merely provide information or advice to an applicant, or which set forth the Department's interpretation of laws or regulations are not appealable actions of the Department. *Associated Wholesalers, Inc. v. DEP*, 1997 EHB 1174.

The first paragraph of the Department's letter, which is the portion of the letter at issue here, contains the following language:

> On November 13, I spoke with Mr. Thomas Levine of Richard H. Bulger, Jr. & Associates regarding the different design flows in the NPDES permit application and the Township's Act 537 Plan. I told Mr. Levine that I could not issue a permit with flows different from those in the municipality's Act 537 Plan. Mr. Levine is going to call Mr. Desai of the Department to discuss revising or amending the plan to update the design flow. Until then, the clock tracking the elapsed time for Department review of the application has been stopped in accordance with the Money Back Guarantee Program.

(*See* Notice of Appeal.)

This letter does *not* deny Appellant's NPDES permit renewal application. It simply provides Appellant with information about the *status* of Appellant's application. Specifically, the letter informs Appellant that: (1) the Logan Township Act 537 Plan design flows have a bearing on the Department's review of Appellant's NPDES permit application; (2) the Department has already contacted Levine to facilitate a necessary revision to the Act 537 Plan design flows; and (3) until the revision is completed, the Department has put its review of Appellant's application on hold. 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.[4] In that event, the Department may decide to take final action and deny the permit application.[5] *At that time*, Appellant could appeal the Department's action.

For the reasons set forth above, the Department's Motion to Dismiss is granted.

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[4] Appellant argues in response to the Department's Motion that it should not have to revise the design flows in its Act 537 Plan. However, we note that Appellant does not raise this issue in its Notice of Appeal.

[5] The Department cannot approve a NPDES permit application unless the project conforms with the Act 537 Plan. 25 Pa. Code § 91.31. Moreover, the Department cannot issue a NPDES permit to a municipality where the Department orders a municipality to revise its Act 537 Plan and the municipality fails to do so. 25 Pa. Code § 71.32(f).

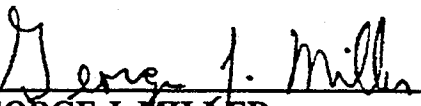
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CENTRAL BLAIR COUNTY SANITARY AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 97-276-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TOWNSHIP OF LOGAN, Permittee	:	

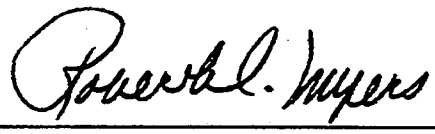
ORDER

AND NOW, this 22nd day of June, 1998, the Department of Environmental Protection's Motion to Dismiss is granted.

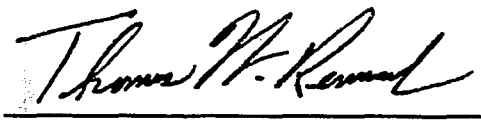
ENVIRONMENTAL HEARING BOARD



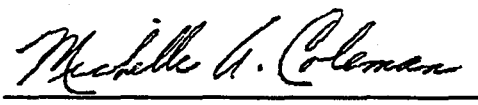
GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: June 22, 1998

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

CNG TRANSMISSION CORPORATION, and PENN FUEL GAS, INC.	:	
v.	:	**EHB Docket No. 97-169-MR (Consolidated with 97-170-MR)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and N.E. HUB PARTNERS, L.P., Permittee	:	**Issued: June 23, 1998**

OPINION AND ORDER
ON MOTION TO DISMISS

by Robert D. Myers, Administrative Law Judge

Synopsis:

A motion to dismiss an issue on appeal because the Department of Environmental Protection (Department) has not yet made a final decision on the matter is denied. The record shows that the Department *made a final decision* to issue a gas well permit without including in the permit a provision requiring the Permittee to obtain noncoal mining permits. It is true that the Department has *not made a final decision* to process a noncoal mining permit application that has been submitted by the Permittee. However, the latter is a different decision.

A motion to dismiss for lack of standing a challenge to the Department's failure to require that Permittee obtain a noncoal mining permit for solution salt mining under section 315(a) of the Clean Streams Law is denied. Section 315(a) requires a permit for preparatory work in connection with the opening of a mine. The opening of the mine here is, arguably, the drilling, casing, and

cementing of the gas wells, and Appellants have alleged harm to their gas storage reservoir and underground sources of drinking water from that drilling, casing, and cementing.

A motion to dismiss for lack of standing a challenge to the Department's failure to require that Permittee obtain a noncoal mining permit for solution salt mining under section 7(a) of the Noncoal Surface Mining Conservation and Reclamation Act is denied. Section 7(a) requires a permit for operation of a surface mine. Surface mining includes surface activities in connection with underground mining. Such surface activities include borehole drilling, construction, and related activities. Appellants have alleged harm to their gas storage reservoir and underground sources of drinking water from borehole drilling, construction, and related activities.

OPINION

On August 19, 1997, CNG Transmission Corporation (CNG) and Penn Fuel Gas, Inc. (Penn Fuel) (collectively, Appellants) filed Notices of Appeal with the Board contesting the Department of Environmental Protection's (Department) issuance of Gas Well Permit Nos. 37-117-20168 and 37-117-20169 (Permits) to N.E. Hub Partners, L.P. (Permittee).[1] The Permits allow Permittee to drill two salt cavern gas storage wells in Farmington Township, Tioga County, Pennsylvania.

In their Notices of Appeal, Appellants assert that they own a gas storage reservoir in Tioga County, known as the Tioga Storage Pool, which is operated by CNG. The Permits issued by the Department allow the drilling of two injection wells directly through the Tioga Storage Pool. Appellants claim that, in issuing the Permits: (1) the Department violated sections 102 and 201(e)(1)

[1] CNG's appeal was docketed at EHB Docket No. 97-169-MR, and Penn Fuel's appeal was docketed at EHB Docket No. 97-170-MR.

of the Oil and Gas Act[2] because it did not properly consider the risk of damage to the Tioga Storage Pool, the risk of contamination to sources of drinking water, and the risk of injury to people; and (2) the Department violated 25 Pa. Code § 78.81(d)(2) because it did not approve a casing installation procedure that was established by mutual agreement between the well operator and the gas storage reservoir operator.

The two appeals were consolidated on September 30, 1997 at EHB Docket No. 97-169-MR. Subsequently, Appellants were granted leave to amend their appeals to include an alternate or supplemental legal issue.[3] In their amended appeals, Appellants assert that Permittee plans to engage in the solution mining of salt in connection with its drilling of the two salt cavern gas storage wells; therefore, the Department should have required that Permittee obtain a noncoal underground mining permit under section 315(a) of the Clean Streams Law[4] and a noncoal surface mining permit under section 7(a) of the Noncoal Surface Mining Conservation and Reclamation Act[5] and 25 Pa. Code § 77.101.

On January 27, 1998, Appellants filed a Joint Motion for Summary Judgment seeking summary judgment with respect to each of the three issues raised in their amended appeals. On February 23, 1998, Permittee and the Department (Appellees) filed a Joint Motion to Dismiss the noncoal mining permit issue. The Board denied these motions in an Opinion and Order dated April

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[2] Act of December 19, 1984, P.L. 1140, 58 P.S. §§ 601.102 and 601.201(e)(1).

[3] CNG amended its appeal by Order of the Board dated January 7, 1998. Penn Fuel did the same by Order of the Board dated February 2, 1998.

[4] Act of June 22, 1937, P.L. 1987, *as amended*, 35 P. S. § 691.315(a).

[5] Act of December 19, 1984, P.L. 1093, 52 P. S. §3307(a).

7, 1998 because there existed genuine issues of material fact.

On April 28, 1998, Appellees filed the present Supplemental Joint Motion to Dismiss with a supporting memorandum of law. Essentially, it covers the same ground as the prior Joint Motion to Dismiss which we denied in our April 7, 1998 Opinion and Order. As we noted there, these Permits are, in many ways, the first of a kind and have generated a great deal of controversy. For that reason, we are treading carefully over unfamiliar ground and are reluctant to dismiss issues that may conceivably have relevance to the issuance of the Permits.

I. Lack of Jurisdiction

In the Joint Motion to Dismiss, Appellees first claim that the Board lacks jurisdiction over the noncoal mining permit issue because the Department has not made a final decision as to whether Permittee must obtain noncoal mining permits in connection with the two gas wells. We do not accept this argument.[6]

In their amended Notices of Appeal, Appellants challenge the Department's failure to include some provision *in the Permits* to require that Permittee obtain noncoal mining permits for solution salt mining at the two wells. (CNG Amended Notice of Appeal at paras. 3(B)(6)-(7); Penn Fuel Amended Notice of Appeal at paras. 3(l)-(m).) The record shows that the Department decided not to require noncoal mining permits *in the two gas well Permits*.[7] Robert Dolence, the Department's

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[6] The Board must view a motion to dismiss in the light most favorable to the non-moving party. *Kelly Run Sanitation*, 1995 EHB 244. In addition, the Board will dismiss an appeal only where there are no material facutal disputes and the moving party is clearly entitled to judgment as a matter of law. *Lehigh Township v. DER*, 1995 EHB 104.

[7] Section 4(a) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. § 7514(a), gives the Board jurisdiction over "decisions" of the Department. Such "decisions" are appealable if they affect the property rights of a person. 25 Pa. Code § 1021.2(a).

Secretary for Mineral Resources Management, stated clearly that the Department decided *not* to require a mining permit as a term or condition of the Permits but, rather, to "proceed with the well permit, and if we had a compelling reason to go with a mining permit, we could always go that route at a later date." (Dolence Deposition at 10-12.)

Appellees' argument is based on the fact that Permittee has now submitted a noncoal mining permit application to the Department for solution salt mining at the two wells. Dolence testified that the Department has not yet decided whether this application is necessary. (Dolence Deposition at 13.) That decision, when made, will have an obvious impact on the issue raised by Appellants but, until it has been made, the only Department decision before us is to not require noncoal mining permits as part of the Permits. That decision, as we have indicated previously, is appealable.

II. Standing

In the alternative, Appellees argue that Appellants lack standing to challenge the Department's decision regarding noncoal mining permits. Appellees assert that Appellants have not alleged any harm to the Tioga Storage Pool from the Department's failure to require noncoal mining permits, and, in addition, that such harm is not within the zone of interests of the Clean Streams Law or the Noncoal Surface Mining Conservation and Reclamation Act. We do not agree.

As a preliminary matter, we note that Appellees base their argument primarily on the Board's decision in *Pennsylvania Game Commission v. DER*, 1985 EHB 1. In that case, the Board held that the appellant lacked standing to challenge the Department's issuance of a permit under the Solid Waste Management Act[8] by raising the Department's failure to require a permit under the Dam

[8] Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018.1003.

Safety and Encroachments Act (DSEA).[9] The Commonwealth Court affirmed this holding in *Pennsylvania Game Commission v. Department of Environmental Resources*, 509 A.2d 877 (Pa. Cmwlth. 1986). However, the Pennsylvania Supreme Court disagreed with the Board and with Commonwealth Court in *Pennsylvania Game Commission v. Department of Environmental Resources*, 555 A.2d 812 (Pa. 1989). Thus, contrary to the position taken by Appellees, an appellant *can* challenge a permit issued under one statute by raising the failure to require a permit under another statute.

Generally, in order for an appellant to do so, the appellant must be "aggrieved" by the Department's failure to require a permit. *Id.* To be "aggrieved," the appellant must have a direct, immediate and substantial interest in the failure to require a permit. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). A "substantial" interest is an interest in the failure to require a permit which surpasses the common interest of all citizens in procuring obedience to the law. *Id.* An interest is "direct" if the failure to require a permit caused harm to the party's interest. *Id.* An "immediate" interest is one with a sufficiently close causal connection to the Department's failure to require a permit, or one within the zone of interests protected by the statute at issue. *Id.*

A. Section 315(a) of CSL

We shall first address whether Appellants have standing to challenge the Department's failure to require a noncoal underground mining permit pursuant to section 315(a) of the Clean Streams Law. This section of the Clean Streams Law provides, in pertinent part, as follows:

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[9] Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1- 693.27.

> (a) No person ... shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the department or such person ... has first obtained a permit from the department. *Operation of the mine shall include preparatory work in connection with the opening ... of a mine.*

35 P.S. § 691.315(a) (emphasis added).

Based on this statutory language, Appellants maintain that Permittee's solution salt mining operation includes preparatory work connected with the opening of the mines. Arguably, such preparatory work consists of the drilling, casing, and cementing associated with the gas wells. Indeed, the noncoal mining permit application submitted by Permittee to the Department for the solution salt mining project discusses the gas well drilling, casing, and cementing procedures in great depth. (*See* Joint Response to Joint Motion to Dismiss, Exhibit C.) In their Amended Notices of Appeal, Appellants allege harm to the Tioga Storage Pool and to underground sources of drinking water from Permittee's drilling, casing, and cementing procedures. (*See* Amended Notices of Appeal.)

Because section 315(a) of the Clean Streams Law requires a mining permit for preparatory work related to the opening of a mine, because the opening of the mine in this case involves drilling, casing, and cementing, and because Appellants have alleged harm from those activities, Appellants have shown at this stage of the proceedings a substantial, direct, and immediate interest in the Department's failure to require a noncoal mining permit under Section 315(a) of the Clean Streams Law.

B. Section 7(a) of NSMCRA

We shall next address whether Appellants have standing to challenge the Department's failure to require a noncoal mining permit under section 7(a) of the Noncoal Surface Mining

Conservation and Reclamation Act. Section 7(a) provides, in pertinent part, as follows:

> **(a) Permit required.** - Except as provided in section 24, no person shall *operate a surface mine* or allow a discharge from a surface mine unless the person has first obtained a permit from the department in accordance with this act.

52 P.S. § 3307 (emphasis added). Section 3 of the Noncoal Surface Mining Conservation and Reclamation Act defines "surface mining," in pertinent part, as follows:

> **"Surface mining."** The extraction of minerals from the earth ... by removing the strata or material that overlies or is above or between them or otherwise exposing and retrieving them from the surface, including, but not limited to, ... *all surface activity connected with ... underground mining, including, but not limited to, ... site preparation ... and borehole drilling and construction and activities related thereto*; but it does not include those mining operations carried out beneath the surface by means of shafts, tunnels or other underground mine openings.

52 P.S. § 3303 (emphasis added).

Based on these statutory provisions, Appellants argue that the drilling and construction of the gas well borehole, and related activities which prepare the site for underground solution salt mining, constitute "surface mining" and require a permit. In their Amended Notices of Appeal, Appellants clearly allege harm to the Tioga Storage Pool from large-diameter borehole drilling and from casing and cementing of the borehole. It is apparent that Appellants believe the latter activities constitute "construction" of the borehole or activities related thereto.

Because section 7(a) of the Noncoal Surface Mining Conservation and Reclamation Act requires a permit for operation of a surface mine, because surface mining includes surface activities related to underground mining, because borehole drilling and construction and related activities are surface activities related to underground mining, and because Appellants have alleged harm to the Tioga Storage Pool from such surface activities, Appellents have shown at this stage of the proceedings a substantial, direct, and immediate interest in the Department's failure to require a

noncoal mining permit under section 7(a) of the Noncoal Surface Mining Conservation and Reclamation Act.

Accordingly, Appellees' Supplemental Joint Motion to Dismiss is denied.

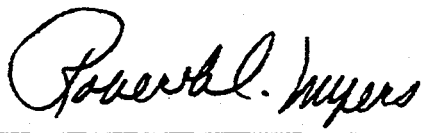
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CNG TRANSMISSION CORPORATION, and PENN FUEL GAS, INC.	:	
v.	:	**EHB Docket No. 97-169-MR (Consolidated with 97-170-MR)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and N.E. HUB PARTNERS, L.P., Permittee	:	

ORDER

AND NOW, this 23rd day of June, 1998, it is ordered that the Supplemental Joint Motion to Dismiss filed by the Department of Environmental Protection and Permittee is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: June 23, 1998

See next page for a service list.

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WILLIAM T. PHILLIPY I
SECRETARY TO THE BOA

WILLIAM S. RITCHEY AND S & R TIRE RECYCLING	:	
v.	:	**EHB Docket No. 96-242-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** June 26, 1998

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion to dismiss is granted where the appeal of Consent Orders & Agreements, which was one basis for the appeal, are untimely filed, and where the Board lacks jurisdiction over a petition to enforce filed in Commonwealth Court which was the other basis of the appeal.

OPINION

Presently before the Board is the Department of Environmental Protection's (Department) motion to dismiss the November 14, 1996 appeal of William S. Ritchey Sr. (Ritchey) and S & R Tire Recycling, Inc. (Appellants). William S. Ritchey is owner and operator of S & R Tire Recycling, Inc. Appellants appeal the Department of Environmental Protection's Petition to Enforce a Consent Order and Agreement (CO&A) because of Appellants' noncompliance with provisions of, among other statutes, the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S.

§§ 6018.101 - 6018.1003. The petition to enforce was filed with Commonwealth Court and concerned a waste tire storage and processing facility located in Tyrone, Blair County, Pennsylvania.

BACKGROUND

Between June 1991 and December 1992 the Department conducted five inspections of the facility. As a result of these inspections the Department determined that the tires were being stored at the facility in a manner which was inconsistent with the Department's Interim Policy (Policy) for the storage of waste tires. After the initial inspection in June 1991, the Department issued Ritchey a letter informing him that the storage of waste tires should be in accordance with the Department's policy and that he must submit a Comprehensive Plan for Operation as well as a Preparedness, Prevention and Continency Plan.[1] After subsequent inspections on August 6, 1991 and March 23, 1992, the Department issued notices of violations citing Appellants for storage/processing/disposal of waste tires without a permit and for failure to operate the facility in accordance with the Department's Policy on the storage of waste tires. In July and December 1992, after completing two additional inspections, the Department determined that Ritchey was still not in compliance with the Policy. In January 1993, the Department issued an administrative order directing Ritchey to cease accepting any more tires and to provide the Department with a plan for the proper removal of the tires already at the facility. Ritchey submitted a plan in May 1993, and submitted a revised plan in June 1994. The revised plan was the subject of a July 15, 1994 meeting with the Department and the subject of a September 8, 1994 CO&A. The September CO&A was revised on March 9, 1995.

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[1] After reviewing the plans Ritchey submitted in accordance with the Department's instructions, the Department advised him that he could operate the facility so long as the operation met the Department's policy.

These revisions included extending the date for removal of all stockpiled tires[2] and setting the daily amount of civil penalty at $750.00 per violation per day for each violation of the order. In October 1996 the Department filed a petition to enforce the consent orders with the Commonwealth Court.

On November 19, 1996 Appellants filed an appeal with the Board challenging the CO&A signed September 8, 1994, the March 9, 1995 revised CO&A, and the October 1996 Petition to Enforce. On December 9, 1996 Appellants amended their appeal.

On June 13, 1997 the Department filed a motion to dismiss in conjunction with its prehearing memorandum. On June 18, 1997 the Board denied the motion on the grounds that the motion failed to conform to Board Rule 1021.73(c)[3] and was filed late according to dates set forth in Pre-Hearing Order No. 1.

On July 25, 1997 the Department refiled its motion to dismiss. The Department contends that the appeal was untimely and the Board lacks jurisdiction over this appeal. Appellants have not filed a response.[4] Under Board Rule 1021.70(f), 25 Pa. Code § 1021.70(f) the Board will deem a party's failure to respond to a motion to be an admission of all properly-pleaded facts contained in the motion. Thus all the properly pleaded facts will be deemed admitted.

The Board treats motions to dismiss the same way it treats motions for judgment on the pleadings; we will dismiss the appeal only where the moving party is entitled to judgment as a matter

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[2] The removal date was extended from March 1, 1995 to September 1, 1995.

[3] Dispositive motions shall be accompanied by a supporting memorandum of law. The Board may deny a dispositive motion if a party fails to file a supporting memorandum of law.

[4] On August 8, 1997 Appellants filed a petition for an appeal nunc pro tunc. We see no need to address that petition based on our decision on this motion.

of law. *Florence Township v. DEP* 1996 EHB 282. We must assess the motion in a light most favorable to the non-moving party. *Id.*

CO&As

The appeal states three Department actions as the bases of the appeal: the September 8, 1994 CO&A, the March 9, 1995 CO&A, and the October 1996 Petition to Enforce. The Department alleges that the appeal of these specific actions is untimely and in the alternative the Board does not have jurisdiction over the CO&As. We will begin our discussion with the timeliness of the CO&As.

We agree with the Department that the appeal is untimely with respect to the CO&As. Board Rule 1021.52, 25 Pa. Code § 1021.52, states that " jurisdiction for the Board will not attach to an appeal from an action of the Department, unless the appeal is in writing and is filed with the Board within 30 days after the party Appellant has received written notice of the action." Consequently, Appellant had to file any appeal regarding either of the CO&As during the Fall of 1994 or the Spring of 1995, respectively. Appellants, however, did not file this appeal until November 14, 1996 well past the 30 day limit. Thus, we will dismiss the appeal with respect to both CO&As.

Petition to Enforce

We also agree with the Department that the Board lacks jurisdiction to hear the appeal regarding the Department's Petition to Enforce.

As we noted in our August 12, 1997 decision denying Appellants' Petition for Supersedeas, the Department filed the petition in Commonwealth Court and Appellants/Petitioners made an inappropriate request by seeking to have the Board wrest jurisdiction of the Department's Petition to Enforce from Commonwealth Court. Under Section 104(10) of the Solid Waste Management Act, the Department has the power to institute an action in a court of competent jurisdiction against any

person or municipality to compel compliance with the provisions of any order of the Department. 35 P.S. § 6018.104(10). Commonwealth Court qualifies as a court of competent jurisdiction under Section 761(a) of the Judicial Code which states, " ... Commonwealth Court has original jurisdiction of all civil actions or proceedings: ... (2) By the Commonwealth government, including any officer thereof, ... except eminent domain proceedings ..." 42 Pa. C.S.A. § 761(a). The Department, a government agency, decided to pursue enforcement of the CO&As by means of a Petition to Enforce rather than through any other method available to the Department. Once that decision had been made, the court of competent jurisdiction was the Commonwealth Court, not the EHB, because the Board lacks jurisdiction over Petitions to Enforce. For the foregoing reasons, we enter the following order.

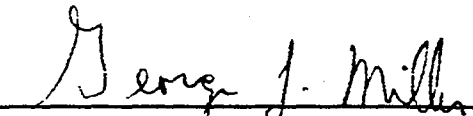
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILLIAM S. RITCHEY and	:	
S& R TIRE RECYCLING	:	
v.	:	EHB Docket No. 96-242-C
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

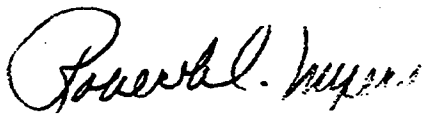
ORDER

AND NOW this 26th day of June, 1998 the Department of Environmental Protection's motion to dismiss is granted and the appeal is dismissed.

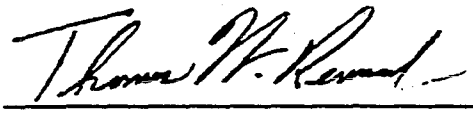
ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: June 26, 1998

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

For the Commonwealth, DEP:
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TELECOPIER 717-783-4738

WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ARNOLD AND PATRICIA GASBARRO	:	
	:	
	:	
v.	:	**EHB Docket No. 97-031-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** June 30, 1998

OPINION AND ORDER ON MOTION TO STRIKE

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion to strike documents attached to a post-hearing brief is granted for documents which were only submitted as attachments to appellant's post-hearing brief.

OPINION

This matter was initiated with *pro se* appellants Arnold and Patricia Gasbarro's (Gasbarros)[1] January 21, 1997 Notice of Appeal concerning the Department's December 24, 1996 denial of a private request. The private request sought, in accordance with Section 5(b) and (b.1) of the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S.

[1] It will become evident in the remainder of this opinion that the Gasbarros' *pro se* status has presented problems in this matter. This Board has noted on a number of occasions that individuals who represent their own interests without legal counsel assume the risk that their lack of knowledge may lead to an adverse ruling. *Palmer v. DER*, 1993 EHB 499; *Smith v. DER*, 1992 EHB 226.

§§ 750.1 - 750.20a, to revise the East Huntingdon Township Official Sewage Facilities Plan to increase sewage flows but not expand the existing on-lot sewage system at their property in Mount Pleasant, Westmoreland County.

Gasbarros wish to build a restaurant/inn on their property. This addition would require that the on-lot sewage flows be increased to an average of 3,000 gallons per day, which Gasbarros want to add without expanding the existing on-lot sewage system.

A hearing on the merits was held before Judge Michelle A. Coleman on November 5 and 6, 1998. At the hearing Mr. Gasbarro appeared *pro se*. The Gasbarros and the Department filed post-hearing briefs on February 27, 1998 and May 5, 1998, respectively.

On May 5, 1998 the Department filed a Motion to Strike and supporting memorandum. The Department contends, among other things, that post-hearing submissions and any reference of the submissions, which were not disclosed in prehearing procedures or made a part of the formal record, should be stricken from the post-hearing brief. The Department asserts that the Gasbarros should not be permitted to introduce new evidence in their post-hearing brief: 1) where the evidence was not made a part of the formal record at the hearing and where the Department will not be afforded the right to cross-examine or present rebuttal evidence as to the new evidence; 2) where they have failed to file a petition to reopen the record; 3) where the submissions were not referenced in the answers to interrogatories or pre-hearing memorandum; and 4) where the proposed submissions are irrelevant and without probative value.

The Gasbarros filed their response on May 19, 1998 in which they request that the Board deny the Department's motion. They contend that the Township has no jurisdiction in this matter once it gave approval on the building permit and that it is impossible for the system to malfunction.

In their response the Gasbarros failed to deny, specifically or by necessary implications, any of the Department's allegations. Under Pa. R.C.P. 1029, " averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication." Pa. R.C.P. 1029(b) Consequently, the Gasbarros are deemed to have admitted all of the factual assertions raised in the motion.

BACKGROUND

The facts which the Gasbarros have admitted are set forth in this background. On or about April 24, 1997 the Department served the Gasbarros with its First Set of Interrogatories and Request for Production of Documents, of which Interrogatories 1 and 9 are relevant here. On or about May 9, 1997 the Gasbarros filed their responses to the Department's discovery requests. In Interrogatory 1, the Department asked the Gasbarros to "[i]dentify any and all persons known to You who have knowledge concerning the matters set forth in the Notice of Appeal filed by You in the instant action." The Gasbarros' responded, "Arnold S. Gasbarro and Patricia A. Gasbarro." In Interrogatory 9, the Department asked the Gasbarros to "[i]dentify each nonexpert witness that Appellant intends to call at the hearing in the above matter." The Gasbarros responded, "N/A." The Gasbarros did not supplement their answers to the Department's Interrogatories during the discovery period. On or about October 19, 1997, the Gasbarros filed their Pre-Hearing Memorandum with the Board, pursuant to the Board's Pre-Hearing Order No.2. The Gasbarros' Pre-Hearing Memorandum listed one expert witness, Milton A. Highland, three fact witnesses, Patricia Gasbarro, Milton A. Highland and Arnold V. Gasbarro and twenty-one documents identified as Appellant's Exhibits. A hearing on the merits was held on November 5 and 6, 1997 before the Honorable Michelle A. Coleman. On or about February 27, 1998, the Gasbarros filed their Post-Hearing Brief with the Board in which

they relied upon documents which were neither offered as evidence nor entered into evidence at the merits hearing. Those new documents include a Death Certificate of William Stader[2], a portion of a Department Policy Manual, a document identified as "Amendment to Ordinance No. 27-1975," an affidavit of Donald J. Pfeifer, an affidavit of Milton A. Highlands R.P.S. dated September 12, 1997, with an accompanying project narrative, a project narrative on the sewage system by David R. Mills[3], and affidavits from Kenneth King, Stanley W. Kreger, Zack Kreger, Carl Maker, Arnold S. Gasbarro, Patricia Gasbarro, Anthony Stells, Oakley Hall, Thomas Showman, and Freeman Bowser, all of which were notarized on or after November 15, 1997. All of these documents the Department contends are new and were not offered or entered into evidence at the hearing on the merits.

Case law in Pennsylvania shows that the Commonwealth Court has been reluctant to expand the record in the manner requested by the Gasbarros. In *Zinman v. Cmwlth. of Pennsylvania, Department of Insurance,* 400 A.2d 689 (Pa. Cmwlth. 1979) the Commonwealth Court vacated the findings of the Insurance Commissioner and remanded the matter when it determined that the Commissioner improperly relied on documents attached to a post-hearing brief because Zinman did not have an opportunity to offer evidence in rebuttal. The court stated that, "It is of course fundamental that matters attached to or contained in briefs are not evidence and cannot be considered

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[2] The copy of the death certificate submitted with the post-hearing brief is for William Stader. However, for unknown reasons, the Gasbarros refer to the document as the Death Certificate of Stanley Stader.

[3] The Gasbarros also submitted an affidavit by David Mills in their post-hearing brief. However, the Department raised only the project narrative as a new document. We will consider only what the Department has raised in its motion to strike.

part of the record either before an administrative agency or on appeal." *Id.* at 691. Similarly, the Commonwealth Court in *Miller v. Comm. Dept. of Public Welfare*, 513 A.2d 569 at 570, n. 5 (Pa. Cmwlth. 1986) held that the Department of Public Welfare was precluded from considering statistical studies attached to petitioner's brief, but not introduced at the hearing on the merits. The Board also has rendered decisions on this issue. In *T.C. Inman, Inc. v. DER*, 1988 EHB 613 the Board rejected an attempt by the Department to introduce testimony not presented at the hearing on the merits by incorporating it into an affidavit attached to its post-hearing brief. Since the documents were only submitted as attachments to the Gasbarros' post-hearing brief we can not consider them as evidence and as part of the record in this proceeding.

Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ARNOLD and PATRICIA GASBARRO	:	
	:	
v.	:	**EHB Docket No. 97-031-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 30th day of June, 1998, the Department of Environmental Protection's Motion to Strike is granted for the following documents :

> 1) Death Certificate of William Stader; 2) a portion of a Department Policy Manual; 3) David K. Mills' project narrative; 4) a document labeled as "Amendment to Ordinance No. 27-1975"; 5) Donald J. Pfeifer affidavit; 6) Milton A. G. Highlands' affidavit and accompanying project narrative; 7) Kenneth King affidavit; 8) Stanley W. Kreger affidavit; 9) Zack Kreger affidavit; 10) Carl Maker affidavit; 11) Arnold S. Gasbarro affidavit; 12) Patricia Gasbarro affidavit; 13) Anthony Stella affidavit; 14) Oakley Hall affidavit; 15) Thomas Showman affidavit; and 16) Freeman Bowser affidavit.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: June 30, 1998

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

RAYMOND PROFFIT FOUNDATION	:	
	:	
v.	:	**EHB Docket No. 98-020-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and VESTA MINING CO., Permittee	:	**Issued: June 30, 1998**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board denies a motion to dismiss for lack of standing where the permittee has failed to show that there are no factual issues in dispute concerning the lack of the appellant's standing to prosecute this appeal. Since standing is not a jurisdictional issue, it is not necessary for an organization to demonstrate that it had members who were aggrieved by the action of the Department at the time it filed its appeal. However, the organization must demonstrate that the individuals were members by the expiration of the thirty-day appeal period. The motion to dismiss is denied because the question of when the individuals became members of the organization is a disputed material fact.

OPINION

Before the Board is the motion to dismiss of Vesta Mining Company (Permittee) which seeks to dismiss the appeal of the Raymond Proffitt Foundation (Appellant) challenging the issuance of a Bituminous Coal Mining Activity Permit by the Department of Environmental Protection. This permit authorizes, among other things, the operation of a preparation plant and a coal refuse disposal area. The permit allows the disposal of 21.6 million tons of coal refuse within 100 feet of an unnamed tributary. The Appellant charges that this disposal process, commonly referred to as a valley fill, will eliminate the existing uses of perennial streams, impair wetlands and destroy wooded uplands.

The following facts are not in dispute. The Department published notice that it issued the permit to the Permittee in the *Pennsylvania Bulletin* on January 3, 1998. 28 Pa. Bull. 85 (1998). Hence the thirty-day appeal period in which third parties may appeal actions of the Department expired on February 2, 1998. The Appellant's initial notice of appeal was received by the Board on January 30, 1998. The Appellants subsequently filed two amended notices of appeal on February 18, 1998,[1] and March 18, 1998.[2] The amended notices of appeal added facts relating to the individuals upon which the Appellant is basing its standing to pursue this litigation. The Appellant admits that at the time it filed its initial notice of appeal on January 30, 1998, it had no members who would be affected by the disposal of refuse in the valley fill authorized by the permit or who used Daniels Run, the receiving stream for discharges from the permit area. (Motion to Dismiss,

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[1] This amended notice of appeal was filed as of right pursuant to 25 Pa. Code § 1021.53(a).

[2] The Appellant requested and was granted leave to amend its notice of appeal pursuant to 25 Pa. Code § 1021.53(b).

¶ 5; Answer to Motion to Dismiss, ¶ 5).

However, the Permittee further alleges that seven individuals were deposed concerning the standing of the Appellant: Paula Hoffman, George Hoffman, Michael Siegel, Barry Gatten, James Dunn, Willa Dunn and Wanda Wade. Permittee avers that at deposition all of these individuals except for Wanda Wade stated that they became members of the Raymond Proffit Foundation (RPF) at a meeting on February 6, 1998. Wanda Wade testified that she joined the RPF on April 7, 1998.

In response the Appellant avers that although these individuals testified that the meeting took place on February 6, 1998, it actually occurred on February 2, 1998.[3] In support Appellant submitted affidavits correcting the deposition transcripts.[4]

Although the motion of Permittee is labeled a motion to dismiss, both parties have presented us with numerous exhibits which include affidavits, depositions and other documents. Moreover we are presented with an issue which is not purely one of law but also involves an interpretation of a factual situation. Accordingly, we will treat this motion as one for summary judgment. *See Reading Anthracite Co. v. DEP*, 1997 EHB 581; *Belitskus v. DEP*, 1997 EHB 939.[5]

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[3] The Appellant admits that Wanda Wade joined RPF on April 7, 1998.

[4] The Department argues that this evidence is not credible. It is not appropriate for the Board to make credibility determinations in motions for summary judgment. *Jefferson County Commissioners v. DEP*, 1996 EHB 997.

[5] As we have often stated, the Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions of record, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. No. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997). Summary judgment may be entered only in those cases where the right is clear and free from doubt. *Martin v. Sun Pipe Line Company*, 666 A.2d 637 (Pa. 1995). In deciding a motion for summary judgment, the record must be viewed in the light most favorable to the nonmoving party, and all doubts as to existence of material fact

It is well-settled that an organization can have standing either in its own right or as a representative of its members. *Barshinger v. DEP*, 1996 EHB 849.[6] Where an organization is acting as a representative for its members, it has standing if at least one of those individuals has been aggrieved by an action of the Department. *Chestnut Ridge Conservancy v. DEP*, 1997 EHB 45; *RESCUE Wyoming v. DER*, 1993 EHB 839. To establish that a member has been aggrieved the Appellant must show that the individual has a "substantial" interest in the subject matter of the particular litigation, which surpasses the common interest of all citizens in seeking compliance with the law; a "direct" interest that was harmed by the challenged action; and an "immediate" interest that establishes a causal connection between the action complained of and the injury they suffered. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). *See also South Whitehall Township Police Service v. South Whitehall Township*, 555 A.2d 793 (Pa. 1989); *Tessitor v. Department of Environmental Resources*, 682 A.2d 434 (Pa. Cmwlth. 1996) (*en banc*); *Empire Coal Mining & Development, Inc. v. Department of Environmental Resources*, 623 A.2d 897 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 629 A.2d 1384 (Pa. 1993).

The Permittee argues that the Appellant lacks standing because it did not have any members with standing at the time it filed its appeal. Relying on three Board decisions in *Del-AWARE Unlimited, Inc. v. DER*, 1984 EHB 178; 1986 EHB 919; 1990 EHB 759, the Permittee further

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must be resolved against the moving party. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995).

[6] The Commonwealth Court has noted that representation of individuals with similar "aggrievement" by an organization is particularly appropriate where there are a large number of potential parties. *Parents United for Better Schools, Inc. v. School District of Philadelphia*, 646 A.2d 689 (Pa. Cmwlth. 1994).

contends that standing is jurisdictional, therefore this appeal must be dismissed.[7] We disagree.

It is true, as the Permittee contends, that the *Del-AWARE* cases stated that an organization which relies upon its members to confer standing must have at least one member who is adequately aggrieved at the time it filed its notice of appeal. However, none of the cases discuss the rationale for this rule in any detail and the courts of this state appear to be silent on this issue. Further, at the time the Board was applying an incorrect standard of law, namely that standing was a question of jurisdiction. The Board very recently corrected this misstatement in *Oley Township v. DEP*, 1996 EHB 1098, where we held that standing is not jurisdictional and could be waived. *Id.* at 1126-27. The Pennsylvania Supreme Court has held many times that standing is *not* jurisdictional. *Beers v. Unemployment Compensation Board of Review*, 633 A.2d 1158 (Pa. 1993)(standing should not be confused with jurisdiction), *Jones Memorial Baptist Church v. Brackeen*, 207 A.2d 861 (Pa. 1965); *see also Erie Indemnity Co. v. Coal Operators Casualty*, 272 A.2d 465 (Pa. 1971). Rather, the purpose of standing is to assure that the litigants have "alleged such a personal stake in the outcome of the controversy as to . . . sharpen the presentation of the issues . . . ." *Parents United for Better Schools, Inc. v. School District of Philadelphia*, 646 A.2d 689, 691 (Pa. Cmwlth. 1994)(*quoting Baker v. Carr*, 369 U.S. 186 (1962). At this point, we do not believe that either the Department or the Permittee has been prejudiced or judicial resources have been wasted by the actions of the

[7] The Permittee has reserved the right to dispute the Appellant's standing based upon the insufficiency of the interests claimed by the individuals at a later date and restricts its motion to the question of the timing of their membership in the RPF. (Motion at 3 n. 1). Accordingly, we expressly do not reach the question of whether any of the individuals are sufficiently aggrieved.

Appellant.[8] Accordingly, we decline to follow the rule in *Del-AWARE Unlimited* that an organization must have representational standing at the exact time it filed its appeal.

The Permittee argues that in the case of "statutory causes of action" there is an exception created to the doctrine that standing is non-jurisdictional, citing Superior Court cases which interpret provisions of the Custody and Grandparents Visitation Act.[9] In *Hill v. Divecchio*, 625 A.2d 642 (Pa. Super. 1993), *petition for allowance of appeal denied*, 645 A.2d 1316 (Pa. 1994), the Superior Court examined whether a grandparent and a step-grandparent had "standing" to assert a cause of action under 23 Pa. C.S. § 5312. Recognizing that standing and subject matter jurisdiction are distinguishable, the court noted that "under *some* statutes, the issue of standing becomes interwoven with that of subject matter jurisdiction. When a statute creating a cause of action *includes the designation of who may sue*, then standing becomes a jurisdictional prerequisite to an action." 625 A.2d at 645 (emphasis added). The court went on to examine the specific language of 23 Pa. C.S. § 5312, and held that it explicitly stated that a particular person, a grandparent of a child whose parents are divorced, may maintain an action for partial visitation or partial custody. *Id.* at 647. Following *Hill* the Superior Court in *Grom v. Burgoon*, 672 A.2d 823 (Pa. Super. 1996), construed 23 Pa. C.S. § 5313, and held that that section specifically designated the person who could maintain a cause of action for visitation, a grandparent with whom a child had resided. Moreover, both courts held that the trial courts had erroneously added other requirements or broadened the field of eligible litigants. *Hill* (a step-grandparent under the plain language of the statute may not maintain a cause

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[8] We would note, however, that it would be preferable for an organization to have members with standing prior to the filing of the notice of appeal.

[9] 23 Pa. C.S. § 5301-5314.

of action); *Grom* (the trial court erroneously dismissed the petition by requiring the petition to be filed with a "reasonable" time where the statute placed no such time limit).

The Clean Streams Law[10] and the Coal Refuse Disposal Act,[11] the two statutes at issue in this matter, do not contain similarly specific provisions by which standing and subject matter jurisdiction are so intertwined that standing is transformed into a jurisdictional issue. Section 30.55(i) of the Coal Refuse Disposal Act, 52 P.S. § 30.55(i), and Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b), are not so specific that subject matter jurisdiction and standing are interwoven. Each statute broadly provides that "any person having an interest which is or may be adversely affected by any action of the department . . . " may appeal to the Board. Rather these sections are more similar to Section 702 of the Administrative Law, 2 Pa. C.S. § 702, which provides that a person aggrieved by an adjudication of a Commonwealth agency may appeal.[12] Further, both the Clean Streams Law and the Coal Refuse Disposal Act confer subject matter jurisdiction upon the Board in other sections. *See* 52 P.S. § 30.53c; 35 P.S. § 691.7(c). The Supreme Court in *Beers v. Unemployment Compensation Board of Review*, 633 A.2d 1158 (Pa. 1993), contrasted Section 702 of the Administrative Law with Section 763 of the Judicial Code, 42 Pa. C.S. § 763 (conferring subject matter jurisdiction upon courts), observing that the issue of standing is distinct from whether a party has a right to appeal. This distinction is evident from the parallel sections in the statutes here. Accordingly, we do not believe that any statutory exception to the nature of standing applies

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

[11] Act of September 24, 1968, P.L. 1040, *as amended*, 52 P.S. §30.51-30.66.

[12] We do not believe there is any significant difference in the definition of "aggrieved" and "adversely affected."

in this case.

However, we believe that individuals who could have appealed an action of the Department for themselves should not be permitted to circumvent the deadlines for the filing of appeals before this Board by signing up with a group after the expiration of the appeal period. In a case such as this our rules clearly provide that appeals from actions of the Department must be filed within thirty days of publication in the *Pennsylvania Bulletin*. 25 Pa. Code § 1021.52. We do not believe that an organization whose sole claim to standing rests upon the aggrievement of individual members can do so where those members would not be permitted to continue their appeal in their own right because the Board's jurisdiction could not attach to their untimely appeal. *See Rostosky v. Department of Environmental Resources,* 364 A.2d 761 (Pa. Cmwlth. 1976); *Sweeney v. DER*, 1995 EHB 544. As a judge on the U.S. Court of Appeals, Justice Ruth Bader Ginsberg wisely observed:

> To allow a "new and improved" [Petitioner] to establish a judicially cognizable challenge . . . beyond [the statute's] prescription period would undercut a deliberate congressional choice to impose statutory finality on agency orders. Were we to agree with [Petitioner], an organization without current standing to sue could file a timely petition for review and thereby extend the statutory period while it seeks out and signs up a person who could have sued but did not do so within the prescribed time. Such an approach to timeliness would render the finality of agency action an uncertain, sometimes thing.

Petro-Chem Processing Inc. v. EPA, 28 ERC (BNA) 1761, 1764 (D.C. Cir.), *cert. denied sub nom Hazardous Waste Treatment Council v. EPA*, 490 U.S. 1106 (1989).

Turning to the motion presented to us for disposition, we will deny the Permittee's motion to dismiss for lack of standing because there are many issues of fact in dispute. First, it is obviously disputed at what time the named individuals became members of the RPF. Second, it is unclear what constitutes membership in the RPF. Third, facts could come to light which may indicate that

what constitutes membership in the RPF. Third, facts could come to light which may indicate that RPF itself is aggrieved by the action of the Department in granting the permit. *See Barshinger v. DEP*, 1996 EHB 849; *RESCUE Wyoming v. DER*, 1993 EHB 839.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RAYMOND PROFFITT FOUNDATION	:	
	:	
v.	:	**EHB Docket No. 98-020-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and VESTA MINING CO., Permittee	:	

ORDER

AND NOW, this 30th day of June, 1998, the motion of the permittee, Vesta Mining Co. Inc. to dismiss the appeal of the Raymond Proffit Foundation in the above-captioned matter is hereby **DENIED.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: June 30, 1998

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

For the Commonwealth, DEP:
Zelda Curtiss, Esq.
Southwestern Region

For Appellant:
John Wilmer, Esq.
Media, PA

For Permittee:
Anthony J. Polito, Esq.
Michael D. Glass, Esq.
POLITO & SMOCK, P.C.
Pittsburgh, PA

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ARNOLD and PATRICIA GASBARRO	:	
	:	
v.	:	**EHB Docket No. 97-031-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** July 1, 1998

OPINION AND ORDER ON PETITION TO REOPEN THE RECORD

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A petition to reopen the record to admit specific documents is denied where two of the proposed documents to be submitted have been admitted as part of the record in a hearing on the matter, where the *pro se* appellants did not comply with the Board's rules of procedure by failing to describe their efforts to discover the proposed evidence prior to the close of the record, and where appellants failed to verify their petition as required by the rules.

OPINION

This matter was initiated with *pro se* appellants Arnold and Patricia Gasbarro's (Gasbarros)[1] January 21, 1997 Notice of Appeal concerning the Department's December 24, 1996 denial of a

[1] It will become evident in the remainder of this opinion that the Gasbarros' *pro se* status has presented problems in this matter. This Board has noted on a number of occasions that individuals who represent their own interests without legal counsel assume the risk that their lack of knowledge may lead to an adverse ruling. *Palmer v. DER*, 1993 EHB 499; *Smith v. DER*, 1992 EHB 226.

private request. The private request sought, in accordance with Section 5(b) and (b.1) of the Pennsylvania Sewage Facilities Act, Act of January 24, 1996, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1 - 750.20a, to revise the East Huntingdon Township Official Sewage Facilities Plan to increase sewage flows but not to expand the existing on-lot sewage system at their property in Mount Pleasant, Westmoreland County.

Gasbarros wish to build a restaurant/inn on their property. This addition would require that the on-lot sewage flows be increased to an average of 3, 000 gallons per day, which Gasbarros want to add without expanding the existing on-lot sewage system. Additional facts of the case were set forth in our June 30, 1998 opinion and will not be repeated here.

On May 19, 1998 the Gasbarros filed a petition to reopen the record from the merits hearing held on November 5 and 6, 1997. The Gasbarros contend 1) that there has not been an adjudication by the Board prior to the filing of this petition; 2) that the documents which are not part of the petition are newly discovered; and 3) that there has been a change of legal authority - from the 1964 regulations and to the 1976.

On June 2, 1998 the Department filed its response, requesting the Board deny the unverified petition, and accompanying memorandum. The Department contends that there is no need for the Board to reopen the record because 1) the documents either had been admitted or were irrelevant, 2) the Gasbarros failed to demonstrate that the documents could not have been discovered before the hearing with the exercise of due diligence, 3) the post-hearing submissions are cumulative and fail to establish a material fact, 4) that there was no change in the legal authority after the close of the record, 5) the petition failed to comply with the Board's rules and 6) the post-hearing submissions are inadmissible hearsay.

On June 15, 1998 the Gasbarros filed a reply in which they set forth their responses in numbered paragraphs.

Under the Board's rules a party may reopen the record prior to adjudication by filing a petition requesting the reopening of the record. *See* 25 Pa. Code § 1021.122 The petition is treated as a miscellaneous motion under Board Rule 1021.74. 25 Pa. Code § 1021.122(d) The Board's rules state that "[E]except as provided in § 1021.73(e) (relating to dispositive motions), the moving party may not file a reply to a response to its motion, unless the Board orders otherwise." 25 Pa. Code § 1021.70(g) Since the Gasbarros have filed a petition to reopen the record, they could not file a reply under the rules. Consequently, we will not consider the Gasbarro's reply in this opinion.

