COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

ADJUDICATIONS

1983

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

DURING THE PERIOD OF THE
ADJUDICATIONS

1983

Chairman.....DENNIS J. HARNISH

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

Member .....EDWARD GERJUOY

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 1983 EHB 1

FORWARD

In this volume are contained all of the final adjudications of the Environmental Hearing Board issued during the calendar year 1983.

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

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

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

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

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

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

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

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

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

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

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

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

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

1983

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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

AMERICAN INSURANCE COMPANY AND
FIREMAN'S FUND INSURANCE COMPANY

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 81-040-H
81-041-H
81-042-H
81-043-H

Surface Mining
Bond Forfeiture

ADJUDICATION

By: Dennis J. Harnish, Chairman, January 12, 1983

The matter arises from DER's forfeiture of bonds issued under the Open Pit Mining Act.

FINDINGS OF FACT

1. Appellant in 81-040-H and 81-041-H is American Insurance Company with an office at 411 Seventh Avenue, Pittsburgh, PA 15219, (American).

2. Appellant in 81-042-H and 81-043-H is Fireman's Fund Insurance Company (Fireman's Fund), with an office at 411 Seventh Avenue, Pittsburgh, PA 15219.

3. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, DER which has the duty and responsibility of administering, *inter alia*, Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 *et seq.* (SMCRA) and the regulations duly promulgated thereunder by the

Environmental Quality Board.

4. Morrone Coal Company (Morrone) is an inactive company which has used an address of R. D. 4, Indiana, PA and was engaged as a surface mining operation in Indiana County, Pennsylvania.

5. Morrone was owned by Mrs. Sara Morrone, an individual with a former address of R. D. 4, Indiana, PA.

6. Mrs. Morrone currently lives at 319 Ninth Street, Ford City, PA.

7. On January 31, 1969, Morrone and Fireman's Fund executed and submitted to the Commonwealth, surety bond no. 234394 in the amount of $5,000.00 in order to obtain a permit to perform surface mining of coal on the property of Fred Rapach in Cherryhill Township, Indiana County, PA. Said bond was conditioned upon full compliance with all the requirements of the Act of May 31, 1945, known as the "Bituminous Coal Open Pit Mining Conservation Act", (Open Pit Mining Act).

8. On April 10, 1969, the Commonwealth of Pennsylvania, Department of Mines and Mineral Industries issued mining permit no. 27-5 to Morrone to perform mining of coal in Cherryhill Township, Indiana County, PA.

9. On February 5, 1970, Morrone and Fireman's Fund executed and submitted to the Commonwealth, surety bond no. 2356161 in the amount of $5,000.00 in order to obtain a permit to perform surface mining of coal on the property of Fred Rapach of Cherryhill Township, Indiana County, PA. Said bond was conditioned upon full compliance with all requirements of the Open Pit Mining Act.

10. On June 24, 1970, the Commonwealth of Pennsylvania, Department of Mines and Mineral Industries issued mining permit no. 27-5(A) to Morrone to perform surface mining of coal in Cherryhill Township, Indiana County, PA.

11. On September 2, 1972, Morrone and American executed and submitted surety bond no. 2391363 in the amount of $5,000.00 in order to obtain a permit to perform surface mining of coal on the property of Arlene and Merle Strong and Viola Bland of Cherryhill Township, Indiana County, PA. Said bond was conditioned upon full compliance with all requirements of the Open Pit Mining Act.

12. On October 6, 1981, DER issued mining permit no. 27-6 to Morrone to perform mining in Cherryhill Township, Indiana County, PA.

13. On January 12, 1971, Morrone and American executed and submitted to the Commonwealth, surety bond no. 2376219 in the amount of $5,000.00 in order to obtain a permit to perform surface mining of coal on the property of Fred Rapach of Cherryhill Township, Indiana County, PA. Said bond was conditioned upon full compliance with all requirements of the Open Pit Mining Act.

14. On February 11, 1971, DER issued mining permit no. 27-5(A2) to Morrone to perform surface mining of coal in Cherryhill Township, Indiana County, PA.

15. Mining permits nos. 27-5, 27-5(A), 27-5(A2) and bonds executed pursuant thereto apply to an area owned by Fred Rapach.

16. Mr. Rapach has lived on his property in Cherryhill Township, Indiana County, since at least 1945.

17. The Morrone mining operation on the Rapach property was on property that was used as a farm prior to mining.

18. Mining permit no. 27-6 and the bond executed pursuant thereto apply to an area owned by Arlene and Merle Strong and Viola Bland in Cherryhill Township, Indiana County.

19. DER Mining Inspector John Serian (Serian) inspected the Morrone operation on the Rapach property on at least twenty-three (23) occasions from June 2, 1969 until February 28, 1972.

20. The last inspection report of the Rapach site made by Serian was on February 28, 1972, wherein Serian indicated that the Rapach site had been backfilled with the exception of an area which had been left open for the Copper Valley Deep Mine.

21. Although Morrone affected 17.3 acres on the Rapach property, Morrone restored 12.8 acres and 4.5 acres were left open for Copper Valley Mining Company.

22. Serian inspected mining permit no. 27-6, generally referred to as the Strong property, at least on eight (8) occasions from January 31, 1972 through November 15, 1972.

23. On November 15, 1972, Serian made an inspection which indicated that approximately one week's work remained to complete backfilling.

24. On November 2, 1972, Morrone went out of the mining business.

25. Morrone left the Strong property on November 2, 1972, because the coal was "not good anymore".

26. Mr. Marsh told Mrs. Morrone to take the mining equipment off the Strong property before November 2, 1972, because Mr. Marsh thought it was just best to go out of business.