Gasbarros requested the following documents be made part of the record:

1) April 27, 1974 *Pennsylvania Bulletin* Volume 4, Number 18 (Ex. 1)
2) Amendment to Ordinance No. 27 (1975) (Ex. 2)
3) Affidavit and Narrative of David Mills (Ex. 3)
4) Affidavit of Donald J. Pfeifer (Ex. 4)
5) Affidavit and Narrative of Milton A. Highlands (Ex.5)
6) Affidavit of Kenneth King (Ex. 6)
7) Affidavit of Stanley W. Kreger (Ex. 7)
8) Affidavit of Zack Kreger (Ex. 8)
9) Affidavit of Carl Marker (Ex. 9)
10) Affidavit of Arnold S. Gasbarro (Ex. 10)
11) Affidavit of Patricia A. Gasbarro (Ex. 11)
12) Affidavit of Anthony Stella (Ex. 12)
13) Affidavit of Oakley Hall (Ex. 13)
14) Affidavit of Thomas Showman (Ex. 14)
15) Affidavit of Freeman Bowser (Ex. 15)
16) 25 Pa. Code § 1021.122 (Ex. 16)
17) Building Permit dated 8/23/1990 (Ex. 17)

The Gasbarros also requested the admission of the Death Certificate of William Stader and a portion of a Department Policy Manual but these were not numbered as exhibits not did the

Gasbarros attach the certificate or policy manual to the petition.

Under the Board's rules a moving party bears the burden of proving that it is entitled to the relief requested. *Reading Anthracite Company v.DEP*, 1997 EHB 581; *Bethenergy Mines, Inc. v. DEP*, 1997 EHB 282. That party has a duty to present its best case, and the Board will not do so by default. *Green Thornbury Committee v. DER*, 1995 EHB 663.

Admitted Proposed Documents

The Department contends that the Board should not reopen the record for two of the documents, the affidavit and the building permit, because both of these documents were admitted into evidence at the hearing.

We agree with the Department. Upon review, the record shows that the affidavit of David Mills[2] and the building permit were admitted at the hearing as Appellant's Ex. 1 and the Department's Ex. C-1B, respectively.

Copies of Rules

The Department contends that the Board should not reopen the record for two other documents, a copy of regulations from the *Pennsylvania Bulletin* and a copy of the Board's procedural rules for reopening the record.

Under Board Rule 1021.109, the Board can take official notice of "an official or public document not relating to the proceeding and of any matter subject to judicial notice." 25 Pa. Code § 1021.109 One item which is subject to judicial notice is the current law, for example existing regulations, whether these regulations are the Board's or the Department's. Consequently, the Board

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[2] Only the affidavit of David Mills was introduced into evidence at the hearing and not the accompanying project narrative.

can consider these documents without having to reopen the record. Therefore, we deny the petition for these two documents.

Compliance with Board Rules

The Department contends Gasbarros' petition must be denied because the Gasbarros failed to comply with the rules because 1) they did not describe their efforts to discover the evidence in the post-hearing submissions prior to the close of the record as required by Board Rule 1021.122(d)(2); 2) the petition was not verified as required by Board Rule 1021.122(c); 3) the petition did not set forth in numbered paragraphs the facts in support thereof and the relief requested as required by Board Rule 1021.70(d); and 4) the Gasbarros' failed to file a memorandum of law in support of their petition to reopen as required by Board Rule 1021.74(d).

We deny the petition. Under the Board's rules the record may be reopened if there is either 1) recently discovered evidence or 2) evidence has become material as a result of a change in legal authority occurring after the close of the record. 25 Pa. Code § 1021.122(b) and (c). The Gasbarros argue both as grounds for their petition.

Board Rule 1021.122(d) states:

> A petition seeking to reopen the record shall:
> (1) Identify the evidence which the petitioner seeks to add to the record.
> (2) Describe the efforts which petitioner had made to discover such evidence prior to the close of the record.
> (3) Explain how the evidence was discovered after the close of the record.
> A petition filed under subsection (b) shall be verified and all petitions shall contain a certification by counsel that the petition is being filed in good faith and not for the purpose of delay.

25 Pa. Code § 1021.122(d). The Gasbarros failed to describe the efforts they made to discover the

proposed evidence prior to the close of the record and they failed to verify the petition as required by the rules. Consequently, their petition failed to satisfy the requirements for a petition to reopen the record set forth in the Board's procedural rules. Therefore, we must deny their petition. For the foregoing reasons, we hold that the Gasbarros, as the moving parties, have failed to sustain their burden of proof that they are entitled to the relief requested. Accordingly we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANTHONY and PATRICIA GASBARRO	:	
	:	
v.	:	**EHB Docket No. 97-031-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW this 1st day of July, 1998, Appellants' Petition to Reopen the Record is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: July 1, 1998

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

For the Commonwealth, DEP:
Bruce M. Hershlag, Esquire
Southwestern Regional Counsel

For Appellant:
Arnold S. Gasbarro
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906 Arthur Avenue
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JOHNSTON LABORATORIES, INC.	:	
	:	
v.	:	**EHB Docket No. 98-098-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** July 1, 1998

OPINION AND ORDER DISMISSING PETITION FOR SUPERSEDEAS

By George J. Miller, Administrative Law Judge

Synopsis:

The Board declines to hold a hearing on a petition for supersedeas of the Department's action in revoking the Appellant's certifications to conduct water sampling. Because the Appellant failed to appeal the Department's action in the required 30 days, the Board has no jurisdiction to supersede the Department's action. The purpose of a supersedeas is to maintain the *status quo* pending the issuance of the Board's adjudication. The *status quo* as of the time the appeal was filed was that the Department's action of revocation was final as to Appellant as a result of its failure to file a timely appeal.

BACKGROUND

Johnston Laboratories, Inc. (Appellant) is engaged in the business of environmental testing with its principal place of business in Cumberland, Pennsylvania. On February 20, 1998, following an on-site inspection by the Department of Environmental Protection (Department), the Department issued a revocation of Appellant's drinking water certifications, microbiology, organic and inorganic. The Appellant did not take an appeal from that action within 30 days as required by the

regulations of the Environmental Hearing Board. Instead, Appellant agreed to apply for recertification for microbiology and thereafter for recertification as a drinking water laboratory in the areas of inorganics and organics. The petition for a supersedeas claims that by April 30, 1998 the Appellant had complied with all of the Department's requirements for certification but the Department has not yet acted in response to the petition for recertification. The petition alleges that as of the time of the filing of this appeal on May 28, 1998, the Department had taken no action with respect to the application for recertification.

In a conference call held with counsel for the parties on June 19, 1998, the Board declined to schedule a hearing on the petition for a supersedeas because of its concern as to whether or not the failure of the Appellant to take a timely appeal from the Department's action in revoking its certifications prevented the Board from having the jurisdiction to issue the supersedeas requested by the Appellant. The relief sought by the Appellant is that the Board direct the Department to issue a microbiology testing certification to the Appellant pending the appeal based on the Department's revocations of the Appellant's drinking water certifications on February 20, 1998 and its continued refusal to recertify the Appellant in microbiology testing. Both parties have filed legal memoranda on the subject of the Board's jurisdiction which the Board has fully considered.

DISCUSSION

The purpose of a supersedeas is to preserve the lawful *status quo* while the appeal is proceeding to final disposition. The power to issue a supersedeas is quite different from the power of a court to issue either injunctive or mandatory equitable relief which necessarily alters the existing relationship of the parties. *Solomon v. DEP,* 1996 EHB 989. Unfortunately for the Appellant, its failure to take an appeal from the Department's revocation action made that action final so that the *status quo* which existed at the time this appeal was taken was that the Appellant's certifications had

been cancelled by the Department. Accordingly, there is no relief that the Board could properly give by way of a supersedeas.

Under Section 4 of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, *as amended,* 35 P.S. §§ 7511 - 7516, 35 P.S. § 7514(c), the action of the Department is final as to any person who has not perfected an appeal by filing an appeal within 30 days as required by the regulations of the Environmental Hearing Board. What the Appellant asks us to do is to set aside an action by the Department which the Environmental Hearing Board Act says is final by reason of the Appellant's failure to take a timely appeal.

Appellant has asked the Board to consider this appeal as an appeal of the Department's action of revocation *nunc pro tunc* in the legal memoranda which it filed with the Board. Appellant claims that the Department fraudulently induced it not to appeal in exchange for false promises that it made concerning the timeliness in which it would consider Appellant's application for recertification. The Board empathizes with the Appellant's hope that the matter could be settled quickly by the Department reissuing the desired certifications to it. However, we do not view these circumstances as permitting an appeal *nunc pro tunc*. Such an appeal is ordinarily permitted only where there is a breakdown in the Board's operations. Attempts to negotiate the settlement of a dispute with the Department are not grounds for the allowance of an appeal *nunc pro tunc*. *Grand Central Sanitary Landfill v. DER,* 1988 EHB 738.

Because we conclude that we do not have jurisdiction to grant relief to the Appellant, we will dismiss the petition for a supersedeas without a hearing. The Board's Rules of Practice and Procedure at 25 Pa. Code § 1021.77(c) authorize the Board to deny a petition for a supersedeas without a hearing where there is a failure to state grounds sufficient for the granting of a supersedeas. Because the Board is without jurisdiction to set aside the Department's action revoking

the Appellant's certifications by reason of the Appellant's failure to take a timely appeal, we conclude that the petition fails to state grounds for the issuance of a supersedeas.

The Department contends in the brief which it submitted to the Board that the Board does not have jurisdiction to entertain appeals concerning the failure of the Department to act. In the conference call held with counsel on June 19, 1998, two and a half months after Appellant claims that it had submitted a complete application for recertification, the Department's counsel took the position that nothing could be done to hurry along the Department's approval of the Appellant's applications for recertification. Because we have only a petition for supersedeas before us, we do not reach the question as to whether or not the Board has jurisdiction to act on a claim that the Department has decided to delay unreasonably action on such an application. Given the state of the legal authorities on this subject, it may well be that only a court such as the Commonwealth Court has jurisdiction to order the Department to act promptly on such an application. The Board, unlike the Commonwealth Court, is not a court of general jurisdiction. The Pennsylvania Supreme Court has held that the Board has no jurisdiction to issue a declaratory judgment, but that the Commonwealth Court has such jurisdiction. *Empire Sanitary Landfill v. DEP*, 684 A.2d 1047 (Pa. 1996). The Department argues that the Board has no jurisdiction over an appeal from Department inaction because the Board lacks equity jurisdiction. See, *Marinari v. DER*, 566 A.2d 385 (Pa. Cmwlth. 1989) and *Westinghouse Electric Corp. v. DER*, 1990 EHB 515. A decision on that contention is reserved for a later time in these proceedings.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHNSTON LABORATORIES, INC.	:	
	:	
v.	:	**EHB Docket No. 98-098-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 1st day of July, 1998, the petition of the Appellant for a supersedeas is DENIED without a hearing.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: July 1, 1998

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

For the Commonwealth, DEP:
Mary MarthaTruschel, Esquire
Southcentral Region
For Appellant:
F. Lee Shipman, Esquire
John R. Ninosky, Esquire
GOLDBERG, KATZMAN & SHIPMAN, P.C.
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rk

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

THROOP PROPERTY OWNER'S ASSOCIATION, et al.	:	
v.	:	**EHB Docket No. 97-164-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, Permittee	:	**Issued: July 8, 1998**

OPINION AND ORDER
ON PETITION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR PERMISSION FOR INTERLOCUTORY APPEAL AND PETITION FOR LIMITED RECONSIDERATION

by Robert D. Myers, Administrative Law Judge

Synopsis:

A Petition for Limited Reconsideration of a final order is denied where the Petition fails to set forth compelling and persuasive reasons for reconsideration, as required by 25 Pa. Code § 1021.124(a).

A Petition for Reconsideration of an interlocutory order is denied where the Petition fails to demonstrate extraordinary circumstances to justify consideration of the matter by the Board, as required by 25 Pa. Code § 1021.123(a).

A Petition for Permission for Interlocutory Appeal is denied where the issue involved is not a controlling question of law and where an immediate appeal would not advance the ultimate disposition of the case.

OPINION

On July 30, 1997, Throop Property Owner's Association (Fred Soltis, President), Andy Kerecman, and Sharon Soltis-Sparano (collectively, Appellants) filed a Notice of Appeal with the Board challenging the Department of Environmental Protection's (Department) June 10, 1997 issuance of a Major Permit Modification (Modification) to Keystone Sanitary Landfill (Permittee) under Solid Waste Permit No. 101247. The Modification allows Permittee to pursue Phase II Site Development at its landfill in Dunmore and Throop Boroughs, Lackawanna County.

In their Notice of Appeal, Appellants set forth numerous objections. The following objections are relevant here.

> SECTION 271.127
>
> Environmental Assessment: Appellants received [Permittee's] permit application on September 23, 1996, and it did not contain a detailed analysis of the potential impact on the environment, public health and public safety and other areas covered under 271.127(a). The [Department] failed to comply with section 271.127(b). Also, the applicant failed to describe in writing the assumed social and economic benefits of the project to the public. *There was no detailed explanation of the need for facility, etc. The [a]pplicant and the [Department] both failed to address the issues in section 271.127.*
>
> ....
>
> SECTION 271.141 Public notice by applicant.
>
> Incorrect and purposely misleading to the public. The [a]pplicant did not comply with this section. The public notice never mentioned a "Major Permit Modification". *This entire section was not followed by the [a]pplicant, nor by the [Department].*
>
> ....
>
> SECTION 271.201 Criteria for permit issuance or denial
>
> The permit application was not complete and was inaccurate. The need for

> the facility does not clearly outweigh the potential harm posed by operation of the facility, based on the factors relating to environmental assessment. A need for the facility was never demonstrated because it does not exist. A potential for mine subsidence exists and was not addressed. Wetlands will be affected. *Host County Plan does not address an expansion.* It originally states the life span as 15 years or to approx [sic] 2005.

(*See* Notice of Appeal.) (Emphasis added.)

On March 31, 1998, Permittee filed a Motion for Partial Summary Judgment (Motion). Permittee claimed, *inter alia*, that Appellants lack standing to challenge Permittee's public notice or to complain that Permittee's landfill expansion is not mentioned in non-host county plans. On June 19, 1998, the Board ruled on Permittee's Motion. Viewing the record in the light most favorable to Appellants, the Board determined that Appellants were harmed by Permittee's public notice and, thus, have standing to challenge it. With respect to the non-host county plan issue, the Board noted that Appellants did not raise the issue in their Notice of Appeal. Thus, the Board entered summary judgment in favor of Permittee on that issue.

On June 26, 1998, Appellants filed a Petition for Limited Reconsideration (Appellants' Petition) and a supporting Memorandum of Law. Appellants ask the Board to reconsider the entry of summary judgment on the non-host county plan issue. Permittee filed a Response to Appellants' Petition on July 6, 1998.

On June 29, 1998, Permittee filed a Petition for Reconsideration Or, In The Alternative, For Permission For Interlocutory Appeal (Permittee's Petition). Permittee asks the Board to reconsider its determination that Appellants have standing to challenge Permittee's public notice. In the alternative, Permittee asks the Board to certify that issue for immediate interlocutory appeal. On July 1, 1998, Appellants filed a Response to Permittee's Petition.

I. Appellants' Petition

Appellants ask the Board to reconsider the non-host county plan issue because the Board decided the matter based on a legal ground that was not proposed by any party and because the Board erred in finding that Appellants failed to raise the issue in their Notice of Appeal.

Reconsideration of a final order is within the discretion of the Board and will be granted only for compelling and persuasive reasons. The Board may find compelling and persuasive reasons for reconsideration where the final order rests on a legal ground which has not been proposed by any party, or where the crucial facts set forth in the petition are such as would justify a reversal of the Board's decision. 25 Pa. Code § 1021.124.

Here, Appellants seek reconsideration because Permittee sought summary judgment based on lack of standing but the Board entered summary judgment based on Appellants' failure to raise the issue in their Notice of Appeal. First of all, it is not true that the Board entered summary judgment based on a legal ground that was not proposed by any party. Permittee stated in its supporting Memorandum of Law that it "does not concede that the objections identified ... [in the Memorandum of Law] were included in Appellants' Notice of Appeal." (Memorandum of Law at 2, n.1.) Thus, Permittee suggested that Appellants had not actually raised the non-host county plan issue in their Notice of Appeal. The Board properly considered the matter and ruled on it. Even if Permittee had not identified the potential jurisdictional problem, the Board may address *sua sponte* matters respecting its jurisdiction. *Eagle Enterprises, Inc. v. DEP*, 1996 EHB 1048.

Appellants also contend that they raised the non-host county plan issue in their Notice of Appeal. If true, this is a crucial fact that would justify a reversal of the Board's decision.

As a preliminary matter, we note that the issue decided by the Board in its June 19, 1998

Opinion and Order was whether "Appellants Lack Standing To Complain That The Expansion Is Not *Provided For* In County Plans Other Than The [Host] County Plan." (*See* Motion at 9.) (Emphasis added.) The question clearly relates to the Department's regulation at 25 Pa. Code § 271.201(a)(6), which states that a permit application will not be approved unless the applicant demonstrates that "the facility is expressly *provided for* in the approved [waste management] plan." In their Notice of Appeal, Appellants objected to the Department's action based on 25 Pa. Code § 271.201(a)(6) as follows: "Host County Plan does not address an expansion." (*See* Notice of Appeal.) Given the specific reference to the "host county plan" and the absence of any reference to a "non-host county plan," the Board could only conclude that Appellants waived any non-host county plan issue under 25 Pa. Code § 271.201(a)(6).

Appellants maintain that they raised the non-host county plan issue under 25 Pa. Code § 271.127(f). This regulation requires that a permit application include "a detailed explanation of the need for the facility and the consistency of the facility with municipal, county, State or regional solid waste plans in effect where the waste is generated." 25 Pa. Code § 271.127(f). Appellants allege in their Notice of Appeal that "[t]here was no detailed explanation of the need for facility, etc." In other words, Appellants challenge the completeness of the permit application under 25 Pa. Code § 271.127(f). This is a different issue, and the Board has not yet ruled on it.

Appellants also argue that, under *Croner, Inc. v. Department of Environmental Resources*, 589 A.2d 1183 (Pa. Cmwlth. 1991), they did not have to set forth specific objections to the Department's action in their Notice of Appeal. In *Croner*, the notice of appeal contained a statement that the Department's action "is otherwise contrary to law and in violation of the rights of Appellant." *Croner*, 589 A.2d at 1185. The Commonwealth Court held that such general language

is sufficient to preserve a particular issue on appeal.

However, in *Newtown Land Limited Partnership v. Department of Environmental Resources*, 660 A.2d 150 (Pa. Cmwlth. 1995), Commonwealth Court held that *Croner* does not apply where only specific challenges are made in a notice of appeal.[1] In this case, the Notice of Appeal does not contain the general language allowed by *Croner*. Quite the contrary, Appellants' Notice of Appeal presents an orderly series of specific regulations, followed by paragraphs which explain in great detail the violations which apply to each regulation. Where Appellants allege a violation of an entire regulation, they say so. For example, Appellants allege: "This entire section [25 Pa. Code § 271.141] was not followed by the [a]pplicant, nor by the [Department]." Likewise, Appellants allege: "The [a]pplicant and the [Department] both failed to address the issues in section 271.127." However, Appellants only mention a problem with the *host* county plan in connection with 25 Pa. Code § 271.201(a)(6). Because Appellants' allegations are so detailed and comprehensive, we conclude that *Croner* does not apply.

Appellants have failed to demonstrate compelling and persuasive reasons to reconsider the Board's entry of summary judgment on the non-host county plan issue, as required by 25 Pa. Code § 1021.124(a). Accordingly, Appellants' Petition is denied.

II. Permittee's Petition

A. Reconsideration

Permittee asks the Board to reconsider its interlocutory order denying summary judgment

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[1] The Board's regulation at 25 Pa. Code § 1021.51(e) states that a notice of appeal shall set forth in separate numbered paragraphs the *specific objections* to the action of the Department, and that an objection not raised by the appeal shall be deemed waived.

with respect to whether Appellants have standing to challenge Permittee's public notice under 25 Pa. Code § 271.141. The Board will not grant reconsideration of an interlocutory order absent "extraordinary circumstances." 25 Pa. Code § 1021.123. To show that "extraordinary circumstances" exist, the petition must meet the criteria for reconsideration of final orders and, in addition, show that special circumstances are present which justify the Board taking the extraordinary step of reconsidering an interlocutory order. *CNG Transmission Corp. v. DEP*, EHB Docket No. 97-169-MR (Opinion issued April 29, 1998).

Permittee contends that reconsideration is in order here because the Board decided the issue on a legal ground that was not proposed by any party and because the Board's decision will require Permittee to elicit testimony at the hearing from "tens or hundreds of witnesses" from the affected communities. (Permittee's Petition at paras. 12-13.) We are not persuaded by these arguments.

Permittee asserts that no party suggested that Appellants can derive standing from their inability to get other people in the community interested in the Department's action. (Permittee's Petition at para. 12.) This is not true. In their Memorandum of Law in opposition to Permittee's Motion, Appellants discussed at length the importance of public participation in the Department's solid waste permitting process, and explained that "the previous expansion of the Landfill generated tremendous opposition" from the community. (Appellants' Memorandum of Law at 18-21.) Appellants even urged the Board to adopt a *per se* standing rule whenever an appellant alleges a defective public notice. The Board did not go that far. The Board simply viewed the record in the light most favorable to Appellants, as was necessary to do, and found that Appellants were harmed

by Permittee's public notice.[2]

Because Permittee has not demonstrated extraordinary circumstances for reconsideration of the public notice standing issue, we decline to reconsider the matter.[3]

B. Interlocutory Appeal

Permittee also asks the Board to certify the public notice standing issue for immediate interlocutory appeal. We will not do so.

Pa. R.A.P. 1311 states that an appeal may be taken by permission from any interlocutory order of the Board which states that the order (1) involves a controlling question of law (2) as to which there is substantial ground for difference of opinion, and (3) an immediate appeal from the order may materially advance the ultimate termination of the matter. *See* 42 Pa.C.S. § 702(b). Where the interlocutory order does not contain this statement, a party may ask the Board to amend the interlocutory order to include it. Pa. R.A.P. 1311(b). The Board will exercise its discretion in deciding whether to amend the order. *Mercy Hospital of Pittsburgh v. Pennsylvania Human Relations Commission*, 451 A.2d 1357 (Pa. 1982).

Whether Appellants have standing to challenge Permittee's public notice is *not* a controlling question of law in this case. Appellants have raised many issues in their Notice of Appeal. The

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[2] Permittee argues that the Board's decision in this regard is contrary to *Campbell v. Department of Environmental Resources*, 396 A.2d 870 (Pa. Cmwlth. 1979), and *Empire Coal Mining & Devel., Inc. v. Department of Environmental Resources*, 623 A.2d 897 (Pa. Cmwlth.), *appeal denied*, 629 A.2d 1384 (Pa. 1993). However, these cases are readily distinguishable from this appeal.

[3] We need not address Permittee's concern about the number of witnesses that must testify at the hearing. We simply note that the Board will consider that matter at the appropriate time.

public notice issue is only one of them. An immediate interlocutory appeal of that single issue *might* dispose of it. However, that interlocutory appeal would delay resolution of the many other issues. Thus, the ultimate termination of this appeal would not be materially advanced.

Accordingly, Permittee's Petition is denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THROOP PROPERTY OWNER'S ASSOCIATION, et al.	:	
	:	
v.	:	**EHB Docket No. 97-164-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, Permittee	:	

ORDER

AND NOW, this 8th day of July, 1998, it is ordered that Appellants' Petition for Limited Reconsideration is denied. It is further ordered that Permittee's Petition for Reconsideration Or, In The Alternative, For Permission For Interlocutory Appeal is denied.

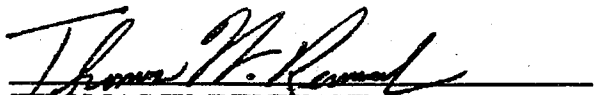
ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: July 8, 1998

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CNG TRANSMISSION CORPORATION, and PENN FUEL GAS, INC.	:	
v.	:	**EHB Docket No. 97-169-MR (Consolidated with 97-170-MR)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and N.E. HUB PARTNERS, L.P., Permittee	:	**Issued: July 9, 1998**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

by Robert D. Myers, Administrative Law Judge

Synopsis:

A motion for summary judgment is denied where there exist genuine issues of material fact, and where one of the issues, as stated, is not properly before the Board.

OPINION

On August 19, 1997, CNG Transmission Corporation (CNG) and Penn Fuel Gas, Inc. (Penn Fuel) (collectively, Appellants) filed Notices of Appeal with the Board contesting the Department of Environmental Protection's (Department) issuance of Gas Well Permit Nos. 37-117-20168 and 37-117-20169 (Permits) to N.E. Hub Partners, L.P. (Permittee).[1] The Permits allow Permittee to

[1] CNG's appeal was docketed at EHB Docket No. 97-169-MR, and Penn Fuel's appeal was docketed at EHB Docket No. 97-170-MR.

drill two salt cavern gas storage wells in Farmington Township, Tioga County, Pennsylvania.

In their Notices of Appeal, Appellants assert that they own a gas storage reservoir in Tioga County, known as the Tioga Storage Pool, which is operated by CNG. The Permits issued by the Department allow the drilling of two injection wells directly through the Tioga Storage Pool. Appellants claim that: (1) the Permits violate sections 102 and 201(e)(1) of the Oil and Gas Act,[2] and other statutory and regulatory provisions, because they threaten the safety of the Tioga Storage Pool and the safety of the people who work there; (2) the Department did not properly consider the risk of damage to the Tioga Storage Pool, the risk of contamination to sources of drinking water, or the risk of injury to people before issuing the Permits; and (3) the Department violated 25 Pa. Code § 78.81(d)(2) in issuing the Permits because it did so without approving a casing installation procedure that was established by mutual agreement between the well operator and the gas storage reservoir operator.

The two appeals were consolidated on September 30, 1997 at EHB Docket No. 97-169-MR. Subsequently, Appellants were granted leave to amend their appeals to include an alternate or supplemental legal issue.[3] In their amended appeals, Appellants assert that Permittee plans to engage in the solution mining of salt in connection with its drilling of the two salt cavern gas storage wells; therefore, the Department should have required that Permittee obtain a noncoal underground mining permit under section 315(a) of the Clean Streams Law[4] and a noncoal surface mining permit under

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[2] Act of December 19, 1984, P.L. 1140, 58 P.S. §§ 601.102 and 601.201(e)(1).

[3] CNG amended its appeal by Order of the Board dated January 7, 1998. Penn Fuel did the same by Order of the Board dated February 2, 1998.

[4] Act of June 22, 1937, P.L. 1987, *as amended*, 35 P. S. § 691.315(a).

section 7(a) of the Noncoal Surface Mining Conservation and Reclamation Act[5] and 25 Pa. Code § 77.101.

On January 27, 1998, Appellants filed a Joint Motion for Summary Judgment seeking summary judgment with respect to three of the issues raised in their amended appeals. On February 23, 1998, Permittee and the Department (Appellees) filed a Joint Motion to Dismiss the noncoal mining permit issue. The Board denied these motions in an Opinion and Order dated April 7, 1998 because there existed genuine issues of material fact.

On April 28, 1998, Appellees filed a Supplemental Joint Motion to Dismiss, asking once again that the Board dismiss the noncoal mining permit issue. The Board denied this motion in an Opinion and Order dated June 23, 1998.

On April 28, 1998, Appellees also filed the present Joint Motion for Summary Judgment (Joint Motion) with supporting affidavits, exhibits, and memoranda of law. On May 26, 1998, Appellants each filed a Response to the Joint Motion. On June 11, 1998, Appellees filed a Reply to the Responses.

I. Statutory and Regulatory Violations

The first issue presented in Appellees' Joint Motion is whether the Permits threaten the safety of the Tioga Storage Pool and the people who work there. In their amended appeals, Appellants allege that: (1) the Permits will allow drilling mud to invade the Oriskany formation and impair the deliverability and storage capacity of the Tioga Storage Pool in violation of 58 P.S. § 601.102 and 25 Pa. Code §§ 78.81, 78.83, 78.84, and 78.85; (2) the Permits will allow inadequate cement

[5] Act of December 19, 1984, P.L. 1093, 52 P. S. §3307(a).

bonding so that cement may invade the Tioga Storage Pool in violation of 58 P.S. § 601.102 and 25 Pa. Code §§ 78.73, 78.81, 78.83, 78.84, 78.85, and 78.403; (3) the Permits will allow gas to escape from the Tioga Storage Pool and the salt caverns in violation of 58 P.S. §§ 601.102, 601.303 and 25 Pa. Code § 78.73; (4) the Permits do not provide for adequate cement bond integrity monitoring in violation of 25 Pa. Code § 78.403; and (5) the Permits do not adequately guard against the possibility of blowouts, kicks, and fracturing of the surface casing shoe in violation of 58 P.S. §§ 102, 209 and 25 Pa. Code §§ 78.71, 78.72, 78.76(c), 78.81, 78.83, 78.84, and 78.85.

Under section 201(e)(1) of the Oil and Gas Act, the Department will issue a permit unless doing so *would result* in a violation of the Oil and Gas Act or other applicable environmental laws. Section 102(2) of the Oil and Gas Act states that the provisions of the act are intended to protect the safety of personnel and facilities employed in the storage of natural gas. Appellees contend that Appellants have not presented evidence to show that the Permits *would result* in harm to the Tioga Storage Pool. Rather, Appellants have shown only *potential* harm to the storage facility in the event that certain *hypothetical* scenarios occur. Thus, Appellees request the entry of summary judgment in their favor on this issue.

The Board may grant summary judgment if, after the completion of discovery, *including the production of expert reports*, an adverse party who will bear the burden of proof at hearing has failed to produce evidence of facts essential to the cause of action. Pa. R.C.P. No. 1035.2(2).

> Special note should be taken of the requirement under Rule 1035.2(2) that the motion be made after completion of discovery relevant to the motion, including the production of expert reports. While Rule 1035.2(2) is prefaced with the statement that any party may file a motion after the relevant pleadings have closed, the adverse party must be given adequate time to develop the case and the motion will be premature if filed before the adverse party has completed discovery relevant to the motion. .... [T]he intent is not to eliminate meritorious claims prematurely before

relevant discovery has been completed.

See Pa. R.C.P. No. 1035.1; Explanatory Comment--1996.

Here, Appellants maintain that the parties have not completed the production of expert reports. Indeed, Appellants assert that Appellees have not supplemented their January 1998 responses to expert interrogatories, have not served expert reports, and have not identified their expert witnesses. (CNG's Response at para. 21, Exhibit K.) Appellees do not deny this. Therefore, we cannot enter summary judgment under Pa. R.C.P. No. 1035.2(2).

The Board may also enter judgment as a matter of law whenever there is no genuine issue of material fact as to a necessary element of the cause of action which could be established by additional discovery or expert report. Pa. R.C.P. No. 1035.2(1). Where a motion for summary judgment is supported by a record which contains an *admission* with respect to a particular matter, the adverse party cannot establish a genuine issue of material fact with respect to that matter by further discovery or expert report. *See* Note to Pa. R.C.P. No. 1035.2.

In this case, Appellees maintain that the record in support of their Joint Motion contains *admissions* with respect to the various technical matters before us. If this is true, then Appellees may be entitled to summary judgment under Pa. R.C.P. No. 1035.2(1). However, if the record does *not* contain appropriate admissions, then Appellees are not entitled to summary judgment because Appellants may be able to establish a genuine issue of material fact with the production of expert reports. We shall proceed, then, to examine each of the technical issues to determine whether Appellants have made admissions that would entitle Appellees to the entry of summary judgment.

A. Drilling Mud

First, Appellees argue that CNG's corporate designees conceded that they have no data to

support the assertion that drilling mud will invade the Oriskany formation and reduce the deliverability and storage capacity of the Tioga Storage Pool; therefore, Appellees are entitled to summary judgment on that issue. (Joint Motion at para. 22.)

James Edward Simons,[6] a well specialist for CNG, testified that, as far as he knows, CNG has no data to support the assertion that drilling with a 28-inch borehole will result in tremendous amounts of drilling fluid invading the Oriskany and causing irrevocable impairment of the deliverability of the Tioga Storage Pool. (Simons Deposition at 149.) However, it is clear from Simons' testimony that CNG has no data because, as far as Simons knows, no one has ever drilled a 28-inch borehole through the Oriskany. (Simons Deposition at 110-13, 126-27.) In other words, Simons has only admitted that CNG has done no formal study of the technical issue before us. Simons testified elsewhere, based on years of experience drilling with different drill bit sizes through the Oriskany formation, that he would be worried that CNG could be susceptible to large drilling mud loss from the slow penetration rate of the 28-inch drill bit. (Simons Deposition at 91-92, 99-100.)

James D. Blasingame,[7] CNG's Manager of Gas Storage, testified that he was never involved in a drilling project with a 28-inch borehole that resulted in tremendous amounts of drilling fluid invading the Oriskany and harming the Tioga Storage Pool. Moreover, he was not aware of anyone at CNG who was so involved. In addition, he was unaware of any literature relating to drilling fluid

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[6] Simons was designated by CNG to testify on CNG's drilling practices. (Joint Motion, Exhibit 2.)

[7] Blasingame was designated by CNG to testify on CNG's gas storage operations. (Joint Motion, Exhibit 2.)

loss from a 28-inch borehole. (Blasingame's Deposition at 191.) However, Blasingame testified based on his experience that: (1) the longer the Oriskany formation is exposed to drilling fluid, the more drilling fluid is lost to the Tioga Storage Pool; and (2) the larger the borehole diameter, the longer it takes to drill the well bore. Thus, it is Blasingame's opinion that drilling a 28-inch borehole would take longer than a small one and would result in more drilling fluid loss to the Tioga Storage Pool. (Blasingame's Deposition at 115-17.) This is hardly an *admission* that drilling mud from the 28-inch borehole will *not* invade the Oriskany and harm the Tioga Storage Pool.

Based on the foregoing, summary judgment is denied on this issue.

B. Cement Bond

Second, Appellees argue that CNG admits that it has *no evidence* that the cement bond will be inadequate, or that there will be an invasion of cement into the Tioga Storage Pool; therefore, Appellees are entitled to summary judgment on this issue. (Joint Motion at paras. 33-34.)

Appellees note that David E. Taylor,[8] a Staff Petroleum Engineer for CNG, testified as follows:

> Q. Is it your understanding that a 28-inch bore hole will result in tremendous amounts of cement invading the Oriskany?
>
> A. No.

(Taylor Deposition at 232.) However, Taylor also testified that a well bore nearly always causes damage, or loss of productivity, from mud or cement invasion. (Taylor Deposition at 191-93.) Moreover, according to Taylor, the larger well bore in this case means more cement, and more

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[8] Taylor was designated by CNG to testify about CNG's drilling practices. (Joint Motion, Exhibit 2.)

cement means more damage. (Taylor Deposition at 207-09.) Taylor's testimony appears to be inconsistent. Viewing it in the light most favorable to Appellants, we cannot say that it is *an admission* that cement invasion will not harm the Tioga Storage Pool. Indeed, Taylor should have an opportunity at the hearing to explain the apparent contradiction in his testimony.

Simons and Blasingame testified that CNG has no data to support the proposition that the cement bond for a large-diameter well bore casing will *necessarily* fail. (Simons Deposition at 164; Blasingame Deposition at 102.) Again, the fact that no formal research data exists is not fatal to Appellants on this issue. There is other testimony based on the experience of experts which suggests the likelihood of cement bond failure. (*See, e.g.,* Watson Deposition at 385-87.) Again, reading the record in the light most favorable to the nonmoving party, as we must do, we find a genuine issue of material fact on the cement bond and cement invasion issue and cannot grant summary judgment with respect thereto.

C. Gas Escape

Third, Appellees argue that CNG admits that it cannot support the proposition that there will *necessarily* be significant gas loss from the large-diameter well bore; therefore, Appellees are entitled to summary judgment on this issue. (Joint Motion at para. 38.)

Taylor, Blasingame, and Simons testified that they were unaware of any data at CNG pertaining to the relationship between well bore size and gas loss. (Taylor Deposition at 248-49; Blasingame Deposition at 200; Simons Deposition at 165-66.) Again, this is only an admission that CNG has conducted no formal research on the matter. Even so, Simons testified that CNG has talked to a consultant about the matter. (Simons Deposition at 167.) Taylor testified that Halliburton Energy Services has conducted research on the relationship of hole casing size to

tendencies for gas migration and has developed an equation based on their research. (Taylor Deposition at 246-47.) Blasingame testified from his own experience that there was some correlation between the size of a well bore and the tendency for gas migration. (Blasingame Deposition at 162-63.) Finally, Robert W. Watson, Ph.D., testified that gas leakage is inevitable here because residual mud on the Oriskany sandstone will prevent an adequate cement bond. (Watson Deposition at 385-87.)

Because CNG has not admitted that borehole size is unrelated to gas escape, we deny summary judgment on that issue.

D. Integrity Monitoring

Fourth, Appellees argue that CNG admits that there are sufficient methods for testing cement bond integrity in a large-diameter well; therefore, Appellees are entitled to summary judgment on that issue. (Joint Motion at paras. 43-44.)

David L. Linger, Jr., a designee for CNG's sister company, CNG Producing Company, testified that it is possible to test the cement bond integrity in a large-diameter well by means of a pressure test and a leak-off test. (Linger Deposition at 53-57.) However, we cannot say from the record before us that this constitutes an *admission by Appellants*. Although CNG Producing Company may be CNG's sister company, CNG Producing Company is not a party to this appeal. Moreover, there is no evidence that Appellants have authorized Linger to testify on their behalf on any technical issue.

John Istvan, a consultant to CNG, testified that, when it is not possible to run a cement bond log test, it is standard industry practice to do a pressure test to analyze the integrity of the cement bond. (Istvan's Deposition at 73-74.) Again, we are not certain from the record that Istvan is

authorized to testify for Appellants on this issue. Kevin Stiles, however, whom CNG did designate to testify on drilling practices, stated that it is *not* possible to test cement bond integrity by means of a pressure test. According to Stiles, a pressure test only tests the integrity of the casing, not the integrity of the cement bond. (Stiles Deposition at 784.) Clearly, there is a genuine issue of material fact on this issue, and summary judgment is not appropriate.

E. Blowouts

Finally, Appellees argue that CNG admits that the risk of blowouts is present when drilling any well, and that conventional procedures to control blowouts can be used here; therefore, Appellees are entitled to summary judgment on that issue. (Joint Motion at paras. 46-47.)

Stiles testified that the potential for blowout is always a risk when performing well work in connection with the gas storage reservoirs here. (Stiles Deposition at 576.) However, Simons also testified that, with the large-diameter borehole, a larger volume of gas is involved. Thus, special care must be taken to ensure that the blowout prevention equipment is capable of handling the larger gas flow. (Simons Deposition at 187.) We do not consider such testimony to be an *admission* that the risk from blowouts is the same regardless of the borehole size.

Taylor testified that he "would think" that industry standard well control procedures would be the same for 28-inch boreholes as for smaller size boreholes. (Taylor Deposition at 207.) However, Appellants cite evidence which suggests that industry standard well control procedures would not work here because the proposed surface casing is too short. (*See* Responses at para. 47.) Such evidence creates a genuine issue of material fact; thus, summary judgment is not proper here.

II. Department's Review

Appellees next argue that the record shows that the Department fully considered Appellants'

technical objections prior to issuance of the Permits; therefore, Appellees are entitled to summary judgment on that issue. In our April 7, 1998 Opinion and Order on Appellants' Joint Motion for Summary Judgment, we refused to grant summary judgment on the extent of the Department's technical review prior to issuance of the permits because the parties disputed the matter. It is clear that the parties still disagree. (*See* Joint Motion and Responses at paras. 61-62, 66-68.) Therefore, once again, summary judgment is denied on this issue.

III. Compliance with 25 Pa. Code § 78.81(d)(2)

The next issue raised in Appellees' Joint Motion is whether the Department issued the Permits without complying with 25 Pa. Code § 78.81(d)(2). We denied summary judgment on this issue in our April 7, 1998 Opinion and Order because there was a genuine issue of material fact as to whether Permittee and CNG mutually agreed on Permittee's casing installation procedure. We addressed the issue again in our April 29, 1998 Opinion and Order on Petition for Reconsideration and in our May 26, 1998 Opinion and Order on Joint Petition to Certify Issue for Immediate Interlocutory Appeal. In each instance, we noted the disagreement on that factual matter.

Here, Appellees cite portions of the record to show that there was mutual agreement, in reality if not in terms, with respect to the casing installation procedure. Appellants deny it and make reference to other portions of the record. (Joint Motion and Responses at para. 86.) Because there is still a genuine issue of material fact, summary judgment is denied on this issue.

IV. Noncoal Mining Permits

The next issue raised in the Joint Motion is whether the Department properly "issued the well drilling permits prior to requiring [Permittee] to obtain underground and surface noncoal mining permits." (Joint Motion at para. 94.) This is *not* the precise issue raised by Appellants in their

Amended Notices of Appeal. Appellants allege on appeal that the Department improperly issued the Permits *without a provision* requiring that Permittee obtain noncoal mining permits for solution salt mining connected with the two gas wells.

This is not the first time that Appellees have misstated the noncoal mining permit issue. In their Joint Motion to Dismiss, Appellees stated the issue somewhat as it is stated here: whether the Department should have required noncoal mining permits *prior to, or in conjunction with, issuance of the Permits*. However, we explained in our April 7, 1998 Opinion and Order that this is not the issue on appeal. Rather, Appellants are challenging the Department's decision to issue the Permits without inserting a special condition requiring that Permittee obtain noncoal mining permits before constructing the wells. *CNG Transmission Corp. v. DEP*, EHB Docket No. 97-169 (Opinion issued April 7, 1998), slip op. at 13.

In their Supplemental Joint Motion to Dismiss, Appellees misconstrued the issue again. There, Appellees asked the Board to dismiss the noncoal mining permit issue because the Department had not yet decided whether to require the noncoal mining application submitted by Permittee in connection with the two wells. However, we explained in our June 23, 1998 Opinion and Order that this is not the issue on appeal. Rather, Appellants are challenging the Department's failure to include a provision in the Permits requiring Permittee to obtain noncoal mining permits. *CNG Transmission Corp. v. DEP*, EHB Docket No. 97-169 (Opinion issued June 23, 1998), slip op. at 4-5.

Because Appellees have again failed to properly set forth the issue on appeal, we will not consider their Joint Motion with respect thereto. Indeed, we will not enter summary judgment on an issue that is not properly before the Board.

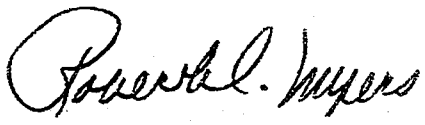
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CNG TRANSMISSION CORPORATION, and PENN FUEL GAS, INC.	:	
v.	:	**EHB Docket No. 97-169-MR**
	:	**(Consolidated with 97-170-MR)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and N.E. HUB PARTNERS, L.P., Permittee	:	

ORDER

AND NOW, this 9th day of July, 1998, it is ordered that the Joint Motion for Summary Judgment filed by the Department of Environmental Protection and Permittee is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: July 9, 1998

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

READING ANTHRACITE COMPANY	:	
	:	
v.	:	**EHB Docket No. 95-196-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, PORTER ASSOCIATES, INC., Permittee, and KOCHER COAL COMPANY, INC., Intervenor	:	**Issued:** July 10, 1998

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT AND COUNTER-MOTION TO STRIKE MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion for summary judgment is granted, and a cross motion to strike the motion for summary judgment is denied. The Board will not strike a motion for summary judgment, even though it was filed after the deadline for dispositive motions, where: (1) the issue on which summary judgment is sought is straightforward and potentially dispositive; (2) the parties would have to expend considerable additional resources to develop their positions at a hearing on the merits; (3) the movant has filed two previous requests for summary judgment that were denied because of procedural problems; and (4) the non-moving party has already filed a response and memorandum in opposition, so no further expenditure would be required to defend against the motion.

The Board will grant a motion for summary judgment seeking dismissal of issues under the administrative finality doctrine. A Department action is final with respect to a third party who fails to file an appeal within 30 days of either actual notice or publication of notice in the *Pennsylvania*

Bulletin. He may not raise issues that he could have raised with respect to that action in appeals of subsequent Department actions.

OPINION

The factual backdrop of this appeal has been set forth in detail in our February 17, 1998, opinion and order. The appeal was initiated with the September 11, 1995, filing of a notice of appeal by Reading Anthracite Company (Reading). Reading challenges the Department of Environmental Protection's (Department) renewal of an anthracite surface mining permit (permit renewal) under the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §1396.1-1396.19a (Surface Mining Act). The permit renewal authorizes Porter Associates, Inc. (Porter) to operate a surface mine and dispose of coal refuse and fly ash or bottom ash (collectively, ash) on a site (site) in Porter Township, Schuylkill County.

Kocher Coal Company (Kocher) joined the proceedings on April 4, 1996, when the Board granted a Kocher petition to intervene. Kocher had agreed to purchase the site in a May 1, 1967, contract with Reading.

Before issuing the permit renewal, the Department took several other actions with respect to the site. On June 25, 1990, the Department issued a surface mining permit (permit) to Kocher. On January 23, 1991, the Department modified the permit, pursuant to a Kocher request, to allow ash disposal at the site. And, on October 3, 1991, the Department granted a request to transfer the modified permit (permit transfer) to Porter, in accordance with an agreement between Porter and Kocher.

The Board has issued five previous opinions in this appeal. We denied a motion to dismiss filed by Kocher and a motion for summary judgment/motion to limit issues filed by Porter. *See*

Reading Anthracite Company v. DEP, 1997 EHB 581. We granted in part and denied in part a Kocher motion for summary judgment and a Porter motion for summary judgment/motion to limit issues. *See Reading Anthracite Company v. DEP*, EHB Docket No. 95-196-C (Opinion issued February 17, 1998). We denied Kocher and Reading's petitions for reconsideration of our February 17, 1998, opinion and order. *See Reading Anthracite Company v. DEP*, EHB Docket No. 95-196-C (Opinions issued March 11 and 12, 1998). And we denied Reading's petition for leave to file an appeal nunc pro tunc. *See Reading Anthracite Company v. DEP*, EHB Docket No. 95-196-C (Opinion issued June 19, 1998).

In its notice of appeal, Reading averred that:

> (1) it still owns the site;
>
> (2) it gave Kocher the right to occupy the site as part of the May 1, 1967, contract, but never gave Kocher the right to allow others to conduct surface mining activities or operate an ash disposal facility on site;
>
> (3) Kocher identified itself--not Reading--as the owner of the site on the consent to enter form submitted with the original surface mining permit application;
>
> (4) neither the original surface mining permit application nor the Department's later actions show that Reading gave Porter the right to mine coal, or consented to Porter's use of the site for surface mining activities or ash disposal.

However, our February 17, 1998, opinion and order narrowed the issues in the appeal. There, we granted in part and denied in part a Kocher motion for summary judgment and a Porter motion for summary judgment/motion to limit issues. Both motions averred that the doctrine of administrative finality precluded Reading from raising the issue in its notice of appeal. We granted the motions with respect to Reading's allegation that the Department erred by approving the permit

renewal without Porter having obtained Reading's consent to enter the site. The doctrine of administrative finality, we explained, barred Reading from making this challenge because Reading failed to appeal either the permit or permit transfer within 30 days of the *Pennsylvania Bulletin* publishing notice of them. But we denied the motions with respect to Reading's claim that it never consented to ash disposal activities on site. Porter and Kocher argued that the administrative finality doctrine bars Reading from raising that issue because Reading could have raised the issue previously, in an appeal of the permit modification. While the Board agreed that the permit modification addressed ash disposal activities on site, we denied Porter's and Kocher's motions on this issue because Porter and Kocher never showed that the permit modification had become final with respect to Reading. For third-party appellants like Reading, when a Department action becomes final depends on whether notice is published in the *Pennsylvania Bulletin.* If the *Pennsylvania Bulletin* publishes notice of the action, individuals have 30 days from the date of publication to appeal; otherwise, they must appeal within 30 days of receiving actual notice. Because Porter and Kocher never addressed the issues of whether or when the *Pennsylvania Bulletin* published notice of the permit modification, we held that they had failed to conclusively establish that the permit modification had become final with respect to Reading.

Kocher filed a third motion for summary judgment and supporting memorandum of law on April 4, 1998. In its motion, Kocher again seeks dismissal of Reading's claim that it had to consent to the ash disposal activities on site. This time Kocher expressly addresses when the *Pennsylvania Bulletin* published notice of the modification. On May 4, 1998, Reading filed a response, a memorandum of law opposing the motion, and a counter-motion to strike Kocher's motion for summary judgment. Kocher filed a response and memorandum of law opposing the counter-motion

to strike on May 18, 1998. We will address Reading's counter-motion to strike first, and then turn to Kocher's motion for summary judgment.

I. Reading's counter-motion to strike Kocher's motion for summary judgment

In its counter-motion, Reading argues that we should strike Kocher's motion for summary judgment because: (1) Kocher filed the motion for summary judgment after the deadline for filing dispositive motions expired; (2) certain averments in Kocher's motion concerning publication of notice rely on disputed factual allegations; and (3) Kocher's filing of repeated motions for summary judgment has resulted in piecemeal litigation, wasting both Reading's and the Board's resources.

In its response and memorandum in opposition, Kocher argues that: (1) it did not require permission from the Board to file the motion for summary judgment; (2) no disputes exist regarding the material facts concerning publication of notice; and (3) disposing of the remaining issues by a summary judgment, if possible, would spare both the Board and the parties the expense of an unnecessary hearing on the merits.

Reading is correct when it points out that Kocher filed its motion for summary judgment after the deadline for filing dispositive motions expired. Kocher should have requested leave to file its motion for summary judgment. Nevertheless, we will deny Reading's counter-motion to strike. The parties have attempted to have the Board rule on this particular administrative finality issue several times. *See Reading Anthracite Company v. DEP*, 1997 EHB 581, *Reading Anthracite Company v. DEP*, EHB Docket No. 95-196-C (Opinion issued February 17, 1998), and *Reading Anthracite Company v. DEP*, EHB Docket No. 95-196-C (Opinion issued March 11, 1998). In each instance, procedural anomalies prevented us from reaching the merits of the motions. Now, Kocher has filed another motion for summary judgment raising the same issue. Although we are ordinarily reticent

to consider a motion for summary judgment received after the filing deadline has expired, we will make an exception here for several reasons. First, Kocher's motion seeks summary judgment on an issue that is straightforward and potentially dispositive. Second, all the parties--Reading included--would have to expend considerable additional resources developing their positions for a hearing on the merits, and they would have to prepare with respect to every issue potentially involved in this appeal, not just the issue of whether the *Pennsylvania Bulletin* published notice of the permit modification. Third, procedural anomalies played a large role in frustrating the parties' earlier attempts to have the Board resolve the administrative finality issues. And fourth, Reading has already filed its response and memorandum opposing the motion for summary judgment, so entertaining the motion would not require Reading to devote additional resources to defending against the motion. In sum, we feel all of the parties would be better served if we rule on the motion for summary judgment.

II. Kocher's motion for summary judgment

In its motion for summary judgment, Kocher argues that Reading cannot argue it never consented to ash disposal on site because Reading failed to raise the issue within 30 days of the *Pennsylvania Bulletin* publishing notice of the permit modification. In its response and memorandum in opposition, Reading argues that: (1) it is unclear whether the notice published in the *Pennsylvania Bulletin* pertained to the permit modification issued to Kocher for this site, as opposed to another permit modification; (2) the notice was inadequate to put Reading on notice that the modification would affect its property; and (3) the administrative finality doctrine cannot apply here because, otherwise, the Department would not have the right to enter onto the site, as required by state law, and would not have collected all the ownership information required by federal law.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions of record--and affidavits, if any--show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.2; *County of Adams v. DEP,* 687 A.2d 1222 (Pa. Cmwlth. 1997). When deciding motions for summary judgment, we view the record in the light most favorable to the nonmoving party and will enter summary judgment only where the right is clear and free from doubt. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995).

After a careful review of the motion, response, and memoranda in support and opposition, we agree with Kocher that the administrative finality doctrine bars Reading from arguing that it never consented to ash disposal on site. Despite Reading's arguments to the contrary, the notice published in the *Pennsylvania Bulletin* clearly pertains to the permit modification at issue here. In the stipulation of facts, Reading admits the application for the permit modification for this site was filed around September 25, 1990, and that the corresponding modification was issued to Kocher on January 23, 1991; modified permit number 54890105; and authorized ash disposal affecting 115.0 acres on a site in Schuylkill County with a receiving stream of Rausch Creek to Pine Creek to Mahantongo Creek. (Stipulation,[1] para. 19-21 and Ex. K.) Similarly, the notice published in the *Pennsylvania Bulletin* pertains to a permit modification where the application was filed around September 25, 1990, and the modification was issued to Kocher on January 23, 1991; affected permit

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[1] References to the "stipulation" pertain to the stipulation of facts the parties filed on September 15, 1997. While the parties submitted the stipulation with one of the previous motions for summary judgment--not the motion at issue here--the stipulation expressly provides that "[i]t is agreed by all parties hereto that the [stipulation] shall constitute the stipulated record for purposes of any motions for summary judgment based upon the defense of administrative finality in this case." (Stipulation, p. 1.)

number 54890105; and authorized ash disposal affecting 115.0 acres on a site in Schuylkill County with a receiving stream of Rausch Creek to Pine Creek to Mahantongo Creek. Given the extent of the identity between the modification issued to Kocher for this site, and the notice published in the *Pennsylvania Bulletin*, the notice clearly pertains to this modification.

Under the doctrine of administrative finality, "one who fails to exhaust his statutory remedies may not thereafter raise an issue that could have and should have been raised in the proceeding afforded by his statutory remedy." *Department of Environmental Resources v. Wheeling-Pittsburgh Coal Corp.*, 348 A.2d 765, 767 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977) (quoting *Philadelphia v. Sam Bobman Department Store Company*, 149 A.2d 518, 521 (Pa. Super. 1959). Since the permit modification authorized ash disposal on site, Reading could have raised the issue of its lack of consent in an appeal of the permit modification. Therefore, if the modification has become final with respect to Reading, the administrative finality doctrine would ordinarily preclude Reading from raising the issue of its consent here, in an appeal of the permit renewal.

Section 4(c) of the Environmental Hearing Board Act (the Environmental Hearing Board Act), Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. § 7514(d), provides that "no action of the [D]epartment adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the [B]oard. . . ." Section 1021.52(a) of the Board's rules of practice and procedure, 25 Pa. Code § 1021.52(a), meanwhile, provides that the Board's jurisdiction extends only to appeals of Department actions filed "within 30 days after the party appellant has received written notice of the action or within 30 days after notice of the action has been published in the *Pennsylvania Bulletin*. . . ."

Precisely when the 30-day appeal period starts to run depends on the prospective appellant. Where, as here, the *Pennsylvania Bulletin* has published notice and the appellant was not directly involved in the Department's action before filing his appeal, the appeal period starts to run only upon the publication of notice in the *Pennsylvania Bulletin*--even if the prospective appellant had written notice beforehand. *See, e.g., Lower Allen Citizens Action Group, Inc. v. DER*, 538 A.2d 130 (Pa. Cmwlth. 1988). The *Pennsylvania Bulletin* published notice of the modification for this site on February 16, 1991. (Motion for summary judgment, Ex. A.) However, Reading never appealed the permit modification. (Stipulation, para. 22.) Since Reading failed to do so, the administrative finality doctrine would ordinarily preclude it from arguing that it did not consent to the ash disposal in an appeal of the permit renewal.

However, Reading argues that the administrative finality doctrine should not apply here because the notice of the permit modification published in the *Pennsylvania Bulletin* was inadequate to put it on notice that the modification affected its property. The implication is that Reading would have filed a timely notice of appeal had the *Pennsylvania Bulletin* published adequate notice of the modification. But even assuming that the notice published in the *Pennsylvania Bulletin* was inadequate, and that Reading's appeal started to run only when Reading *received actual notice*--not earlier, when the *Pennsylvania Bulletin* published notice--the permit modification would still be final with respect to Reading.[2] Reading had actual notice of the permit modification, and knew that it

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[2] Reading only appealed the permit renewal. It did not appeal the permit modification, permit transfer, or other actions the Department took with respect to the site. Although Reading has attempted to collaterally attack those other actions in this, its appeal of the permit renewal, the collateral attacks themselves are insufficient to preserve Reading's right to challenge the other actions. In other words, Reading had to appeal the other Department actions to contest them; Reading cannot challenge those actions in its appeal of the permit renewal.

authorized ash disposal on site, by at least September 15, 1997, when the parties filed the stipulation.[3] Therefore, even assuming Reading's 30-day appeal period started to run only after Reading received actual notice, Reading should have appealed the permit modification by October 15, 1997, at the latest. Since Reading failed to appeal the permit modification by that time, the permit modification is final with respect to Reading--even if the notice published in the *Pennsylvania Bulletin* was inadequate.[4]

This leaves only Reading's last argument: that it must be able to argue that it did not consent to ash disposal, even if the administrative finality doctrine would ordinarily apply, because, otherwise, the Department would not have the right to enter onto the site, as required by state law, and would not have the collected all the ownership information required by federal law. In its response to Kocher's motion for summary judgment, Reading avers:

> [S]hould this Board determine that administrative finality doctrine bars it from challenging the permit actions of DEP, the result will be that a permit will have been issued and affirmed by this Board based upon an incorrect Supplemental C. As a consequence, DEP will have absolutely no right to come on [Reading's] ground to reclaim the site into which [Porter] is currently disposing of ash if Porter or Kocher should ever default in any reclamation obligations they might have. Accordingly, the permit itself is invalid under such a scenario and DEP is in violation of federal statutes regarding its obligations to obtain property ownership information and other property rights and right of entry from the landowner to go upon the ground which is the subject of a permit.... DEP will have absolutely no rights on [Reading's]

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[3] The stipulation contained, among other things, a copy of the permit modification. (Stipulation, Exhibit K.)

[4] This is consistent with our approach for determining whether we will grant a third party leave to file an appeal nunc pro tunc on the basis that the published notice was inadequate. In that context, we have noted that, where a third party receives actual notice after publication of notice and fails to appeal for much longer than 30 days after receiving actual notice, it is difficult to accord much weight to the argument that adequate publication of notice would have made a difference. *See, e.g., Reading Anthracite Coal Company v. DEP*, EHB Docket No. 95-196-C (June 19, 1998).

> ground and the consent is absolutely meaningless in the context of the permit granted and then transferred and then modified. Such a permit is as a matter of law a nullity and revocable.

(Response, p. 2.)

Several problems exist with Reading's argument. First, although Reading raises the argument within the context of the permit modification, Reading is really trying to challenge the landowner consent agreement Kocher submitted with the original permit, and to argue that Porter required its consent to enter the site. We have previously held that the doctrine of administrative finality bars Reading from raising these issues, and we denied Reading's petition to reconsider that decision. *See Reading Anthracite Company v. DEP*, EHB Docket No. 95-196-C (Opinions issued February 17, 1998, and March 12, 1998).[5] Second, Reading's argument is based on a non sequitur: Even assuming the Department has the power to enter the site if necessary to reclaim the property, it does not necessarily follow that *Reading* must have the right to challenge the permit modification

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[5] Reading repeatedly argues that the administrative finality doctrine should not apply to its assertions that the Department erred by issuing the permit modification. According to Reading, applying the doctrine to such challenges would amount to the Board sanctioning unlawful Department conduct. Reading's argument, however, is based on a fundamental misunderstanding of administrative finality.

The administrative finality doctrine does not apply only to specious claims; it bars *all* claims which could have been raised in a previous proceeding. While the doctrine will sometimes preclude appellants from raising issues, it serves an important purpose. It guarantees a measure of order and certainty to the administrative process: on the one hand, persons affected by an agency action have an opportunity to challenge the agency action in an adjudicatory proceeding; on the other, they have an incentive to bring their challenges promptly, and can accord some finality to the agency's action if it is not challenged or the challenges are dismissed. See, e.g., *Department of Environmental Resources v. Wheeling-Pittsburgh Coal Corp.*, 348 A.2d 765, 767 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977). We know of no exception to the doctrine, nor does Reading point us to any, which exempts issues simply because they are otherwise meritorious.

or landowner consent agreement, or argue that Porter required its consent to enter the property.[6] The Department can have the power to enter the site whether or not Reading may collaterally challenge previous Department actions in this proceeding.[7] The Department also has options with respect to actions it has previously taken that private parties do not. Reading, for instance, has no recourse with respect to the permit modification, since it failed to file a timely appeal of that action. However, if the Department determines that it issued the permit modification unlawfully, or that Kocher obtained the modification by fraud, the Department could always revoke the permit.

In light of the above, we conclude that the administrative finality doctrine bars Reading from arguing that it never consented to the ash disposal activities on site. Accordingly, we grant Kocher's motion for summary judgment and deny Reading's counter-motion to strike Kocher's motion. Since the ash disposal issue was the only remaining issue in Reading's appeal, the appeal is now dismissed.[8]

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[6] Indeed, we fail to see how the issuance of the permit renewal affected the Department's ability to enter and reclaim the site. Prior to the permit renewal, Kocher and Reading conducted mining and ash disposal activities at the site under their preexisting permit. If, as Reading insists, the Department would require its permission to enter the site, then the Department would have been unable to enter the site without Reading's permission even before it issued the renewal.

[7] For instance, section 4c of the Surface Mining Act, 52 P.S. § 1396.4c, provides, "The department shall have the right to enter upon and inspect all surface mining operations for the purpose of determining conditions of health or safety and for compliance with the provisions of this act, and all rules or regulations promulgated pursuant thereto."

[8] We noted in our February 17, 1998, opinion and order that the permit renewal did not affect any property rights Reading may have in the site. *Reading Anthracite Company v. DEP*, EHB Docket No. 95-196-C, pp. 11-12. Consequently, our decision on the renewal does not affect any claim Reading may have with respect to those rights before the Court of Common Pleas.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

READING ANTHRACITE COMPANY	:	
	:	
v.	:	**EHB Docket No. 95-196-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, PORTER ASSOCIATES, INC., Permittee, and KOCHER COAL COMPANY, INC., Intervenor	:	

ORDER

AND NOW, this 10th day of July, 1998, it is ordered that Kocher's motion for summary judgment is granted and Reading's counter-motion to strike Kocher's motion is denied.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: July 10, 1998

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

RJM MANUFACTURING, INC.	:	
	:	
v.	:	**EHB Docket No. 97-126-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 10, 1998**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT AND MOTION FOR PARTIAL SUMMARY JUDGMENT

by Robert D. Myers, Member

Synopsis:

A Motion for Summary Judgment is denied where the moving party challenges the constitutional adequacy of the Department's regulations. The Board determines that the moving party is not entitled to judgment as a matter of law because the regulations are constitutionally adequate. A Motion for Summary Judgment is denied with respect to an equitable estoppel argument where there are genuine issues of material fact. A Motion for Partial Summary Judgment on Liability is also denied because there are genuine issues of material fact.

OPINION

On June 12, 1997, RJM Manufacturing, Inc. (RJM) filed a Notice of Appeal seeking Board review of a $332,724 civil penalty assessed by the Department of Environmental Protection (Department) on May 12, 1997. The civil penalty, assessed pursuant to Section 9.1 of the Air Pollution Control Act (APCA), Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. §

4009.1, was based on alleged violations of the APCA at RJM's manufacturing facility in Fairless Hills (Falls Township, Bucks County), Pennsylvania.

A related appeal was filed by RJM on the same date at EHB Docket No. 97-137-MR, challenging an Air Pollution Abatement Order also issued by the Department on May 12, 1997. RJM moved to consolidate the two appeals but action was deferred by Board order on February 26, 1998 pending disposition of a Department motion to dismiss the abatement order appeal for mootness. That motion was denied in an Opinion and Order issued May 13, 1998 but, in the meantime, both parties had filed dispositive motions in the civil penalty appeal on May 6, 1998.

RJM filed a Motion for Summary Judgment with exhibits and a memorandum of law. The Department filed a Motion for Partial Summary Judgment on Liability with exhibits and a memorandum of law. Each party filed a response to the other's motion on June 1, 1998; replies were filed on June 22, 1998. Both motions (and both appeals, for that matter) concentrate on the impact of RJM's relocation of its manufacturing facility on its pending application for Plan Approval and Permit. We will deal first with RJM's Motion for Summary Judgment.

RJM's Motion for Summary Judgment

The Board is empowered to grant summary judgment where the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits and expert reports, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa.R.C.P. No. 1035.1, 1035.2; *Township of Florence v. DEP*, 1996 EHB 1399. Summary judgment is appropriate only where the right is clear and free from doubt. *Martin v. Sun Pipe Line Company*, 666 A.2d 637 (Pa. 1995); *Hayward v. Medical Center of Beaver County*, 608 A.2d 1040 (Pa. 1992); *White Glove, Inc. v. DEP*, EHB Docket No. 97-172-MG

(Opinion issued April 28, 1998.) In reviewing a motion for summary judgment, the Board must examine the record in the light most favorable to the nonmoving party; all doubts as to the existence of a material fact must be resolved against the moving party. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995); *People United to Save Houses v. DEP*, EHB Docket No. 97-262-R (Opinion issued April 6, 1998.)

RJM claims that it is entitled to summary judgment because Pennsylvania's air regulations did not provide RJM with constitutionally adequate notice of the requirements to which it would be subject if it moved its plant from Bensalem Township, Bucks County, to Falls Township, Bucks County, a distance of about ten miles. RJM also claims that, since it relied to its detriment on Department representations and silence as to the effect of the move, the Department is equitably estopped from assessing the civil penalties. The pertinent facts, as alleged by RJM, are these.[1]

RJM purchased in 1987 an existing pressure sensitive tape manufacturing plant in Bensalem Township, Bucks County, and took over operation of the business. The seller and RJM's own "due diligence" attorneys represented that the plant was in compliance with all applicable environmental permit requirements. RJM discovered in 1992 that this was not the case. Coater No. 3 was determined to be a significant source of volatile organic compound (VOC) emissions. The Department notified RJM that the coater had to comply with the requirements of Table I of 25 Pa. Code § 129.52 (surface coating processes) by August 3, 1992, the effective date of new regulations lowering the permissible level of VOC emissions.

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[1] The Department asserts that certain of RJM's exhibits are not part of the record and cannot be considered, but offers no explanation for the assertion. Since they are all Department documents produced during discovery, we fail to see how they are not to be considered part of the record.

A Notice of Violation (NOV) was issued to RJM on August 7, 1992 stating that a Plan Approval and Permit should have been obtained when the coater was installed in 1983. An abatement plan was requested by August 31, 1992.[2]

The VOC emission regulations at 25 Pa. Code § 129.51 contain alternative methods of complying with the requirements of 25 Pa. Code § 129.52 (referred to as "equivalency"). One of those methods allows a source to average the VOC content of each coating station in the surface coating process to achieve compliance. The Department, in September 1992, agreed that RJM could seek Plan Approval and Permit by averaging the VOC emissions from its three coaters. An application to that effect was filed on September 25, 1992.

The record is silent as to what, if anything, transpired during the next 22 months, but on July 23, 1994, the Department published notice in the *Pennsylvania Bulletin* of its intention to approve the Plan Approval application and issue a Permit based on RJM's equivalency demonstration under 25 Pa. Code § 129.51. A public hearing was set for September 8, 1994 at the Department's office in Conshohocken, Pennsylvania. No one other than RJM and Department personnel attended the hearing and no comments on the proposed Permit were received. The Department's Edward Brown advised RJM at the hearing that the application still had to be sent to the Environmental Protection Agency (EPA) for its approval before matters could be finalized. No evidence exists to show that the application was ever sent to EPA.

On January 27, 1995, RJM sent a letter to the Department (certified mail, return receipt requested) advising that RJM would be moving its operations from the Bensalem Township location

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[2] Two other coaters and a printing press were determined by the Department to be in compliance.

to 250 Canal Road, Fairless Hills (Falls Township), Pennsylvania 19039, sometime before December 31, 1995. The concluding paragraph read "Please let me know if you need further information. I presume all is going well with processing our permit." The Department contends that it did not receive this letter at the time it was allegedly mailed and points out that the return receipt bears no signature of any recipient.

The Fairless Hills address had been mentioned to the Department previously in a June 24, 1994 letter and Request for Determination of Requirement for Plan Approval/Operating Permit Application also sent by certified mail, return receipt requested. The Department does not deny receipt of this submittal, but points out that there is nothing in it to suggest that RJM was relocating its entire operation. In fact, the letter states that the new Coater No. 4, which is the subject of the Request, "will be located in a different plant than our current operation in Bensalem. The new leased plant is in Falls Township in the Penn Werner Industrial Park." The concluding paragraph refers to it as an "additional leased building."

Even though the Department admits receipt of the Request on or about June 27, 1994, it never responded to RJM. It also never responded to RJM's January 27, 1995 notice of intended relocation, but denied receiving that correspondence. Because the Department did not respond, RJM contends that it assumed that the relocation of its plant to Falls Township would have no effect on the pending application for Plan Approval and Permit which, RJM believed, was pending before EPA.[3]

RJM accomplished the relocation of its plant to Falls Township during the late summer and

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[3] Bensalem Township and Falls Township both are in a severe nonattainment area for ozone and subject to the same restrictions on VOC emissions.

early fall of 1995. On September 26, 1995, it submitted to the Department a Title V Air Permit Application. Upon reviewing this document in early October 1995, the Department contends, it learned for the first time that RJM had moved from Bensalem Township to Falls Township. The Department (at least the Southeast Regional Office in Conshohocken) was uncertain about the effect of this move, but it took a number of steps. It requested copies of RJM's June 24, 1994 Request, January 27, 1995 letter, and 1994 Air Emissions Statement filed with the Department on January 27, 1995. It conducted an unannounced inspection of the Falls Township plant on October 13, 1995, to satisfy itself that the plant was essentially the same as the Bensalem Township plant. It requested on November 1, 1995 a copy of the local notice of the Department's intention to approve the 1992 Plan Approval and Permit Application that RJM published in August 1994.

According to RJM, the Department also asked for a revised cover page of the 1992 Application reflecting the new location. The Department denies this. It is clear, however, that in its letter of November 20, 1995, sending to the Department a copy of the local notice, RJM also includes a new cover page showing the Falls Township address. RJM asks at the end of the letter whether a new notice needs to be published. The Department made no response to this question and RJM presumed that its 1992 Application was still viable.

The Southeast Regional Office was seeking guidance from the Bureau of Air Quality Control in Harrisburg, and was informed (probably in 1996) that the relocation made RJM's Falls Township plant a "new source" subject to New Source Review and the Best Available Technology (BAT) requirements. On July 8, 1996, the Department requested RJM to meet on July 22, 1996 to discuss the permitting situation. At the meeting, RJM was told that the 1992 Application was no longer valid because of the plant relocation, that the Falls Township plant was a "new source" and that a

new application needed to be filed meeting New Source requirements. RJM claims that this was the first time they were told this. The Department denies that.

RJM filed another Plan Approval Application on December 12, 1996, which the Department found to be "seriously deficient." Accordingly, the Department on May 12, 1997 issued the Assessment of Civil Penalties and the Air Pollution Abatement Order which form the bases of the appeals. It also returned the application.

The Department assessed civil penalties only for RJM's installation of VOC sources in Falls Township in 1995 and for operation of those sources at that location from 1995 through January 1997, all without Plan Approval or Permit. The prior operations at the Bensalem site are not included and the Plan Approval and Permit Application for that site are deemed by the Department to have expired when the plant was moved to Falls Township.

RJM, as noted above, contends that Pennsylvania's air regulations did not provide constitutionally adequate notice of the requirements to which RJM would be subject if it moved the plant. There is no question that the APCA and its regulations never mention relocation. Yet, it is common knowledge that permits issued by the Department under any of the statutes it administers are, by their nature, site specific.

The discharge of sewage or industrial waste is governed, to a large extent, by the nature and quality of the receiving stream at the point of discharge. The placement and construction of a dam must consider the extent of the watershed and the ecology of the area to be inundated. The location of a landfill must take into account the condition and capacity of access roads. The suitability of a

surface mining area is determined, in part, by its potential to produce acid mine drainage.[4]

Plan approvals and permits under the APCA are, if anything, even more finite than those under other programs, tied to a specific source operating in a specific manner emitting specific quantities of pollutants into specific ambient air resources of the Commonwealth. Perusal of the application form filed by RJM in 1992 (Exhibit C to the Motion for Summary Judgment) reveals the precise and highly technical information used by the Department in deciding whether to approve the application and, if so, under what conditions. Clearly, a change in any one of the factors can have an effect on the Department's regulatory decision.

Any remaining doubt about the matter is dispelled by 25 Pa. Code § 127.32 which deals with "Transfer of plan approval." Subsections (a) and (b) govern transfers of ownership; but subsection (c) addresses transfers of locations, specifically stating that a "plan approval is valid only for that specific source and that specific location of the source as described in the application." If this applies to plan approvals, it obviously applies as well to applications for plan approvals. We conclude that the Pennsylvania air regulations did provide constitutionally adequate notice that RJM's removal of its equipment and processes to a site ten miles away would impact its pending application for Plan Approval and Permit.

RJM realized this in January 1995 when it allegedly notified the Department of the pending move, asked whether the Department needed "further information" and mentioned the "processing [of the] permit." While RJM did not specifically ask what the impact would be, its letter opened that

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[4] The concept of general permits does not contradict these statements. General permits are limited to activities that are similar in nature and can be adequately regulated by standard specifications at most sites. *Belitskus v. DEP*, 1997 EHB 939.

door for the Department to consider. When no response was forthcoming, RJM assumed that the change of location would not have a *material* effect on its pending application.

This assumption was strengthened, according to RJM, during the fall of 1995 after the Department "awoke" to the fact that the plant had been moved. There was no statement from the Department that the move voided the pending application and required RJM to begin anew. That never happened, RJM avers, until July 1996 after the Southeast Regional Office had received instructions from Harrisburg. In the interim, the Department had inspected the Falls Township plant to satisfy itself that it was virtually identical to the Bensalem Township facility and, RJM asserts, had asked for a revised cover page for the 1992 application showing the new location. These circumstances convinced RJM that, despite the Department's claimed ignorance of the intention to move the plant, the impact on its pending application would be minor.

The Department's failure to react prior to the removal and the nature of its reaction afterward, RJM argues, raise an equitable estoppel against the assessment of civil penalties. However, the estoppel argument rests on factual allegations disputed by the Department. These are obviously material facts that cannot be resolved at the summary judgment stage. We will, therefore, deny RJM's Motion for Summary Judgment on the equitable estoppel issue.

We will also deny the Motion on the constitutional adequacy issue because we conclude that the air regulations did provide adequate notice that the relocation of the plant would impact the pending application. However, there may still be a potential constitutional argument as to whether the regulations adequately informed RJM of the extent of the harm it could suffer as a result of the move. This, too, is fact dependent and disputed by the parties.

Department's Motion for Partial Summary Judgment on Liability

Our standards for addressing this Motion are the same as those applicable to RJM's Motion.

The Department seeks summary judgment only on the liability issue and not on the reasonableness of the penalty amount. It claims that there is no dispute concerning the fact that RJM installed sources of air pollution at its Falls Township plant and operated them without Plan Approval and Permit. Since these actions violate the APCA and the regulations at 25 Pa. Code §§ 127.11, 127.443, and 129.52, the Department is entitled to summary judgment on the issue of liability.

RJM argues, of course, that it was lead to believe by the Department that the removal to Falls Township would not have a material effect upon its pending application. As noted in connection with RJM's Motion, this equitable estoppel defense is based on disputed issues of fact. Our resolution of that defense will influence, if not control, our determination of whether RJM's actions in Falls Township are violations of the APCA and the regulations. Accordingly, we will not issue summary judgment to the Department on the issue of liability.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RJM MANUFACTURING, INC.	:	
	:	
v.	:	**EHB Docket No. 97-126-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 10th day of July, 1998, it is ordered that Appellants' Motion for Summary Judgment is denied. It is further ordered that the Department of Environmental Protection's Motion for Partial Summary Judgment on Liability is denied.

ENVIRONMENTAL HEARING BOARD

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: July 10, 1998

See next page for a service list.

c: **DEP Bureau of Litigation**
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STOYSTOWN BOROUGH WATER AUTHORITY	:	
v.	:	**EHB Docket No. 97-174-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SOLAR FUEL COMPANY, INC., Permittee	:	**Issued: July 13, 1998**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

An appeal is not barred by the doctrine administrative finality where changes in the law occurred between the original issuance of the permit and the subsequent permit renewal. The Appellant is barred from litigating an issue that could have been challenged when the permit was renewed in 1990. Under the 1994 amendments to the Bituminous Mine Subsidence and Land Conservation Act, an operator is required to describe how water supplies will be replaced in the event the supplies are adversely affected by the mining operations.

BACKGROUND

This is an appeal by the Stoystown Borough Water Authority (Stoystown) from the Department of Environmental Protection's (Department) approval of a permit renewal and revision of Solar Fuel Company, Inc.'s (Solar Fuel) Bituminous Coal Mining Activity Permit No. 56841318

(permit). The permit authorizes Solar Fuel to operate its Solar No. 10 underground coal mine located in Quemahoning Township, Somerset County, Pennsylvania.

The following facts are not in dispute. The Department issued the original permit to Solar Fuel on February 10, 1987 (1987 permit). The 1987 permit was renewed by the Department on April 19, 1990 (1990 permit) and 18 underground acres were added to the permit area. (Department Motion, Winter Affidavit, ¶7) The 1990 permit included special condition No. 2, which established an 1800 foot radius (3600 foot diameter) no mining zone around Stoystown's water supply wells. (Department's Motion, Exhibit E) The Department revised the permit on April 25, 1995 to add two pressure relief bore holes and 0.3 surface acres to the 1990 permit. (Department's Motion, Winter Affidavit, ¶12) The permit was renewed and revised on June 5, 1997 (1997 permit).

The 1997 permit revisions updated the underground permit boundary, increased the bond amount for the two pressure relief bore holes added to the 1995 permit, added information to Module 18 documenting and describing measures to be taken by Solar Fuel to comply with the 1994 amendments (Act 54 Amendments) to the Bituminous Mine Subsidence and Land Conservation Act (Act),[1] added one additional groundwater monitoring well, and added one hydrologic monitoring point. (Department's Motion, Exhibit A and Winter Affidavit, ¶14)

Stoystown appealed the Department's issuance of the 1997 permit on August 20, 1997.[2] In its notice of appeal, Stoystown contends that the permit fails to assure that Stoystown's water supply

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[1] Act of April 27, 1966, P.L. 31, *as amended*, 52 P.S. §§ 1406.1-1406.21.

[2] The Board previously issued an Opinion and Order in this case denying both the Department's and Solar Fuel's motions to dismiss. *Stoystown Borough Water Authority v. DEP*, 1997 EHB 1089. The Board held that the Department was required to notify Stoystown upon receipt of Solar Fuel's coal mining permit renewal application pursuant to 25 Pa. Code § 86.31(c).

and the aquifer from which it is derived will not be degraded, diminished or polluted. In addition, Stoystown asserts that the bond required by the Department for the mine is inadequate to replace Stoystown's water supply in the event that the supply is degraded, diminished or polluted.

DISCUSSION

Currently before the Board is the Department's motion for summary judgment. The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions of record, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997). When deciding motions for summary judgment, the record must be viewed in the light most favorable to the nonmoving party, and all doubts as to existence of material fact must be resolved against the moving party. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995).

The Department asserts that Stoystown is barred by administrative finality from appealing the decisions made when the 1990 permit was issued. In its motion, the Department contends that the permit decision is simply a renewal of a prior permit and no new facts, conditions, or changes in the law exist which justify a reexamination of the original permit decision. In its response, Stoystown argues that it is not barred by administrative finality because the Act 54 Amendments became effective on August 22, 1994, which was subsequent to the issuance of the original permit but prior to the 1997 permit renewal and revision.[3] Stoystown asserts that the Act 54 Amendments

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[3] Pursuant to the Board's Order dated June 3, 1998, the Appellant filed an amended response to the Department's motion for summary judgment and the Department filed a reply to the Appellant's amended response.

impose new obligations on permittees and operators, specifically with regard to restoring or replacing affected water supplies.

The Board has held that where a party aggrieved by an administrative action of the Department fails to appeal that action, neither the content nor the validity of the Department' action or the regulations underlying it may be attacked in a subsequent administrative or judicial proceeding. *People United to Save Homes v. DEP*, 1996 EHB 1428, 1432. The doctrine of administrative finality has been applied in the case of a permit renewal and permit reissuance to bar a third party from raising objections to issues which appeared in the original permit where the third party failed to file an appeal from the original permit issuance. *Reading Anthracite Company v. DEP*, 1997 EHB 581. However, a change in the law between the time of the original action and the subsequent action may bar the application of the doctrine of administrative finality. *Dithridge House v. Department of Environmental Resources*, 541 A.2d 827 (Pa. Cmwlth. 1988); *Blevins v. DER*, 1986 EHB 1003. In this case, since the Act 54 changes to the Bituminous Mine Subsidence and Land Conservation Act occurred between the 1990 permitting action and the 1997 permit renewal, Stoystown is not subject to the doctrine of administrative finality as it relates to the issue of replacing affected water supplies.

However, Stoystown is barred by the doctrine of administrative finality from challenging the adequacy of the bond amount as stated in its notice of appeal. Solar Fuel obtained insurance coverage for replacement water supplies as part of the 1990 permit. (Department's Motion, Terretti Affidavit, ¶4 and Exhibit T-1) Since Stoystown did not appeal the 1990 permit, the amount of the

bond cannot be challenged now.[4]

We now turn to the question of what is required under Act 54 in terms of replacing affected water supplies. The Department contends that no new obligations or factors are required to be considered under Act 54 and an applicant is not required to demonstrate that water supplies can be replaced. Stoystown points to section .5b(j) of the Act, 52 P.S. § 1406.5b(j), for its assertion that the Act requires a description and demonstration of how water supplies will be replaced. This section of the Act states:

> *The department shall require an operator to describe how water supplies will be replaced.* Nothing contained herein shall be construed as authorizing the department to require a mine operator to provide a replacement water supply prior to mining as a condition of securing a permit to conduct underground coal mining. (Emphasis added)

The Act clearly requires a description of how an applicant intends to replace water supplies in the event the supplies are affected. The question remains whether Solar Fuel provided enough information to meet the requirements of Act 54. Under the Subsidence Control Plan section of Module 18, Solar Fuel states:

> f) The applicant agrees to comply with all provisions of Act 54.
> . . . 6. Stoystown Water Company wells have been protected by establishing an 1800 foot no mining zone along the northwestern boundary of the mining permit in the vicinity of the existing wells. . . .
> g) 2. . . . All wells penetrating the coal seam being mined will be protected by a 50 foot radius no mining barrier. . . . In the event of a water interruption, diminution, or contamination, the operator will abide by the requirements of Act 54 as stated below. If any water losses or contamination occur . . . the operator will

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[4] The Board's rules require that a response to a motion set forth in correspondingly-numbered paragraphs all factual disputes and the reason the opposing party objects to the motion. 25 Pa. Code § 1021.70(e). Stoystown did not fashion its response in correspondingly-numbered paragraphs and it did not address the bond issue in either its response, supporting brief, or amended response.

provide one of the following within 24 hours:

> - a temporary water supply to the complainant; or
> - information documenting that the operator was denied access to the water supply to conduct a pre-mining or post mining survey after following the notification requirements specified in Section 5.9(c); or
> - information documenting that the supply is still adequate in quantity and quality to serve the premining [sic] uses of the supply or any reasonably foreseeable uses of the supply. . . . (Department's Motion, Exhibit H)

Stoystown argues that Solar Fuel's mere agreement "to comply with all provisions of Act 54" is not enough to comply with Section .5b(j) of the Act, 52 P.S. § 1406.5b(j). However, we agree with the Department's contention that Solar Fuel adequately described how it intends to comply with the Act 54 requirements when it identified no mining zones and the structures and water supplies to be protected, and because it will provide for temporary water to be supplied in the event that water is adversely affected by its mining operations.

Accordingly, the following order is entered:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STOYSTOWN BOROUGH WATER AUTHORITY	:	
v.	:	**EHB Docket No. 97-174-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SOLAR FUEL COMPANY, INC., Permittee	:	**Issued: July 13, 1998**

ORDER

AND NOW, this 13th day of July, 1998, the Department's motion for summary judgment is **granted** and the Appeal is **dismissed**.

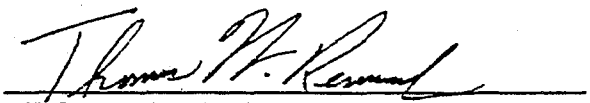
ENVIRONMENTAL HEARING BOARD

George J. Miller

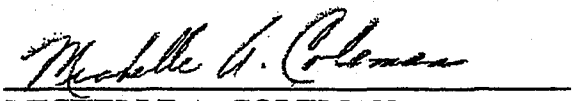
GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: July 13, 1998

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

ROBACHELE, INC.	:	
	:	
v.	:	**EHB Docket No. 97-279-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** July 14, 1998

OPINION AND ORDER ON MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis:

Before the Board is a motion to dismiss the appeal of the Appellant for filing an untimely appeal of a Department action. The appeal was filed because the Department denied issuance of a surface mine permit. The Board grants the Department's motion because the appeal was not filed within 30 days from the Department action, which denies the Board of jurisdiction.

BACKGROUND

Robachele, Inc. (Robachele) has appealed a letter dated November 25, 1997 by which the Department of Environmental Protection (Department) denied Robachele's Permit Application #40971101 for the operation of a surface mine in Hughestown Borough, Luzerne County, pursuant to the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.1 *et seq.* ("Surface Mining Act"). The Department's decision to deny issuance of the permit was based on Robachele's failure to submit the ground/land lease for the area

proposed for mining activities. Robachele received the Department's letter on December 1, 1997. Robachele filed an appeal to the Department's denial letter on January 23, 1998.

The Department filed its Motion To Dismiss on May 28, 1998. The Department's Motion takes the position that Robachele's appeal was untimely filed and, therefore, must be dismissed because the Board lacks jurisdiction over untimely appeals. The Department asserts that the appeal period expired on December 31, 1997, thirty days after Robachele received written notice of the permit denial. Robachele's appeal was filed January 23, 1998, fifty-three days after written notice of the Department's action. Therefore, the Board does not have jurisdiction to hear Robachele's appeal pursuant to 25 Pa. Code §1021.52(a). Robachele did not file a response with the Board to the Department's Motion To Dismiss.

This Board has jurisdiction over appeals from actions of the Department which adversely affect an appellant. *Borough of Ford City v. DER*, 1991 EHB 169; *see also,* 25 Pa. Code § 1021.1(a)(defining "action"). If an appellant fails to perfect an appeal within the time required by the regulations of the Board the action is no longer appealable. *Environmental Hearing Board Act*, 35 P.S. § 7514(c). Under 25 Pa. Code § 1021.52(a), an appeal of a Department action must be received by the Board within thirty days after the Appellant has received notice of the action by the Department. This Board has no jurisdiction to hear appeals from actions of the Department which are received after the thirty-day appeal period. *Rostosky v. Department of Environmental Resources*, 364 A.2d 761 (Pa. Cmwlth. 1976).

Since Robachele received notice of the denial of their permit application on December 1, 1997, Robachele had until December 31, 1997, to file a timely appeal with the Board. Robachele's failure to file a timely appeal deprives the Board of jurisdiction pursuant to 25 Pa. Code § 1021.52(a). Therefore, the Department's Motion To Dismiss is granted.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBACHELE, INC.	:	
	:	
v.	:	**EHB Docket No. 97-279-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 14th day of July, 1998, the Department's Motion To Dismiss is granted and this appeal is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

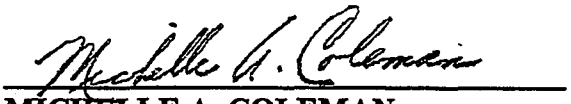
GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 97-279-MG

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: July 14, 1998

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MUNDIS, INC. d/b/a ENVIRO-LAB	:	
v.	:	**EHB Docket No. 98-113-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** July 16, 1998

OPINION AND ORDER ON MOTION FOR SUPERSEDEAS

By George J. Miller, Administrative Law Judge

Synopsis:

The Board grants the appellant's petition for supersedeas where it has demonstrated that it had a reasonable likelihood of proving that the Department abused its discretion by informing third parties that the appellant no longer held a valid drinking water certification, ignoring information that it was erroneously informed that a laboratory was no longer in operation. The Board further finds that the appellant has suffered irreparable economic damage and that there is no evidence of harm to the public.

OPINION

Before the Board is a petition for supersedeas filed by the Appellant, Mundis, Inc. d/b/a Enviro-Lab. On June 26, 1998, the Appellant filed a notice of appeal seeking review of the Department's conduct in informing third parties that the Appellant did not have a valid certification

to perform testing of drinking water under the Department's regulatory program at 25 Pa. Code §§ 109.801-109.810, authorized by the Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, *as amended,* 35 P.S. §§ 721.1 - 721.17. The notice of appeal was accompanied by a petition for supersedeas which sought to supersede the Department's notice to some of the Appellant's customers that it did not have a valid drinking water certificate.

The background of this dispute involves the certificate of microbiology, inorganic and organic testing of drinking water issued on application of Enviro-Lab, a laboratory owned by Mundis, Inc. (Exs. P-2; C-6; P-1; C-7)[1] In mid-January 1998, William Carter, the then-owner of Mundis, Inc., entered into negotiations with Edward Kellogg for the sale of Enviro-Lab, a commercial laboratory certified pursuant to the Safe Drinking Water Act. Mr. Kellogg was the owner of one of Enviro-Lab's competitors, Johnston Laboratories, Inc. During the course of these negotiations Mr. Kellogg worked with Mr. Carter to submit a bid for work at the Defense Distribution Center (DDC), a U.S. Army facility in New Cumberland, Pennsylvania. This bid was submitted to DDC on March 11, 1998. (Ex. P-3)

On March 26, 1998, Mr. Carter and Mr. Kellogg completed their negotiations and executed a memorandum agreement of sale which they both signed. (Ex. P-4) A check was tendered to Mr. Carter who negotiated it the next day. Both Mr. Kellogg and Mr. Carter testified that the sale included all the physical assets of Enviro-Lab, including, they believed, the drinking water certificate of Enviro-Lab. The two agreed that the change in ownership would become effective March 31,

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[1] The Appellant's exhibits were admitted into evidence as "Ex. P-__"; the Commonwealth's exhibits are noted as "Ex. C-__."

1998. The text of the agreement was in the form of a sale of stock of Mundis, Inc. to Mr. Kellogg.[2]

Thereafter an unauthorized communication led the Department to remove Enviro-Lab from its database of certified laboratories. By letter dated April 3, 1998, Mr. Carter informed the Department that Enviro-Lab had "ceased operations on April 1, 1998." (Exs. P-6; C-3) He admitted at the hearing that he was not authorized to so inform the Department. By letter dated April 8, 1998, the Department acknowledged receipt of Mr. Carter's letter and demanded the return of Enviro-Lab's certificate. (Exs. P-7; C-4) Mr. Carter immediately told Mr. Kellogg that he had contacted the Department and that the Department was demanding the return of the certificate. Both Mr. Carter and Mr. Kellogg attempted to communicate to the Department that Mr. Carter was not authorized to write to the Department on behalf of Enviro-Lab and that Mr. Kellogg was now the owner and operator of Enviro-Lab. However, because of proceedings in the Department concerning Mr. Kellogg's other company, Johnston Laboratories, Inc., Richard Shiebley, Chief of Laboratory Accreditation and Quality Assurance refused to speak directly to Mr. Kellogg. By letter dated April 8, 1998, Mr. Kellogg informed the Department that changes of personnel had occurred at Enviro-Lab. (Ex. P-7) On April 14, 1998, Mr. Carter spoke to Mr. Shiebley explaining that there had been a mix-up and that his April 3 letter had been written in error. (Ex. P-12). Nevertheless Mr. Shiebley directed that Enviro-Lab be removed from the Department's database of certified laboratories. (See Ex. C-5) By letter dated May 18, 1998, Mr. Kellogg informed the Department that the location of the laboratory was moving from York, Pennsylvania to New Cumberland, Pennsylvania. (Ex. P-9) Mr. Shiebley was aware of the April 8 and May 18 letters but chose not to respond to them or re-

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[2] The sale was memorialized into a more formal agreement for the sale of Mundis, Inc. stock to Mr. Kellogg in mid-April, effective March 31, 1998. (Ex. P-5).

enter Enviro-Lab into the database.

Meanwhile, Enviro-Lab was awarded a contract by the DDC on May 20, 1998, to perform various types of laboratory work for an estimated $ 116,308.25. (See Ex. P-3).[3] Enviro-Lab began working for DDC under this contract. However, on June 18, 1998, in spite of Mr. Carter and Mr. Kellogg's attempts to clear up the misunderstanding concerning the status of Enviro-Lab, the Department informed DDC that Enviro-Lab was not a certified laboratory. (Ex. P-10) Because DDC requires that laboratories be certified by the Commonwealth, DDC told Enviro-Lab to cease working under the contract. The Department has taken no action to revoke Enviro-Lab's certification pursuant to 25 Pa. Code § 109.809.

On June 26, 1998, this appeal and petition for supersedeas were filed with the Board. A hearing was held before Administrative Law Judge George J. Miller on July 9, 1998. Reviewing the evidence we believe that the Appellant is entitled to a supersedeas of the Department's action.

Petitions for supersedeas before this Board are governed by Section 4(d)(1) and (2) of the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. § 7514(d)(1)(2), and Rule 1021.78(a) and (b), 25 Pa. Code § 1021.78(a)(b). In granting or denying a petition for supersedeas Rule 1021.78 provides that the Board should consider (1) irreparable harm to the appellant; (2) the likelihood that the appellant will prevail on the merits; and (3) the likelihood of injury to the public or other parties. 25 Pa. Code § 1021.78(a). The Board will also consider other judicial precedent such as *Pennsylvania Public Utility Commission v. Process Gas Consumers*

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[3] Enviro-Lab bid for this work before the Department took action against Johnston Laboratories, Inc. which was owned by Mr. Kellogg.

Group, 467 A.2d 805 (Pa. 1983).[4] *See also 202 Island Car Wash, L.P. v. DEP*, EHB Docket No. 98-023-MG (Opinion issued May 13, 1998). These factors are to be balanced collectively. *Svonovec, Inc. v. DEP*, EHB Docket No. 97-274-R (consolidated)(Opinion issued May 11, 1998). Additionally, we may not grant a petition where pollution or injury to the public health, safety or welfare exists. 25 Pa. Code § 1021.78(b).

We first turn to the Appellant's likelihood of success on the merits. Likelihood of success on the merits is a *prima facie* case showing a reasonable probability of success. *Empire Sanitary Landfill, Inc. v. DER*, 1994 EHB 1419, 1424 n. 3; *Houzdale Municipal Authority v. DER*, 1987 EHB 1. Where the Board finds that an appellant has demonstrated a likelihood of success in a supersedeas proceeding, it does not necessarily follow that the Board will ultimately hold in favor of the appellant.

We find that the Appellant has demonstrated a reasonable probability of success on the merits of this appeal. Reviewing the totality of the circumstances in the case it is likely that the Department abused its discretion in informing third parties that Enviro-Lab did not have a valid drinking water certificate based on erroneous information provided by Mr. Carter at a time when it knew that Mr. Kellogg claimed to be the owner of the certification through the stock of Mundis, Inc. Although the Department has a procedure for revoking drinking water certificates, it did not avail itself of that process in this case. *See* 25 Pa. Code § 109.809.

The Department argued at the hearing that it was entitled to rely on Mr. Carter's April 3 letter

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[4] In *Process Gas Consumers*, the Supreme Court held that a stay is proper if the petitioner makes a strong showing that he is likely to prevail on the merits, that he will suffer irreparable injury without the requested relief, that the stay will not substantially harm other interested parties in the proceeding and the issuance will not adversely affect the public interest.

stating that Enviro-Lab was no longer in operation. Based on that letter the Department contends that it properly removed Enviro-Lab from its database of certified laboratories which in turn provided reasonable grounds to inform third parties that Enviro-Lab was not a certified laboratory. We agree that the Department was entitled to rely on Mr. Carter's letter initially. However, it is patently obvious that shortly after April 3 numerous attempts were made to clear up a misunderstanding and that the Department was aware that Enviro-Lab had been transferred from Mr. Carter to Mr. Kellogg. The Department even admitted in a letter dated April 16, 1998, that it was "confused" concerning the status of Enviro-Lab. (Ex. C-1) Given this confusion, we believe that the Department erred in informing third parties that Enviro-Lab was not a certified laboratory, blindly relying on its removal from the database, rather than endeavoring to straighten out the information it was receiving or instituting proceedings to formally terminate the certification. *Cf. Coolspring Stone Supply, Inc. v. DEP*, EHB Docket No. 96-171-R (Opinion issued March 25, 1998)(the Department has a duty to look beyond a permit application and make an informed decision regarding the applicant's conformance with the regulations).

The Department also contends that there was not a valid transfer of the certificate because the certificate states on its face that it is non-transferable. (Exs. P-2; C-6) However, our review of the Safe Drinking Water Act and the regulations governing drinking water certificates reveals no provision which prohibits the transfer of a certificate, or requires the Department's approval of a change in ownership or control of a laboratory to which such a certification has been issued. *See, e.g.*, 35 P.S. § 721.9. Rather, laboratories which hold a drinking water certificate are simply required to notify the Department of "major changes in personnel, personnel assignments,

equipment, and facilities which affect accredited procedures." 25 Pa. Code § 109.805(e)(1).[5] The regulations are silent as to whether a change in ownership would qualify as a major change which would affect accredited procedures.

Moreover, in explaining an earlier transfer of the Enviro-Lab certificate from the prior owner to Mr. Carter, Mr. Shiebley testified that the certification attaches to the laboratory, not necessarily to the owner of the lab. The plain implication is that the validity of a certificate is not changed by a change in ownership. Clearly, at the time that Mr. Carter sold Enviro-Lab to Mr. Kellogg there was no change in the laboratory to which the certificate was attached. In fact, the Department renewed the certificate on Enviro-Lab's application made well after ownership of Enviro-Lab was conveyed to Mr. Carter. (*See* Ex. P-1; P-2; C-7; C-6)

In sum, there is no basis in the regulations for the proposition that the certification became invalid merely because Enviro-Lab was sold to Mr. Kellogg in spite of what seems to be a gratuitous statement on the front of the certificate.

The Department next argues that the Board lacks jurisdiction over this appeal because the Appellant should have appealed when the Department informed its counsel by letter dated April 16, 1998, that it had questions concerning the status of Enviro-Lab's certification. There is nothing in this letter which appears to be a final action of the Department from which an appeal may be lodged. It merely relays to counsel that the Department is "confused" concerning the conveyance from Mr. Carter to Mr. Kellogg and that even if there were no controversy "Enviro-Lab's certification status would be in grave jeopardy" because of the Department's concerns related to the staff of Enviro-Lab

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[5] Failure to provide the appropriate information to the Department could provide grounds for revocation of a certificate pursuant to 25 Pa. Code § 109.810(5).

and the location of some of its equipment. (Ex. C-1) The Department takes the position that at that time the Appellant was on notice that the Department had removed Enviro-Lab from its database and that it should have appealed within thirty days of receipt of the April 16 letter.

We do not believe that the mere removal of information from a computer system can properly terminate the certificate. First, there has never been official notification to either Mr. Carter or the Appellant that Enviro-Lab's certification was removed from the database and that such removal had the effect of invalidating the certificate. Mr. Shiebley's April 8 letter to Mr. Carter merely states that he was in receipt of Mr. Carter's notice and asks for the return of the certificate. It does not state that Enviro-Lab will be removed from a database. Second, the Department's letter dated April 16 does not unequivocally state that the effect of removing Enviro-Lab from the database is the invalidation of the certificate. Therefore, the Appellant's appeal rights were not ripe merely because the Department removed Enviro-Lab from a database. The Department's April 16 letter does not unequivocally so inform the Appellant and gives no notice of any right to appeal the Department's action.[6] *See Soil Remediation Service, Inc. v. Department of Environmental Protection*, 703 A.2d 1081 (Pa. Cmwlth. 1997); *Lehigh Township v. Department of Environmental Resources*, 624 A.2d 693 (Pa. Cmwlth. 1993).

The action from which the Appellant is appealing is what it claims to be advice from the Department to its customer which resulted in the termination of a contract. This was done by the Department even though it admitted that the status of Enviro-Lab was *unclear,* yet it nevertheless acted as if the certification had been revoked or invalidated and published such information to third

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[6] It is also noteworthy that the subject line of the April 16 letter references Johnston Laboratories, Inc. and not the Appellant. (Ex. C-1)

parties. We believe that such behavior extensively affects the rights, privileges and immunities of the Appellant which this Board has the jurisdiction to adjudicate. *Cf. Middle Creek Bible Conference v. Department of Environmental Resources*, 645 A.2d 295 (Pa. Cmwlth. 1994). Since the Appellant discovered that the Department was informing third parties that it was not certified on or about June 18, 1998, its appeal on June 26, 1998 was timely. *See* 25 Pa. Code § 1021.52. In sum, the Appellant has raised a claim upon which there is a reasonable likelihood of success on the merits of this appeal.

We next turn to the issue of irreparable harm. The Board has held that an economic loss for which the appellant has no recourse may constitute irreparable harm. *Consolidated Penn Labs v. DEP*, 1997 EHB 908. However, if the challenged action of the Department is without authority, the appellant may be entitled to a supersedeas irrespective of proof of irreparable harm. *202 Island Car Wash, L.P. v. DEP*, EHB Docket No. 98-023-MG (Opinion issued May 13, 1998); *Wayne Drilling and Blasting, Inc. v. DER*, 1992 EHB 1.

At the hearing Mr. Kellogg testified that because the Department informed DDC that Enviro-Lab was not a certified laboratory he has been precluded from working under that contract valued at approximately $ 116,000. He also testified that several longstanding clients have been lost and that he lost a prospective contract with the Willow Grove Naval Air Station valued at $30,000. In addition to economic loss, Mr. Kellogg stated that the situation has created low morale among his staff.

The Department argues that little of the work under these contracts required drinking water certification as far as the Commonwealth of Pennsylvania is concerned, therefore the harm to the Appellant does not arise from the Department's action. We disagree. Mr. Kellogg testified that although the Commonwealth does not require certification, certification is a prerequisite for any kind

of laboratory work, at least by federal government agencies such as DDC with which the Appellant and a contract to perform laboratory work. We do not believe that it is relevant that the Commonwealth does not itself require certification for the specific work.

The Department also takes the position that there was insufficient evidence concerning the relative magnitude of Enviro-Lab's financial loss. We believe it is enough to suffer some economic harm; it is not necessary for the financial loss to constitute a certain percentage of Enviro-Lab's total revenue or that the loss threatens to bankrupt Enviro-Lab. When balanced against the Appellant's likelihood of success on the merits because the Department acted without authority and lack of any harm to the public (discussed below) we believe that this element has been met. *See 202 Island Car Wash, L.P. v. DEP*, EHB Docket No. 98-023-MG (Opinion issued May 13, 1998); *Al Hamilton Contracting Co. v. DER*, 1993 EHB 598 (the economic loss suffered by the appellant was not huge but was enough when coupled with the appellant's likelihood of success on the merits and the lack of injury to the public to grant the supersedeas).

Finally, we do not believe that any harm will be suffered by the public if we grant the Appellant's petition. It is true, as the Department pointed out in closing argument, that the Appellant did not provide direct evidence on this point. However, it is difficult if not impossible to prove a negative. There was testimony that Enviro-Lab was operating satisfactorily. Moreover, the Department does not aver that the public will be harmed by a supersedeas and we can not envision what that harm might be.

Accordingly, we will grant the Appellant's petition for supersedeas. However, we wish to make it patently clear that the certificate at issue here attaches to Enviro-Lab to the extent that it exists as an entity separate and distinct from Johnston Laboratories, Inc. In the case of the DDC it

is clear that the contract was between Enviro-Lab and DDC so that the advice to DDC that Enviro-Lab had no certificate was erroneous for the purpose of that contract. We are concerned that the two are not, in fact, separate laboratories. Evidence was adduced at hearing that the staff of Enviro-Lab is paid by Johnston Laboratories, Inc., that Enviro-Lab had been moved to the facility which houses Johnston Laboratories, Inc., and that Enviro-Lab communicates with its customers on Johnston Laboratories, Inc. letterhead. (Ex. C-2) Thus, we emphasize that the certificate may not be used by Johnston Laboratories, Inc. but only by Enviro-Lab. Obviously, to the extent that Enviro-Lab attempts to use its certificate to perform work contracted to Johnston Laboratories, Inc. or which would normally be performed by Johnston Laboratories, Inc., the Department may take appropriate steps pursuant to the regulations.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MUNDIS, INC. d/b/a ENVIRO-LAB	:	
v.	:	**EHB Docket No. 98-113-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 16th day of July, 1998, the Petition for Supersedeas of the appellant in the above-captioned matter, Mundis, Inc. d/b/a Enviro-Lab is hereby **GRANTED** and the Department of Environmental Protection's advice to Defense Distribution Center and other customers of Enviro-Lab that Enviro-Lab has no certificate for drinking water testing is hereby set aside.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: July 16, 1998

c: DEP Library:
Attention: Brenda Houck
For the Commonwealth, DEP:
Mary Martha Truschel, Esquire
Sourhcentral Region
For Appellant:
F. Lee Shipman, Esquire
GOLDBERG, KATZMAN & SHIPMAN, P.C.
Harrisburg, PA

ml/rk

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DARLENE K. THOMAS, et al.	:	
	:	
v.	:	**EHB Docket No. 95-206-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LAMAR TOWNSHIP BOARD OF SUPERVISORS	:	**Issued:** July 24, 1998

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A petition for supersedeas is denied. An affidavit asserting that the facts averred in appellants' petition are true to the best of the affiant's knowledge is not an affidavit made upon personal knowledge, as required by Pa.R.C.P. 1035.4. Furthermore, the Board will not grant a supersedeas which requests only injunctive relief.

OPINION

This matter was initiated with the September 25, 1995, filing of a Notice of Appeal by Darlene Thomas, L. Carl Rumbalski, Truman and Miriam Neff, and Lewis Barner (collectively, Appellants). The appeal challenges an August 29, 1995, letter sent from the Department of Environmental Protection (Department) to the Lamar Township Board of Supervisors (Lamar Township) informing it of the Department's conditional approval of two related requests to revise official sewage facilities plans under the Pennsylvania 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): one filed by Lamar Township, and one filed by Porter and Walker Townships. The revised sewage facilities plans provide for the construction of a 400,000 gallon-per-day sewage treatment facility that will serve portions of Lamar, Porter and Walker Townships. The townships formed a joint municipal authority, the East Nittany Valley Joint Municipal Authority (ENVJMA), to implement the revised plans.

The Board has issued three previous opinions in this appeal. On May 9, 1996, we granted in part and denied in part a motion to compel filed by Appellants. On May 29, 1997, we denied a motion for joinder filed by Appellants. And, on February 12, 1997, we granted in part and denied in part a Department motion to dismiss.

On July 6, 1998, Appellants filed a petition for supersedeas. They request that we (1) enjoin ENVJMA and Lamar Township from proceeding further in applying for a loan from the U.S. Department of Agriculture's Rural Utilities Service (Rural Utilities Service); (2) enjoin ENVJMA and Lamar Township from taking any further action on the construction of a centralized sewer line; and (3) enjoin the Department from taking any action with respect to the centralized sewer line.

On July 10, 1998, the Department filed a motion to deny Appellants' petition without a hearing, as well as a supporting memorandum of law. In the motion and memorandum, the Department asserts that the Board should deny Appellants' petition without a hearing because Appellants failed to support their petition with an affidavit,[1] as required by sections 1021.77(a)(1)

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[1] In a July 10, 1998, letter to Department's counsel, Appellants admit that they chose not to include a copy of the affidavit with the copy of the petition they served on the Department. Appellants included a copy of the affidavit with the letter and explained that they did not include the affidavit with the petition because they "saw no reason" to do so.

Section 1021.32(a) of the Board's rules, 25 Pa. Code § 1021.32(a), provides that parties must serve opposing counsel with all documents filed in a proceeding. The Department reaonably (continued...)

and (a)(2) of the Board's Rules of Practice and Procedure, 25 Pa. Code §§ 1021.77(a)(1) and (a)(2); and failed to state sufficient grounds for a supersedeas, as required by section 1021.77(c)(4) of the Board's Rules, 25 Pa. Code § 1021.77(c)(4).

We agree with the Department that denying Appellants' supersedeas petition without a hearing is appropriate. The factual averments in the petition are not properly supported, and we do not have jurisdiction to issue the type of supersedeas Appellants request.[2]

I. Factual averments in petition for supersedeas are not properly supported.

The Board may deny a petition for supersedeas--either *sua sponte* or upon a motion without conducting a hearing--for several reasons, including:

> (1) Lack of particularity in the facts pleaded.
>
> (2) An inadequately explained failure to support factual allegations by affidavits.
>
> (3) A failure to state grounds sufficient for the granting of a supersedeas.

25 Pa. Code § 1021.77(c). Section 1021.77(a) of the Board's rules, 25 Pa. Code § 1021.77(a),

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[1](...continued)
assumed that Appellants had served it with a complete copy of the petition and devoted a substantial portion of its response and memorandum in opposition to arguing that the petition should be denied for failure to include an affidavit. We have previously admonished Appellants that, although they have chosen to proceed without legal representation, they are nevertheless responsible for complying with the Board's rules of practice and procedure. *See Thomas v. DEP*, EHB Docket No. 95-206-C (Opinion issued February 12, 1998) p. 3, n. 2. Appellants should be aware, if they are not already, that they risk sanctions under 25 Pa. Code § 1021.125 by refusing to comply with the Board's rules.

[2] We realize that our reasons for denying the petition differ from those advanced by the Department. The Department, for instance, argues that Appellants failed to support their petition for supersedeas with *any* affidavits. The Board holds that the affidavit Appellants included is inadequate. However, the discrepancies between the arguments the Department makes in its motion and those the Board relies on to dispose of the petition are not consequential here. Since the Board has the power to dispose of petitions for supersedeas *sua sponte* under the circumstances here, it follows that we can dispose of the motion for reasons other than those raised in the Department's motion.

requires that factual averments in the petition must be supported by either affidavits, prepared as specified in Pa.R.C.P. Nos. 76 and 1035.4, or an explanation of why affidavits have not accompanied the petition.

The affidavit Appellants filed in support of their petition is deficient because it does not show that the affiant had personal knowledge of the facts averred, as required by Pa.R.C.P. 1035(d). In their petition for supersedeas, Appellants make numerous factual averments. Among other things, they assert that:

(1) Lamar Township has applied for a $9 million loan from the Rural Utilities Service (para. 4);

(2) the Rural Utilities Service is about to make its decision on the loan (para. 10);

(3) ENVJMA, Lamar Township, and the Department have purposefully hidden information concerning the status of the loan from Appellants (para. 12);

(4) Lamar Township "set up a separate and subterfuge organization entitled the Lamar Township Authority" and applied for a Community Development Block Grant from the U.S. Department of Housing and Urban Development (HUD) (para. 12);

(5) Fraud was discovered in relation to the block grant, leading to investigations by both HUD and the Federal Bureau of Investigation (para. 13); and

(6) The Department was aware of the fraudulent activity but failed to expose it (para. 14).

However, the only support Appellants provided for the averments in their petition is an affidavit by Darlene Thomas, one of the Appellants. The affidavit reads, "DARLENE K. THOMAS, acting *pro se* on behalf of the Appellants in the above captioned case, says that facts [sic] set forth in the Petition attached hereto are true and correct to the best of her knowledge, information and belief."

The Thomas affidavit is inadequate to support the factual assertions in the petition because it does not demonstrate that Thomas has personal knowledge of those facts. We have previously held that an affidavit stating that facts are true to the best of the affiant's knowledge does not qualify

as an affidavit made upon personal knowledge required by Pa.R.C.P. 1035.4. *See E.P. Bender Coal Company v. DER*, 1990 EHB 1624, 1625-626. We know of no reason to treat the Thomas affidavit any differently. There is an important difference between an affiant averring that she personally knows a fact to be true, and her simply averring that the fact is true to the best of her knowledge: an affiant could honestly testify that a fact is true to the best of her knowledge even where she has no personal knowledge of the fact.

II. The Board does not have the authority to grant the type of supersedeas Appellants request.

As noted previously in this opinion, this appeal concerns a Department letter informing Lamar Township that the Department conditionally approved two related requests to revise official sewage facilities plans: one filed by Lamar Township, and one filed by Porter and Walker Townships. The revised sewage facilities plans provide for the construction of a 400,000 gallon-per-day sewage treatment facility that will serve portions of Lamar, Porter, and Walker Townships.

The problem with Appellants' petition for supersedeas is that it appears to have nothing to do with the conditional plan approval or the proposed sewage treatment facility. Instead, Appellant's request that we (1) enjoin ENVJMA and Lamar Township from proceeding further in applying for a loan from the Rural Utilities Service; (2) enjoin ENVJMA and Lamar Township from taking any further action on the construction of a centralized sewer line; and (3) enjoin the Department from taking any further action with respect to the centralized sewer line. Whether any relationship exists between the conditional plan approval and the loan from the Rural Utilities Service or the centralized sewer line is unclear from the petition.

Appellants are requesting an injunction, not a mere supersedeas. Although the two bear some superficial similarities, they are distinctly different. When a person would like to prevent another from engaging in a particular activity, he must ordinarily secure an injunction, an equitable remedy.

A supersedeas, by contrast, is a much narrower remedy: it merely supersedes an action by an agency or tribunal pending a review of challenges to the action. *See, e.g.*, "supersedeas" in *Black's Law Dictionary* 1437-438 (6th ed. 1990). The difference is significant because, while the Board has the statutory authority to issue a supersedeas, we lack the power to grant equitable relief, like injunctions. *Marinari v. DER*, 566 A.2d 385 (Pa. Cmwlth. 1989), *City of Scranton v. DER*, 1995 EHB 104, 123-124. The remedy that Appellants request is in the nature of an injunction, rather than a supersedeas, because Appellants are asking the Board to do more than simply treat the requests to revise the official sewage facilities plans as though the Department never approved them. Appellants are asking that we *affirmatively prohibit* ENVJMA, Lamar Township, and the Department from engaging in certain activities--activities which, based on Appellants' petition, seem to bear only an attenuated relationship to the Department's conditional approval of the plan revisions. Since Appellants are requesting injunctive relief, and the Board does not have the power to grant injunctions, we could not grant the petition even assuming Appellants supported it with adequate affidavits and the petition was otherwise procedurally sound.

Accordingly, Appellants' petition for supersedeas is denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DARLENE K. THOMAS, et al.	:	
	:	
v.	:	**EHB Docket No. 95-206-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LAMAR TOWNSHIP BOARD OF SUPERVISORS	:	

ORDER

AND NOW, this 24th day of July, 1998, it is ordered that Appellants' petition for supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: July 24, 1998

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

ROBERT K. GOETZ, JR. d/b/a GOETZ DEMOLITION	:	
	:	**EHB Docket No. 97-226-C**
v.	:	**(Consolidated with 97-147-C, 97-223-C, 97-224-C, and 97-225-C.)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** July 24, 1998

OPINION AND ORDER ON MOTION TO QUASH

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion to quash an untimely filed post-hearing memorandum is denied. Quashing an appellant's post-hearing memorandum would be inappropriate where (1) the memorandum was five days late, (2) the memorandum pertains to a hearing on the appellant's financial ability to prepay a civil penalty assessed by the Department, and (3) quashing the memorandum might hamstring Appellant's litigation of his ability to prepay the penalty.

OPINION

This appeal was initiated with the October 21, 1997, filing of a notice of appeal by Robert K. Goetz, Jr., (Appellant) challenging a noncoal inspection report the Department of Environmental Protection (Department) issued on September 9, 1997. The report, prepared by Thomas Flannery, identified alleged violations of the Noncoal Surface Mining Conservation and Reclamation Act, Act

of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301-3326. (Noncoal Surface Mining Act) which Appellant allegedly engaged in on property in Franklin Township, Adams County (the site). Among other things, the notice of appeal asserts that the inspection report is legally insufficient and factually inaccurate.

On December 16, 1997, pursuant to a Department motion, we consolidated Appellant's appeal of the civil penalty with three other appeals he had pending before the Board: (1) an appeal challenging a June 6, 1997, noncoal inspection report identifying alleged violations at the site (EHB Docket No. 97-147-C); an appeal challenging a September 19, 1997, civil penalty assessment for violations at the site of the Noncoal Surface Mining Act and the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001 (Clean Streams Law), at the site (EHB Docket No. 97-223-C); an appeal challenging a September 30, 1997, noncoal inspection report identifying alleged violations at the site (EHB Docket No. 97-224-C); and an appeal challenging a September 3, 1997, noncoal inspection report identifying alleged violations at the site (EHB 97-225-C). We consolidated all four appeals at the instant docket number, EHB Docket No. 97-226-C.

When Appellant filed his appeal of the civil penalty assessment, he also filed a "Petition Forma Pauperis,"[1] explaining that he had fallen victim to financial hardship, and asking that the Board waive the requirement that he prepay the civil penalty before appealing it, or, at least, that the Board reduce the amount he had to prepay. The Board held a hearing on Appellant's ability to

[1] An action "in forma pauperis" is an action to allow a poor person to proceed without having to pay the usual fees to the tribunal for his action. *See, e.g., Black's Law Dictionary* 779 (6th ed. 1990). The present petition is not a true petition to proceed "in forma pauperis" because Appellant seeks to avoid prepaying a penalty imposed by the Department, not fees imposed by the Board itself.

prepay the penalty on January 21, 1998, and April 21, 1998.

Although Appellant's post-hearing memorandum was due on May 22, 1998, Appellant did not file the memorandum until May 27, 1998. The Department filed its post-hearing memorandum on May 29, 1998, along with a motion to quash Appellant's post-hearing memorandum and a memorandum in support of the motion. Appellant filed an answer to Appellant's motion to quash on June 12, 1998.

We shall confine our attention here to the motion to quash. Our decision on whether Appellant must comply with the prepayment requirements will follow shortly.

In its motion, the Department argues that we should quash Appellant's post-hearing memorandum because it was filed after the filing deadline. Appellant, meanwhile, argues that it would be unreasonable to quash the post-hearing memorandum because he made "repeated attempts" to contact the Board on May 22, 1998, to request an extension of the filing deadline, and because the Board was closed for the Memorial Day weekend on May 23-25, 1998.

Appellant's excuses for the late filing of his post-hearing memorandum are inadequate. The Board has both phones and a fax, and it would be extraordinary for an individual to make repeated attempts to contact the Board and be unsuccessful. In the unlikely event that an individual was unsuccessful in contacting the Board by phone, he could always fax a message to the Board--even after business hours. As for Appellant's assertion that his memorandum was late because the Board was closed for the Memorial Day weekend on May 23-25, 1998, that argument would carry more weight if Appellant had filed the memorandum on the next day the Board was open, May 26. Appellant did not file the memorandum on May 26, however, nor did he request an extension from the Board on that day. Instead, he simply filed the memorandum on May 27--five days after it was

due.

Despite Appellant's late filing we will deny the Department's motion to quash. While the Board takes violations of its rules of practice and procedure seriously, and has the authority under 25 Pa. Code § 1021.125 to impose sanctions where appropriate, quashing Appellant's post-hearing memorandum would be too draconian a sanction under the particular circumstances here. Appellant's post-hearing memorandum concerns a hearing on his ability to prepay a civil penalty. In the event we rule in the Department's favor on the hearing, and conclude that Appellant is able to prepay the penalty, Appellant's appeal could be dismissed if he fails to prepay--regardless of the merits of his challenges to the civil penalty assessment. Given the seriousness of the potential consequences to Appellant, we want to avoid doing anything which might hamstring Appellant's litigation of his ability to prepay the penalty. Naturally, however, if Appellant continues to violate the Board's rules, sanctions may become appropriate later in the proceedings.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT K. GOETZ, JR.	:	
d/b/a GOETZ DEMOLITION	:	
	:	**EHB Docket No. 97-226-C**
v.	:	**(Consolidated with 97-147-C,**
	:	**97-223-C, 97-224-C, and**
	:	**97-225-C.)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW, this 24th day of July, it is ordered that the Department's motion to quash is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: July 24, 1998

c: **DEP Litigation Library:**
Attention: Brenda Houck

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ALLEGRO OIL & GAS, INC.,	:	
	:	**EHB Docket No. 98-021-C**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** July 29, 1998

OPINION AND ORDER ON MOTION FOR JUDGMENT ON THE PLEADINGS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion for judgment on the pleadings is denied where no "pleadings" have been filed. A notice of appeal is not a "pleading" within the meaning of the Board's rules of practice and procedure. Neither is a motion for judgment on the pleadings or a response to that motion.

OPINION

This matter was initiated with the February 6, 1998, filing of a notice of appeal by Allegro Oil & Gas, Inc. (Allegro) of Jamestown, N.Y. The notice of appeal challenges a declaration of bond forfeiture the Department issued to Allegro on December 26, 1997. The Department declared the bonds forfeit because Allegro allegedly failed to comply with a Department order directing it to plug certain wells it owned and operated in Sharon Township, Potter County, PA. In its notice of appeal, Allegro asserts that the Department erred by declaring the bonds forfeit because it refused to plug the wells or allow James Lee and Lee Oil Company (collectively, "Lee Oil") to plug them. Allegro

requests that the Board return the bond money to Lee Oil.[1]

On April 27, 1998, the Department filed a motion for judgment on the pleadings and a supporting memorandum of law. The Department starts by arguing that the Board must deem Allegro to have admitted certain averments in the declaration of bond forfeiture because Allegro failed to challenge those averments in its notice of appeal. Specifically, the Department contends that, by failing to challenge the averments in its notice of appeal, Allegro has admitted that:

(1) Allegro holds the permit and registration for the wells at issue;

(2) Allegro submitted a $25,000 letter of credit (bond) from Norstar Bank to the Department;

(3) the Department approved the bond;

(4) the wells have been abandoned;

(5) the Department issued an order to Allegro on October 22, 1996, directing it to plug the wells;

(6) Allegro failed to appeal the October 22, 1996, order or plug the wells;

(7) on February 13, 1997, the Department notified Allegro that it intended to forfeit Allegro's bond unless Allegro took remedial action or submitted a schedule for such action; and,

(8) Allegro never took the remedial action or submitted a schedule for such action.

Based on these "admissions," the Department contends that it had the authority to forfeit Allegro's bond under sections 215(a)(1) and 215(3)(c) of the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, *as amended*, 58 P.S. §§ 601.101-601.605 (Oil and Gas Act), §§ 601.215(a)(1) and

[1] It is unclear from the parties' filings what relationship, if any, exists between Allegro and Lee Oil.

601.215(3)(c).

Allegro filed its response on May 15, 1998. Contrary to section 1021.64(e) of the Board's Rules of Practice and Procedure, 25 Pa. Code § 1021.64(e), the response did not admit or deny each averment in the Department's motion.[2] Nor did the paragraphs in the response correspond to those in the motion as required by section 1021.70(e) of the Board's Rules of Practice and Procedure, 25 Pa. Code § 1021.70(e).[3] Instead, Allegro simply averred that:

(1) the Department prevented Lee Oil from plugging and abandoning the wells;

(2) the Environmental Protection Agency first "shut in," then plugged and abandoned the wells; and,

(3) the Commonwealth would be unjustly enriched if the bond is forfeit because:

(a) neither the Department nor anyone in privity with it plugged or abandoned the wells; and,

(b) the Department unreasonably, arbitrarily, and capriciously precluded Lee Oil from plugging and abandoning the wells.[4]

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[2] Section 1021.64(e) provides, in pertinent part, "The response shall admit or deny specifically and in detail the material allegation ... answered, and state clearly and concisely the facts and matters of the law relied upon." As we explained in *Thomas v. DEP*, EHB Docket No. 95-206-C (Opinion issued February 12, 1998), "The paragraph in the response should admit or deny the averments in the motion--in whole or in part--and explain the response, if necessary." *Thomas*, p. 3 n. 2.

[3] Section 1021.70(e) provides, "A response to a motion shall set forth in correspondingly-numbered paragraphs all factual disputes and the reason opposing party objects to the motion." As we explained in *Thomas v. DEP*, EHB Docket No. 95-206-C (Opinion issued February 12, 1998), "The phrase 'correspondingly-numbered paragraphs' means that the response should have a paragraph responding to each paragraph in the motion." *Thomas*, p. 3 n. 2.

[4] The context surrounding "abandon" in Allegro's notice of appeal and response suggests that Allegro attributes a different definition to the word than that set forth in the Oil and Gas Act. The Oil and Gas Act defines an "abandoned well" as

The Department filed a reply on May 15, 1998. Pointing to Allegro's argument that the bond forfeiture would unjustly enrich the Commonwealth, the Department argues that EPA did not plug the wells and that, even if it did plug them, Allegro waived any objections it had regarding EPA plugging the wells because Allegro failed to raise the issue in its notice of appeal. The Department also argues that, under the Oil and Gas Act, it need not plug an owner/operator's wells to declare his bond forfeit. The Department did not address Allegro's failure to admit or deny the specific averments in its motion.

Before we turn to our analysis of the Department's motion, a few words are in order about motions for judgment on the pleadings in general. Motions for judgment on the pleadings have proven a stumbling block for the Board since we first confronted one, in *Morton v. DER*, 1974 EHB 457. In *Morton*, we considered a joint stipulation of facts as a "pleading." Six years later, confronting our second motion for judgment on the pleadings, we considered a supersedeas transcript and Board order as "pleadings." *See Campbell v. DER,* 1980 EHB 338. Neither of these cases explained why the documents the Board considered were pleadings.

In the years since then, the Board's case law on motions for judgment on the pleadings has

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> [a]ny well that has not been used to produce, extract or inject any gas, petroleum or other liquid within the preceding 12 months, or any well for which the equipment necessary for production, extraction or injection has been removed, or any well, considered dry, not equipped for production within 60 days after drilling, redrilling or deepening, except that it shall not include any well granted inactive status.

And the Act imposes *additional* duties with respect to abandoned wells. *See, e.g.,* section 210 of the Oil and Gas Act, 58 P.S. § 601.210 (requiring that owner/operators plug wells they abandon).

Allegro, meanwhile, seems to use the word "abandon" to refer to an owner/operator *winding up* duties with respect to a well, hence Allegro's argument that the Department should not forfeit the bond because the Department prevented Lee Oil from "abandoning" the wells.

become progressively more complicated. There has been increased confusion over two fundamental issues: (1) When, if ever, should parties file a motion for judgment on the pleadings, as opposed to a motion to dismiss or motion for summary judgment? and (2) What documents are "pleadings" for purposes of the motion?

Much of the confusion over when parties should file motions for judgment on the pleadings traces back to a series of Board decisions in the 1980s. In each of these decisions, the parties had filed a motion other than a motion for judgment on the pleadings, and the Board stated that, regardless of the motions' captions, the motions were really motions for judgment on the pleadings, and the Board would treat them accordingly.[5] None of these cases explained why the particular documents the Board considered when ruling on the motions were "pleadings." However, the opinions did lead litigants to believe that the Board sometimes preferred motions for judgment on the pleadings to motions for summary judgment or motions to dismiss.

To make matters more confusing, the Board developed inconsistent case law as to what

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[5] *See Maursberg Coal Company v. DER*, 1981 EHB 568 (treating a motion to dismiss as a motion for judgment on the pleadings), *Bethlehem Mines Corporation*, 1983 EHB 296 (treating a motion for summary judgment as a motion for judgment on the pleadings), *Magnum Minerals Inc. v. DEP*, 1983 EHB 589 (treating a motion to dismiss as a motion for judgment on the pleadings), *North Fayette Township v. DEP*, 1984 EHB 654 (treating a motion to dismiss as a motion for judgment on the pleadings), *Swanson v. DEP*, 1984 EHB 681 (treating a motion to dismiss as a motion for judgment on the pleadings), *B & D Coal Company v. DEP*, 1986 EHB 359 (treating a motion to dismiss as a motion for judgment on the pleadings), *B & D Coal Company v. DEP*, 1986 EHB 615 (treating a motion to dismiss as a motion for judgment on the pleadings), *Del-Aware Unlimited, Inc. v. DER*, 1987 EHB 351 (treating a motion to dismiss as a motion for judgment on the pleadings), and *Upper Allegheny Joint Sanitary Authority v. DER*, 1989 EHB 303 (treating a motion for summary judgment as a motion for judgment on the pleadings).

documents are "pleadings" for purposes of motions for judgment on the pleadings.[6] Although most of the relevant Board decisions assume that a notice of appeal is a pleading, none of them state how the Board arrived at that conclusion, and several acknowledge that a notice of appeal is not a true pleading.[7] Other decisions express doubts that judgment on the pleadings is even an appropriate

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[6] *See Tunkhannock Borough Municipal Authority v. DEP*, 1988 EHB 667 (notice of appeal and its supporting documentation are pleadings), *G.B. Mining Company v. DER*, 1988 EHB 1065 (notice of appeal is a pleading), *Upper Allegheny Joint Sewer Authority v. DER*, 1989 EHB 303 (notice of appeal is a pleading), *Deitz v. DER*, 1990 EHB 263 (pre-hearing memorandum is a pleading), *Borough of Dunmore v. DER*, 1990 EHB 689 (notice of appeal is a pleading), *Winton Consolidated Companies v. DER*, 1990 EHB 860 (notice of appeal is a pleading), *Raymark Industries, Inc. v. DER*, 1990 EHB 1181 (notice of appeal is a pleading), *North American Oil and Gas Drilling Company, Inc.*, 1991 EHB 22 (Department administrative order is not a pleading), *Davis Coal v. DER*, 1991 EHB 270 (notice of appeal is a pleading), *Grand Central Sanitary Landfill*, 1992 EHB 1510 (notice of appeal, petition for supersedeas, response to petition for supersedeas, and pre-hearing memoranda are pleadings), *Wunder v. DER*, 1993 EHB 30 (notice of appeal is a pleading), *Huntington Valley Hunt v. DER*, 1993 EHB 1533 (notice of appeal is a pleading), *Ingram v. DER*, 1993 EHB 1533 (notice of appeal is a pleading), *Capelli v. DER*, 1994 EHB 1835 (notice of appeal, and only the notice of appeal, is a pleading), *Florence Township v. DEP*, 1996 EHB 282 (notice of appeal, and only the notice of appeal, is a pleading), *White v. DEP*, 1996 EHB 320 (notice of appeal, and only a notice of appeal, is a pleading), *Township of Florence v. DEP*, 1996 EHB 871 (notice of appeal, motion for judgment on the pleadings, and response to motion are pleadings), *Weiss v. DEP*, 1996 EHB 1565 (notice of appeal, and only the notice of appeal, is a pleading), *Agmar Sewer Co. v. DEP*, 1997 EHB 433 (notice of appeal, motion for judgment on the pleadings, and response to motion are pleadings), *May Energy, Inc. v. DER*, 1997 EHB 723 (notice of appeal is a pleading), and *Heidelberg Heights Sewerage Company*, EHB Docket No. 97-150-C (Opinion issued May 19, 1998) (notice of appeal, motion for judgment on the pleadings, and response to motion are pleadings).

[7] *See Huntington Valley Hunt v. DER*, 1993 EHB 1533, 1538 n. 4 (notice of appeal is not a "true pleading"), *Capelli v. DER*, 1994 EHB 1835, 1838 n. 3 (notice of appeal is technically not a pleading), *Florence Township v. DEP*, 1996 EHB 282, 303 n. 12 (notice of appeal is technically not a pleading), *May Energy, Inc. v. DER*, 1997 EHB 723, 727 (notice of appeal is technically not a pleading). *See also North American Oil & Gas Drilling Company, Inc.*, 1991 EHB 22, which states that "Which legal filings constitute 'pleadings' is spelled out in Pa.R.C.P. 1017 and 25 Pa. Code §§ 21.64 through 21.66." 1991 EHB at 27. (A notice of appeal is not listed under either Pa.R.C.P. 1017 or 25 Pa. Code §§ 21.64 through 21.66.)

"procedural vehicle" in practice before the Board.[8] Very few of the opinions address prior inconsistent Board decisions, much less seek to distinguish or overturn them.

The Board's past decisions reflect a tension between the nature of practice before the Board, as set forth in the Board's rules of practice and procedure, and the nature of practice before the Courts of Common Pleas, as set forth in the Pennsylvania Rules of Civil Procedure. Ordinarily, the Board is bound by its own rules, and only looks to the Rules of Civil Procedure for issues not addressed in either the Board's rules or the General Rules of Administrative Procedure, 1 Pa. Code Chaps. 31-35. When it comes to deciding which documents are "pleadings," however, section 1021.64(a) of the Board's rules, 25 Pa. Code § 1021.64(a), incorporates the definition of "pleadings" in the Rules of Civil Procedure:

> Except as provided in this chapter, the various pleadings described in the Pa.R.C.P. are the pleadings permitted before this Board, and the pleadings shall have the functions defined in the Pa.R.C.P.

Pa.R.C.P. 1017(a), which lists the documents that are "pleadings" under the Rules of Civil Procedure, provides:

> [T]he pleadings in an action are limited to a complaint, an answer thereto, a reply if the answer contains new matter or a counterclaim, a counter-reply if the reply to a counterclaim contains new matter, a preliminary objection and an answer thereto.

The list of "pleadings" at Pa.R.C.P. 1017(a) presents few problems when applied to Board

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[8] *See North American Oil & Gas Drilling Company, Inc. v. DER*, 1991 EHB 22, 22-23 (questioning whether judgment on the pleadings is "an appropriate procedural vehicle"), and *Ingram v. DER*, 1993 EHB 1849, 1853 ("judgment on the pleadings is a questionable procedural vehicle given the nature of practice before the Board").

actions initiated with a complaint, since the documents filed in those actions track those filed in a typical action before the Court of Common Pleas.[9] In Board actions initiated with the filing of a notice of appeal, however, the situation becomes more complicated. Since notices of appeal are not used in practice before the Courts of Common Pleas, the Rules of Civil Procedure do not address them. The Board has grappled with whether a notice of appeal is a "pleading" or not. An appeal before the Board is analogous to a complaint before the Courts of Common Pleas in that both initiate legal proceedings. But significant differences also exist between the two. For instance, a complaint must state all the material facts on which a cause of action is based. Pa.R.C.P. 1019(a). However, a notice of appeal need only list the appellant's objections to the Department's action. 25 Pa. Code § 1021.51(c), *Croner, Inc. v. Department of Environmental Resources,* 589 A.2d 1183 (Pa. Cmwlth. 1991).

The Board plans to amend its rules in the near future to remedy the problems arising from the definition of "pleadings" at section 1021.64(a). In the meantime, however, we must contend with the current definition and apply it to the motion filed by the Department.

The Department cannot prevail on its motion for judgment on the pleadings under the current definition of "pleadings" at section 1021.64(a). Of the documents at issue--the notice of appeal, the motion for judgment on the pleadings, and the response to the motion--none are "pleadings" within the meaning of section 1021.64(a). Pa.R.C.P. 1017(a) expressly provides that "the pleadings in an action *are limited to*" the documents listed 1017(a), and notices of appeal, motions, and responses

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[9] The Department will sometimes file complaints for civil penalties or for special actions, pursuant to sections 1021.56 and 1021.61 of the Board's rules, 25 Pa. Code §§ 1021.56 and 1021.56, respectively.

to motions do not appear on that list.[10] (Emphasis added.) Although section 1021.64(a) of the Board's rules qualifies the incorporation of the pleadings described in Pa.R.C.P. 1017(a)--by stating that the list of pleadings in the Rules of Civil Procedure controls unless the Board's rules provide otherwise--nothing in the Board's rules provides that a notice of appeal, a motion for judgment on the pleadings, or a response to a motion is a "pleading" notwithstanding their omission from Pa.R.C.P. 1017(a). Therefore, although the Department has moved for judgment on the pleadings, the Board currently has no "pleadings" before it.[11]

The fact that the Board recognizes different types of filings than the Courts of Common Pleas does not affect our conclusion. The Supreme Court may not have had notices of appeal in mind

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[10] Under the rules of statutory construction, where the legislature includes a list of specific designations in an act, things omitted from the list are presumed excluded. *City Council City of Hazleton v. City of Hazleton*, 578 A.2d 580 (Pa. Cmwlth. 1990), *aff'd* 600 A.2d 191 (Pa. 1992)). The rules of statutory construction may be used to ascertain the intent of the Supreme Court in adopting the Rules of Civil Procedure pursuant to Pa.R.C.P. 127(c)(5).

[11] If the Department feels that it is entitled to judgment as a matter of law based on the undisputed facts of this appeal, it can file a motion for summary judgment, and can even use admissions Allegro may have made in its filings to support that motion. However, the Department cannot establish a fact--as the Department attempted to do here--simply by noting that it averred the fact in its order and Allegro failed to challenge the averment in its notice of appeal.

While an appellant waives issues he fails to raise in a timely notice of appeal, *Pennsylvania Game Commission v. DER*, 509 A.2d 877 (Pa. Cmwlth. 1986), *aff'd* 555 A.2d 812 (Pa. 1989), that does not necessarily mean that he admits every averment in the Department action unless he specifically challenges that averment. A notice of appeal need only contain an appellant's objections to a Department action, 25 Pa. Code § 1021.51(c), *Huntingdon Valley Hunt v. DER*, 1993 EHB 1533, 1538 n. 4, and the objections need only be raised generally. *Croner, Inc. v. DER*, 589 A.2d 1183 (Pa. Cmwlth. 1991). Since an appellant has no duty to admit or deny the averments in the Department's action, he is not deemed to admit the averments simply by failing to respond to them in his notice of appeal. Instead, the Board treats a notice of appeal in the same way the Courts of Common Pleas treat a complaint: An appellant is deemed to admit only those facts which he *actually avers* in his notice of appeal; he is not deemed to admit factual averments in the Department's action simply because he *could have denied them* in his notice of appeal.

when it adopted Pa.R.C.P. 1017(a), but that is immaterial here. The Board's rules, which incorporate the list of pleadings in Pa.R.C.P. 1017(a), were promulgated after being recommended by the Environmental Hearing Board Rules Committee and adopted by a majority of the administrative law judges at the Board.[12] The Rules Committee and the Board members certainly realized that parties before the Board would be filing notices of appeal as well as complaints, and, since other parts of the Board's rules distinguish between notices of appeal and complaints,[13] the Rules Committee and Board members certainly knew of the distinctions between both types of documents. Nevertheless, when the Board incorporated the list of "pleadings" found in Pa.R.C.P. 1017(a) into its own rules of practice and procedure, the Board did not add notices of appeal to the list of "pleadings." We only can conclude that this omission was deliberate. Since the Board distinguished between notices of appeal and complaints in other parts of its rules, the Board would have expressly indicated that it meant to add notices of appeal to the list of pleadings incorporated from the Rules of Civil Procedure if the Board meant to treat them as "pleadings."

Since the Board currently has no "pleadings" before it, the Department cannot prevail on its motion for judgment on the pleadings. Accordingly, the Department's motion is denied.

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[12] *See* Section 5 of the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7514, 35 P.S. § 7515.

[13] *See, e.g.*, 25 Pa. Code § 1021.51 (relating to notices of appeal) and 25 Pa. Code §§1012.56 and 1021.62 (relating to complaints for civil penalties and complaints in special actions, respectively).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ALLEGRO OIL & GAS, INC.,	:	
	:	**EHB Docket No. 98-021-C**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 29th day of July, 1998, it is ordered that the Department's motion for judgment on the pleadings is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: July 29, 1998

c: **DEP Litigation Library:**
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SECRETARY TO THE BOARD

RONALD L. CLEVER	:	
	:	
v.	:	**EHB Docket No. 98-086-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 29, 1998**

OPINION AND ORDER ON THE DEPARTMENT'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES AND PRODUCTION OF DOCUMENTS

By George J. Miller, Administrative Law Judge

Synopsis:

The Department's motion to compel the Appellant to answer interrogatories is granted to the extent that the discovery sought is plainly beyond the scope of permissible discovery or is improper and does not involve the claim of an attorney-client privilege. The Department's motion is denied at this time to the extent that certain of the objections made by the Appellant may involve a proper assertion of the attorney-client privilege. The Department is granted an extension of time for completion of discovery in order to determine whether or not that assertion is proper and to file appropriate motions with respect to the Appellant's response to the Department's discovery requests.

OPINION

Background:

This appeal is from the Department's order demanding access to certain real estate in Marcus Hook, Pennsylvania issued pursuant to the provisions of the Hazardous Sites Cleanup Act, Act of

October 18, 1988, P.L. 756, 35 P.S. §§ 6020.101- 6020.1305. The order is directed to the Appellant who is an attorney-at-law. Appellant purchased the property on May 28, 1997 as the successful bidder at a tax sale on behalf of undisclosed parties.

On June 1, 1998, the Department served on Appellant Department's First Set of Interrogatories and Requests for Production of Documents which sought information with respect to the Appellant's interest in the property and the identity of his client or clients. When the Department received no response to its discovery requests, the Department on July 22, 1998 filed its motion to compel answers to the interrogatories and the production of documents.

A conference call was scheduled on July 27, 1998 on the Department's motion to be held on July 28, 1998. Shortly before that conference call was held, the Appellant served on the Department, and filed with the Board, answers and objections to the interrogatories and produced a document in response to the requests for production of documents. The Appellant's response to the interrogatories also included certain objections based on the attorney-client privilege which primarily relate to the identity of the Appellant's client or clients. The Appellant also interposed objections to certain other interrogatories on the ground that the interrogatories called for conclusions of law.

In the course of the conference call with counsel for the parties on July 28, 1998, the Appellant contended that there was no waiver of objections to any of these interrogatories by reason of his prior failure to object and that he could not possibly waive the attorney-client privilege with respect to those interrogatories as to which his objection is based on grounds of privilege because this privilege can only be waived by the client.

DISCUSSION

Rule 4006(a)(2) requires an answering party to serve a copy of answers and objections to interrogatories within 30 days after the service of the interrogatories. Ordinarily a failure to object to the interrogatories within the 30 day period will result in a waiver of the objections. *Nissley v. The Pennsylvania Railroad Co.,* 259 A.2d 451 (Pa. 1969); *Hartford Accident & Indemnity Co.*, 6 Pa. D.&C. 4th 537 (1990); *Burda v. Cesare,* 50 Pa. D.&C. 3d (1992), *aff'd.,* 613 A.2d 26 (Pa. Super. 1992), appeal denied, 617 A.2d 1272 (Pa. 1992). One Pennsylvania trial court has held that objections to interrogatories are ordinarily waived if the objections are not made until after a motion seeking to enforce compliance with the discovery request has been filed. *Mountainview Condominium Owners' Assn. v. Mountainview Associates,* 9 Pa. D.&C. 4th 81 (1991). While at least one Court of Common Pleas has held that such a waiver does not result from a failure to object within 30 days of service (*Northampton Borough Mun. Auth. v. Remsco Associates, Inc.,* 22 Pa. D.&C. 3d 541 (1981)), the Board has held that a failure to timely object to the interrogatories is a waiver of those objections. Those decisions will be applied to the Department's interrogatories in this case which are not plainly beyond the scope of permissible discovery or are not plainly improper. *See Weiss v. DEP,* 1996 EHB 246; *Johnston v. DER,* 1986 EHB 1106. Similarly, the Board has held that a failure to respond to a request for production of documents constitutes a waiver of any available defenses. *Blosenski v. DER,* 1986 EHB 1883.

Other Pennsylvania trial courts have developed a rule that only a failure to file timely objections to the form of the interrogatories is a waiver whereas an objection to the substance of the interrogatories is not waived by a failure to file objections within the 30 day period. *Snyder v. CNA Insurance Companies,* 6 Pa. D.&C. 4th 549 (1990), *aff'd.* 653 A.2d 1310 (Pa. Super. 1994)

(requested discovery was beyond the scope of permissible discovery). Even if we were to apply this rule in this case, the Appellant's objections to interrogatories on the ground that they call for a conclusion of law were clearly waived because that objection is merely an objection to the form of the question. As indicated in our order, those interrogatories (Nos. 15, 16, 22 and 26) must be answered. Interrogatory No. 29 must also be answered to the extent it seeks information about the Appellant and any person other than Appellant's client or clients.

The existence of the Appellant's assertion of an attorney-client privilege, however, raises a more serious issue. The important policy considerations underlying the attorney-client privilege were recently emphasized by the United States Supreme Court in *Swidler & Berlin v. United States* (No. 97-1192), 1998 U.S. LEXIS 4214 (1998). The Pennsylvania Supreme Court has also placed a similarly high value on the attorney-client privilege. *Slater v. Remar, Inc.*, 338 A.2d 584, 589 (Pa. 1975). Accordingly, we will not now hold that the Appellant's failure to file objections to the interrogatories constituted a waiver of the attorney-client privilege which normally may be waived only by the client. We think that the policy underlying the privilege is more important than the policy underlying the Department's claim to a waiver of objections to interrogatories by failure to object to the interrogatories within 30 days. Of course, the assertion of this privilege may also be important to the Department in proceedings before this Board. *Sedat v. DER*, 641 A.2d 1243 (Pa. Cmwlth. 1994).

It is not clear, however, that the Appellant has made an appropriate assertion of the attorney-client privilege in this case. The question of whether the assertion of privilege is properly made or whether the privilege has been waived may involve complex, factual issues. *Maleski v. Corporate Life Ins. Co.*, 646 A.2d 1 (Pa. Cmwlth. 1994). Accordingly, we merely reserve judgment on

Appellant's objections to those interrogatories which seek the identity and location of the Appellant's client or clients which may possibly be protected by the attorney-client privilege. While the majority rule appears to be that the identity of the client is not protected by the privilege,[1] there is Pennsylvania authority indicating that the location of the client may be privileged. *See Brennan v. Brennan,* 422 A.2d 510 (Pa. Super. 1980). In any event, we are hesitant to rule on this issue without briefing by the parties. Accordingly, we will permit the Appellant to maintain his objections at this time to interrogatories 11(e), 11(f), 12(e), 12(f), 19, 20, 21, 22(a)-(d) and interrogatory 29 to the extent that this interrogatory seeks information about the Appellant's client or clients.

To enable the Board to determine whether or not the Appellant has asserted a proper claim of attorney-client privilege, the time for completion of discovery by the Department will be extended for 60 days to enable it to conduct discovery with respect to whether or not the Appellant's claim of attorney-client privilege is proper and to file any motion which it may deem appropriate with respect to Appellant's responses to the Department's interrogatories and requests for production of documents.

Accordingly, we enter the following Order:

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[1] *McCormick On Evidence*, 4th ed., pp. 330-333.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RONALD L. CLEVER	:	
	:	
v.	:	**EHB Docket No. 98-086-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	

ORDER

AND NOW, this 29th day of July, 1998, in consideration of the motion of the Department to compel answers to interrogatories and to produce requested documents based on the failure of the Appellant to respond to the Department's interrogatories and requests for documents within 30 days, and in consideration of the Appellant's answers to discovery requests served on the Department and filed with the Board on July 28, 1998, and following a conference call with counsel for the parties, IT IS HEREBY ORDERED as follows:

1. The Department's motion is granted in part. The Appellant is directed to file full and complete answers to those interrogatories to which late objections were made in the answers filed yesterday as to which Appellant has no valid objection on grounds of attorney-client privilege. Specifically, the Appellant's objections in response to the following interrogatories are dismissed and the Appellant is directed to answer them on or before **August 12, 1998:** 15, 16, 26 (to the extent the answer did not reveal a communication from the Appellant's client or clients) and 29 (to the extent that interrogatory 29 seeks information about the Appellant and any person other than Appellant's client or clients).

2. The Department's motion is denied at this time as to interrogatories 11(e), 11(f), 12(e), 12(f), 19, 20, 21, 22(a)-(d) and 29 to the extent that interrogatory 29 seeks information about the Appellant's client or clients.

3. The time for completion of discovery by the Department is hereby extended until **September 28, 1998** to enable it to conduct discovery with respect to whether or not the Appellant's claim of attorney-client privilege is proper and to file any motion it may deem appropriate with

respect to Appellant's responses to the Department's interrogatories and requests for production of documents.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: July 29, 1998

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

For the Commonwealth, DEP:
Paul Rettinger, Esquire
Southeast Region

For Appellant:
Ronald L. Clever, Esquire
Allentown, PA

rk

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JAMES LEE AND LEE OIL COMPANY	:	
	:	**EHB Docket No. 98-035-C**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** July 31, 1998

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A Department of Environmental Protection's (Department) motion to dismiss an appeal of a declaration of bond forfeiture under the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, *as amended*, 58 P.S. §§ 601.101-601.605 (Oil and Gas Act), is granted. Where notice of a Department action is not published in the *Pennsylvania Bulletin*, the Board has jurisdiction over an appeal of the action only if the appellant files a notice of appeal within 30 days of receiving actual or constructive notice of the action.

OPINION

This appeal was initiated with the February 26, 1998, filing of a notice of appeal by James Lee and Lee Oil Company (collectively, "Appellants") of Frewsburg, NY. The notice of appeal challenges a December 26, 1997, declaration of bond forfeiture the Department issued to Allegro Oil & Gas (Allegro) of Jamestown, NY. The Department declared the bonds forfeit because Allegro

allegedly failed to comply with a Department order directing it to plug certain wells it owned and operated in Sharon Township, Potter County, PA. In their notice of appeal, Appellants assert that the Department erred by declaring the bonds forfeit because the Department refused to plug the wells and also refused to allow Appellants to plug them. Appellants also ask that the Board return the bond money to them.

We have issued two previous decisions in this case: a May 6, 1998, opinion and order denying a Department motion to dismiss, and a June 4, 1998, opinion and order denying a Department petition for reconsideration.

The Department filed a second motion to dismiss and supporting memorandum of law on June 22, 1998, arguing that the Board lacks jurisdiction over Appellants appeal because Appellants failed to file their notice of appeal within 30 days of receiving actual notice of the declaration of forfeiture. Appellants failed to respond to the Department's motion.

Section 1021.52(a) of the Board's rules of practice and procedure provides:

> Except as specifically provided in [25 Pa. Code] § 1021.53 (relating to appeal *nunc pro tunc*), jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of the action or within 30 days after notice of the action has been published in the *Pennsylvania Bulletin*. . . .

Where notice of a Department action is not published in the *Pennsylvania Bulletin*--as is the case here-- a third party must appeal within 30 days of receiving actual or constructive notice for the appeal to be timely. *See, e.g., New Hanover Township v. DER*, 1991 EHB 1234; *Paradise Township Citizens Committee, Inc. v. DER*, 1992 EHB 668.

Appellants admit in their notice of appeal that they received a copy of the declaration of

forfeiture on January 10, 1998. (Notice of appeal, para. 2(d).) However, they did not file their notice of appeal until February 26, 1998--47 days later. Since they failed to file their notice of appeal within 30 days of receiving actual notice of the Department's action, their appeal was not timely filed, and the Board does not have jurisdiction over it.

Accordingly, the Department's motion to dismiss is granted.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES LEE AND LEE OIL COMPANY	:	
	:	**EHB Docket No. 98-035-C**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 31st day of July, 1998, the Department's motion to dismiss is granted.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: July 31, 1998

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

For the Commonwealth, DEP:
Thaddeus A. Weber, Esquire
Northwest Regional Counsel

For Appellants:
Raymond W. Bulson, Esquire
BULSON & LINDHOME
Portville, NY

jb/bl

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SVONAVEC, INC.	:	
	:	
v.	:	**EHB Docket No. 97-011-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 18, 1998**

OPINION AND ORDER
ON MOTION TO DISMISS
PETITION FOR COSTS AND ATTORNEY FEES

by Robert D. Myers, Administrative Law Judge

Synopsis:

A Motion to Dismiss a Petition for Costs and Attorney Fees is granted. The Petition sought costs and attorneys fees under both the Costs Act and the Surface Mining Conservation and Reclamation Act. The Board's Rule at 25 Pa. Code § 1021.132(b) states that an application for costs and attorneys fees under the Costs Act must be filed with the Board "within 30 days of the date of the final order under which the applicant claims to have prevailed." That was not done here. The Board's Rule at 25 Pa. Code § 1021.142(b) states that an application for costs and attorneys fees under a statute other than the Costs Act must be filed with the Board "within 30 days of the date of a final order of the Board." That was not done here.

The Board's Rule at 25 Pa. Code § 1021.151 eliminates the need for separate applications where a party seeks costs and attorneys fees under more than one statute. However, this rule requires that the applicant demonstrate, in separate counts, entitlement to recover under each statute.

Entitlement includes timely filing.

An order of the Board granting summary judgment and terminating the litigation is a final order. The taking of an appeal to Commonwealth Court does not alter the finality of the order. Likewise, the expiration of the appeal period without the filing of an appeal does not alter the final nature of the order. The order simply becomes unappealable as well as final.

OPINION

This appeal, filed on January 9, 1997, involved a December 9, 1996 Order of the Department of Environmental Protection (Department) charging Svonavec, Inc. (Svonavec) with degrading the water quality of a residential well in Milford Township, Somerset County, and directing Svonavec to provide a temporary and permanent replacement. On April 3, 1998, we issued an Opinion and Order granting summary judgment to Svonavec. The Department requested reconsideration of the Opinion and Order which we denied in another Opinion and Order issued on April 23, 1998.

On June 19, 1998, Svonavec filed a Petition for Costs and Attorney Fees under both the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1-1396.19a, and the Commonwealth Agency Adjudicatory Expenses Award Act (Costs Act), Act of December 13, 1982, P.L. 1127, *as amended*, 71 P.S. §§ 2031-2035, in the total amount of $35,264.65. On July 6, 1998, the Department filed its Answer to the Petition and also filed a Motion to Dismiss. Svonavec responded to the Motion on July 30, 1998.

In its Motion, the Department contends that the Petition was filed too late to be considered and should, therefore, be dismissed. Our procedural rules at 25 Pa. Code §§ 1021.131-1021.151 deal with costs and attorneys fees sought under the Costs Act (§§ 1021.131-1021.134), under statutes other than the Costs Act (§§ 1021.141-1021.144) and under more than one statute (§ 1021.151). The

last section, applicable here because of the dual nature of Svonavec's Petition, authorizes the filing of a single application but requires separate counts establishing entitlement under each statute included in the claim.

Entitlement to recovery of costs and attorneys fees under the Costs Act requires the filing of an application "within 30 days of the date of the final order under which the applicant claims to have prevailed," § 1021.132(b). Entitlement under SMCRA, a statute other than the Costs Act, requires the filing of an application "within 30 days of the date of a final order of the Board," § 1021.142(b). The final order of this Board under which Svonavec prevailed was our Order of April 3, 1998, granting summary judgment in Svonavec's favor. According to 25 Pa. Code § 1021.15(a), this Order was effective as of the date of entry, April 3, 1998.

To be timely, Svonavec's Petition had to be filed on or before May 4, 1998.[1] As noted earlier, it was not filed until June 19, 1998, 46 days later. Svonavec attempts to excuse this delinquency with two arguments. First, it contends that it was misled by § 1021.151 which contains no filing deadline for applications seeking costs and attorneys fees under more than one statute. This is a misinterpretation of the rules.

25 Pa. Code § 1021.151 eliminates the need for separate applications, one for each statute invoked, but requires the applicant to demonstrate, in separate counts, entitlement to recover under each statute. Entitlement includes timely filing, which is 30 days in each instance involved here. We find no reasonable grounds for Svonavec's claim of being misled.

Svonavec's second argument is that the 30-day period did not begin until the appeal period

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[1] The 30th day being a Sunday, filing on Monday would have been acceptable. Pa. R.C.P. No. 106(b).

for the summary judgment order expired, because, prior to that date, the matter was not final. Of course, this argument overlooks the plain language of our rules. As noted above, the 30 days is measured under the Costs Act from the "date of the final order under which the applicant claims to have prevailed," § 1021.132(b), and under other statutes from the "date of a final order of the Board," § 1021.142(b).

The April 3, 1998 Order granting summary judgment to Svonavec was a final order of the Board terminating the litigation.[2] Nothing remained to be done after that date to make it final. Even the taking of an appeal to Commonwealth Court would not have altered the finality of the Order; the final Order would have formed the basis of the appeal. Pa. R.A.P. 341. By the same token, the expiration of the appeal period without the filing of an appeal does not alter the final nature of the Order. The Order simply becomes unappealable as well as final.

We conclude that Svonavec was not justified in ignoring the plain language of our rules. Therefore, its Petition, filed beyond the time allowed by our rules, cannot be entertained.

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[2] Orders granting summary judgment are classic examples of final orders. *See* 16 *Standard Pennsylvania Practice*, 2d, § 86.52 and the numerous cases cited.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SVONAVEC, INC.	:	
	:	
v.	:	**EHB Docket No. 97-011-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 18th day of August, 1998, it is ordered as follows:

1. The Department's Motion to Dismiss is granted.

2. Svonavec's Petition for Costs and Attorney Fees is dismissed.

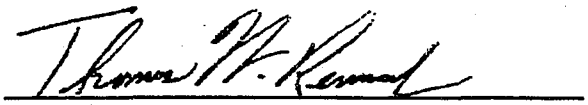
ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: August 18, 1998

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

For the Commonwealth, DEP:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MYRON A. YOURSHAW and CHARLES J. YOURSHAW	:	
v.	:	**EHB Docket No. 97-039-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and READING ANTHRACITE CO., Permittee	:	**Issued: August 18, 1998**

OPINION AND ORDER ON PERMITTEE'S MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

The Permittee's motion for summary judgment is denied at this time. Neither the Permittee nor the Appellants in response to the motion have presented affidavits or other evidence of record which would justify the granting or denial of the motion for summary judgment at this time. A pre-hearing conference is scheduled and the parties are required to submit in their pre-hearing memoranda, or as a supplement thereto, whatever evidence they may have supplementing the motion for summary judgment and the response thereto. The appeals from the mining permit are not moot by reason of agreements reached by the Permittee and the Department subsequent to the filing of the appeal because the Board may still grant Appellants relief.

BACKGROUND

This appeal was filed on February 10, 1997 by the filing of a *pro se* notice of appeal by Myron A. Yourshaw and Charles J. Yourshaw (Appellants) from the Department of Environmental Protection's (Department) second renewal on January 10, 1997 of a surface mining permit to Reading Anthracite Co. (Reading). The permit and subsequent renewals were issued under the provisions of the Surface Mining Conservation and Reclamation Act, Act of May 13, 1945, P.L. 1198, *as amended,* 52 P.S. §§ 1936.1 to 1396.31. The renewed permit authorized Reading to continue operating a surface mine located in New Castle Township, Schuylkill County, Pennsylvania.

In October, 1997, Reading filed a motion for summary judgment, or in the alternative, to limit issues on the ground that the Appellants had not challenged the first renewal of the permit under these grounds and are therefore barred by the doctrine of administrative finality from maintaining this appeal. The Board granted this motion in part by an Opinion dated February 4, 1998, but denied the motion as to grounds for appeal which appear to be based on events that occurred between the first and second renewal of the permit which might provide grounds for the claim that the Department should not have renewed the permit a second time. The Board's Order specifically left open for further consideration in this appeal Objection 1 relating to a claimed unsafe high wall, Objection 4 relating to a claimed absence of sediment traps and Objection 9 relating to claimed improper blasting. The Board's Opinion and Order left these issues open and took this action even though the Appellants' response to Reading's motion for summary judgment was not supported by affidavits or other evidence of record as is required of a response to a motion for

summary judgment by Rule 1035.3 of the Pennsylvania Rules of Civil Procedure.[1] The Board specifically stated in its Opinion:

> The Appellants are cautioned that they must provide such evidence in the event the Permittee should renew its motion as to the Appellants' claim that the permit should not have been renewed under 25 Pa. Code § 86.55(g).

Thereafter, Reading sought and was granted leave to file a renewed motion for summary judgment based in part on agreements between Reading and the Department in settlement of Reading's appeals from conditions in the Department's permit. These agreements resulted in modifications to the permit. Reading now contends that these modifications to the permit render Appellants' appeals moot because the permit provisions which Appellants objected to are no longer part of the permit as modified. Reading's motion also contends that the objection relating to the safety of the eastern high wall was not raised in the original appeal so that the Board has no jurisdiction to adjudicate this objection. Reading also states that the objection as to sediment traps and blasting must also be denied because there are proper sediment traps on the property and the Department expressly considered the Appellants' objections as to improper blasting.

The Appellants' response to the renewed motion for summary judgment is contained in a document entitled "Yourshaws' Motion In Opposition To Permittee's Renewed Motion For Summary." Neither the motion nor the brief in support of the motion were signed by Appellants and neither of them are supported by the affidavits or other evidence in the record as required by Rule

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[1] At the outset of this appeal, the Board also advised Appellants by letter dated March 18, 1997 that they should secure legal counsel who could retain appropriate experts to present their contentions in this appeal. They elected despite this advice to continue to represent themselves in this proceeding.

1035.3 of the Pennsylvania Rules of Civil Procedure.[2] The response does contain conclusory statements that the high wall remains unsafe, that the Department's files contain no evidence of sediment traps being required and that blasting will continue to cause damage to homes in violation of the Department's regulations.

Following the receipt of the Appellants' response on July 27, 1998, the Board advised the Appellants by telephone call and by letter dated July 30, 1998 that their response required supporting affidavits based on personal knowledge and other evidence of record. The letter enclosed a copy of Rule 1035 of the Pennsylvania Rules of Civil Procedure and specifically directed their attention to the provisions of Rule 1035.4 so that Appellants would know that the affidavits had to be based on personal knowledge, were required to set forth such facts as are admissible in evidence and must show affirmatively that the signer is competent to testify to the matters stated therein.

Appellants responded to this advice by only refiling their signed response with affidavits signed by both Appellants asserting that "the facts set forth in the foregoing document are true and correct to the best of his knowledge and belief."

DISCUSSION

A motion for summary judgment is governed by Rules 1035.1 to 1035.5 of the Pennsylvania Rules of Civil Procedure. Rule 1035.2 permits the filing of a motion for summary judgment as a matter of law whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report. Such a motion may also be filed when after the completion of discovery, including the production

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[2] Evidence of record is defined by Rule 1035.1 to include pleadings, depositions, answers to interrogatories, admissions and affidavits as well as expert reports.

of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of fact essential to the cause of action or defense which would require the issue to be submitted to a jury. Rule 1035.3 provides that a party may not rest upon mere allegations or denials in the pleadings but must file a response identifying one or more issues of fact arising from the evidence in the record controverting the evidence cited in support of the motion. In the alternative, the opposing party may defend a motion for summary judgment by a challenge to the credibility of one or more witnesses testifying in support of the motion or through evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced. Under this rule, the court may rule on the motion for summary judgment or permit affidavits to be obtained or other discovery to be taken. More importantly, Rule 1035.4 requires that supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible into evidence, and shall show affirmatively that the signer is competent to testify to the matters stated therein. The affidavit may attach copies of papers referred to in the affidavit but those documents must be verified or certified copies.

The Eastern High Wall

Reading first contends that the objection that the eastern high wall is unsafe is now moot because subsequent action taken by it and approved by the Department has rendered the eastern high wall safe. Reading's motion attaches the affidavit of Keith Laslow of the Department made only on the basis of knowledge and belief and attaches Exhibits A1 through A6 to indicate that the high wall has now been repaired by removing an overhang fracture on a portion of the wall. The motion quite frankly acknowledges that in March, 1997 the Department's inspection of the eastern high wall found that it might be failing and creating a safety hazard. However, Reading contends that Exhibit

A6 shows that the high wall is now safe and stable. Exhibit A6 is a Department inspection report dated April 3, 1997. This inspection report states, in part, that the overhang fracture on the eastern high wall was successfully removed and that the high wall now appears to be stable from a safety standpoint. However, Reading's motion is not accompanied by an affidavit which states that the signer of the affidavit or the Department employee who signed the inspection report is competent, in the sense of having the required qualifications as an expert, to testify that the high wall is now safe.

On this issue the Appellants' response to the motion for summary judgment only states that the eastern high wall on the permitted property remains in an unsafe condition despite Reading's assertion to the contrary. It states that the attached geological map shows the fault lines. The Appellants' argument, contained in a supporting brief, adds that a map of 1972 indicates work limits. The brief asserts that this shows that the high wall was not pre-act as contended by both the Department and Reading. It concludes that, accordingly, the limit of mining must be moved back to 300 feet as required by the state regulations and no special dispensation is possible. Nothing in the Appellants' response indicates that Appellants have the necessary expert qualifications to testify that the high wall continues to be unsafe.

We deny the motion for summary judgment at this time because neither Reading nor the Appellants have supported their motion by appropriate evidence from the record or by proper affidavits which would enable the Board to resolve this issue at this time. However, the Board does not intend to hold a hearing on the merits on this issue unless the Appellants, who bear the burden of proof in this proceeding, demonstrate that they have an expert with sufficient qualifications to testify that the high wall is now unsafe. Our order schedules a pre-hearing conference to be held in

Harrisburg on September 25, 1998 to determine whether the Appellants have sufficient testimony to establish their claim that the high wall remains in an unsafe condition.

In any event, we reject Reading's claim that this controversy is now moot because the Department considers the high wall to be safe as a result of remedial action taken by Reading at the Department's request. The fact that the Department required a remedy for what it perceived to be an instability of the high wall may only be evidence that the Department improperly reissued the permit in the first place.

Accordingly, the dispute with respect to the eastern high wall is not moot because the Board may well determine that the Department abused its discretion in reissuing the permit or in not requiring additional action if the eastern high wall is demonstrated to be unsafe now based on whatever appropriate testimony Appellants may be able to present. The Department's reissuance of the permit in face of the Appellants' contention that the high wall was unsafe was clearly a discretionary act. If the Board were to find, based on the basis of competent evidence, that the Department has abused its discretion, then the Board may properly substitute its discretion for that of the Department and order the relief requested. This includes the power to modify the Department's action and direct the Department in what is the proper action to be taken. *Pequa Township v. Department of Environmental Protection,* 1912 C.D. 1997 (Pa. Cmwlth. 1998); *Warren Sand & Gravel Co., Inc. v. Department of Environmental Resources,* 341 A.2d 556 (Pa. Cmwlth. 1975). Since the Board could grant relief to Appellants by directing further action by the Department, the dispute is not moot.

Reading also contends that Appellants have waived the objection with respect to the safety of the high wall by reason of their failure to raise the issue in their notice of appeal. This contention

is simply erroneous. The notice of appeal (and a supplement to the notice of appeal filed in response to the Board's Order of February 12, 1997 as a condition of docketing the appeal) under the title of "Additional Complaints not Covered Above" states: "Eastern high wall is unsafe and ready for failure."

Sediment Traps

Reading contends that it must be granted summary judgment with respect to the Appellants' Objection 4 relating to the claimed absence of sediment traps. Reading's motion is supported by what appears to be the Department's records and the affidavit of a Department employee, Keith Laslow. However, the Laslow affidavit is made only on the basis of knowledge or belief and his deposition testimony attached to the motion does not appear to be based on personal knowledge which would make it admissible evidence. The Department's documents, if properly placed before the Board, would demonstrate that sediment traps are currently in place on Reading's property and were also in place at the time of the second renewal of the mining permit. The affidavit also states that these sediment traps are adequate to address any erosion or sedimentation concerns raised by Reading's mining. Since Mr. Laslow is a Department hydrologist, he may be competent to give this testimony. The affidavit also refers to Exhibits A8 and A9 which are said to be records from the Department's files showing that sediment traps were considered and are in place.

The Appellants' response only asserts that no sediment traps exist on the permitted property based on Appellants' search of the Department's files which found none in existence. However, Appellants make no specific response to Mr. Laslow's reference to Exhibits A8 and A9 which show that sediment traps are in place.

If Reading presents proper evidence of record to the Board when it files its pre-hearing memorandum which establishes the existence of appropriate sediment traps and there is no evidence to the contrary presented by the Appellants, summary judgment will be granted to Reading with respect to Appellants' Objection 4 that there are no sediment traps on the property.

Blasting

Reading contends that summary judgment must also be granted against the Appellants based on its objection with respect to blasting and the resulting damage to homes. Objection 9 of the Appellants' notice of appeal states: "Damage to home with no response by DEP to reduce it to a safe level of 0.08." Reading appears to believe that because the Department considered the complaints of residents with respect to blasting that this is dispositive of the issue. However, the Appellants' claim, as set forth in the brief accompanying its response to the motion for summary judgment, appears to contend that the Department improperly resolved the issue of what is a safe level for blasting based on a federal study which they assert cannot properly be used as a basis for the Department's determination.

The Federal Report referred to by the Appellants is apparently the report referred to in the study conducted for the Department of the damage done to the Yourshaw homes by Kenneth L. Eltschlager, a Pittsburgh mining engineer. This opinion, attached to the Laslow affidavit as Exhibit A11, adopts a standard established by the United States Bureau of Mines which is a minimum safe level for blasting at 0.5 in/s for older homes. This report concludes that a record review of blasting done by Reading indicated that ground vibrations were 0.04 in/s or less for all blasts. The report concludes that the Yourshaws' residences should be adequately protected from damage by the use of this minimum vibration level.

The study by the United States Bureau of Mines appears to be attached to the Appellants' response. The abstract of this study states that safe levels of ground vibrations from a blasting range from 0.5 to 2.0 in/sec is peak particle velocity for residential type structures.

Appellants claim that this report is not a proper basis for the Department's permit which limits blasting to this level because the homes adversely affected by blasting are constructed on a horizontal rock level rather than compacted earth layers as in the Federal Report. Appellants claim, as a result, that most of the damage that does occur to nearby homes is because the blasting vibration is more prevalent in the upper stories due to the amplification of the vibrations in the home construction. However, this contention appears to vary from the Appellants' statement in the notice of appeal that the Department failed to reduce blasting to a safe level of 0.08 and from the expert opinion of Kenneth Eltschlager.

Even if it is determined that this contention of the Appellants is proper under the claim set forth in their appeal, this contention is not supported by any affidavit or other evidence of record indicating that the Appellants have a competent witness who could present this theory to the Board. The Appellants' brief does refer to conversations with Dr. Richard Woods, Chairman of the University of Michigan Department of Civil Engineering and Environmental Science, which might support this theory. However, evidence that these statements were made by Dr. Woods to the Appellants would be inadmissible hearsay testimony.

Reading's second contention on this objection in its motion for summary judgment is that adjustments which the Department has made to the permit since this appeal was taken moot the appeal. Reading claims that two special conditions, nos. 7 and 14 to the permit (relating to use of seismographs and protective provisions which grant the Department power to require cessation of

blasting if the blasting is not safe), moot the Appellants' appeal.

We reject Reading's contention that these modifications to the permit moot this appeal. The permit as renewed was clearly an act of discretion as was the Department's more recent changes to the permit. As indicated above with respect to the claimed instability of the eastern high wall, the Board, after hearing evidence in this appeal, might conceivably determine that the Department's permit even with these additional special conditions is inadequate to protect Appellants from the effect of blasting.

While we are inclined to enter summary judgment in Reading's favor on Objection 9 based on the expert report before us and the apparent absence of any expert testimony to be offered by Appellants, we are reluctant to do so because Appellants do not appear to understand that a competent expert on the issue of the proper safe level of blasting must be presented at the hearing on the merits. It may also be that Appellants, as trained engineers, may be competent to present such testimony. However, if Appellants' pre-hearing memorandum indicates that Appellants have no such expert, this objection to the permit will be dismissed at the time of the pre-hearing conference scheduled by the order entered following this opinion.

Accordingly, we enter the following

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MYRON A. YOURSHAW and CHARLES J. YOURSHAW	:	
v.	:	**EHB Docket No. 97-039-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and READING ANTHRACITE CO., Permittee	:	

ORDER

AND NOW, this 18th day of August, 1998, the Board enters the following Order:

1. Reading's renewed motion for summary judgment is denied at this time pending whatever ruling the Board may make as a result of the pre-hearing conference scheduled by this order.

2. The Appellants and counsel for Reading are to attend a pre-hearing conference in this case on September 25, 1998 at 10:00 a.m. in Hearing Room No. 1 at the offices of the Environmental Hearing Board, Rachel Carson State Office Building, 400 Market Street, Harrisburg, Pennsylvania.

3. The pre-hearing memoranda of the parties, or other material presented by the time those memoranda are due as a supplement to the motion for summary judgment or the Appellants' response thereto, must demonstrate that there remains a factual issue for the hearing on the merits (including the identification of competent expert testimony on the issues of the safety of the high wall and the safe level for blasting) or the motion for summary judgment will be granted and the hearing on the merits now scheduled to commence on October 6, 1998 will be cancelled.

4. Any affidavits or other evidence of record so presented must meet the requirements of Rules 1035.3 and 1035.4 of the Pennsylvania Rules of Civil Procedure.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: August 18, 1998

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

For the Commonwealth, DEP:
Charles Haws, Esquire
Central Region

For Appellant:
Myron A. Yourshaw
Charles J. Yourshaw
St. Clair, PA

For Permittee:
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SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 98-078-CP-MR**
WHITEMARSH DISPOSAL CORPORATION, INC. and DAVID S. MILLER	:	**Issued: August 18, 1998**

OPINION AND ORDER
ON PRELIMINARY OBJECTIONS

by Robert D. Myers, Member

Synopsis:

The Department's first preliminary objection is overruled. The Department objected that, contrary to Pa. R.C.P. No. 1033, the defendant had not obtained the Department's consent or leave of court to file an amended pleading. However, the defendant had an absolute right under Pa. R.C.P. No. 1028(c)(1) to file an amended pleading within 20 days after service of preliminary objections, and the defendant properly did so here. Moreover, when the defendant filed his amended pleading, the Department's preliminary objections to the original pleading became moot. Because the defendant had the right to file an amended pleading under Pa. R.C.P. No. 1028(c)(1), we overrule the Department's further objection that the defendant did not raise all preliminary objections at one time, and that the amended pleading caused undue prejudice to the Department.

The Department's second preliminary objection asking the Board to strike certain paragraphs

of the defendant's New Matter for insufficient specificity is granted in part. The Board agrees that the pleading lacks sufficient specificity to allow the Department to prepare a defense; however, the remedy is to order a more specific pleading, not to strike the paragraphs.

The Department's third preliminary objection asking the Board to strike a paragraph of the defendant's New Matter because it improperly reserves affirmative defenses is overruled. The paragraph in question explicitly recognizes the affirmative defense limitations imposed by Pa. R.C.P. Nos. 1032 and 1030.

A defendant's preliminary objection in the nature of a demurrer is overruled. Accepting as true all well-pleaded allegations of material facts in the complaint, considering applicable case law, and resolving all doubts in favor of the Department, the Board concludes that the complaint states a proper cause of action against the defendant.

A defendant's preliminary objection is overruled where the defendant claims that certain "Counts" of the complaint lack sufficient specificity. Considering applicable case law, the material facts of the complaint are sufficient. With respect to some "Counts," the defendant simply seeks further details of an evidentiary nature that can be learned during discovery.

Finally, a defendant's preliminary objection asking that the Board dismiss the complaint because the Department failed to join a necessary and indispensable party is overruled. The Department's failure to take enforcement action against a party constitutes an exercise of prosecutorial discretion. Moreover, the Board lacks the power to join a necessary and indispensable party.

OPINION

On April 29, 1998, the Department of Environmental Protection (Department) filed a

Complaint for Assessment of Civil Penalty (Complaint) against Whitemarsh Disposal Corporation, Inc. (Whitemarsh) and David S. Miller (Miller) for unlawful sewage treatment operations and for unlawful discharges into Sandy Run Creek. The Department makes the following allegations in its Complaint.

Whitemarsh owns and operates a sewage treatment plant in Fort Washington, Whitemarsh Township, Montgomery County (Plant). From August 12, 1991 through August 12, 1996, Whitemarsh operated the plant pursuant to National Pollutant Discharge Elimination System (NPDES) Permit No. PA0046779 (Permit). The Permit authorized Whitemarsh to discharge treated effluent into Sandy Run Creek. Miller, the president, general manager, and sole shareholder of Whitemarsh, has had authority and responsibility for operations, maintenance, and repairs at the Plant since June 1996. (Complaint at paras. 5-8, 10.)

The Complaint contains six "Counts" against Whitemarsh and Miller. Counts I and II allege that, from approximately June 15, 1996 to September 24, 1996, the Plant violated the Permit's effluent limits because of a blower problem. (Complaint at Counts I-II; paras. 21-22, 24, 28.) In Count III, the Department asserts that neither Whitemarsh nor Miller notified the Department about the blower problem. (Complaint at Count III; para. 34.) Count IV avers that Whitemarsh and Miller continued to discharge from the Plant into Sandy Run Creek after the Permit expired on August 12, 1996. (Complaint at Count IV; paras. 40-41.) The last two "Counts" allege that the Department conducted a Plant inspection on April 11, 1997 and learned that raw sewage was bypassing the Plant and entering Sandy Run Creek, but neither Whitemarsh nor Miller notified the Department about the problem. (Complaint at Counts V-VI; paras. 46, 54.) Based on these allegations, the Department asks that the Board assess a civil penalty.

On May 27, 1998, Whitemarsh and Miller filed separate Answers to the Complaint denying the Department's allegations. Miller's Answer included New Matter described as "New Matter and Additional Material by way of Defense and Preliminary Objection." Miller asserted in his New Matter that: (1) he is president and the sole shareholder of Keystone Group, Inc. (Keystone); (2) Keystone purchased shares of Whitemarsh from a judicial receiver for the former owner of Whitemarsh on September 3, 1996; (3) at no time prior to September 3, 1996 did Miller exercise any control over the affairs of Whitemarsh; (4) Waste-ops, Inc. (Waste-ops) was the certified operator of the Plant during the period of the alleged violations; (5) on September 8, 1996, a severe flood destroyed the business records of Miller, Keystone, and Whitemarsh and rendered certain Plant equipment inoperable; (6) on September 24, 1996, the Department issued a Compliance Order requiring immediate rehabilitation of the Plant; (7) in November 1996, Whitemarsh terminated the services of Waste-ops because it had not been operating the Plant in a proper manner; and (8) since replacing Waste-ops on May 1, 1997, Whitemarsh has not violated its Permit.

The Department filed a Reply to Miller's New Matter and Preliminary Objections on June 15, 1998. In the preliminary objections, the Department asked the Board to strike portions of Miller's New Matter as redundant and to strike any reference to "Preliminary Objections" because it is not clear which paragraphs are preliminary objections.

On July 2, 1998, Miller filed Amended Preliminary Objections, Answer and New Matter (Amended Pleading). In the Amended Pleading, Miller eliminated the redundant language, added clearly designated preliminary objections, and appended new paragraphs asserting the affirmative defenses of estoppel, laches, impossibility of performance, justification, waiver, and any other affirmative defense contemplated by Pa. R.C.P. Nos. 1032 and 1030 that may become available

through discovery and/or at trial. (Amended Pleading at paras. 21-26.)

Miller's first preliminary objection is in the nature of a demurrer. Miller contends that, absent misconduct or disregard of corporate formalities on his part, he has no individual liability for the activities of Whitemarsh. His second preliminary objection is that Counts III, V, and VI of the Complaint lack sufficient specificity. Count III does not allege facts to show that Miller knew or should have known about the blower problem, and Counts V and VI do not allege sufficient facts about the alleged raw sewage problem. Miller's third preliminary objection is that the Department failed to join Keystone as a necessary party.

On July 22, 1998, the Department filed Preliminary Objections, Responses and Answer to Miller's Amended Pleading. The Department's first preliminary objection is that: (1) contrary to Pa. R.C.P. No. 1033, Miller failed to obtain the Department's consent or leave of court to file an amended pleading; (2) contrary to Pa. R.C.P. No. 1028(b), Miller has not raised his preliminary objections at one time; and (3) the Department has been prejudiced by the filing of the Amended Pleading. The Department's second preliminary objection is that Miller's affirmative defense paragraphs lack sufficient specificity to determine the factual bases for each claim. The third preliminary objection is that, under Pa. R.C.P. No. 1032, Miller cannot reserve affirmative defenses that are not listed in Pa. R.C.P. No. 1030(b).

In response to Miller's first preliminary objection, the Department argues that, under *DER v. Lucky Strike Coal Company*, 1987 EHB 234, Miller is personally liable for the civil penalty. With respect to Miller's second preliminary objection, the Department contends that Miller, as general manager of Whitemarsh, is strictly liable for the violations under *Kaites v. DER*, 1986 EHB 234. Responding to Miller's third preliminary objection, the Department maintains that: (1) Miller is

liable for civil penalties without Keystone as a party; (2) Miller has not shown that Keystone has a joint interest in the subject matter of this litigation under Pa. R.C.P. No. 2227; and (3) the Department is merely exercising its prosecutorial discretion here.

On August 11, 1998, Miller filed an Answer to the Department's Preliminary Objections to the Amended Pleading. In response to the Department's first preliminary objection, Miller claims that the Amended Pleading was proper under Pa. R.C.P. No. 1028(c)(1). With respect to the second preliminary objection, Miller contends that it is not proper to strike his affirmative defense paragraphs for lack of specificity because specific facts can be learned through the discovery process. In the alternative, Miller asks the Board to grant leave to amend the affirmative defense paragraphs. Turning to the third preliminary objection, Miller argues that he only intends to reserve any unwaivable affirmative defense.

I. Department's Preliminary Objections

A.

We shall first address the Department's three preliminary objections to Miller's Amended Pleading. First, the Department asks the Board to strike the Amended Pleading because, under Pa. R.C.P. No. 1033, it is not permissible without the Department's consent or leave of court. Miller, however, argues that the Amended Pleading was a proper filing under Pa. R.C.P. No. 1028(c)(1).

Rule 1028(c)(1) of the Pennsylvania Rules of Civil Procedure states that "[a] party may file an amended pleading as of course within twenty days after service of a copy of preliminary objections. If a party has filed an amended pleading as of course, the preliminary objections to the original pleading shall be deemed moot." The right to amend as of course is absolute within the 20-day period; the party can amend without either the consent of the adverse party or court approval.

5 *Standard Pennsylvania Practice 2d*, § 24:35 (1993).

Here, the Department served a copy of its original preliminary objections on Miller on June 15, 1998 by facsimile and first class mail. *See* Department's Preliminary Objections, Certificate of Service. Thus, Miller had until July 6, 1998 to file an amended pleading *without* the consent of the Department or leave of the Board. Miller filed his Amended Pleading on July 2, 1998. Therefore, the pleading is allowed, and the Department's original preliminary objections are moot.

The Department also objects that, contrary to Pa. R.C.P. No. 1028(b), Miller did not raise all preliminary objections at one time. We disagree. A preliminary objection is a pleading under Pa. R.C.P. No. 1017(a). As stated above, Rule 1028(c)(1) gives a party the right to amend a pleading within 20 days after service of preliminary objections. Miller has properly done so here. Miller has *not* filed a second set of preliminary objections.

The Department also contends that it has suffered undue prejudice from Miller's filing of his Amended Pleading. This argument has no merit. Miller's filing of his Amended Pleading was in perfect compliance with the rules of court.

B.

Second, the Department asks the Board to strike Miller's affirmative defense paragraphs under Pa. R.C.P. No. 1028(a)(3) because they lack sufficient specificity to allow the Department to determine the bases for the claims of estoppel, laches, impossibility of performance, justification or waiver.

The purpose of a preliminary objection for insufficient specificity in a pleading is to insure that an adverse party's ability to defend will not be unduly impaired by a pleader's vagueness; the remedy is to order a more specific pleading. 5 *Standard Pennsylvania Practice 2d*, § 25:57 (1993).

Such an objection requires that the pleading be tested to determine whether it fully summarizes the material facts so that the adverse party can prepare a defense. 5 *Standard Pennsylvania Practice 2d*, § 25:58. All allegations of the pleading are to be considered. *Id.*

Miller's affirmative defense paragraphs state that the Department's claims are barred and/or waived pursuant to the principles of estoppel, laches, impossibility of performance, justification, and waiver. (Amended Pleading, paras. 21-25.) Miller alleges facts in the Amended Pleading which could be material to one or more of these affirmative defenses. However, we agree with the Department that the Amended Pleading lacks sufficient specificity with respect to these affirmative defenses. Therefore, Miller will be required to file a more specific pleading within 20 days of the date of this Opinion and Order.

C.

Third, the Department asks the Board to strike Paragraph 26 of Miller's New Matter under Pa. R.C.P. No. 1032 because that rule allows a party to reserve only those affirmative defenses listed in Pa. R.C.P. No. 1030(b).

Rule 1032(a) of the Pennsylvania Rules of Civil Procedure provides as follows:

> A party waives all defenses and objections which are not presented either by preliminary objection, answer or reply, except a defense which is not required to be pleaded under Rule 1030(b), the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, the objection of failure to state a legal defense to a claim and any other nonwaivable defense or objection.

Pa. R.C.P. No. 1032(a).

Paragraph 26 of Miller's New Matter states: "To the extent to which Pennsylvania Rule of Civil Procedure 1032 mandates that any and all affirmative defenses not set forth herein are waived,

Miller asserts any and all affirmative defenses contemplated by Pennsylvania Rule of Civil Procedure 1032 and 1030 if the same become available to Miller through discovery and/or at trial of this matter." This paragraph does not conflict with Rule 1032. In fact, it makes explicit reference to the limitations imposed by Rule 1032 and asserts only those affirmative defenses which Rules 1032 and 1030 allow Miller to reserve. Therefore, the Department's third preliminary objection is overruled.

II. Miller's Preliminary Objections

A.

Miller's first preliminary objection is in the nature of a demurrer. Miller argues that the Department's Complaint is legally insufficient because it does not allege any affirmative misconduct or blatant disregard of corporate formalities which, if proven, might establish a basis for Miller's personal liability. *See* Pa. R.C.P. No. 1028(a)(4). The Department counters that Miller is personally liable for a civil penalty under *DER v. Lucky Strike Coal Company*, 1987 EHB 234.

In *Lucky Strike*, the Board discussed a corporate officer's potential personal liability for a civil penalty. *Lucky Strike*, 1987 EHB at 253. The Board explained that a corporate officer may be found liable for a civil penalty under a "piercing the corporate veil" theory or a "participation" theory. With respect to the "participation" theory, a corporate officer may be found liable: (1) when the officer's actions actually furthered the alleged violations; (2) when the officer did not personally participate in the violations but had knowledge of them and consented to them; or (3) when the officer had a statutory duty to deal with the violations and failed to do so. *Lucky Strike*, 1987 EHB at 253-54; *see Kaites v. DER*, 1986 EHB 234.

In order to test the legal sufficiency of a complaint, the Board must accept as true all well-

pleaded allegations of material facts set forth in the complaint and every inference reasonably deducible therefrom. 16 *Standard Pennsylvania Practice 2d*, § 91:107 (1995). Where the end result of a preliminary objection would be dismissal of the cause of action, the preliminary objection should be sustained only in cases that are clear and free from doubt or reservation, and all doubts must be resolved in favor of overruling the preliminary objection. 16 *Standard Pennsylvania Practice 2d*, § 91:105.

Here, the Department alleges in the Complaint that Miller is the president, general manager, and sole shareholder of Whitemarsh, and that Miller has had authority and responsibility for operations, maintenance, and repairs at the Plant since June 1996. Accepting this as true, Miller would be personally liable for a civil penalty under *Lucky Strike*. Accordingly, Miller's first preliminary objection is overruled.

B.

Miller's second preliminary objection is that Counts III, V, and VI of the Complaint lack sufficient specificity. Miller contends that, from Counts III and VI, he cannot determine in what manner he knew or should have known about the blower and bypass problems and the related violations. However, Counts III and VI incorporate by reference Paragraphs 5 and 8 of the Complaint. These are the paragraphs which allege that Miller is president, general manager, and sole shareholder of Whitemarsh, and that he had authority and responsibility for operations, maintenance, and repairs at the Plant since June 1996. The Department contends that, as general manager of Whitemarsh, Miller is strictly liable for an assessment of civil penalty. *See Lucky Strike* and *Kaites*. Thus, a more specific pleading is unnecessary.

With respect to Counts V and VI, Miller argues that he cannot determine whether, when and

where the alleged sewage bypass occurred. Miller suggests that the Complaint should state the source of the bypass, some indicia of the occurrence, and the point of discharge into Sandy Run Creek. We note that a preliminary objection on the ground of insufficient specificity of the pleading will be overruled where the details requested are evidentiary in nature and thus better obtained by discovery, or where a party merely wants to learn more details. 5 *Standard Pennsylvania Practice 2d*, § 25:61.

Paragraph 53 of the Complaint states that a Department inspection on April 11, 1997 revealed that the Plant's discharge included raw sewage which was bypassing the Plant and entering Sandy Run Creek. These facts are sufficient to inform Miller of the nature of the violation and when it allegedly occurred. It is enough to allow Miller to prepare a defense with the aid of additional discovery. Indeed, the precise source of the bypass and discharge point into Sandy Run Creek are details of an evidentiary nature that can be learned from the Department during discovery. Therefore, the preliminary objection is overruled.

C.

Miller's third preliminary objection is that the Department failed to join Keystone as a necessary party. Miller asks the Board to dismiss the Department's Complaint for this reason. This we cannot do.

In *McKees Rocks Forging, Inc. v. DER*, 1991 EHB 730, the Board addressed a motion to dismiss for failure to join an indispensable party. The Department denied the motion, explaining that the Department's failure to take enforcement action against a party constitutes an exercise of prosecutorial discretion. In *Empire Sanitary Landfill, Inc. v. DER*, 1994 EHB 1365, the Board explicitly stated that it does not have the power to join a necessary and indispensable party. Indeed,

the Board stated that it "may not inject itself into the regulatory process and review what the Department might have or should have done in a particular situation. *Empire Sanitary Landfill*, 1994 EHB at 1370; *see Al Hamilton Contracting Co. v. DER*, 1989 EHB 383. Therefore, Miller's preliminary objection is overruled.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 98-078-CP-MR**
WHITEMARSH DISPOSAL CORPORATION, INC. and DAVID S. MILLER	:	

ORDER

AND NOW, this 18th day of August, 1998, it is ordered as follows:

1. The preliminary objections filed by David S. Miller are overruled.

2. The first and third preliminary objections filed by the Department of Environmental Protection are overruled.

3. The Department's second preliminary objection is granted in part. Miller shall file a more specific pleading within 20 days of the date of this Order indicating the factual bases for the affirmative defenses set forth in Paragraphs 21-25 of Miller's New Matter.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: August 18, 1998

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

WILLIAM and MARY BELITSKUS, RONALD and ANITA HOUSLER, PROACT	:	
v.	:	**EHB Docket No. 96-196-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WILLAMETTE INDUSTRIES, INC., Permittee	:	**Issued: August 20, 1998**

ADJUDICATION

By Robert D. Myers, Administrative Law Judge

Synopsis:

Two Appellants have standing as individuals to challenge the Department's approval of coverage under a general NPDES permit for storm water discharges from a Chip Plant into a stream. The two Appellants have shown that storm water runoff from the Chip Plant may adversely affect their use and enjoyment of the stream. The standing of a third Appellant was not addressed in Appellants' post-hearing brief; therefore, that issue was waived.

The Department's regulation at 25 Pa. Code § 92.83(b)(2) requires that the Department deny any application for coverage under a general NPDES permit when the discharger has a significant history of noncompliance with prior "permits" issued by the Department. This means that, before approving coverage under a general NPDES permit, the Department must consider the applicant's compliance history for any and all permits issued by the Department for any site in the state. The

Department's attempt to limit this review is inconsistent with the plain language of the regulation and is clearly erroneous in light of section 609 of the Clean Streams Law, 35 P.S. § 691.609.

In failing to consider any and all permits issued by the Department before approving coverage under the general NPDES permit, the Department misapplied 25 Pa. Code § 92.83(b)(2). Because the Department misapplied the law, it also abused its discretion. Where the Board finds that the Department has abused its discretion, the Board may properly substitute its discretion for that of the Department based upon the record made before it.

An applicant has a "significant" history of noncompliance when past or continuing permit violations indicate that the applicant cannot be trusted with a permit. Therefore, evidence which shows that the applicant violated the terms and conditions of prior permits issued by the Department is relevant here. If such evidence demonstrates that the applicant lacks the ability or intention to comply with the law, then the Department cannot approve coverage under a general NPDES permit. However, if the Department is satisfied that the applicant's past or continuing unlawful conduct has been or is being corrected, the Department may approve coverage. 35 P.S. § 691.609. In this case, the evidence shows that the applicant does not lack the ability and intention to comply with the law, that the applicant's past or continuing violations are being corrected to the satisfaction of the Department, and that the applicant does not have a "significant" history of noncompliance with prior permits issued by the Department. Accordingly, the Board will not disturb the Department's decision to approve coverage under the general NPDES permit.

Ordinarily, the Board will not revisit an issue on equitable grounds after granting summary judgment on that issue. Indeed, the Board lacks judicial power to act in equity. However, because the Board may substitute its discretion for that of the Department when the Board finds that the

Department abused its discretion, the Board may decide to adjudicate the issue where the Appellants were not represented by legal counsel when the Board entered summary judgment, and where the parties presented sufficient scientific evidence at the hearing. Here, Appellants ask the Board to consider whether storm water runoff from the Chip Plant has adversely affected the stream used and enjoyed by Appellants. Having weighed the evidence presented at the hearing, the Board concludes that there is no adverse impact on the stream due to storm water runoff associated with Chip Plant activities authorized by the Storm Water Permit.

PROCEDURAL HISTORY

On September 30, 1996, William and Mary Belitskus, Ronald and Anita Housler, and PROACT, an unincorporated group of concerned citizens, filed a *pro se*[1] Notice of Appeal with the Board, challenging the Department of Environmental Protection's (Department) August 14, 1996 approval of coverage under General National Pollutant Discharge Elimination System (NPDES) Permit No. PAR228325 (Storm Water Permit) for storm water discharges from Willamette Industries, Inc.'s (Willamette) North Chip Plant (Chip Plant) into the West Branch of the Clarion River in Hamlin Township, McKean County. In the Notice of Appeal, Appellants set forth five objections to the Department's action.

On June 13, 1997, Willamette filed a Motion to Dismiss and/or for Summary Judgment (Motion) with the Board. In an Opinion and Order dated October 21, 1997, the Board entered summary judgment in favor of Willamette on most of the issues raised in the Notice of Appeal. However, the Board ruled that a hearing was necessary to decide: (1) whether the Houslers, Mr.

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[1] Appellants retained legal counsel who entered an appearance with the Board on October 27, 1997.

significant history of noncompliance with prior *coverage* under the NPDES general stormwater permit issued by DER." (Amended Motion in Limine at para. 10.) (Emphasis added.) Based on this language, the Department then asserted that 25 Pa. Code § 92.83(b)(2) only requires the Department to review an applicant's history of compliance with prior *general* NPDES permits. (Amended Motion in Limine at para. 13.) Accordingly, the Department asked the Board to limit testimony and evidence at the hearing to Willamette's history of compliance with prior *general* NPDES permits. (Amended Motion in Limine at para. 16.) On January 14, 1998, the Board denied this request. However, the Board allowed the Department and Willamette to present evidence at the hearing related to the Department's interpretation of 25 Pa. Code § 92.83(b)(2).

On February 2, 1998, Willamette filed a Motion in Limine asking the Board to preclude compliance history evidence involving incidents that occurred *after* the Department's August 14, 1996 approval of coverage. On February 6, 1998, the Board granted this motion. On the same date, the parties filed a Joint Stipulation of facts. In the Joint Stipulation, the parties agreed that any compliance history evidence involving violations that occurred prior to May 1, 1990 should not be considered. (Joint Stipulation F.)

The Board held a hearing on February 10, 11, and 12, 1998. At the hearing, Appellants agreed to strike PROACT as a party to this appeal. (N.T. at 84.) Thus, it is no longer necessary for the Board to consider whether PROACT has standing in this matter.

On April 20, 1998, Appellants filed their post-hearing brief with the Board. Appellants' brief does not address Mrs. Housler's standing. Thus, the Board will not address Mrs. Housler's standing here. *Lucky Strike Coal Co. v. Department of Environmental Resources*, 547 A.2d 447 (Pa. Cmwlth. 1988) (holding that an issue not raised in a post-hearing brief is deemed waived). Willamette filed

its post-hearing brief on June 19, 1998, and the Department filed its post-hearing brief on June 23, 1998.

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001; the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119 (1959), *as amended*, 35 P.S. §§ 4001-4015; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17; and the rules and regulations promulgated thereunder. (Joint Stipulation A.)

2. Willamette is a corporation organized and existing under the laws of Delaware. Its principal place of business is located at 500 First Interstate Tower, Portland, Oregon, 97210. (Joint Stipulation B.)

3. Keystone Chipping, Inc. (Keystone) is a corporation organized and existing under the laws of Pennsylvania. Its principal place of business is located at Pennsylvania State Route 6, Kane, McKean County, Pennsylvania. (Joint Stipulation C.)

4. Appellants William Belitskus and Ronald Housler are individuals who reside in Hamlin Township, McKean County, Pennsylvania. (Joint Stipulation D.)

5. Willamette owns a parcel of real property located approximately one-half mile south of Pennsylvania State Route 6 and approximately one and one-half miles west of Pennsylvania State Route 219 in Hamlin Township, McKean County. This property consists of approximately 110 acres, buildings, and various structures used to manufacture wood chips. Keystone operates this Chip Plant. The chips manufactured at the Chip Plant are transported to a Willamette pulp mill

located in Johnsonburg, Pennsylvania (Johnsonburg Mill). The Johnsonburg Mill was previously owned and operated by Penntech Papers, Inc. (Penntech). Willamette acquired Penntech as a subsidiary on May 1, 1990. Penntech was merged into Willamette on December 31, 1992. (Joint Stipulation E.)

6. Willamette owns and operates a total of five plants in Pennsylvania. In addition to the Chip Plant and the Johnsonburg Mill, Williamette owns and operates: a second chip plant located in Woodland; a facility to convert rolls of paper into sheets of paper located in Dubois; and a second converting facility located in Langhorne. (Joint Stipulation G.)

7. The Department has issued no permits to either the Dubois or Langhorne converting facilities. (Joint Stipulation H.)

8. Between May 1990 and August 14, 1996, Willamette submitted applications and the Department approved the following permits:

a. Johnsonburg Mill - Air Quality Permit Nos. 24302008, 24302021A, 24309007, 24315001, 24315006, 24306003, 24315007, 24315008, 2435009, and individual NPDES Permit No. PA0002143 for discharge of industrial waste from industrial activities;

b. Chip Plant - general NPDES Permit No. PAR104100 for storm water discharges from construction activities and general NPDES Permit No. PAR28325 for storm water discharges from industrial activities (Storm Water Permit);

c. Woodland Chip Plant - general NPDES Permit No. PAR101708 for storm water discharges from construction activities.

(Joint Stipulation I.)

9. The Department has determined that Willamette has not violated the terms and conditions of NPDES Permit Nos. PAR104100, PAR28325, or PAR101708. (Joint Stipulation J.)

10. A small unnamed tributary of the West Branch of the Clarion River known as Lanigan Brook originates, in part, from springs situated on or around portions of the Chip Plant. (Joint Stipulation K.)

11. Lanigan Brook is classified as a cold water fishery pursuant to 25 Pa. Code § 93.9r. Lanigan Brook is not classified as "high quality" or "exceptional value" waters as defined in 25 Pa. Code § 93.3. (Joint Stipulation L.)

12. William Belitskus lives "probably three-quarters of a mile" from the Chip Plant. He moved to that location 13 or 14 years before the Chip Plant was built after spending a lot of time looking in several states for a place to live that was "clean and green," with "peace and quiet" and a "high quality life." On really hot days in the summertime, when the temperature reaches 90 degrees, Belitskus enjoys driving down to Lanigan Brook at Burning Well, where Lanigan Brook runs into Buck Run, about five miles downstream from the Chip Plant. There in the cool shade, he stands and watches the water go by; he observes the five and six-foot-high ferns, the moss-covered logs, and the insects; and, sometimes, he wades into the water. (N.T. at 44, 64-66, 69-70, 85, 102.)

13. Ronald Housler has lived on a farm near Lanigan Brook for his entire life. During those 44 years, Housler has used and enjoyed Lanigan Brook and its environs for hunting, camping, riding horses, and fishing. Housler goes fishing in Lanigan Brook every year. Over the years, he has caught brook trout, brown trout, suckers, catfish, and mudpuppies. Housler has taken his son and daughter fishing and would like them to be able to enjoy fishing in Lanigan Brook in the future. (N.T. at 17-19, 22-23, 46-49.)

14. Before Willamette began construction of the Chip Plant in 1993, Lanigan Brook and its tributaries ran clear. In 1995, Housler began to notice that there is no more clear water. The water is red, and a reddish-orange color hangs on every stick and rock. There are bark chips and wood particles in the water; there is mud and sedimentation. When Housler goes fishing: "You don't get as many bites. You don't get as many ... little ones." As a result, Housler does not enjoy fishing at Lanigan Brook as much as in the past. (N.T. at 21, 28, 40, 61.)

15. Since Willamette constructed the Chip Plant, there is a layer of loose sediment on the streambed and rocks in Lanigan Brook at Burning Well, and some of the rocks are discolored. There is mud, foam, white scum, red slime, and black rocks in Lanigan Brook downstream of the Willamette property line. (N.T. at 66, 68-69.)

16. Appellant Belitskus asked Peter John Hutchinson, Ph.D., to investigate the changes to Lanigan Brook since construction of the Chip Plant. Hutchinson is an expert in hydrogeology with a related specialty in biology and aquatic systems. (N.T. at 152, 155; Exhibit A-3.)

17. Hutchinson visited Lanigan Brook on January 14, 1998 and took some field measurements at several locations. Hutchinson did not take any water samples; however, water samples were taken on January 20, 1998 by Charlene Ann Sheppard, a science teacher, under the supervision of Belitskus. (N.T. at 164, 167; Exhibit A-3 at 1.)

18. Hutchinson concluded that "two discharge areas considered to be downgradient of the [Chip Plant] site showed some impact from site operations" with "elevated levels of conductivity, pH, turbidity and organic acids and depressed levels of dissolved oxygen." Hutchinson testified that there is "something" in the water of Lanigan Brook, and he attributed it to storm water runoff from the Chip Plant site. However, Hutchinson acknowledged that, because of winter

conditions, his field measurements could be spurious and his conclusions false. (N.T. at 166, 174-75, 182-83, 200; Exhibit A-3 at 4-5.)

19. David C. Hails, an expert in aquatic surveys, concluded that there is no impact whatsoever to Lanigan Brook. Hails noted that Hutchinson failed to consider relevant biological and physical factors in reaching his conclusion. Hails explained that the pH, conductivity, turbidity, organic acid and dissolved oxygen levels in the water samples taken from Lanigan Brook could be attributable to certain biological or physical factors. (N.T. at 315, 330-45.)

20. Steven Kepler, a fish biologist for the Pennsylvania Fish and Boat Commission, conducted electrofishing at two sites on Lanigan Brook on September 23, 1997. Electrofishing is a process whereby a small generator with a voltage regulator and two electrodes stuns the fish with an electric current. Trained individuals then collect, examine, identify and count the fish. Through this process, Kepler found wild brook trout and brown trout of varying sizes in Lanigan Brook. Kepler noted that the numerous size classes indicate "a fairly good system" and concluded that Lanigan Brook had a viable trout population. (Joint Exhibit G; N.T. at 291, 295-96, 301-02, 309-10.)

21. In 1994, the Department published the DER Permit Guide to Stormwater Discharges From Nonconstruction Industrial Activities. This Permit Guide was given to at least some prospective general NPDES permittees to describe the procedures for obtaining coverage under the general NPDES permit for storm water discharges from industrial activities. (Joint Stipulation N.)

22. The Permit Guide provides on page 5, paragraph 5, that: "Storm Water discharges associated with industrial activities that are not eligible for coverage under the general permit [include] ... [d]ischarges from persons with a significant history of noncompliance with prior

coverage under the NPDES general stormwater permit issued by DER." (Joint Stipulation O.)

23. The parties have stipulated that Appellants' Exhibits 4-22 describe or pertain to permit violations at the Johnsonburg Mill. (N.T. at 385.)

24. Appellants' Exhibit 23 is a Notice of Violation which begins: "I conducted an inspection on December 3, 1992 .... The inspection revealed the facility to be in violation of your NPDES Permit No. PA0002143." The notice goes on to say that a boiler precipitator discharged wash water into a storm sewer and into the East Branch of the Clarion River, and that "[t]his discharge is not authorized by your Permit or any permit issued by the Department."

25. Appellants' Exhibits 24 and 25 are Consent Assessments of Civil Penalties involving industrial discharges into the East Branch of the Clarion River. The captions of these exhibits refer to the Johnsonburg Mill NPDES Permit.

26. Appellants' Exhibits 26, 27, and 28 are letters from Willamette to the Department reporting unauthorized discharges from an evaporator, a pipe, and a drain valve into the East Branch of the Clarion River.

27. Appellants' Exhibit 29 is a Notice of Violation advising Willamette that it violated 25 Pa. Code § 123.2 on October 18, 1994 when fugitive particulate emissions, *i.e.*, wood dust, from an air contamination source at the Johnsonburg Mill were visible at the point the emissions passed outside Willamette's property.

28. Appellants' Exhibit 30 is a Notice of Violation which states in pertinent part that: "Operation of the sources, as specified above, without incineration constitutes a violation of permit and plan approval conditions as set forth in Department permit #24-315-008."

29. Appellants' Exhibits 31-49 are Continuous Emissions Monitoring (CEM) reports and

related documents for the following air contamination sources: a recovery furnace, a lime kiln, and two boilers. The boilers operate under Air Quality Permit # 24-302-021A. *See* Appellants' Exhibit 32. The lime kiln is covered by Air Quality Permit # 24-315-007. *See* Appellants' Exhibit 6. The recovery furnace operates under Air Quality Permit # 24-306-003. *See* Appellants' Exhibit 22.

30. When Willamette acquired the Johnsonburg Mill in 1990, some of the equipment had been in operation since 1928, and waste water was being pumped into a 243-acre lake known as the Dill Hill Lagoon. In order to ensure compliance with future permits issued by the Department, Willamette immediately began to install a waste water treatment plant and embarked on a program to replace all of the major processing equipment associated with making pulp or recovering chemicals. Willamette has spent $550 million on these projects, including roughly $110 million on environmental control technology and permit compliance. (N.T. at 372-77.)

31. Willamette completed construction of the waste water treatment facility in April 1992. The violations enumerated in Exhibit 4 did not continue after the new treatment plant was constructed. (N.T. at 374, 395.)

32. Half of the exhibits presented to show violations of the Johnsonburg Mill NPDES Permit pertain to exceedences for "total suspended solids." *See* Appellants' Exhibits 7-10, 15-21. Willamette has taken short-term and long-term measures to address those violations, and, for the most part, the measures have been successful in reducing the violations. (N.T. at 399-401.)

33. The exhibits indicate that some of Willamette's Johnsonburg Mill NPDES Permit violations were due to: the failure of a pipe; a broken drain valve; a loose pipe flange; a power outage; and an incorrect setting on a new piece of equipment. Appellants' Exhibits 11, 24-28.

34. On September 26 and 27, 1995, Willamette exceeded allowable NPDES Permit

effluent limits during its annual shutdown of the Johnsonburg Mill. When Willamette discovered the problem, it held up the scheduled shutdown in spite of possible economic hardship to Willamette. (N.T. at 402-03; Appellants' Exhibit 12).

35. On November 12, 1995, Willamette violated the provisions of Air Quality Permit No. 24-306-003 when black liquor concentrate was released from a pressure relief valve on a new piece of equipment. Because of a design flaw in the equipment, Willamette could not accurately monitor the build-up of pressure. Approximately 65 homes and numerous vehicles were impacted by the release. The release also resulted in the discharge of contaminated water into the Clarion River. Willamette immediately began to wash the streets and vehicles; arranged to have an outside firm wash the homes and vehicles; and circulated handouts on the streets to explain the release and the arrangements for cleanup. Willamette also corrected the design flaw in the equipment and ensured that any future release would not escape into the atmosphere. (N.T. at 417-19; Appellants' Exhibits 13-14, 18, 22.)

36. With respect to Willamette's CEM exceedences, the record shows that they compare quite favorably with similar facilities in some areas and are on a par with similar facilities in other areas. (N.T. at 477; Appellants' Exhibits 31-49.)

37. Patrick G. Williams, Permits Chief in the Department's Bureau of Water Management, who made the decision to approve coverage under the Storm Water Permit, testified that Willamette's permit violations do not represent a significant history of noncompliance for purposes of approving coverage under a general NPDES permit. (N.T. at 503-06.)

38. William McCarthy, Regional Monitoring and Compliance Manager, testified that Willamette's compliance history between 1992 and August 1996 for the Johnsonburg NPDES Permit

has been good, and that he would recommend that the Department grant coverage to Willamette under the Storm Water Permit. (N.T. at 447-48.)

39. William Snyder, an Air Quality Specialist for the Department, who has performed inspections at the Johnsonburg Mill since 1993 and has been responsible for determining permit compliance there, testified based on his inspections that Willamette's compliance history at the Johnsonburg Mill is "very favorable." Snyder agreed that Willamette worked diligently to address any permit violations he identified at the Johnsonburg Mill and has been very cooperative. (N.T. at 456-58, 465-66.)

40. Ronald Gray, an Air Quality District Supervisor for the Department, who has had oversight of the CEM reports from the Johnsonburg Mill for the past five years, testified that none of the Johnsonburg Mill exceedences have been significant, that he is satisfied with steps that Willamette took to address various problems, that he considers the air permit compliance history at the Johnsonburg Mill to be good, and that the site is now thoroughly modernized. (N.T. at 472-73, 475, 477-81.)

DISCUSSION

I. Standing

The first issue is whether Belitskus and Housler have standing to challenge the Department's approval of coverage under the Storm Water Permit.

In order to have standing to challenge a Department action, an appellant must be "aggrieved" by that action. This means that the appellant must have a direct, immediate and substantial interest in the litigation challenging the action. A "substantial" interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. For

an interest to be "direct," it must have been adversely affected by the action. An "immediate" interest means one with a sufficiently close causal connection to the challenged action, or one within the zone of interests protected by the statute at issue. *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975); *Barshinger v. DEP*, 1996 EHB 849.

Both the Pennsylvania Supreme Court and the United States Supreme Court have recognized that aesthetic and environmental well-being are important ingredients of the quality of life in our society. Therefore, a member of society may challenge a government action which threatens to harm that person's use and enjoyment of natural resources. *See Wm. Penn Parking Garage, Inc.*, 346 A.2d at 281, n. 20 (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686-87 (1973)); *see also Sierra Club v. Morton*, 405 U.S. 727 (1972). The Board, too, has held that an individual may challenge a Department action which may adversely affect the person's recreational and aesthetic use and enjoyment of an area. *See Barshinger*, 1996 EHB 849, 855-56; *Heasley v. DER*, 1991 EHB 1758, 1763. Indeed, the Board has conferred standing where a Department action was alleged to have an adverse effect on the recreational use of a stream for trout fishing. *Pohoqualine Fish Association v. DER*, 1992 EHB 502, 504-505.

Belitskus lives "probably three-quarters of a mile" from the Chip Plant. (N.T. at 65.) He moved to that location 13 or 14 years before the Chip Plant was built after spending a lot of time looking in several states for a place to live that was "clean and green," with "peace and quiet" and a "high quality life." (N.T. at 64, 102.) On really hot days in the summertime, when the temperature reaches 90 degrees, Belitskus enjoys driving down to Lanigan Brook at Burning Well, where

Lanigan Brook runs into Buck Run, about five miles downstream from the Chip Plant.[2] (N.T. at 44, 65-66, 69.) There in the cool shade, he stands and watches the water go by; he observes the five and six-foot-high ferns, the moss-covered logs, and the insects; and, sometimes, he wades into the water. (N.T. at 65-66, 69-70, 85.)

Belitskus' use and enjoyment of Lanigan Brook in this manner may be properly characterized as either recreational or aesthetic in nature. Whatever the case, his use and enjoyment of Lanigan Brook on really hot days in the summertime is sufficient to give Belitskus a substantial, direct and immediate interest in the outcome of this litigation. It is one facet of the "high quality life" he sought years ago. Lanigan Brook is a place for him to go on hot summer days that is "clean and green" with "peace and quiet." Lanigan Brook gives Belitskus what the Pennsylvania and United States Supreme Courts called a sense of aesthetic and environmental well-being. If nothing else, Belitskus' particular use and enjoyment of Lanigan Brook gives him an interest in this litigation that surpasses the common interest of all citizens in procuring obedience to the law.

Housler has lived on a farm near Lanigan Brook for his entire life. During those 44 years, Housler has used and enjoyed Lanigan Brook and its environs for hunting, camping, riding horses, and fishing. (N.T. at 17-18, 22-23.) Indeed, Housler goes fishing in Lanigan Brook every year. (N.T. at 18, 46-49.) Over the years, Housler has caught brook trout, brown trout, suckers, catfish, and mudpuppies. (N.T. at 19.) Housler has also taken his son and daughter fishing and would like them to be able to enjoy fishing in Lanigan Brook in the future. (N.T. at 19.) Housler's fishing of Lanigan Brook gives him a substantial, direct and immediate interest in the outcome of this

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[2] Buck Run eventually runs into the West Branch of the Clarion River. (N.T. at 43.)

litigation. *Pohoqualine Fish Association.*

To support their individual testimony, Belitskus and Housler asked Dr. Peter John Hutchinson to investigate the matter. (Exhibit A-3.) He is an expert in hydrogeology with a related specialty in biology and aquatic systems. (N.T. at 152, 155.) Hutchinson concluded that there is "something" in the water of Lanigan Brook downstream of the Chip Plant which he attributed to storm water runoff from the Chip Plant site. (N.T. at 166, 174-75, 182-83; Exhibit A-3 at 4.)

This testimony was unnecessary. In our October 21, 1997 Opinion and Order, we granted summary judgment to Willamette on Appellants' contention that the issuance of the Storm Water Permit will adversely affect the water quality of Lanigan Brook. *Belitskus*, 1997 EHB at 955. This was done because Appellants had not shown that they could make out a *prima facie* case on that issue. Pa. R.C.P. No. 1035.2(2). As a result, that issue is no longer before us.

We also held that, in order to prove standing on the only remaining substantive issue, Willamette's compliance history, Belitskus and Housler did not have to show a specific impact upon Lanigan Brook's recreational uses. "The Storm Water Permit's conditions may be entirely appropriate to protect the brook and still [the Department's] approval of coverage would be unlawful and an abuse of discretion if Willamette's compliance history shows that it cannot be trusted with a discharge permit." *Belitskus*, 1997 EHB at 955-56. Belitskus and Housler have demonstrated sufficient interest to confer standing to raise this issue.

II. Significant History of Noncompliance

The second issue is whether the Department properly considered Willamette's compliance history in approving coverage under the Storm Water Permit.

The Department's regulation at 25 Pa. Code § 92.83(b)(2) mandates that the Department

deny "any application for coverage under a general permit when ... [t]he discharger ... has a significant history of noncompliance with a prior permit issued by the Department." In our October 21, 1997 Opinion and Order, we explained: "Since the disqualification is based upon noncompliance with a prior DEP permit, it is relevant to consider *any and all* permits issued by DEP to Willamette for any site in the state." *Belitskus v. DEP*, 1997 EHB 939, 956-57 (emphasis in original). However, in our January 14, 1998 Order, we allowed Willamette and the Department to present evidence on the Department's interpretation of 25 Pa. Code § 92.83(b)(2). The Department claims that the word "permit" in the regulation means "general NPDES permit," and the Department urges the Board to give deference to this interpretation. This we cannot do.

A. "Permit" in 25 Pa. Code § 92.83(b)(2)

When reviewing the validity of the Department's interpretation of its own regulation, the Department's interpretation is to be given controlling weight unless it is plainly erroneous or inconsistent with the regulation. *Department of Environmental Protection v. City of Philadelphia*, 692 A.2d 598 (Pa. Cmwlth. 1997). In this case, the Department's interpretation is plainly erroneous and inconsistent with the regulation.

First, it is inconsistent with the regulation. The plain language of the regulation refers to "a significant history of noncompliance with *a prior permit issued by the Department*." 25 Pa. Code § 92.83(b)(2) (emphasis added). There is nothing ambiguous about this language. As we stated in our earlier Opinion and Order, it means *any and all* permits previously issued by the Department.

There is absolutely no reason to change the single word "permit" into the phrase "general NPDES permit." In the regulations which specifically govern general NPDES permits, the word "permit" appears by itself only at 25 Pa. Code § 92.83(b)(2). In every other instance, the phrase

"general permit" or "general NPDES permit," "individual permit" or "individual NPDES permit" is used. *See* 25 Pa. Code §§ 92.81-92.83. Certainly, if the Environmental Quality Board (EQB) intended the word "permit" to mean "general permit" or "general NPDES permit," it would have used those phrases as it did everywhere else.

Second, the Department's interpretation of 25 Pa. Code § 92.83(b)(2) is plainly erroneous because it conflicts with the compliance history review requirements of section 609 of the Clean Streams Law.[3] Section 609 provides in pertinent part as follows:

> The department shall not issue *any permit required by this act* ... if it finds, after investigation and an opportunity for informal hearing that:
>
> ....
>
> (2) the applicant has shown a lack of ability or intention to comply with such laws as indicated by past or continuing violations. Any person ... which has engaged in *unlawful conduct as defined in section 611* ... shall be denied *any permit required by this act* unless the permit application demonstrates that the unlawful conduct is being corrected to the satisfaction of the department.

Section 611 of the Clean Streams Law defines "unlawful conduct" as follows: "It shall be unlawful ... to fail to comply with *any* ... permit ... of the department, to violate ... *any* ... permit ... of the department, [or] to cause air or water pollution ...." 35 P.S. § 691.611 (emphasis added). In other words, by statute, the Department must investigate violations of *any and all* permits before approving coverage under a general NPDES permit.

The Department argues that the thorough investigation required by section 609 of the Clean Streams Law does not apply to the general NPDES permit program because the general permit process was intended to reduce paperwork, procedures, and delays. We agree that general permit

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[3] Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.609.

applications are not intended to receive the level of scrutiny accorded to individual permit applications, but we find no language in the Clean Streams Law or the regulations that authorizes a condensed review of compliance history for these types of permits.

We have considered the other arguments made by the Department and Willamette, including the language of the 1994 Permit Guide, and are not persuaded by them. The Board reaffirms its previous holding that, under 25 Pa. Code § 92.83(b)(2), the Department must review an applicant's history of compliance with any and all prior permits issued by the Department. Because the Department misinterpreted the compliance history review requirements of 25 Pa. Code § 92.83(b)(2), the Department's approval of coverage was improper.[4] Moreover, because the Department failed to act in accordance with applicable law, the Department's approval of coverage constitutes an abuse of discretion. *Concerned Residents of the Yough, Inc. v. DER*, 1995 EHB 41, 77.

Because the Department abused its discretion, Appellants ask the Board to vacate the Department's approval of coverage under the Storm Water Permit and remand this case to the Department for a proper review of Willamette's compliance history. However, in this case, it is not necessary for the Board to vacate and remand. When the Board finds, based on the evidence presented at a hearing, that the Department has abused its discretion, the Board may properly substitute its discretion based upon the record made before it. *Pequea Township v. Herr*, ___ A.2d ___ (No. 1912 C.D. 1997, Pa. Cmwlth. filed July 10, 1998); *Warren Sand & Gravel Co., Inc. v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975). Therefore, we

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[4] Appellants contend that the record contains evidence that the Department conducted no compliance history review at all. *See* Appellant's Post-hearing Brief at 44-47. We need not determine whether the Department did or did not conduct a compliance history review. In either case, the Department failed to comply with 25 Pa. Code § 92.83(b)(2).

shall next examine the evidence presented by Appellants at the hearing to determine what is relevant here.

B. Compliance History Evidence

Appellants have presented Exhibits 4 to 49 as evidence that Willamette had a significant history of noncompliance with prior permits issued by the Department when the Department approved coverage under the Storm Water Permit on August 14, 1996. All of these exhibits pertain to operations at Willamette's Johnsonburg Mill. (*See* Joint Stipulations G, H, and J.) The Department has issued an individual NPDES permit and various air quality permits to Willamette for the Johnsonburg Mill. (Joint Stipulation I.)

The parties agree that Exhibits 4 to 22 are relevant here. (N.T. at 385.) However, Willamette and the Department contend that Exhibits 23-49 are unrelated to any prior permit issued by the Department and, therefore, are not relevant here.[5] We disagree.

Exhibit 23 is a Notice of Violation which begins: "I conducted an inspection on December 3, 1992 .... The inspection revealed the facility to be in *violation of your NPDES Permit No. PA0002143*." Appellants' Exhibit 23 (emphasis added). On its face, then, Exhibit 23 is notice of a permit violation. The notice goes on to say that a boiler precipitator discharged wash water into a storm sewer and into the East Branch of the Clarion River, and that "[t]his discharge is *not authorized* by your Permit or any permit issued by the Department." Appellants' Exhibit 23

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[5] In our October 21, 1997 Opinion and Order, we stated that, in order to prove that Willamette had a significant history of noncompliance with prior permits issued by the Department, Appellants have to: (1) relate any alleged violation of law to a specific permit issued by the Department; and (2) establish the severity of the violations. *Belitskus*, 1997 EHB at 957.

(emphasis added). In other words, to the Department, an unauthorized discharge violates the Johnsonburg Mill NPDES Permit. We do not have the NPDES permit before us; therefore, we have no reason to conclude otherwise.

Exhibits 24 and 25 are Consent Assessments of Civil Penalties involving industrial discharges into the East Branch of the Clarion River. The exhibits, in their captions, refer to the Johnsonburg Mill NPDES Permit. Thus, as with Exhibit 23, the unauthorized discharges are violations of the Johnsonburg Mill NPDES Permit.

Exhibits 26, 27, and 28 are letters from Willamette to the Department reporting unauthorized discharges from an evaporator, a pipe, and a drain valve into the East Branch of the Clarion River. Because unauthorized discharges violate the Johnsonburg Mill NPDES Permit, Exhibits 26, 27, and 28 are relevant here.

Exhibit 29 is a Notice of Violation advising Willamette that it violated 25 Pa. Code § 123.2 on October 18, 1994 when fugitive particulate emissions, *i.e.*, wood dust, from an air contamination source at the Johnsonburg Mill were visible at the point the emissions passed outside Willamette's property. *See* Appellants' Exhibit 29. Under 25 Pa. Code § 127.441, every air quality permit incorporates by reference the emission standards of the regulations. Therefore, a fugitive particulate emissions violation is a permit violation, and Exhibit 29 is relevant here.

Exhibit 30 is another Notice of Violation. It states: "Operation of the sources, as specified above, without incineration constitutes a violation of permit and plan approval conditions as set forth in Department permit #24-315-008." Therefore, Exhibit 30 involves a permit violation and is relevant here.

Exhibits 31-49 are CEM reports and other CEM documents. It is apparent that these are

related to specific air contamination sources at the Johnsonburg Mill: a recovery furnace, a lime kiln, and two boilers. It is equally apparent that the Department has issued air quality permits for these sources. Exhibit 32 indicates that the boilers operate under Air Quality Permit # 24-302-021A. Exhibit 6 indicates that the lime kiln operates under Air Quality Permit # 24-315-007. Exhibit 22 indicates that the "recovery boiler and related equipment" is covered by Air Quality Permit # 24-306-00003 [sic].[6] Therefore, all of these exhibits are relevant here.

C. Willamette's Compliance History

We now must decide whether this evidence shows that Willamette had a significant history of noncompliance with prior permits issued by the Department when the Department approved coverage under the Storm Water Permit on August 14, 1996.

In our October 21, 1997 Opinion and Order, we stated that the Department's approval of coverage under the Storm Water Permit would be unlawful under 25 Pa. Code § 92.83(b)(2) if Willamette's compliance history shows that it cannot be trusted with a discharge permit. *Belitskus*, 1997 EHB at 956. Indeed, we read 25 Pa. Code § 92.83(b)(2) in conjunction with section 609 of the Clean Streams Law, which states that the Department shall not issue a permit if the applicant has shown *a lack of ability or intention to comply with the law* as indicated by past or continuing violations. 35 P.S. § 691.609(2); *see Western Pennsylvania Water Company v. DER*, 1991 EHB 287, 335-36 (finding that permittee had no intention to comply with permit conditions). Where there are past or continuing violations, section 609 allows the Department to issue a permit if the applicant's unlawful conduct is being corrected to the satisfaction of the Department. 35 P.S. §

[6] It seems self-evident that the "recovery furnace" is related to the "recovery boiler."

691.609(2).[7]

First, the record does not show that Willamette lacks the *intent* to comply with the law. In 1990, when Willamette acquired the Johnsonburg Mill, some of the equipment was antiquated, and waste water from the mill was being pumped into a lake. (N.T. at 372-74.) In order to ensure future permit compliance, Willamette spent more than $500 million to install a waste water treatment plant and to replace all of the major processing equipment associated with making pulp or recovering chemicals. (N.T. at 373-76.) In 1995, when the mill's annual shutdown caused an environmental problem, Willamette held up the process despite possible adverse economic consequences to Willamette. (N.T. at 402-03; Appellants' Exhibit 12). Indeed, according to the Department, Willamette has worked diligently to address permit violations and has been very cooperative with the Department. (N.T. at 465-66.)

Second, the evidence does not establish that Willamette lacks the *ability* to comply with the law. We note, for example, that Willamette has not violated *in any way* the permits issued by the Department for the two chip plants. Moreover, at the Johnsonburg Mill, the new waste water treatment plant has prevented the continuation of certain NPDES permit violations there. (N.T. at 395.) Other measures have been successful, for the most part, in reducing exceedences for "total suspended solids." (N.T. at 399-401.) With respect to CEM exceedences, Willamette thoroughly

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[7] Appellants ask the Board to hold, as a matter of law, that a long series of permit violations and large civil penalties attributable to negligence or to behavior that is not even "blameworthy" is sufficient to establish that Willamette is unable to comply with the law and, therefore, cannot be trusted with a discharge permit. (Appellants' Post-hearing Brief at 35-36, 43.) However, this formulation of the law fails to take into account the severity of the permit violations, Willamette's efforts to correct its unlawful conduct, and the Department's satisfaction with those efforts.

modernized the mill and has been able to maintain a record that is at least as good as at similar facilities. (N.T. at 477, 481; Appellants' Exhibits 31-49.)

It is true that, between May 1990 and August 1996, Willamette violated its Johnsonburg Mill permits when a pipe failed, a drain valve broke, a pipe flange became loose, and the power went out. Willamette also had trouble when a new piece of equipment had a design flaw and when new equipment was not properly installed. (N.T. at 417-19; Appellants' Exhibits 11, 13-14, 18, 22, 24-28). In each instance, however, Willamette acted responsibly to control the situation and to repair the problem. Moreover, only one of these occurrences had a severe environmental impact, *i.e.*, the release of black liquor condensate into the atmosphere on November 12, 1995 because of the design flaw. One serious occurrence over six years for permits at several sites does not constitute a significant history of noncompliance.

Finally, we note that Department officials have expressed their satisfaction with Willamette's ability and intent to comply with the law. The Permits Chief in the Department's Bureau of Water Management does not consider Willamette's permit violations to be "significant." (N.T. at 503-06.) The Regional Monitoring and Compliance Manager considers Willamette's compliance history between 1992 and August 1996 for the Johnsonburg Mill NPDES Permit to be good; he would recommend that the Department grant coverage to Willamette under the Storm Water Permit. (N.T. at 447-48.)

The Air Quality Specialist who has performed inspections at the Johnsonburg Mill since 1993 and who has been responsible for determining permit compliance there testified that Willamette's compliance history at the Johnsonburg Mill is "very favorable." (N.T. at 456-58, 465.) The Air Quality District Supervisor, who has had oversight of the CEM reports from the

Johnsonburg Mill for the past five years, testified that none of the Johnsonburg Mill exceedences have been significant, that he is satisfied with steps that Willamette took to address various problems, and that he considers the air permit compliance history at the Johnsonburg Mill to be good. (N.T. at 472-75, 477-81.)

Appellants characterize the testimony of Department officials as "post hoc assertions" made years after issuance of the Storm Water Permit that should be viewed skeptically. This may be appropriate with respect to laudatory adjectives like "good," "very favorable," and others, but the factual evidence in the record stands on its own merits.

Because the record establishes that, when the Department approved coverage under the Storm Water Permit on August 14, 1996, Willamette did not lack the ability or intent to comply with the law and any problems were being corrected to the satisfaction of the Department, we conclude that Willamette did not have a significant history of noncompliance with prior permits issued by the Department at that time. Therefore, Willamette's compliance history was no bar to its receipt of the Storm Water Permit.

D. Equitable Relief

Finally, Appellants ask the Board to order the Department to deny approval of coverage under the Storm Water Permit because of evidence that storm water runoff from the Chip Plant is causing harm to Lanigan Brook. In the alternative, Appellants ask the Board to vacate the Department's approval of coverage and remand the case to the Department for consideration of the impact of storm water runoff on Lanigan Brook.

As noted earlier, we granted summary judgment to Willamette on this issue in our October 21, 1997 Opinion and Order. But in that same decision, we reserved our power to bestow equitable

relief on Appellants if we were persuaded that the appeal required such treatment. *Belitskus*, 1997 EHB at 951-52. The *Herr* case we cited for this proposition has since been reviewed by Commonwealth Court, *Pequea Township v. Herr*, ___ A.2d ___ (No. 1912 C.D. 1997, Pa. Cmwlth. filed July 10, 1998), which instructed us that we do not have judicial powers to act in equity but do have the power to substitute our discretion for that of the Department when we find that it has been abused. This includes the "power to modify the department's action and to direct the department in what is the proper action to be taken." *Pequea Township*, slip op. at 15.

Here we have determined that the Department abused its discretion with regard to its review of Willamette's compliance history and have exercised our own discretion on that issue. That abuse of discretion does not involve any impact on the water quality of Lanigan Brook, and we have no justifiable basis for revisiting that issue after having granted summary judgment to Willamette. Nevertheless, at the risk of being criticized for rendering an advisory opinion, we are induced by the circumstances of this appeal to consider the issue on the basis of the current record.

Appellants were not represented by legal counsel at the time we entered summary judgment for Willamette and were clearly prejudiced by that fact. While litigants assume the high risk of failure whenever they choose to proceed *pro se*, we believe these particular individuals may not have fully appreciated the extent of the risk until after our October 21, 1997 Opinion and Order was issued. They retained legal counsel promptly thereafter and were represented throughout the remainder of the proceedings.

It is clear that Appellants' chief concern is what they perceive to be a threat to the brook that is the focus of their recreational and environmental interests which, as we have held, gives them standing in this appeal. The other persuasive factor is the body of scientific evidence that was

presented at the hearing. Appellants presented it for the purpose of proving standing although, as noted earlier, it was unnecessary for that purpose. Willamette responded with its own scientific evidence. As a result, the record is sufficient for us to adjudicate the issue.

Both Belitskus and Housler testified to changes in Lanigan Brook after the Chip Plant was built in 1993. By 1995 the water appeared orange-red and contained bark chips, wood particles, sedimentation, foam and white scum. (N.T. at 21, 28, 66, 68-69.) Housler experienced fewer bites when fishing and his enjoyment of the sport in Lanigan Brook diminished. (N.T. at 40, 61.)

Dr. Hutchinson got into the case very late, visiting the site less than a month before the hearing commenced. (Exhibit A-3 at 1.) While he personally took some field measurements at several locations, he did not take any water samples. These were taken on January 20, 1998 by Charlene Ann Sheppard, a science teacher, under the supervision of Belitskus. (N.T. at 164, 167.) The manner of taking the samples, the details of their preservation, and their chain of custody cannot be substantiated by Hutchinson or any other highly-trained expert.

Based on his own field measurements and the results of the water sampling, Hutchinson concluded that "two discharge areas considered to be downgradient of the site showed some impact from site operations" with "elevated levels of conductivity, pH, turbidity and organic acids and depressed levels of dissolved oxygen." (Exhibit A-3 at 5.) In his words, there was "something" in the water which he attributed to runoff from the Chip Plant site. (N.T. at 166, 174-75.)

While Hutchinson's investigation suggests the presence of constituents in Lanigan Brook that could adversely affect its water quality, there is no scientific data to show the background quality of the stream before the Chip Plant was built. Moreover, Hutchinson acknowledged in his report and at the hearing that, because of winter conditions, his field measurements could be spurious and his

conclusions false. (N.T. at 200.) The claim that the waters are degraded, thus, hangs by a very slender scientific thread.

Contrary testimony from David C. Hails, an expert in aquatic surveys, maintains that the constituent levels found in the water samples do not show any impact on Lanigan Brook. (N.T. at 334.) This seems to be confirmed by the testimony of Steven Kepler, a fish biologist with the Pennsylvania Fish and Boat Commission, who conducted electrofishing[8] at two locations on Lanigan Brook on September 23, 1997. Wild brook trout and brown trout of varying sizes were found indicating a viable reproducing trout population. (Joint Exhibit G.) As Kepler explained, the numerous size classes indicate "a fairly good system." (N.T. at 310.) It is hard to believe that this fairly good system for trout that was present in September 1997 was degraded by January 1998.

Weighing all of the evidence, we are convinced that Appellants have not shown any adverse impact on the water quality of Lanigan Brook. The argument that the degradation may be taking place so slowly as to be as yet scientifically undetectable is too speculative to give serious consideration.

Housler's and Belitskus' observations, while sincere, cannot be given much weight without scientific data to support them, especially since the conditions observed can be explained by factors unrelated to runoff from the Chip Plant. (N.T. at 330, 334-345.) In addition, their observations relate to changes that began in 1993 and were very apparent by 1995, long before the Storm Water Permit was issued in August 1996. The cause, obviously, was something other than the activities authorized by the Storm Water Permit.

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[8] This is a procedure whereby fish are stunned by electric current, then examined, identified and counted by trained individuals.

Since the scientific evidence before us fails to show any adverse impact to Lanigan Brook and since Housler's and Belitskus' observations relate to conditions existing prior to the issuance of the Storm Water Permit, we find no basis for remanding the matter to the Department for reconsideration.

CONCLUSIONS OF LAW

1. Mr. Belitskus and Mr. Housler have standing to challenge the Department's approval of coverage under the Storm Water Permit because storm water runoff from the Chip Plant may adversely affect their use and enjoyment of Lanigan Brook. *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975); *Barshinger v. DEP*, 1996 EHB 849; *Pohoqualine Fish Association v. DER*, 1992 EHB 502; and *Heasley v. DER*, 1991 EHB 1758.

2. Because Appellants' Post-hearing Brief fails to address Mrs. Housler's standing, Appellants have waived that issue. *Lucky Strike Coal Co. v. Department of Environmental Resources*, 547 A.2d 447 (Pa. Cmwlth. 1988).

3. The Department's regulation at 25 Pa. Code § 92.83(b)(2) requires that the Department deny any application for coverage under a general permit when the discharger has a significant history of noncompliance with a prior "permit" issued by the Department. This means that, in this case, the Department had to consider any and all permits issued by the Department to Willamette for any site in the state. *Belitskus v. DEP*, 1997 EHB 939.

4. The Department's contrary interpretation of 25 Pa. Code § 92.83(b)(2) is clearly erroneous because it conflicts with section 609 of the Clean Streams Law; therefore, it is not to be given controlling weight in this case. *Department of Environmental Protection v. City of Philadelphia*, 692 A.2d 598 (Pa. Cmwlth. 1997).

5. The Department's contrary interpretation of 25 Pa. Code § 92.83(b)(2) is inconsistent with the plain language of the regulation; therefore, it is not to be given controlling weight in this case. *Id.*

6. The Department misapplied 25 Pa. Code § 92.83(b)(2) because it did not consider any and all permits issued by the Department to Willamette for any site in the state before approving coverage under the Storm Water Permit.

7. The Department abused its discretion in approving coverage under the Storm Water Permit because it misapplied 25 Pa. Code § 92.83(b)(2).

8. Where the Board finds that the Department has abused its discretion, the Board may properly substitute its discretion for that of the Department based upon the record made before it. *Pequea Township v. Herr*, ___ A.2d ___ (No. 1912 C.D. 1997, Pa. Cmwlth. filed July 10, 1998); *Warren Sand & Gravel Co., Inc. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975.)

9. The violations of law set forth in Appellants' Exhibits 23-49 are related to specific permits issued by the Department; therefore, the exhibits are relevant here.

10. The Department shall not issue a permit under the Clean Streams Law if the applicant has shown a lack of ability or intention to comply with the law as indicated by past or continuing violations. Where the Department is satisfied that the applicant's past or continuing unlawful conduct has been or is being corrected, the Department may issue the permit. 35 P.S. § 691.609.

11. Because the record establishes that, when the Department approved coverage under the Storm Water Permit on August 14, 1996, Willamette did not lack the ability or intent to comply with the law and any problems were being corrected to the satisfaction of the Department, we

conclude that Willamette did not have a significant history of noncompliance with prior permits issued by the Department.

12. Because Willamette's past and continuing violations do not indicate that Willamette cannot be trusted with a permit and do not constitute a significant history of noncompliance with prior permits issued by the Department, the Board will not disturb the Department's decision to approve coverage under the Storm Water Permit.

13. Ordinarily, the Board will not revisit an issue on equitable grounds after granting summary judgment on that issue; indeed, the Board lacks judicial power to act in equity. However, because the Board may substitute its discretion for that of the Department when the Board finds that the Department abused its discretion, because Appellants were not represented by legal counsel when the Board entered summary judgment, and because the parties presented sufficient scientific evidence on the issue, the Board concludes that it is proper to consider whether storm water runoff from the Chip Plant has harmed Lanigan Brook.

14. Weighing the evidence presented at the hearing, the Board concludes that there is no adverse impact on Lanigan Brook from storm water runoff associated with activities at the Chip Plant authorized by the Storm Water Permit.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILLIAM and MARY BELITSKUS, RONALD and ANITA HOUSLER, PROACT	:	
v.	:	**EHB Docket No. 96-196-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WILLAMETTE INDUSTRIES, INC., Permittee	:	

ORDER

AND NOW, this 20th day of August, 1998, it is ordered that the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: August 20, 1998

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

CNG TRANSMISSION CORPORATION, and PENN FUEL GAS, INC.	:	
v.	:	**EHB Docket No. 97-169-MR (Consolidated with 97-170-MR)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and N.E. HUB PARTNERS, L.P., Permittee	:	**Issued: August 27, 1998**

OPINION AND ORDER ON JOINT MOTION TO VACATE AND REMAND AND MOTIONS FOR CLARIFICATION

by Robert D. Myers, Administrative Law Judge

Synopsis:

The Board will accept and consider a dispositive motion filed after the established deadline where the motion could not have been filed sooner.

The Board will not impose sanctions upon a moving party for failure to file an accompanying and supporting memorandum of law with a dispositive motion where the legal basis for the motion is apparent from the averments of the motion.

A motion to vacate two gas well permits issued by the Department of Environmental Protection and to remand the case to the Department so that Appellants can comment on proposed permit modifications is denied. Appellants failed to show that the Department abused its discretion in failing to provide an opportunity for comments before approving the modifications.

The Board will reopen discovery where Appellants have challenged a drilling program authorized by a gas well permit and, after the close of discovery, the Department approved a modified drilling program. Under such circumstances, Appellants will be allowed to conduct discovery with respect to the revised drilling program and the Department's approval of it.

A competitor's employee may *not* have access to Confidential Information. A third party must produce documents pursuant to previous Board Orders; however, the third party may withhold or redact the documents to the extent that they contain information that has been precluded from discovery by previous Board Orders.

OPINION

On August 19, 1997, CNG Transmission Corporation (CNG) and Penn Fuel Gas, Inc. (Penn Fuel) (collectively, Appellants) filed Notices of Appeal with the Board contesting the Department of Environmental Protection's (Department) issuance of Gas Well Permit Nos. 37-117-20168 and 37-117-20169 (Permits) to N.E. Hub Partners, L.P. (Permittee).[1] The Permits allow Permittee to drill two salt cavern gas storage wells in Farmington Township, Tioga County, Pennsylvania.

In their Notices of Appeal, Appellants assert that they own a gas storage reservoir in Tioga County, known as the Tioga Storage Pool, which is operated by CNG. The Permits issued by the Department allow the drilling of two injection wells directly through the Tioga Storage Pool. Appellants claim that: (1) the Permits violate sections 102 and 201(e)(1) of the Oil and Gas Act,[2] and other statutory and regulatory provisions, because they threaten the safety of the Tioga Storage

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[1] CNG's appeal was docketed at EHB Docket No. 97-169-MR, and Penn Fuel's appeal was docketed at EHB Docket No. 97-170-MR.

[2] Act of December 19, 1984, P.L. 1140, 58 P.S. §§ 601.102 and 601.201(e)(1).

Pool and the safety of the people who work there; (2) the Department did not properly consider the risk of damage to the Tioga Storage Pool, the risk of contamination to sources of drinking water, or the risk of injury to people before issuing the Permits; and (3) the Department violated 25 Pa. Code § 78.81(d)(2) in issuing the Permits because it did so without approving a casing installation procedure that was established by mutual agreement between the well operator and the gas storage reservoir operator.

The two appeals were consolidated on September 30, 1997 at EHB Docket No. 97-169-MR. Subsequently, Appellants were granted leave to amend their appeals to include an alternate or supplemental legal issue.[3] In their amended appeals, Appellants assert that Permittee plans to engage in the solution mining of salt in connection with its drilling of the two salt cavern gas storage wells; therefore, the Department should have required that Permittee obtain a noncoal underground mining permit under section 315(a) of the Clean Streams Law[4] and a noncoal surface mining permit under section 7(a) of the Noncoal Surface Mining Conservation and Reclamation Act[5] and 25 Pa. Code § 77.101.

The parties have conducted discovery and filed dispositive motions. The Board has issued several Opinions and Orders pertaining to the dispositive motions. Presently before the Board is the Joint Motion of CNGT and Penn Fuel to Vacate and Remand to the Department (Joint Motion). The Joint Motion was filed on July 2, 1998. Appellants aver therein that, on April 20, 1998, the Federal

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[3] CNG amended its appeal by Order of the Board dated January 7, 1998. Penn Fuel did the same by Order of the Board dated February 2, 1998.

[4] Act of June 22, 1937, P.L. 1987, *as amended*, 35 P. S. § 691.315(a).

[5] Act of December 19, 1984, P.L. 1093, 52 P. S. §3307(a).

Energy Regulatory Commission (FERC) issued a Certificate of Public Convenience and Necessity (Certificate) to Permittee under section 7(c) of the Natural Gas Act. The Certificate authorized Permittee to drill the two salt cavern gas storage wells, *provided that* Permittee modifies its drilling program to minimize the possibility of damage to the Tioga Storage Pool. The Certificate contains specific recommendations for Permittee's drilling program and indicates that any state permits must be consistent with the Certificate's recommendations. Appellants contend that, because Permittee's drilling program must now be modified, the Permits are no longer valid. Appellants ask the Board to vacate the Permits and remand the matter to the Department so that Permittee can make the necessary revisions and so that the Department can evaluate the revisions. In the alternative, Appellants request that the Board suspend the Permits and stay these proceedings until Permittee has made the necessary revisions and the Department has completed its evaluation.

On July 27, 1998, the Department and Permittee (Respondents) filed a Joint Response in Opposition to Motion of CNGT and Penn Fuel to Vacate and Remand to the Department (Joint Response). In their Joint Response, Respondents aver that: (1) the modifications required by the Certificate are only "minor supplements" to Permittee's drilling plan; (2) Permittee has already submitted an updated plan to the Department; and (3) the Department has already determined that the updated plan meets or exceeds all legal requirements. (Joint Response at paras. 2, 4-5; Exh. B, paras. 8-9.) Respondents ask the Board to deny the Joint Motion for this reason and because: (1) it is an untimely *de facto* motion for summary judgment; (2) it lacks a supporting legal memorandum; (3) its factual allegations are not supported with record evidence; (4) it does not establish that the Department abused its discretion in deciding *not* to revoke or suspend the Permits in light of the modifications; and (5) granting the Joint Motion would be a waste of the Board's time

and resources.

On August 17, 1998, Appellants filed a Joint Reply. Appellants state that they were unaware of the Department's review and approval of Permittee's modified drilling program and now concede that their request to stay proceedings until the Department evaluates the plan is moot. (Joint Reply at 7, n. 11.) Nevertheless, Appellants maintain that the permit changes are more than "minor supplements," and it would be unfair and a waste of time and resources to hold a hearing in this appeal when Appellants have had no opportunity to comment on Permittee's new drilling program or to conduct discovery relating thereto. Thus, Appellants ask the Board to vacate the Permits and remand the matter to allow Appellants an opportunity to comment on the redesigned drilling program. In the alternative, Appellants ask the Board to reopen discovery so that Appellants can conduct discovery relating specifically to the drilling plan modifications and the Department's review and approval of them. With respect to the timeliness of the Joint Motion, Appellants contend that they could not have filed the Joint Motion any sooner. As for the lack of a legal memorandum, Appellants maintain that their legal argument was included in the Joint Motion, and, therefore, the Board should not impose sanctions.

I. Procedural Issues

A. Timeliness

We shall first address Respondents' contention that the Joint Motion should be denied as an untimely dispositive motion. The Board may deny a dispositive motion that is not timely filed. *Short v. DEP*, 1997 EHB 837; *see* 25 Pa. Code § 1021.125 (relating to sanctions). A motion that seeks to resolve the issues in an appeal without the need for hearing is a dispositive motion. 25 Pa. Code § 1021.2(a).

To the extent that the Joint Motion asks the Board to vacate the Permits and remand the matter to the Department without a hearing before the Board, it is a dispositive motion. By Order dated January 6, 1998, the Board established April 28, 1998 as the deadline for filing dispositive motions. Appellants filed the Joint Motion on July 2, 1998, 65 days after this deadline.

Appellants maintain that they could not have filed the Joint Motion any sooner because Permittee's revised drilling program was not submitted to the Department until June 26, 1998. In other words, Appellants claim that they could not argue that the original Permits were invalid until Permittee actually attempted to modify them by submitting revisions to the Department. We accept this argument and will consider Appellants' Joint Motion.

B. Supporting Memorandum of Law

Respondents also point out that, under 25 Pa. Code § 1021.73(c), dispositive motions must be accompanied by a supporting memorandum of law, and, if the moving party fails to file a supporting memorandum of law, the Board may deny the dispositive motion. Here, Appellants failed to file a memorandum of law in support of their Joint Motion. However, Appellants maintain that, because their legal argument was clear from the Joint Motion itself, the Board should not impose sanctions. We agree with Appellants that the legal ground for their position is apparent from the averments of the Joint Motion. Therefore, exercising our discretion on this point, we will not deny the Joint Motion.

C. *De Facto* Motion for Summary Judgment

Respondents also contend that we should view the Joint Motion as a *de facto* motion for summary judgment and apply rules governing such motions here. Although the Joint Motion is a dispositive motion, it is *not* a motion for summary judgment. Indeed, the Joint Motion does not even

attempt to address whether there are any disputed issues of material fact or whether Appellants are entitled to judgment as a matter of law. *See* Pa. R.C.P. No. 1035.2. Thus, the rules which govern motions for summary judgment will not be applied here.

II. Vacate and Remand

In their Joint Motion, Appellants ask the Board to vacate the Permits and remand the matter so that Permittee can make necessary drilling plan revisions to the permit applications and so that the Department can evaluate them. However, Permittee has already submitted the modifications, and the Department has already reviewed and approved them. Given that fact, Appellants ask in their Joint Reply that the Board vacate the Permits and remand to the Department so that Appellants can comment on Permittee's new drilling plan.

Appellants suggest by their request that the Department abused its discretion in allowing Permittee to modify the Permits without providing an opportunity for Appellants to comment on the modifications.[6] In *County of Schuylkill v. DER*, 1989 EHB 1241, the Board suspended and remanded a permit to the Department after conducting a full adjudication and concluding that the Department abused its discretion by failing to provide a meaningful opportunity for the public to participate in the permitting process.

"[A] mere difference of opinion, or even a demonstrable error of judgment, is insufficient to constitute an abuse of discretion." *Oley Township v. DEP*, 1997 EHB 660, 681. An abuse of discretion comes about only where manifestly unreasonable judgment, partiality, bias, ill-will,

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[6] Appellants do not actually set forth this argument in their Joint Motion or Joint Reply, but it is implied in their request to vacate and remand the Permits to allow for comments on the modifications.

misapplication or overriding of the law, or similarly egregious transgressions on the part of the Department can be shown. *Id.*

While the Department certainly abused its discretion in *County of Schuylkill*, that is not the case here. Appellants have not shown any partiality, bias, ill-will, or illegal conduct[7] on the part of the Department. Appellants evidently believe, however, that the Department exercised manifestly unreasonable judgment in failing to solicit comments from Appellants with respect to Permittee's revised drilling program. We disagree.

The Department provided Appellants with an opportunity to comment on Permittee's original drilling program *before issuing the Permits*. Appellants' comments did not persuade the Department to withhold the Permits from Permittee. Since then, FERC ordered Permittee to *improve* the drilling program authorized by the Permits to minimize the possibility of damage to the Tioga Storage Pool. Permittee subsequently submitted a revised drilling program to the Department pursuant to the FERC order. Appellants indicate that their experts and consultants have not completed a review of the revised program. (Joint Reply at 5.) Therefore, Appellants cannot possibly show that the changes are not improvements, or that Department exercised manifestly unreasonable judgment in approving the changes without seeking further comments from Appellants.

Because Appellants cannot show an abuse of discretion, we deny Appellants' request to vacate and remand the Permits.

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[7] Appellants have not cited any law requiring the Department to seek comments from interested parties when a gas well permittee modifies a drilling program pursuant to a FERC Certificate. Indeed, in their Joint Motion, Appellants asked the Board to remand the matter to the Department for an evaluation of the modified drilling program; however, Appellants never suggested that, on remand, the Department had to solicit Appellants' comments before completing its evaluation of Permittee's drilling program changes.

III. Reopening of Discovery

In the alternative, Appellants ask the Board to reopen discovery so that Appellants can conduct discovery relating specifically to the drilling plan modifications and the Department's review and approval of them. We agree that, under the circumstances here, it is appropriate to reopen the discovery period. Appellants challenged Permittee's drilling program, and Permittee changed its drilling program after the completion of discovery. Therefore, as requested, Appellants will be permitted to conduct discovery with respect to Permittee's drilling program modifications and the Department's review and approval of them.

IV. Motions for Clarification

Because we have decided not to vacate and remand the Permits, we shall now address two pending discovery motions with respect to discovery that was commenced prior to the deadline for completion of discovery.

A. CNG's Motion for Clarification

On June 24, 1998, CNG filed a Motion for Clarification of Confidentiality Order asking the Board whether CNG employee Ronald Walden may have access to Confidential Information pursuant to the Board's April 15, 1998 Confidentiality Order. Walden has been employed by CNG for approximately 7½ years as a geologist and a geophysicist, and CNG's counsel would like to utilize Walden's expertise in the preparation of CNG's case.

On July 8, 1998, Permittee filed a Response opposing Walden's access to Confidential Information because Walden is an employee of its competitor, CNG. Permittee points out that Walden is the person who collects and analyzes geologic data for CNG and who selects new well locations. Thus, it is contrary to the terms of the Confidentiality Order to allow him to view

Permittee's proprietary geologic data.

Paragraph 4(c) of the Confidentiality Order states that access to Confidential Information is limited to experts "retained by the parties or by their counsel to assist in the preparation and presentation of this case." Walden has *not* been retained by CNG or by CNG's counsel to assist in the preparation and presentation of this case. Walden has been retained by CNG for approximately 7½ years to perform work as a geologist. Therefore, Walden may *not* have access to Confidential Information.

B. Penn Fuel's Motion to Clarify

On June 25, 1998, Penn Fuel filed the Motion of Penn Fuel Gas, Inc. to Clarify the Order of April 29, 1998 and to Impose Sanctions (Motion to Clarify). On April 29, 1998, the Board issued an Order stating that "Daniel Sutton shall produce all documents that are responsive to Categories 1 through 6 of Penn Fuel's subpoena duces tecum, as modified in the revised listing of the categories of documents attached to the February 17, 1998 letter of Mark J. Larson, Esquire, to Neil R. Mitchell, Esquire." Sutton, who is President and CEO of United Salt Corporation (United Salt), responded to the Order by turning over certain documents to Penn Fuel; however, Sutton refused to produce *all* documents responsive to the six categories for various reasons.

On July 8, 1998, Sutton filed a Response to Penn Fuel's Motion to Clarify explaining his failure to fully comply with the Board's April 29, 1998 Order. On July 7, 1998, Permittee filed a letter with the Board concurring with Sutton's Response. On July 14, 1998, Penn Fuel filed a Reply to Sutton's Response. On July 20, 1998, United Salt filed a letter asking the Board to strike Penn Fuel's Reply under 25 Pa. Code § 1021.70(g).

We shall first consider United Salt's request to strike Penn Fuel's Reply. The Board's

regulation at 25 Pa. Code § 1021.70(g) states that a moving party may not file a reply to a response to its motion unless the Board orders otherwise, or unless the motion is a dispositive motion. Penn Fuel's Motion to Clarify is not a dispositive motion, and the Board has not ordered the filing of a reply. Therefore, a reply was not appropriate in this case, and we shall strike Penn Fuel's Reply.

Turning to the Motion to Clarify, Sutton refuses to produce: (1) Engineering, Procurement, and Construction (EPC) Cost Proposals prepared by Stone & Webster and all drafts of such proposals; and (2) correspondence, reports, and memoranda relating thereto. (*See* Categories 2 & 3). Sutton explains that he will not produce these materials because they are irrelevant, because the Board ruled on April 7, 1998 that Stone & Webster did not have to produce such documents, and because the Board ruled on February 25, 1998 and March 24, 1998 that Sutton did not have to produce documents describing the financing of the brine evaporation plant or economic studies, reports, or analyses performed in connection with the brine evaporation plant. (*See* Categories 7-10.)

The Board has ruled on more than one occasion that the EPC Cost Proposals and related documents are discoverable. The Board has not altered its view in that regard. The Board's April 7, 1998 Order pertaining to Stone & Webster has no bearing here. In that Order, the Board denied a motion to compel the production of documents relating to Stone & Webster's *preparation* of the EPC Cost Proposal. Stone & Webster asserted in opposition to the motion that it did not *prepare* the gas well and storage cavern portions of the EPC Cost Proposal. The Board accepted the assertion and concluded that Stone & Webster had no documents to produce. Here, Penn Fuel does *not* seek nonexistent documents; rather, Penn Fuel seeks the EPC Cost Proposals themselves, as well as any drafts, and related correspondence, reports, and memoranda. Once again, we order Sutton to produce these materials; however, Sutton may withhold or redact any document which contains Category 7-

10 information. The Board reaffirms that the information described in Categories 7-10 is *not* discoverable.

Sutton also refuses to produce: (1) design, development, and construction documents for the "dry side" of the brine evaporation plant; and (2) designs, schematics, blueprints, pictures, drawings, illustrations, or engineering analyses for the "dry side" of the brine evaporation plant. (*See* Categories 1 & 6.) Sutton maintains that such documents would disclose the nature of the salt products which will be manufactured at the plant, and the Board has ruled that Sutton need not produce marketing studies, reports, or analyses performed for the sale of salt from the plant. (*See* Category 9.) To the extent that Category 1 and 6 documents contain marketing, sales, and financial information, Sutton will not be required to produce them.

Sutton next refuses to produce certain correspondence, reports, and/or memoranda exchanged between United Salt and Permittee and all draft and/or executed contracts or agreements between United Salt and Permittee. (*See* First Category 4.) Sutton asserts that some of these documents contain ownership and financing information, and the Board has ruled that Sutton need not produce documents describing ownership and financing of United Salt. (*See* Category 7.) To the extent that these documents contain ownership and financing information, Sutton will not be required to produce them.

Finally, Sutton refuses to produce correspondence, reports, and/or memoranda exchanged between United Salt and ACRES International Corporation (ACRES). (*See* Second Category 4.) Sutton argues that: (1) ACRES is made up of experts; (2) the Board has ruled that only the role of experts in the permitting process is discoverable; (3) ACRES was never involved in the permitting process; therefore, (4) the documents requested are not discoverable. On January 2, 1998, the Board

ruled that Permittee could not discover "expert opinion prepared in anticipation of litigation." Thus, unless the documents exchanged between United Salt and ACRES contain expert opinion prepared in anticipation of litigation, the documents are discoverable, and Sutton must produce them.

We shall briefly address Penn Fuel's request for sanctions. We realize that Sutton has failed to comply with more than one Board Order. However, it is apparent from the above discussion that the Board Orders required some clarification. Indeed, some of Sutton's hesitancy in producing the documents sought by Penn Fuel was justifiable. Therefore, the Board will not impose sanctions upon Sutton at this time.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CNG TRANSMISSION CORPORATION, and PENN FUEL GAS, INC.	:	
v.	:	**EHB Docket No. 97-169-MR (Consolidated with 97-170-MR)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and N.E. HUB PARTNERS, L.P., Permittee	:	

ORDER

AND NOW, this 27th day of August, 1998, it is ordered as follows:

1. Appellants' Joint Motion to Vacate and Remand is denied.

2. Appellants are permitted to conduct discovery for 30 days from the date of this Order solely with respect to Permittee's drilling program modifications and the Department's review and approval of them.

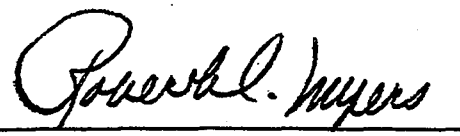
3. Ronald Walden may not have access to Confidential Information.

4. Daniel Sutton shall produce documents that are responsive to Categories 1 through 6 of Penn Fuel's subpoena duces tecum, as modified in the revised listing of the categories of documents attached to the February 17, 1998 letter of Mark J. Larson, Esquire, to Neil R. Mitchell, Esquire (Revised Listing). However, Sutton may withhold or redact such documents to the extent that they contain information described in Categories 7 through 10 of the Revised Listing and to the extent that they contain expert opinion prepared in anticipation of litigation.

5. Penn Fuel's request for sanctions is denied.

EHB Docket No. 97-169-MR
(Consolidated with 97-170-MR)

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: August 27, 1998

See next page for a service list.

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

EAGLE ENVIRONMENTAL, L.P.	:	
	:	
v.	:	**EHB Docket No. 96-215-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, PENNSYLVANIA FISH AND BOAT COMMISSION, JEFFERSON COUNTY COMMISSIONERS, JEFFERSON COUNTY SOLID WASTE AUTHORITY and CLEARFIELD-JEFFERSON COUNTIES REGIONAL AIRPORT AUTHORITY, Intervenors	:	**Issued:** September 3, 1998

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Board dismisses an appeal from the suspension and/or revocation of a series of permits issued for the operation of a proposed landfill. Although the Department erred in suspending or revoking the permits without exercising independent discretion over a determination by the Pennsylvania Fish and Boat Commission that streams in the area were wild trout streams, the Board, substituting its discretion for that of the Department, finds that the streams qualify as wild trout streams under the Department's regulations. Because these streams are wild trout streams, the wetlands along the floodplains of the streams' tributaries of the wild trout streams qualify as exceptional value wetlands and can not be filled as authorized by the encroachment permit. The Department's regulation which creates this classification is not invalid. Because the design of the

Department's regulation which creates this classification is not invalid. Because the design of the proposed landfill required portions of exceptional value wetlands to be filled, the encroachment permit was properly revoked. The revocation of the encroachment permit requires the proposed landfill to be redesigned, therefore the suspension of the solid waste permit, the air quality permit and the NPDES permit was proper pending review of the revised design by the Department.

BACKGROUND

This appeal by Eagle Environmental, L.P, which was filed on October 18, 1996, challenges an order of the Department of Environmental Protection suspending or revoking a series of permits issued for the construction of a municipal waste facility known as the Happy Landing Landfill. Shortly thereafter, the Pennsylvania Fish and Boat Commission, the Jefferson County Commissioners, the Jefferson County Solid Waste Authority, and the Clearfield-Jefferson Counties Regional Airport Authority were granted leave to intervene. The Board denied Eagle's motion for summary judgment in this matter. *Eagle Environmental, L.P. v. DEP,* 1997 EHB 733. A hearing on the merits was held for thirteen days on October 21-24 and 27-31, 1997 and February 17, 19, 20 and 24, 1998, before Administrative Law Judge George J. Miller. Following the hearing, the parties filed requests for findings of fact and conclusions of law and supporting legal memoranda over the time period from April 16 to July 27, 1998. The record consists of the pleadings, a transcript of 3,010 pages and 98 exhibits.[1] After a full and complete review of the record we make the following:

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[1] Eagle's exhibits admitted into evidence are referenced as "Ex. E-__"; the Department's as "Ex. C__"; the Commission's as "Ex. F-__"; Jefferson's as "Ex. I-__." A joint stipulation was entered into by all parties as Ex. B-6 and is referenced "J.S." The notes of testimony are designated "N.T."

FINDINGS OF FACT

1. The Commonwealth of Pennsylvania, Department of Environmental Protection (Department) is the agency with the duty and authority to administer and enforce the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1 - 693.27 (Dam Safety and Encroachments Act); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.1 - 691.1001 (Clean Streams Law); the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101 - 6018.1003 (Solid Waste Management Act); the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §§ 4001 - 4015 (Air Pollution Control Act); 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. (J.S. ¶1)

2. Eagle Environmental, L.P. (Eagle) is a limited partnership which applied for and obtained permits necessary to operate a municipal waste landfill known as Happy Landing Landfill located in Washington Township, Jefferson County. Eagle first prepared its application materials in 1989 and published notice of its application on October 26, 1990. (J.S. ¶2-3; Ex. E-18)

3. The Pennsylvania Fish and Boat Commission (Commission) is an independent administrative commission of the Commonwealth of Pennsylvania with such duty and authority as is provided by the Pennsylvania Fish and Boat Code.[2] (J.S. ¶ 4)

4. The Jefferson County Commissioners, the Jefferson County Solid Waste Authority, and the Clearfield-Jefferson Counties Regional Airport Authority (collectively, Jefferson) are

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[2] 30 Pa. C.S. §§ 101-7314.

governmental entities who object to the Happy Landing Landfill. (J.S. ¶5)

I. The Department's Action

5. On February 9, 1996, the Department issued Water Obstruction and Encroachment Permit No. E33-171 (Encroachment Permit) to Eagle. (J.S. ¶13; Ex. C-7)

6. The Encroachment Permit authorized Eagle to, among other things, fill in a total of 5.02 acres of wetlands in connection with the development of certain phases of the Happy Landing Landfill. (J.S. ¶15)

7. Among the wetlands which the Encroachment Permit authorized Eagle to fill was a wetland area designated by Eagle as Wetland Nos. 4, 9 and 10. (J.S. ¶16; Brumagin, N.T. 89; *see* Ex. C-2C[1])

8. The Department issued the Encroachment Permit on the basis of information known to the Department at the time of issuance of the Permit. (J.S. ¶14)

a. When completing the environmental assessment portion of the encroachment permit application, Eagle indicated that no natural salmonid[3] reproduction was occurring in the vicinity of the Happy Landing Landfill because at that time no stream stretches in the watershed were identified on the Commission's list of wild trout streams. (Valiknac, N.T. 2162; Ex. E-32D)

b. In April 1995, the Commission informed the Department that the Commission did not believe that Irish Run contained naturally reproducing trout populations. (Brumagin, N.T. 109)

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[3] The brook trout is a member of the salmonid family. (Stauffer, N.T. 2581-82)

c. The Commission based its opinion at that time on the wild trout list, stocking records, field observations and survey data of Wolf Run. At that time the Commission had no knowledge concerning the presence or absence of brook trout in Irish Run, or two unnamed tributaries known as UNT01 and UNT02. (Spotts, N.T. 1565, 1570)

9. On February 9, 1996, the Department also issued the following permits to Eagle relating to Happy Landing Landfill: Solid Waste Permit No. 101605 (Solid Waste Permit); Air Quality Permit No. 33-322-001 (Air Quality Permit); and Water Quality NPDES Permit No. PA010443 (NPDES Permit). (J.S. ¶17)

10. In late June, 1996, the Commission received from Damariscotta, an environmental services firm, information concerning alleged wild trout found in streams in the vicinity of the Happy Landing Landfill site. (J.S. ¶18)

11. On July 15, 1996, David E. Spotts, Fisheries Biologist of the Commission's Environmental Services Division, visited the Happy Landing Landfill site and did electrofishing. [4] (J.S. ¶19)

12. On July 15, 1996, David Spotts observed and identified brook trout. (J.S. ¶20)

13. David Spotts reported the information that he received from Damariscotta in June, as well as the results of his July 15 site visit to the Department by means of a July 18, 1996 letter to Steven Beckman, Regional Director of the Department's Northwest Regional Office. (J.S. ¶21; Ex.

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[4] Electrofishing involves placing an electrical current in the water to render fish either stunned or momentarily immobilized so that they may be netted to determine their presence and/or abundance in a stream. (Snyder, N.T. 931)

C-4)

14. Mr. Spotts' letter of July 18, 1996, expressed concerns, including concerns that Wetland No. 9 potentially qualified as an exceptional value wetland. (Spotts, N.T. 1602-03)

15. Wetland No. 9 is within the disposal area of the proposed landfill. (N.T. 78)

16. Mr. Spotts concluded that additional electrofishing was necessary on Irish Run and Wolf Run. He advised Mr. Beckman of this. (Spotts, N.T. 1604)

17. On September 3 and 4, 1996, Commission personnel, including David Spotts and Ronald Lee, Fisheries Biologist, Bureau of Fisheries, sampled fish populations at eight sites within the Wolf Run Watershed to determine the absence or presence of wild trout. On these dates, Commission personnel observed brook trout in Irish Run and two unnamed tributaries known as UNT01 and UNT02. (J.S. ¶22)

18. By letter dated September 12, 1996 from David Spotts to Steven Beckman, the Commission staff informed the Department of the results of the September 3 and 4 survey of Irish Run, UNT01 and UNT02. (J.S. ¶23; Ex. C-5)

19. By letter dated September 19, 1996, from John Arway, Chief of the Commission's Division of Environmental Services, to Steven Beckman, the Commission reported that Irish Run meets and exceeds the Commission's criteria for classification of a wild trout stream. UNT01 and UNT02 are also considered wild trout streams. (Arway, N.T. 1865; Ex. C-6)

20. The Department determined that Wetland No. 9, among other areas, was an exceptional value wetland because it was in or along the floodplain of a tributary of Irish Run. (Brumagin, N.T. 89-90)

a. Mr. Brumagin, the Department's water biologist, testified that he walked

upstream on UNT02 from Irish Run into Wetland No. 9 (N.T. 71-72)

b. The watercourse went into wetland No. 9 and the wetland was therefore in or along the floodplain of UNT02. (N.T. 72; 167-68)

21. Similarly, Wetland No. 4 is in or along the floodplain of the waterway referred to as the northwest/southeast tributary. (Brumagin, N.T. 70, 90) The northwest/southeast tributary is a tributary to Irish Run. (Brumagin, N.T. 171)

22. Before the Suspension Order was issued, allegations were made by supporters of the landfill that stocked trout had been placed in these streams by persons who opposed the landfill to make it appear that they were wild trout streams. Allegations had also been made by opponents of the landfill that landfill supporters had removed native trout from Irish Run, UNT01 and UNT02 to make it appear that these streams were not wild trout streams.

23. The allegations in the preceding paragraph had been widely reported in the newspapers and other media that cover Jefferson County and nearby areas. (J.S. ¶33)

24. The Commission was aware of and considered these allegations when it classified Irish Run, UNT01 and UNT02 as wild trout streams. (Arway, N.T. 1896, 1899-1900, 1912-14, 1928)

25. When the Department issued the Suspension Order, the Department was aware of these allegations and knew that the Commission was aware of and had considered these allegations when the Commission classified Irish Run, UNT01 and UNT02 as wild trout streams. (Ex. E-102)

26. On September 25, 1996, the Department issued the Suspension Order to Eagle. (J.S. ¶26; Ex. C-8)

27. In the Suspension Order, the Department modified the Encroachment Permit by

revoking the authorization to fill in any wetlands, including Wetland Nos. 9 and 4. (J.S. ¶ 28; Ex: C-8)

28. Steven Beckman made the determination to issue the Suspension Order to Eagle. (J.S. ¶27)

29. In issuing the Suspension Order, the Department relied upon the Commission's classification of Irish Run, UNT01 and UNT02 as "wild trout streams" and 25 Pa. Code §§ 105.1 and 105.17. (J.S. ¶¶ 30-31; Beckman, N.T. 260-61)

30. The Department did not make an independent determination that Irish Run, UNT01 and UNT02 are wild trout streams. It does not customarily verify the comments and concerns of other agencies that are made in the permit review process. (J.S. ¶¶ 34, 35)

31. The Department's position was that the determination as to whether a stream should properly be classified as a wild trout stream was a decision for the Commission to make. (Beckman, N.T. 295-96)

32. Mr. Beckman testified that based on his interpretation of the regulation he felt that the Department's reliance in this instance on findings of the Commission was distinct from the Department's reliance on the findings of other agencies such as the Department of Transportation. (N.T. 291)

33. However, Mr. Beckman testified that he had discussions with his staff to assure that there were in fact brook trout living in the streams. (Beckman, N.T. 261)

34. In the Suspension Order, the Department also suspended the Solid Waste Permit, the Air Quality Permit, the NPDES Permit and the portion of the Encroachment Permit that had not been modified by the Suspension Order. (J.S. ¶29; Ex. C-8)

35. Mr. Beckman suspended the solid waste permit because by revoking the authorization to fill the wetlands the design in the permit was no longer possible. Since the air quality permit and the NPDES permits were issued as part of the Department's coordinated permit program, these permits were also suspended. Mr. Beckman felt that the overall design scheme of the landfill was significant and wanted an opportunity to review all of the permits based on the necessary design modification. (Beckman, N.T. 242; 244-45; 321)

36. Mr. Beckman rejected the idea of revoking these permits which would have resulted in Eagle having to start the entire permitting process from the beginning. Suspension allowed Eagle to seek to modify its design to avoid impacting the exceptional value wetlands and allowed for a reevaluation of the wetlands issues generally. (N.T. 247-49)

37. Eagle has not requested the Department to reinstate or modify the solid waste permit. (Beckman, N.T. 269-70; Khodara, N.T. 2068)

II. The Commission's Wild Trout Stream Criterion and "Listing" Procedure

38. Richard A. Snyder is Chief, Division of Fisheries Management for the Commission. He has held this position since 1980. He has a Masters of Science degree in Wildlife Biology. In addition to his current position with the Commission, Mr. Snyder has served as an aquatic biologist and a fisheries biologist since 1972. (Snyder, N.T. 906-09; Ex. F-57)

39. In his role as a division chief, Mr. Snyder is responsible for the identification and quantification of the trout resources in the Commonwealth and the development of management plans and programs which effectuate the Commission's mission. (N.T. 910)

40. Under his supervision the "wild trout streams list" is compiled to identify streams which support naturally reproducing trout populations. A stream is placed on the list following a

staff assessment of various attributes of the waterway and then run through a computer sort based on certain criteria to designate it as a waterway having certain standard of trout abundance and other attributes. (Snyder, N.T. 923, 926; Ex. E-82)

41. The Commission first generated the wild trout list in 1992, following the adoption of the current regulatory definition of "wild trout stream" by the Environmental Quality Board in 1991. (Snyder, N.T. 927; 21 Pa. Bull. 4911)

42. Data would be collected by doing a stream survey. A Commission stream survey involves a two or three person crew going into the field and quantifying and qualifying the chemical, physical and biological characteristics of a stream. (Snyder, N.T. 929; Lee, N.T. 1070)

43. A stream is a "wild trout stream" if it contains trout measuring less than 150 mm (6 inches)[5] in length that constitute 0.1 kilogram per hectare biomass or greater.

a. This criterion was developed by the Commission's fisheries scientists to provide a straightforward mechanism for discriminating between those waters that support naturally reproducing populations of trout and those that do not.

b. The biomass aspect of this criterion was designed to provide for some minimum level of trout population.

c. The size aspect was designed to be inclusive of waters containing one or two year classes of young trout and to exclude waters with only stocked trout populations.

(Snyder, N.T. 931-33)

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[5] There are approximately 25 mm per inch and approximately .04 inches in one mm.

44. Other factors are also considered by Commission personnel in classifying a wild trout stream such as:

a. the proximity of hatcheries, fish culture stations or cooperative nurseries;

b. other types of fisheries management practices in the area that might contribute trout other than those that may be naturally reproducing in a stream;

c. the habitat of the stream; and

d. the appearance of the fish such as body length, body configuration, deformities common to hatchery trout, coloration and fin wear.

(Snyder, N.T. 937-39)

45. A stream supports naturally reproducing populations of trout when it provides the habitat and water quality to support one or more life stages of a trout. (Arway, N.T. 1905)

46. Not all of the streams in Pennsylvania which support naturally reproducing populations of trout are on the wild trout list because the Commission has not had an opportunity to survey every waterway. (Lee, N.T. 1141)

47. The Commission uses the wild trout list internally, largely to provide information to the public. (Snyder, N.T. 945)

48. Neither the wild trout list nor the factors the Commission applies to determine whether or not a stream supports naturally reproducing trout has ever been published in the *Pennsylvania Bulletin.* (N.T. 998)

III. The Waterways

A. Wolf Run

49. The Commission has not classified Wolf Run as a wild trout stream. (J.S. ¶24)

50. Wolf Run is a Commission approved trout water, and as such, the Commission stocks Wolf Run. (Snyder, N.T. 913; Lee, N.T. 1075)

51. The Commission stocks Wolf Run with catchable, legal size trout, averaging 10 inches (250 mm) in length. (Lee, N.T. 1075)

52. Waterways Conservation Officer Richard Valazak, an employee of the Commission, has responsibility for stocking Wolf Run.

a. Wolf Run is generally stocked with fish in March and May.

b. These stocked trout are at least the legal size of seven inches (175 mm). (Valazak, N.T. 1158, 1160, 1196)

53. Wolf Run is the only stream that the Commission stocks in the vicinity of the proposed landfill. (Lee, N.T. 1075)

54. The Commission does not stock fingerling trout in Wolf Run. (Snyder, N.T. 914-15; Lee, N.T. 1076)

55. Cooperative nurseries do not stock fingerling trout in Wolf Run. (Snyder, N.T. 916; Lee, N.T. 1076-77)

B. Irish Run

1. Physical Characteristics

56. Irish Run is a tributary of Wolf Run. (J.S. ¶7)

57. Irish Run is a moderate sized stream, two to three times larger than UNT01 and

UNT02. It has a very good pool-to-riffle structure with stream bed materials suitable for brook trout habitat. (Arway, N.T. 1883)

58. The stretch of Irish Run that was surveyed in September, 1996 provided a good habitat for brook trout. (Spotts, N.T. 1758)

59. In July 1996, the temperature of Irish Run was 66° F. This is a reasonable temperature for the survival of brook trout. (Spotts, N.T. 1599, 1769; *see also* Stauffer, N.T. 2628)

60. Dr. William Kodrich, called as an expert for Jefferson, has a Ph.D. in biology. His degree preparation was in terrestrial and aquatic ecology, and he taught general ecology courses at Clarion University. In 1975 he took over the Fisheries Program and taught fisheries biometrics, ecology seminars, and fish identification. (Kodrich, N.T. 464-65)

a. At the time of the hearing Dr. Kodrich was an Emeritus Professor of Biology at Clarion University. (Kodrich, N.T. 456)

b. He is an expert in fisheries biology, particularly as it relates to brook trout. (N.T. 473)

c. Dr. Kodrich has also served as a deputy waterways conservation officer for the Commission. He has also studied bass and trout for the Commission. (N.T. 466-67; Ex. I-2)

d. He has also held various positions with Trout Unlimited. (N.T. 469-70)

61. Dr. Kodrich testified that Irish Run is typical of 60% of streams he has sampled in the coal region of Pennsylvania. There are indications that the condition of the stream has improved since 1981. (N.T. 525-26)

62. Ronald Lee is the Area Fisheries Manager of the Commission responsible for the

Upper Allegheny River Drainage Basin. He is a certified fisheries scientist and has been a fisheries biologist for 30 years. He is an expert in fisheries biology and fisheries management. He has handled tens of thousands of brook trout in his career. (N.T. 1065-70, 1137)

63. Mr. Lee also testified that Irish Run is typical of wild trout streams in his area of responsibility. (N.T. 1132)

64. In Dr. Kodrich's opinion, Irish Run is capable of supporting the reproductive activities of brook trout. (N.T. 519)

2. Stream Surveys

65. Dr. Kodrich surveyed Irish Run on October 28, 1981. (Kodrich, N.T. 500-03; *see also* Dickson, N.T. 425, 430)

a. He captured 17 wild brook trout. (Kodrich, N.T. 500)

b. The smallest fish which he surveyed was not quite two inches (50 mm) long and the largest fish was over six inches (150 mm). (Kodrich, N.T. 503; Ex. I-3)

66. The study conducted by Dr. Kodrich reflected a range of lengths of brook trout typical of small western Pennsylvania trout streams. (Kodrich, N.T. 502)

67. Douglas Kepler is an environmental consultant and an expert in fish and wetlands. He has been a partner in a private firm, Damariscotta, since 1991. He has seen thousands of native and stocked brook trout in the course of his career. (Kepler, N.T. 758-64, 783)

68. Douglas Kepler electrofished on Irish Run on June 13, 1996. He observed small brilliantly colored brook trout which he believed were wild brook trout. (N.T. 782-83)

69. He did not believe these brook trout were migrating stocked trout. (N.T. 891)

70. David Spotts is a Fisheries Biologist in the Environmental Services Division of the Commission. He is responsible for reviewing permit applications that may impact waters of the Commonwealth. The mission of the Environmental Services Division is to protect the aquatic resources of the Commonwealth. He has surveyed over one hundred streams in his career. (Spotts, N.T. 1560, 1563-64)

71. Mr. Spotts and Mr. Lee sampled three locations on Irish Run, namely, IR01, IR02 and IR03.

72. On September 3, 1996, Messrs. Spotts and Lee first sampled Irish Run at a station that began approximately 50 meters upstream of UNT02 (at IR02). (Lee, N.T. 1091-92; Spotts, N.T. 1627)

73. During the September 3, 1996 survey, they captured and marked 37 wild brook trout, ranging in size from 69 mm (2.8 inches) to 126 mm (5 inches) at IR02. (Lee, N.T. 1092-96; Spotts, N.T. 1630; Exs. F-20, F-60)

74. The second site on Irish Run sampled by the Commission on September 3, 1996, was near the mouth of Irish Run (at IR03). (Lee, N.T. 1098)

75. During the September 3, 1996 survey, the Commission found one wild brook trout, in the 75 mm (3 inches) size group, at IR03. (Lee, N.T. 1099; Ex. F-25)

76. The third site on Irish Run sampled by the Commission on September 3, 1996 was IR01. They did not find any brook trout at this site. (Lee, N.T. 1365)

77. On September 4, 1996, Mr. Lee surveyed IR02 as part of a mark and recapture estimate to get a population or biomass estimate. (Lee, N.T. 1103)

78. During the September 4, 1996 survey of IR02, 33 wild brook trout, 27 of which had

been marked the previous day, were collected. (Lee N.T. 1107; Ex. F-60)

79. The data collected during the September 3 and 4, 1996 surveys show that Irish Run contains trout measuring less than 150 millimeters in length that constitute a biomass of 0.1 kilogram/hectare or greater. (Ex. F-59)

80. Trout that were not wild would not have been included in this calculation. (Lee, N.T. 1317-19; *see also* Arway, N.T. 1994-95)

81. Based on Mr. Lee's observations of the physical characteristics of the fish collected, it was his opinion with a reasonable degree of scientific certainty that the brook trout he surveyed were wild trout. (Lee, N.T. 1095-96)

82. Based upon Mr. Lee's review of the data collected in his surveys of September 3 and 4, 1996, his personal observations at the site, his thirty years of background and experience in education as a fisheries biologist, it was his opinion with a reasonable degree of scientific certainty that Irish Run supports naturally reproducing trout. (Lee N.T. 1115-17)

83. In addition to the Commission's wild trout criteria in forming his opinion Mr. Lee considered other factors. He considered the size range or the length frequency of the fish, the color, the history of stocking records, all of which supported his opinion that the trout in Irish Run and the unnamed tributaries were wild trout. (Lee, N.T. 1132-34)

84. He also concluded that the small brightly colored fish were sexually mature. Further, it would be unlikely that fish between 3-1/2 to 4-1/2 inches (87.5 mm - 112.5 mm) in length that are not wild and not young of the year would have such bright coloration. (Lee, N.T. 1132-33)

85. Dr. Jay Stauffer, Eagle's expert, is a professor of ichthyology at Penn State University and an expert in fisheries biology. (Stauffer, N.T. 2512)

86. On December 23, 1996, Dr. Stauffer electrofished Irish Run and collected three brook trout, ranging in length from 95 mm to 115 mm (3.8 to 5.6 inches). (Stauffer, N.T. 2536-37)

87. Dr. Stauffer described these brook trout as having good color and eye color. They were brightly colored with no particular evidence of fin erosion. They were healthy individuals that did not have sunken stomachs (which would indicate poor nutrition) and were in good condition. (Stauffer, N.T. 2537)

88. Dr. Stauffer could not offer an opinion that the brook trout he captured in December, 1996 were not wild brook trout; nor could he opine that they were hatchery bred brook trout. (N.T. 2592-93)

89. Dr. Kodrich also examined these brook trout. In his opinion they were wild brook trout. (N.T. 509)

90. However, Dr. Stauffer admitted that the trout that he observed on December 23, 1996, had the characteristics of wild brook trout. (Stauffer, N.T. 2773)

91. Dennis Elmitsky testified that he caught brook trout in Irish Run since before he could drive. (N.T. 369-70)

a. These trout were from three (75 mm) to four (100 mm) inches to ten (250 mm) inches. (N.T. 371)

b. These fish were brilliantly colored with blue and red dots. The fins were highly colored with a white leading edge and black and orange. The inside was very orange or pink colored. (N.T. 372)

c. The presence of brook trout is the reason he fished at Irish Run. (N.T. 373-74)

92. Other anglers also testified that they had caught brook trout in Irish Run from their childhoods to the present. (Heitzenreiter, N.T. 441-44; Frano, N.T. 681-84)

93. When questioned as to what types of evidence he would need to classify as a stream that supports naturally reproducing trout populations, Dr. Stauffer indicated that he would need:

a. evidence that at least two age classes are present (N.T. 2610-11);

b. evidence that there is natural reproduction in the stream that is active and ongoing, such as redds being built and fish collected in their reproductive state (N.T. 2658, 2660); and

c. evidence pertaining to the growth and condition of the trout (N.T. 2662).

94. Dr. Stauffer is primarily a research scientist, and the vast majority of his work involves research, teaching courses and supervising graduate students on their theses and dissertations. (Stauffer, N.T. 2711-12)

95. Dr. Stauffer does much of his work outside of the United States and devotes the majority of his time to non-game species. (Stauffer, N.T. 2709, 2711)

96. Dr. Stauffer surveys very few brook trout streams each year: none in 1997 and less than a half dozen in 1994, 1995 and 1996. (Stauffer, N.T. 2703-05)

97. Dr. Stauffer admitted that there are wild trout streams where little if any spawning occurs. (Stauffer, N.T. 2645-46)

98. Dr. Stauffer admitted that he has surveyed fewer brook trout streams than Ron Lee. (Stauffer, N.T. 2706)

C. UNT01

1. Physical Characteristics

99. UNT01 is a tributary of Wolf Run. (J.S. ¶8; Brumagin, N.T. 87; Kepler, N.T. 799; Ex. C-2C[1])

100. Located approximately a quarter mile downstream from the mouth of Irish Run, it flows from an impoundment in Wetland No. 10. (Brumagin, N.T. 87; Lee, N.T. 1080)

101. UNT01 passes under a series of railroad beds. When it meets the first railroad bed it flows into a culvert under a railroad embankment. The culvert measures 32 inches wide and 48 inches high. (Valiknac, N.T. 2178-79)

102. Patrick Bonislawsky, an environmental consultant working for Eagle, has seen the stream numerous times over the five-year period that he had been involved with the landfill. He has never seen it deeper than ten inches, except in some of the pools which may be as deep as three feet. (Bonislawsky, N.T. 2422-23; 2425)

103. Between the pond and the railroad tracks it averages two to three feet wide. (Valiknac, N.T. 2175)

104. In July 1996, the water temperature of UNT01 was 60° F. This indicates that the stream is cold year round. (Spotts, N.T. 1593, 1689)

105. In September 1996, Mr. Arway observed that the water flowing after a rainfall in UNT01 was clearer than the water flowing in Irish Run. This indicates that it provides a suitable refuge for trout in times of flooding. (Arway, N.T. 1883-84)

106. The Commission does not stock UNT01. (Lee, N.T. 1075)

2. Stream Surveys

107. Mr. Kepler electrofished in UNT01 on June 13, 1996. The purpose of this survey was to determine the presence or absence of native brook trout. He found five brook trout which he believed to be wild brook trout. (N.T. 783-85; Ex. C-4)

108. The brook trout he observed were very small, had brilliant coloration as native fish would have, and the condition of the fish physically and their size made them appear to be native or wild brook trout. (Kepler, N.T. 783)

109. Mr. Spotts electrofished in UNT01 on July 15, 1996. The purpose of this survey was to verify information provided by the report of Douglas Kepler by confirming the presence or absence of wild brook trout in UNT01. (N.T. 1587-88, 1674)

110. Mr. Spotts did some "spot" electrofishing in 20 meters of UNT01, downstream from the railroad tracks. He observed several juvenile wild brook trout which were less than three inches (75 mm) long. These trout were very colorful with red spots. Their fins were perfect, with no wear and tear associated with brook trout that have been raised in hatcheries. (N.T. 1591-93, 1668, 1719; Ex. C-4)

111. On September 3, 1996, Messers. Spotts and Lee performed a follow-up survey of UNT01.

a. They sampled a 48 meter segment of habitat above the railroad tracks.

b. They captured two wild brook trout west of the railroad tracks and four other species of fish in the culverts.

c. The brook trout were weighed and measured.

(Lee, N.T. 1085-88; Spotts, N.T. 1611-16; Exs. F-26, F-60)

112. Based on the data collected on July 15, 1996 and September 3, 1996, both Ron Lee and David Spotts opined with a reasonable degree of scientific certainty that UNT01 supports naturally reproducing trout. (Lee, N.T. 1115-17; Spotts, 1651-55)

113. On November 18, 1996, Dr. Stauffer electrofished in UNT01 upstream from the railroad tracks to the road. He did not survey downstream from the railroad tracks near the mouth of the UNT01 where the Commission performed their survey.

114. He found no brook trout but opined that it is possible for UNT01 to support brook trout. (Stauffer, 2519, 2521, 2783-84)

115. In the past, Dennis Elmitsky has observed small brook trout residing in the culvert of UNT01. (Elmitsky, N.T. 388)

116. Reviewing the data collected by the Commission and others, Mr. Snyder testified with a reasonable degree of scientific certainty that UNT01 was properly classified as supporting naturally reproducing populations of trout. (Snyder, N.T. 954)

117. Mr. Arway also reviewed the data and testified with a reasonable degree of scientific certainty that UNT01 supports naturally reproducing populations of brook trout. (Arway, N.T. 1867-68; 1872)

D. UNT02

1. Physical Characteristics

118. UNT02 is a tributary of Irish Run. It is located approximately 3/10 of a mile upstream from the mouth of Irish Run. (J.S. ¶6; Brumagin, N.T. 71; Lee, N.T. 1080)

119. It originates in a wetland known as Wetland No. 9. (Brumagin, N.T. 72-73; Ex. C-4)

120. At the point where it exits Wetland No. 9 it is a very small narrow stream channel that meanders through tall grasses. In that channelized portion it is approximately a foot wide and about six inches deep. (Valiknac, N.T. 2176-77)

121. As it gets closer to the railroad tracks the terrain becomes steeper and the flow spreads out and the depth decreases. (Valiknac, N.T. 2177)

122. At its widest it is three feet. (Bonislawsky, N.T. 2423)

123. Like UNT01, UNT02 passes under two separate railroad embankments. The main portion of UNT02 flows at a slight angle into the culverts which are the same size and construction as those under which UNT01 flows. The second culvert is taller and narrower than the first culvert. UNT02 then flows into Irish Run. (Valiknac, N.T. 2179-81)

124. UNT02 has one deep pool located at the outlet of the railroad culvert. (Ex. C-4)

125. In June, between the east side of the railroad tracks and the confluence with Irish Run, UNT02 was about three feet wide. (Kepler, N.T. 849)

126. In July, 1996 the water temperature of UNT02 was 60° F. This indicates that the stream is cold year round. (Spotts, N.T. 1596, 1689)

127. The Commission does not stock UNT02. (Lee, N.T. 1075)

2. Stream Surveys

128. Douglas Kepler electrofished in UNT02 on June 13, 1996. He found six brook trout which he testified were wild brook trout. (Kepler, N.T. 782, 784)

129. The brook trout he observed were very small, had brilliant coloration as native fish would have, and the condition of the fish physically and their size made them appear to be native or wild brook trout. (N.T. 783)

130. On July 15, 1996, David Spotts did some "spot" electrofishing on UNT02 downstream from the railroad tracks.

a. He caught between four and six wild brook trout which were all two to three inches long (50-75 mm).

b. They had "good" coloration and no fin wear.

(Spotts, N.T. 1593-96, 1670)

131. On September 3, 1996, Messers. Spotts and Lee performed a follow-up survey of UNT02. They measured a 100 meter station in which they electrofished.

a. They found one wild brook trout between the railroad culverts, outside the measured survey area.

b. This fish was approximately five inches long (125 mm), smaller than most brook trout which are stocked. It also had good coloration and no fin wear.

c. They also found several other species of fish including chubbs, sucker and sculpin.

(Spotts, N.T. 1620-23; Lee N.T. 1089-90; Ex. F-23)

132. Mr. Arway testified that UNT02 is very important to maintaining the temperature in Irish Run. (N.T. 1895)

133. He also believed that UNT02 improves the water quality of Irish Run. (Arway, N.T. 1995)

134. Small tributaries are an important part of the stream continuum for trout. (Kodrich, N.T. 527-28, 628)

135. The tributaries to Irish Run support one of the life stages of wild brook trout as

evidenced by the presence of juveniles in those tributaries; thus, the tributaries are very important for maintaining the native brook trout population in the Irish Run watershed. (Arway, N.T. 1890-91)

136. As a tributary to Irish Run, which is a wild trout stream, UNT02 should also be considered a wild trout stream because it is part of the "continuum" of habitat in the Irish Run watershed. (Kodrich, N.T. 527)

137. Mr. Spotts opined that UNT02 was not a wild brook trout stream because the trout captured on September 3, 1996 was outside the measured station area. (N.T. 1642; 1682-83)

138. However, UNT02 is important to the fishery located in Irish Run because it is an area where trout can go during harsh climactic conditions such as times of extreme heat. It also supports cold water in Irish Run. (N.T. 1683)

139. Ron Lee, based on his 30 years of experience and his observations on September 3, 1996, believed with a reasonable degree of scientific certainty that UNT02 supports naturally reproducing brook trout. (N.T. Lee, 1116-17)

140. Mr. Snyder testified with a reasonable degree of scientific certainty that UNT02 is properly listed as a water supporting naturally reproducing populations of trout. (N.T. 954)

141. Mr. Arway testified with a reasonable degree of scientific certainty that UNT02 supports naturally reproducing populations of trout. (N.T. 1872)

142. Dr. Stauffer did not do any sampling on UNT02. (Stauffer, N.T. 2784)

IV. Characteristics of Brook Trout

143. The Eastern Brook trout (*Salvelinus fontinalis*) is endemic to Pennsylvania, that is, it evolved in Pennsylvania streams, unlike brown trout which originated in Europe. (Kodrich, N.T. 529, 532)

144. Brook trout are a member of the Salmonid family. They generally have a life span of three to four years. (Stauffer, N.T. 2581-82)

145. In western Pennsylvania, wild brook trout spawn primarily during the second week of October through the end of October. (Kodrich, N.T. 522; Kepler, N.T. 817)

146. In Pennsylvania, wild brook trout are usually born in late January or February. (Kepler, N.T. 817)

147. In Pennsylvania, it is not uncommon to find small brook trout populations in small tributaries. (Spotts, N.T. 1679)

148. By convention among fisheries scientists, all fish are considered born on January 1. (Stauffer, N.T. 2542)

149. Wild brook trout use different parts of a stream for different purposes. (Kodrich, N.T. 521; Kepler, N.T. 799)

150. Wild brook trout do not always reproduce in every portion of a stream, for example, they swim in the fall to the uppermost reaches of the smaller tributaries to spawn. (Kepler, N.T. 799)

151. Reproduction of brook trout can be determined without seeing reproduction. (Snyder, N.T. 959)

a. Mr. Lee noted that the presence of young of the year or wild adult brook trout evidence reproduction. (Lee, N.T. 1130)

b. Another indicator of reproduction is the presence of several age classes. (Kodrich, N.T. 573)

152. Brook trout most often reach sexual maturity when they are three to four years old and are four inches long (100 mm) or longer but some male brook trout can be sexually mature at the end of the first year. (Arway, N.T. 1886; Stauffer, N.T. 2800)

153. The optimum water temperature for brook trout is 58° F. However, they thrive in temperatures up to 70° F. When the water temperature is higher they get stressed. (Spotts, N.T. 1669, 1665-76; 1727; *see also* Kodrich, N.T. 530)

154. The size range for wild brook trout is about one inch (25 mm) to 12 inches (300 mm) in length; most are in the range of two to three inches (50-75 mm) up to about seven inches (175 mm). (Kodrich, N.T. 535)

155. Stocked brook trout are generally nine inches (225 mm) or greater in length. (Kodrich, N.T. 536)

156. In streams similar to Irish Run, UNT01, and UNT02, wild brook trout typically grow to three to three-and-a-half inches (75-87.5 mm) during their first year of growth and to about five inches (125 mm) during their second year of growth. (Snyder, N.T. 961)

157. Hatchery trout grow faster than wild trout. (Snyder, N.T. 962)

158. At the end of their first year hatchery trout are between nine and 11 inches (225-275 mm). (Greene, N.T. 1521)

159. Hatchery trout typically average between 10 and 10 ½ inches (250 - 262.5 mm) in length at 15 to 18 months of age. (Snyder, 961-62)

160. Generally if a brook trout were captured measuring nine inches (225 mm) or longer, a surveyor would look closely to determine whether it was a stocked trout. (Kodrich, N.T. 534-35)

161. A difference between wild brook trout and stocked brook trout is that the wild trout have been spawned in the watershed where they are located, whereas stocked trout have been placed by people in the watershed where they are located. (J.S., ¶12)

162. Stocked fish generally do not live through the summer, but it is possible for them to reproduce. (Kodrich, N.T. 587-88)

163. Trout are an indicator of good water quality. (Smith, N.T. 207-08; Kepler, N.T. 889-90; Lee, N.T. 1126)

164. Trout require good water quality to thrive. (Arway, N.T. 1875-76)

DISCUSSION

The burden of proof in this matter is governed by 25 Pa. Code § 1021.101. Where the Department suspends or revokes a permit it bears the burden of proof. 25 Pa. Code § 1021.101(b); *LCA Leasing, Inc. v. DEP*, 1997 EHB 546. To carry this burden the Department must demonstrate by a preponderance of the evidence that its order was an appropriate exercise of its discretion by adducing sufficient evidence to support its order. *Farmer v. DEP*, 1996 EHB 568. To satisfy the "preponderance of evidence" standard, a party need not foreclose the possibility of other alternatives; it need only prove that the existence of a contested fact is more probable than not. *South Hills Health System v. Department of Public Welfare*, 510 A.2d 934, 936 (Pa. Cmwlth. 1986); *C & K Coal Co. v. DER*, 1992 EHB 1261, 1289.

Our review is *de novo*, therefore the Board is not limited to considering the evidence the Department actually had before it at the time it acted but considers evidence presented before the Board. *Warren Sand and Gravel Co., Inc. v. Department of Environmental Resources*, 341 A.2d 556

(Pa. Cmwlth. 1975). Where the Department acts pursuant to mandatory authority of a statute or regulation the only question for the Board is whether to uphold or vacate the Department's action. On the other hand, where the Department exercises its discretionary authority, the Board may substitute its discretion for the Department's. *Id. See also Pequea Township v. Herr*, __ A.2d ___ (1912 C.D. 1997, Pa. Cmwlth. filed July 10, 1998). However, we are not required to do so. *Western Hickory Coal Company v. Department of Environmental Resources*, 485 A.2d 877 (Pa. Cmwlth. 1984); *LCA Leasing, Inc. v. DEP*, 1997 EHB 546.

The Department contends that it did not abuse its discretion by relying upon the Commission's conclusion that the waterways at issue here are wild trout streams because the Commission is the agency with expertise in the classification of wild trout streams. As we held in our disposition of the motion for summary judgment in this matter, the Department may rely upon the expertise of other agencies. Thus, the definition of wild trout stream as written is not an improper delegation of authority to the Commission. *Eagle Environmental, L.P. v. DEP*, 1997 EHB 733, 741.

However, the Department may not *blindly* defer to the determinations of other agencies. *Eagle Environmental, L.P. v. DEP*, 1997 EHB 733. It must reserve for itself the ultimate decision of whether or not to issue a permit, or in this case, suspend a permit. *T.R.A.S.H. Ltd. v. DER*, 1989 EHB 487 (the Department does not abuse its discretion by referring traffic study to the Department of Transportation, but it must reserve ultimate authority to issue a permit); *County of Schuylkill v. DER*, 1989 EHB 1241 (Department may properly consult the Museum Commission regarding the mitigation of impact of a project on historical sites). In short, the Department must evaluate the determination of another agency and exercise its legislatively mandated discretion to reject that

determination if it so chooses. It is the sole agency under the Dam Safety and Encroachments Act with the authority to issue or revoke permits to fill wetlands; the Commission is granted no such authority by the General Assembly. 32 P.S. § 693.9

It is clear from the evidence adduced at hearing that the Department did not feel free to exercise any independent discretion once the Commission classified the waterways as wild trout streams. First, the Department stipulated that it did not exercise any independent judgment concerning the Commission's findings. (Finding of Fact No. 30) Second, it is clear from the testimony of Steven Beckman that he did not feel free to reject the Commission's opinion and determine that there was not sufficient evidence to conclude that wetlands were exceptional value wetlands.[6] In fact, he specifically stated that based on his interpretation of the regulation he felt that the Department's reliance in this instance on findings of the Commission was distinct from the Department's reliance on the findings of other agencies such as the Department of Transportation. (Finding of Fact No. 32) While we must defer to the Department's interpretation of its regulations, we will not do so where that interpretation is clearly erroneous. *Concerned Residents of the Yough, Inc. v. DER*, 670 A.2d 1120 (Pa. 1995).

We believe that the Environmental Quality Board has no authority from the legislature to delegate to the Commission final authority to decide whether a stream is a wild trout stream when the practical effect of that determination would be to require the Department to revoke a previously issued permit. The authority to issue or revoke the Encroachment Permit resides solely in the

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[6] We note that Mr. Beckman was very frank concerning his thinking in this matter, and there is no suggestion in his testimony that he would have been inclined to reject the Commission's wild trout stream classification.

Department at least when the Commission has not previously classified streams within the reach of the floodplain of a wetland as wild trout streams. In this circumstance the Department must exercise its discretion in revoking the permit by assuring itself that the facts justify the Commission's classification made after the Department had issued the permit. Accordingly, we do not address the arguments of the parties on the issue of whether under other circumstances principles of administrative finality might require an appeal from the Commission's determination. Here, the Department incorrectly concluded that it had no discretion to reject the Commission's finding that the waterways at issue are wild trout streams. Its reliance upon the Commission in its determination cannot be any different than its reliance upon other agencies which gather facts and make recommendations to the Department in permitting matters.

Although the Department's reliance upon the Commission as a legal matter was in error, we nevertheless conclude that the factual determination, that the waterways are wild trout streams, was correct. We believe that there was sufficient evidence adduced at hearing to support the conclusion that UNT01, UNT02 and Irish Run are appropriately classified as streams which support naturally reproducing populations of brook trout which leads to the conclusion that Wetland Nos. 4 and 9 must be classified as exceptional value wetlands.

First, most of the expert witnesses agreed that all three waterways were physically capable of supporting native brook trout. Even Dr. Stauffer admitted that it was possible that UNT01 could support wild brook trout. (Finding of Fact No. 115) The temperature of each waterway was below 70° F, the temperature at which brook trout begin to get stressed. (Finding of Fact Nos. 59, 105, 127) In July the temperature of UNT01 and UNT02 was only two degrees above the optimum water temperature in which brook trout thrive. (*See* Finding of Fact No. 154) Moreover, the fact that the

water was so cold in the middle of the summer indicates that it is cold year round.

Eagle argues that it is necessary to establish the water temperature all year round. We do not believe that it is necessary to perform a year-long study before concluding that it is more likely than not that the temperature of the streams is adequate to support wild brook trout. It is logical to conclude that if the water is sufficiently cool in July it is very likely sufficiently cool in other summer months, and obviously sufficiently cool in the cooler months of the year. Further, the fact that there were so-called "warm water" fishes present is not sufficient to rebut the conclusion that the waterways are cool enough for wild brook trout to thrive. Several experts, particularly those familiar with the area, testified that it is not uncommon to find warm water fishes in streams that support wild brook trout. (*See, e.g.,* Lee, N.T. 1397)

Second, there was testimony that there was habitat in which native brook trout thrive. In Irish Run, there were both "pool" areas of slower deep water and "riffle" areas of shallow, fast moving water present. The bottom of the waterways was made up of materials conducive to the survival of native brook trout. (Finding of Fact Nos. 57, 58) Both Dr. Kodrich and Mr. Lee testified that Irish Run is typical of wild trout streams in that area of Pennsylvania. (Finding of Fact Nos. 61,62)

Third, not one witness testified that any of the brook trout which were observed during the various stream surveys were hatchery bred trout. All of the fisheries experts described the trout that were captured at various times as small, healthy, brightly colored brook trout. None of the witnesses observed signs of fin abrasion common in hatchery bred trout.[7] Dr. Stauffer testified that the brook

[7] Fin abrasion occurs where a fish would be rubbing its fins on a rough surface such as a hatchery system with concrete runways. Silt and sand common in stream beds do not cause such

trout that he captured during his survey in December looked like wild brook trout. He could not conclude that they were hatchery bred trout. (Finding of Fact No. 88, 89)

In addition to the physical appearance of the brook trout, there was also no evidence that would imply that any of the brook trout captured in the various surveys were not native brook trout. The unrebutted testimony of witnesses of the Commission was that none of the waterways in the area were stocked with brook trout except for Wolf Run. (Finding of Fact No. 53) These stocked fish were a "catchable size", at least seven inches (175 mm), but averaging ten inches long (250 mm). (Finding of Fact No. 51, 52) The vast majority of the brook trout observed during stream survey were much smaller. The largest brook trout captured by Dr. Stauffer in December in Irish Run was only half the size of brook trout stocked in Wolf Run. (Finding of Fact No.87) It simply defies logic that the brook trout observed by the various fisheries scientists during the surveys of these waterways could have been stocked brook trout that migrated from Wolf Run. None of the evidence offered supports that theory.

Finally, in addition to the presence of acceptable habitat for brook trout and the presence of native brook trout, there is evidence that there have historically been brook trout at least in Irish Run for many years. Several local fishermen testified that they had caught or observed small, brightly colored brook trout in Irish Run from their childhoods to the present. (Finding of Fact No.92, 93) Dr. Kodrich testified that he captured many brook trout during a survey he performed of Irish Run in 1981. (Finding of Fact No. 64) The observations made by Dr. Kodrich during the 1981 survey were similar to the observations made by the Commission during its September survey in that the

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abrasion. (Lee, N.T. 1095)

appearance of the trout was similar, and the range of sizes of trout present were similar. (E.g.; Finding of Fact Nos. 64, 74)

We are mindful that the evidence concerning the presence of native brook trout currently and historically is not as compelling for UNT01 and UNT02 as it is for Irish Run. We nevertheless find that these qualify as streams which "support" naturally reproducing trout populations which are present in Irish Run. There was significant testimony from Mr. Arway that these small tributaries are important to the life cycle of Irish Run brook trout because they are cooler than Irish Run and thus provide refuge from heat. (Finding of Fact Nos. 106, 133, 134, 136) Further, Mr. Kepler and Dr. Kodrich both testified that brook trout use different parts of a watershed for different purposes. (Finding of Fact No. 150) Dr. Kodrich explained that each waterway is not an isolated habitat for brook trout, but serves as a "continuum" of habitat. That is, they are interrelated. Even Mr. Spotts, who testified that he did not believe that UNT02 was a wild trout stream, nevertheless felt that it was very important to brook trout populations in Irish Run. (Finding of Fact No. 139) In sum, even though UNT01 and UNT02 may not have their own distinct populations of naturally reproducing brook trout, we believe that they support these populations within the meaning of Section 105.1 of the regulations and thus qualify for definition of "wild trout stream."

Eagle argues that we must reject the Commission's classification of the waterways as wild trout streams because the wild trout stream criterion is a scientifically unsound standard because strict application of this standard is both overly inclusive and overly exclusive. That is, streams that

do not support wild trout could nevertheless be included on the list. Conversely, streams that should be considered wild trout streams could be excluded from the list.[8]

We would agree if it was not abundantly clear from the evidence that the Commission considered much more than this single criterion in their classification of the wild trout streams. (*See* Finding of Fact No. 44) Both Mr. Spotts and Mr. Lee testified extensively that they made observations and formed conclusions based on their professional judgment and experience in working with wild trout streams in this area of Pennsylvania. They credibly testified that they would not have included brook trout in their biomass calculation if they were hatchery bred brook trout. (Finding of Fact No.81) It is also clear that they took into account the condition of the habitat of the waterways and conducted their surveys in accordance with Commission procedure. The fact that these procedures may not be in the form of written protocols does not persuade us that methods used by the Commission to survey streams were invalid or inappropriately utilized.

Eagle also contends that the streams were improperly classified as wild trout streams because there is no direct evidence of trout reproduction. That is, there were no redds observed in the July, September and December surveys and no evidence of milt[9] or eggs observed in any of the brook trout that were captured.

The lack of direct evidence of reproduction is not determinative of whether or not a stream supports natural trout populations. First, Mr. Snyder of the Commission testified that it was not necessary to observe direct evidence of reproduction to conclude that reproduction was occurring

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[8] A stream is a wild trout stream if it contains trout measuring less than 150 mm (6 inches) in length that constitute 0.1 kilogram of biomass per hectare or greater. (Finding of Fact No. 43).

[9] "Milt" is sperm produced by sexually mature male trout. (Kodrich, N.T. 573)

in the streams. (Finding of Fact No.152) For example, Mr. Lee noted that the presence of young of the year or wild adult brook trout evidence reproduction. (Finding of Fact No. 152(a)) Second, even Dr. Stauffer admitted that while reproduction is an important piece of evidence, direct evidence of reproduction alone is not determinative of whether a stream supports naturally reproducing populations of trout. Moreover, he noted that there are streams he would consider as "wild trout streams" where little if any spawning occurs. (N.T. 2645-46) Third, even if there was no actual reproduction in Irish Run there was testimony that brook trout do not reproduce in every portion of a stream; thus, they obviously could have been reproducing in reaches of streams that were not surveyed. (Finding of Fact No.151)

Dr. Stauffer, whose expert testimony Eagle relied upon, did not conclude that Irish Run and its tributaries were *not* wild trout streams[10] but that there was insufficient evidence for him to conclude that the waterways were wild trout streams.[11] His opinion largely rested upon his conclusion that there was only one age class of brook trout captured in the stream surveys. That is, only one generation was present, and those trout were "young of the year." [12] This opinion was formed based on his belief that a scale from one brook trout he captured in December indicated that it was less than one year old and a graph he constructed using data collected in the various stream surveys demonstrated his position.

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[10] With the exception of UNT02. (N.T. 2783-84)

[11] He listed a series of data which he would examine before concluding that a waterway was a wild trout stream. (Finding of Fact No. 94)

[12] Trout hatched between February and April are considered young of the year until their first birthday, which is by convention January 1. After January 1 they are known as one-year old trout. (Stauffer, N.T. 2541-42)

First, we do not find the scale reading of one brook trout to be sufficient to rebut other evidence adduced in support of the Commission's classification. Second, we do not find the graph of Dr. Stauffer persuasive. Dr. Stauffer grouped the trout captured in the Irish Run stream surveys in 10 mm groups which he plotted on a graph where the horizontal axis was the length of the trout and the vertical axis was the number of trout in each 10 mm group. The result was a smooth bell-shaped curve. He explained that if there had been more than one age class of brook trout present there would have been more than one "hump" in the graph. However, the Commission in rebuttal presented the same data in different graphs where different length groups (for example by grouping the trout in 5 mm groups) produced different results, that is more "humps" suggesting more than one age class. This exercise illustrated the obvious principle that data can be illustrated in a variety of ways and the same information can be used to support opposite conclusions. We find both demonstrations unpersuasive.

What *is* persuasive on this point is the testimony of Mr. Lee who has considerable experience with brook trout in this area of Pennsylvania. (Finding of Fact No. 71) Based on his years of experience and familiarity with streams in the area, he was confident that the waterways qualified as streams which support naturally reproducing population of brook trout. He testified that Irish Run and the tributaries were typical of many of the streams that he is responsible for. (Finding of Fact No. 62) He stated that the presence of either adult wild brook trout or young of the year were evidence of natural reproduction. (Finding of Fact No. 152) The diversity of lengths of brook trout that he observed in the September surveys indicated to him that they were wild brook trout. (Finding of Fact No. 82) Based upon their coloring he believed that some of the trout that he observed were

sexually mature.[13] (Finding of Fact No. 85) It is not unusual to not find young of the year and adult brook trout in the same reach of stream because brook trout use different parts of a watershed for different purposes.[14] Thus, an area that is useful to juvenile brook trout may not be equally useful for mature brook trout.

Unlike Mr. Lee, Dr. Stauffer does not specialize in the study of trout. Most of his work is devoted to non-game species of fish. (N.T. 2711). The work that Dr. Stauffer has done with brook trout has mostly been with populations in West Virginia and Maryland. (N.T. 2688) He has not personally done any studies with brook trout in Pennsylvania. Finally, his opinion concerning the importance of finding multiple age classes was based at least in part upon studies which noted that young of the year brook trout and adult brook trout occupy the same habitat. (N.T. 2628, 2696) The other fish experts who have personal experience with brook trout in Pennsylvania streams like Irish Run all opined that this phenomenon does not always occur; the fact that all life stages of the brook trout are not present in a particular location does not mean that a particular stream does not support naturally reproducing trout populations. Furthermore, in reviewing the data collected during the Commission's September 3 and 4 surveys, he could not testify with a reasonable degree of scientific certainty that the smallest brook trout and the largest brook trout belonged to the same age class. (N.T. 3002)

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[13] Dr. Stauffer also noted that some male brook trout can be sexually mature at the end of their first year. (N.T. 2800) Mr. Spotts noted that brook trout can be sexually mature when they are four or five inches (100-125 mm) long.

[14] Mr. Lee testified that based on the lengths of the brook trout that were captured he suspected that none of those fish were young of the year. Many of the trout streams that he surveyed in 1996, many of which were similar to Irish Run, had poor survival of young of the year because of the harsh January weather that year. (N.T. 1131-32)

In sum, while Dr. Stauffer is surely a preeminent scientist in the study of many species of fish, we believe that the Commission personnel also have considerable experience and knowledge of brook trout. Their intimate and personal knowledge of the trout streams in the area of the proposed landfill convinces us that their conclusions concerning the status of the waterways as trout streams was correct and reasonable.

The Department next argues that because at least Irish Run qualifies as a wild trout stream, the Department properly concluded that Wetland Nos. 9 and 4 were exceptional value wetlands.[15] We agree.

Section 105.17 of the regulations defines exceptional value wetlands as, among other things, wetlands "that are located in or along the floodplain of the reach of a wild trout stream . . . and the floodplain of streams tributary thereto . . . .: 25 Pa. Code § 105.17(1)(iii). Further, since wetlands are such an important natural resource, this regulation is to be construed broadly. 25 Pa. Code § 105.17. Thus, under this definition even if UNT02 did not support naturally reproducing populations of wild trout, it is tributary to Irish Run and any wetlands within its floodplain would fall into the definition of exceptional value wetlands.

Eagle argues that the definition of exceptional value wetland is irrational and unreasonable. Specifically, Eagle contends that a better approach to wetland protection is a case-by-case analysis of the functional value of a particular area of wetland because some wetlands can actually degrade water quality and perhaps harm wildlife.

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[15] The Department determined that Wetland Nos. 1, 2, 4 and 9 were exceptional value wetlands. (Brumagin, N.T. 89) However, the Encroachment Permit only authorized fill of Wetland Nos. 4, 9 and 10. (N.T. 89) Therefore we do not reach the issue of Wetland Nos. 1 and 2.

The burden of proving that a regulation is invalid is a heavy one. *Department of Environmental Resources v. Locust Point Quarries, Inc.*, 396 A.2d 1205 (Pa. 1979); *Allegheny County Institution District v. Department of Public Welfare*, 668 A.2d 252 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied*, 692 A.2d 567 (Pa. 1997). The Board will not invalidate a regulation of the Department simply because it appears to be burdensome or inferior to another means of addressing the subject. *Municipal Authority v. Department of Environmental Resources*, 555 A.2d 878 (Pa. 1989). A regulation is presumed to be valid unless it amounts to a clear abuse of discretion:

> Error or unwisdom is not equivalent to abuse. What has been ordered must appear to be so entirely at odds with fundamental principles . . . as to be the expression of a whim rather than an exercise of judgment.

Municipal Authority, 555 A.2d at 881 (*quoting Pennsylvania Human Relations Commission v. Uniontown Area School District*, 313 A.2d 156 (Pa. 1973)).

We find that Eagle has not persuaded us that Section 105.17(1)(iii) of the regulations amounts to an expression of whim. It is true, as Eagle contends, that it is possible at times for the classification of wetlands as exceptional because of their proximity to a wild trout stream to result in overinclusiveness in that the wetland is not providing benefit to the habitat of the trout. However, the fact that a regulatory standard may be overinclusive, alone, is not sufficient to invalidate it. The Commonwealth Court's decision in *Department of Environmental Resources v. Metzger*, 347 A.2d 743 (Pa. Cmwlth. 1975), is instructive on this point. In that case the appellant had been denied a permit to install a sewage system because he failed to demonstrate the maximum elevation of groundwater and the location of rock formations at a certain depth. He argued that his system would not cause pollution and, therefore, any regulation which would prohibit it was unreasonable and

constituted an unlawful exercise of police power. The court held that "*the mere possibility* that [pollution] could result from the installation of the proposed system would be enough to justify the regulations." *Id.* at 746 (*emphasis added*). Similarly, in *Mountain Rest Nursing Home, Inc. v. Department of Public Welfare*, 457 A.2d 600 (Pa. Cmwlth. 1983), the appellant argued that a formula used by the Department of Public Welfare to calculate a reimbursement for depreciation was invalid because in some cases it would result in the failure to allow complete depreciation of a facility's original cost basis and thereby violate the intent of the regulation. The court held that the fact that in some cases the regulation would not allow total depreciation, while burdensome to those in that situation, was not sufficient to warrant an invalidation of the regulation by the court.

In this case it is enough that it is possible for wetlands to contribute to the quality of water in which wild trout will thrive and thus merit special protection. The Environmental Quality Board in promulgating the current wetland regulations specifically found that "[w]etlands provide valuable fish, waterfowl and wildlife habitat, harbor many of our endangered plant species and are essential for the maintenance of surface water quality and quantity." 21 Pa. Bull. 4911 (1991). There was testimony at the hearing that trout are an indicator of good water quality (Finding of Fact No. 164), and that trout require good water quality to thrive. (Finding of Fact No. 165) There are certainly instances where wetlands can degrade water quality[16] and that it is burdensome to landowners to avoid encroachment on wetlands that do not serve a positive function in human terms. However, we cannot say as a matter of law that 25 Pa. Code § 105.17(1)(iii), is so patently unreasonable or arbitrary that it must be invalidated.

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[16] See generally testimony of Dr. William Mitsch.

We find that the Department correctly applied 25 Pa. Code § 105.17(1)(iii). The Department's evidence in support of its determination that Wetland No. 9, a wetland area within the disposal area of the proposed landfill, was an exceptional value wetland is unrebutted. Mr. Brumagin, the Department's water pollution biologist, testified that he walked upstream on UNT02 from Irish Run into Wetland No. 9. The watercourse went into Wetland No. 9 and the wetland was therefore in or along the floodplain of UNT02. (Finding of Fact No. 20) Since UNT02 is at least a tributary of a wild trout stream, Wetland No. 9 was properly classified as an exceptional value wetland.

Similarly, Wetland No. 4 is in or along the floodplain of the waterway referred to as northwest/southeast tributary. (Finding of Fact No. 21) Because it is a tributary to Irish Run, which is a wild trout stream, wetlands within or along its floodplain qualify as exceptional value wetlands pursuant to 25 Pa. Code § 105.17(1)(iii).

Eagle takes the position that Wetland No. 9 can not be an exceptional value wetland because UNT02 enters Irish Run downstream from where brook trout were found during the various surveys. We are not persuaded by this argument. There is no reason to believe that the portion of Irish Run downstream from the survey locations is not part of the wild brook trout habitat in the watershed. Several witnesses testified that these small streams in the watershed formed a singled habitat for brook trout. Further, witnesses of the Commission classified Irish Run as a wild trout stream all the way to its confluence with Wolf Run. (Ex. C-6) Therefore, the fact that UNT02 meets Irish Run downstream from the survey locations is not relevant.

The Department next argues that because Wetland Nos. 9 and 4 were exceptional value wetlands, it was precluded from authorizing encroachment by 25 Pa. Code § 105.18a, which

provides that the Department will not grant an encroachment permit for exceptional value wetlands unless the project is water dependent, will not have an adverse impact on the wetland, and there is no practicable alternative that would have less effect on the wetland. A water dependent project is one which "requires access or proximity to or siting within the wetland to fulfill the basic purposes of the project." 25 Pa. Code 105.18a(a)(2). It is beyond peradventure that the proposed landfill is not a water dependent project. It is also clear that the wetland does not involve the entire disposal area of the landfill, but only a small portion of it. There was no evidence that the landfill design could not be modified to avoid encroachment upon the wetland. Because the Department properly determined that it could not authorize encroachment upon Wetland Nos. 9 and 4, it properly revoked the permit.[17]

We also find that the Department appropriately suspended the other permits that were issued for the construction of the proposed landfill. Mr. Beckman very credibly testified that he had a rational reason for suspending the solid waste, water quality, and air plan approvals for the landfill. He suspended the solid waste permit because by revoking the authorization to fill the wetlands the design in the permit was no longer possible. (Finding of Fact No. 35) Since the air quality permit and the NPDES permits were issued as part of the Department's coordinated permit program, these permits were also suspended. Mr. Beckman felt that the overall design scheme of the landfill was significant and wanted an opportunity to review all of the permits based on the necessary design

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[17] Eagle argues that the Department inappropriately suspended the solid waste permit by incorrectly applying the setback requirement of 25 Pa. Code § 273.202(a)(2) (prohibiting landfills within 300 feet of an exceptional value wetland). Although this provision was mentioned in the Department's suspension order it is clear that the prohibition against filling wetlands formed the basis for the Department's order. Therefore, the application of 25 Pa. Code § 273.202(a)(2) is not relevant to the propriety of the Department's suspension order.

modification. Mr. Beckman rejected the idea of revoking these permits which would have resulted in Eagle having to start the entire permitting process from the beginning. Suspension allowed Eagle to seek to modify its design to avoid impacting the exceptional value wetlands and allowed for a reevaluation of the wetlands issues generally. (Finding of Fact No. 36)

This rationale also supports the Department's decision to revoke the authorization to encroach upon Wetland No. 10. Even though the Department did not determine that it was an exceptional value wetland, the design of the whole project must be revisited and in view of the circumstances it is not unreasonable for the Department to revisit proposed encroachments on Wetland No. 10.

In sum, Mr. Beckman's desire to review the proposed landfill as a whole is a reasonable explanation for the Department's action and clearly not an abuse of its discretion.[18] The Department has a duty to approve permits which are based upon a final, approvable design. *New Hanover Township v. DEP,* 1996 EHB 668, *aff'd.* 2081 C.D. 1996 (Pa. Cmwlth. filed August 19, 1997). Since the proposed landfill had to be redesigned, and the air quality and NPDES permits were issued based upon the design of the landfill, it was not erroneous to suspend them pending review of the modified design.

Eagle argues that the Department erred in suspending all of the permits because it could

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[18] In *Sussex, Inc. v. DER,* 1984 EHB 355, 366, we stated that:

> [M]ere difference of opinion, or even a demonstrable error in judgment, is insufficient under Pennsylvania decisional law to constitute an abuse of discretion; such abuse comes about only where manifestly unreasonable judgment, partiality, prejudice, bias, ill-will, misapplication or overriding of the law, or similarly egregious transgressions on the part of DER . . . can be shown to have occurred.

begin construction and operation of the landfill without encroaching upon the wetland area. While this is true, we believe that Mr. Beckman's desire to review the project as a whole with a new landfill design which avoids encroachment upon exceptional value wetlands is completely within the Department's discretion. Since the exercise of the Department's discretion was reasonable we will not disturb its decision.

Finally, Eagle has filed a motion to strike Exhibit I-3, the fisheries biology stream survey completed by Dr. Kodrich after his October, 1991 stream survey. Eagle also requests the Board to strike Dr. Kodrich's testimony which pertained to Exhibit I-3. For the reasons that follow we deny Eagle's motion.[19]

On October 23, 1997, the Board admitted into evidence Exhibit I-3 and testimony concerning Exhibit I-3 over the objection of Eagle. (N.T. 644-45) Dr. Kodrich identified Exhibit I-3 as a report of a stream survey he conducted in 1981 on Irish Run. Dr. Kodrich did not have present recollection of the specifics of the survey, but was able to describe his normal method of conducting stream surveys as a professor teaching a class. He used Exhibit I-3 to refresh his recollection concerning the specific fish that were observed in the 1981 survey. Eagle argues that the exhibit and the testimony should be stricken because (1) Dr. Kodrich did not produce the original computer disk upon which the survey report was stored; (2) the scientific name of one of the fish species had been changed at some point by an unknown person; and (3) because Dr. Kodrich surveyed Harveys Run, not Irish Run.

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[19] Eagle also sought for certain testimony of Russell Greene pertaining to Exhibit I-3, Exhibit F-65, and certain testimony of Dennis Elnitsky to be stricken. Because we have not relied on any of the contested testimony or Exhibit F-65 we do not reach this portion of Eagle's motions.

Eagle takes the position that the "best evidence rule" dictates that the original computer disk upon which Dr. Kodrich entered the information be produced. We do not believe that it is necessary for the original computer disk to be produced to satisfy the best evidence rule. None of the parties cited any Pennsylvania case law where this issue has been addressed, nor did our research find any. However, commentators have noted that

> An even more recent challenge to the flexibility of the rule requiring documentary originals has appeared in the form of machine readable records stored on punch cards or magnetic tape. Obviously, where records are originally deposited in such media nothing akin to a conventional documentary original will be created. To the credit of the courts, records there stored have generally fared well in the face of objection predicated on the original document rule, and machine printouts of such records have been admitted.

John W. Strong et al., *McCormick on Evidence* § 236, at 75 (4th ed. 1992). Further, although not in effect at the time of the hearing, the new Pennsylvania Rules of Evidence in defining an "original" explicitly state "[i]f data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an 'original.'" Pa. R.E. 1001(3). Accordingly, the best evidence rule is not offended by the failure to produce the original computer diskette which contained the report of the stream survey.[20]

However, Dr. Kodrich did testify that Exhibit I-3 was not the original report printed out from the diskette. He stated that Exhibit I-3 was retyped by his daughter because the original printout was done by a dot-matrix printer and did not photocopy well. (N.T. 492) He testified that he had compared the original dot-matrix version with the current version and except for one typographical error Exhibit I-3 was an accurate reflection of the original document. (N.T. 554-55) The original

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[20] We also note that Eagle's counsel did not request the production of the original diskette at hearing.

was provided for Eagle's examination at hearing. (N.T. 556)[21] Therefore, we conclude that an original document was provided at the hearing and that Exhibit I-3 was a reliable duplicate of that original.

Eagle argues that Exhibit I-3 is inherently unreliable because at some point while the report was maintained in the files of Dr. Kodrich the scientific name of a fish called a common shiner was updated by someone.[22] Dr. Kodrich could not remember by whom or when exactly this was done. (N.T. 637) Eagle contends that the necessary implication is that Exhibit I-3 could not have been contemporaneously prepared from the October 1981 stream survey. We do not believe there is support for this contention.

Dr. Kodrich testified that he typed the stream survey report from field notes within a week of the stream survey because it was to be used for the next class meeting. (N.T. 498-99) The scientific names were added later, probably by one of his students. (N.T. 636) He also admitted that it could have been updated at some point when he shared the data with other investigators or graduate students. (N.T. 638) Although it is unclear when the scientific names were added to the report, Dr. Kodrich never testified that the types of fish or the number of fish which were observed during the October, 1981 survey was ever altered in any way during the time he has maintained the information in his files. We find his testimony that he prepared the report within a week of the survey credible and the updated scientific naming of the common shiner irrelevant.

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[21] Evidently this original version had also been faxed to Eagle's counsel during discovery in this matter. (N.T. 556)

[22] The scientific name of the common shiner was updated in the listing maintained by the American Fisheries Society from *Luxilus notropis* to *Luxilus cornutus* in 1989. Exhibit I-3 reflected to latter denomination.

Eagle also argues that Exhibit I-3 should be stricken because Dr. Kodrich's survey took place on Harvey's Run, not Irish Run. First, we find Dr. Kodrich's testimony that the survey took place on Irish Run credible. Second, we do not believe that a motion to strike is the proper medium in which to make this argument. Rather, it is a question of evidence which should be argued in the post-hearing briefs. Eagle has failed to provide evidence which was adduced at the hearing to support its contention that Dr. Kodrich's survey was conducted at Harvey's Run.

Accordingly, we deny Eagle's motion to strike Exhibit I-3 and the testimony related to it.

CONCLUSIONS OF LAW

1. The Department bears the burden of proof where it suspends or revokes a permit. 25 Pa. Code § 1021.101(b).

2. The Department committed an error of law by interpreting 25 Pa. Code § 105.1 to mean that it had no discretion to reject the Pennsylvania Fish and Boat Commission's determination that Irish Run, UNT01 and UNT02 are wild trout streams where those streams had not been previously included on the wild trout list.

3. Only the Department has the authority to revoke the previously issued permits, and the practical effect of the Department's interpretation of this regulation would be to delegate that authority to the Commission without any statutory authority to do so.

4. Under these circumstances it was the Department's duty to determine whether or not the Commission's determination was proper before exercising its discretion to revoke the permits and its failure to do so was an abuse of discretion.

5. The Board, substituting its discretion for that of the Department, concludes that Irish Run, UNT01 and UNT02 are wild trout streams as defined by 25 Pa. Code § 105.1. *Pequea*

Township v. Herr, __ A.2d ___ (1912 C.D. 1997, Pa. Cmwlth. filed July 10, 1998); *Warren Sand & Gravel Co., Inc. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975).

6. Wetland No. 9 is an exceptional value wetland because it is along the floodplain of UNT02, a tributary to Irish Run. 25 Pa. Code § 105.17(1)(iii).

7. Wetlands along the floodplains of a tributary to a wild trout stream are exceptional value wetlands. 25 Pa. Code § 105.17(1)(iii).

8. Wetland No. 4 is an exceptional value wetland because it is along the floodplain of the northeast/southwest tributary to Irish Run. 25 Pa. Code § 105.17(i)(iii).

9. It is unlawful to fill Wetland Nos. 4 and 9 because they are exceptional value wetlands. 25 Pa. Code § 105.18a.

10. The regulations in Chapter 105 of 25 Pa. Code relating to exceptional value wetlands upon which the Department's suspension order was premised are reasonable and valid regulations.

11. Because the proposed landfill must be redesigned to avoid encroachment upon exceptional value wetlands, it was appropriate to suspend other permits necessary for the operation of the landfill pending review of a new design.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EAGLE ENVIRONMENTAL, L.P.	:	
	:	
v.	:	**EHB Docket No. 96-215-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, PENNSYLVANIA FISH AND BOAT COMMISSION, JEFFERSON COUNTY COMMISSIONERS, JEFFERSON COUNTY SOLID WASTE AUTHORITY and CLEARFIELD-JEFFERSON COUNTIES REGIONAL AIRPORT AUTHORITY, Intervenors	:	

ORDER

AND NOW, this 3rd day of September, 1998, the appeal of Eagle Environmental, L.P., in the above-captioned matter is hereby **DISMISSED**.

The motion to strike Exhibit I-3 and testimony related thereto by Eagle Environmental, L.P. is hereby **DENIED**.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: September 3, 1998

See following page for service list.

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