27. On January 4, 1973, Mrs. Morrone wrote to W. E. Guckert of the Bureau of Surface Mine Reclamation and informed him that Morrone was not applying for a license, because Morrone was "no longer in the business".

28. On January 31, 1973, Mr. Guckert replied to Mrs. Morrone's letter of January 4, 1973, asking Morrone to file a completion report for the Strong property, but indicated that there would be further correspondence concerning the Rapach property.

29. On January 19, 1973, Mrs. Morrone submitted a completion report, no. 3419, to DER for the Strong property. Said report indicated that 6.3

acres of the Strong property had been affected and 6.3 acres restored. Said report also indicated that no planting of the affected area had been completed.

30. Mr. Serian inspected the Strong property in 1975 but as of 1975, backfilling had not been completed on the Strong property.

31. When Serian left DER in 1975 - backfilling was still in progress on the Strong property.

32. When Serian left DER in 1975 - neither the Strong property nor the Rapach property had been planted or seeded.

33. Before leaving DER, Serian, on several occasions, had communicated his displeasure with the backfilling job done by Morrone and came close to forfeiting the bonds but did not because he was told that a Mr. Bob Helm, a former employee of Mrs. Morrone, would finish the job.

34. On September 18, 1975, DER Inspector James Straw made an inspection of the Strong property in response to Morrone's completion report and determined that "approximately 4 acres of this area remained to be graded with removal of large rocks that are scattered about and more slope is also required on the outside perimeter of the spoil pile."

35. The inspection completion report filed by Inspector Straw on September 18, 1975, recommended that bonds not be released on the Strong property because the operation had not been completed.

36. Mr. Rapach has allowed a gas drilling operation to affect approximately 1/4 acre of the Morrone operation after Morrone left the site.

37. Mr. Rapach installed a diversion ditch on the Copper Valley section of the Morrone operation sometime after 1977 for purposes of attempting to prevent water from accumulating in the low spots.

38. Mr. Rapach planted 180 fruit trees on the Morrone operation on the border of the permit area which affected no more than one acre of the Morrone area of responsibility.

39. Conditions on the Rapach property within the Morrone responsibility are currently the same as those conditions found when Morrone left the property except for the 1/4 acre affected by the gas well, the area of the fruit trees, areas where natural vegetation has grown, and areas where erosion gullies have been created.

40. During 1977, a storm caused a large erosion ditch on the Rapach property within the Morrone area of responsibility. This erosion ditch is approximately 12 feet wide and 3 to 4 feet deep.

41. Although Mr. Marsh and Mr. Rapach, at one time, discussed Mr. Rapach doing the planting and seeding on the Rapach property, Mr. Rapach never did the planting.

42. DER Mining Inspector, Donald Wissinger (Wissinger) inspected the Rapach site on November 12, 1980, December 11, 1980 and April 19, 1982.

43. During these inspections, Mr. Wissinger found that only volunteer growth had established itself on the Rapach property, that the slopes had little to no growth on them, that severe erosion had occurred in some areas, especially on the slopes facing east and NNE, and that there were depressions collecting water.

44. Mr. Wissinger inspected the Strong property on November 12, 1980, December 11, 1980 and April 19, 1982.

45. Mr. Wissinger found during these inspections on the Strong property, that the only growth was volunteer, that this area had never been planted, that the Strong property was very rough and rocky, that the volunteer vegetation on the Strong property was very sparse.

46. On November 14, 1980, Mr. Wissinger attempted to contact Morrone Coal Company concerning violations he had noted in his inspection reports but his letter was returned to him by the post office.

47. Later Mr. Morrone attempted to contact Morrone Coal Company through Mr. Serian but was unsuccessful.

48. On March 12, 1981, J. Anthony Ercole, Director of the Bureau of Mining and Reclamation, notified Morrone, American and Fireman's Fund that it was forfeiting the surety bonds of American and Fireman's Fund on the Strong and Rapach property for failure to meet the minimum restoration requirements of the Open Pit Mining Act.

49. No one from DER inspected the Rapach site within five years after it filed a backfilling completion report with DER.

DISCUSSION

At issue in this appeal is DER's March 12, 1981 forfeiture of four surety bonds. Three of the bonds, each bearing a face amount of $5,000.00, each supported a separate mining permit. Bonds 234394, 2356161 and 2376219 supported, respectively, mining permits 27-5, 27-5(A) and 27-5(A-2) all of which were issued under mine drainage permit 2966BSM88. These mining permits and said mine drainage permit were issued to Morrone Coal Company. The said mining permits encompassed three contiguous plots all located on the farm of Fred Rapach in Cherryhill Township, Indiana County, Pennsylvania. Each of the said mining permits was issued for 10 acres but from the completion report of Morrone Coal Company filed with DER it appears that Morrone affected 17.3 acres out of the possible 30 acres covered by all three permits.

Complicating this matter is the fact that after Morrone mined and backfilled the Rapach site, deep mining operations, conducted by Copper Valley Coal Company, affected 4.5 acres of the Rapach site which had been originally covered by one or more of mining permits 27-5, 5(A) and 5(A-2) and the corresponding bonds. DER agrees that it should not and did not forfeit that proportion of the bond on that portion of the Rapach property for which Copper Valley was responsible but neither DER nor either of the appellants was able to correlate the Copper Valley Operations to any of the said mining permits. A close examination of Commonwealth's Exhibit 6, Morrone's Final Completion Report for the Rapach site, clears up this matter. On this exhibit affected acreage of 17.3 acres exceeds restored acreage of 12.8 acres by the 4.5 acres affected by Copper Valley. The restored acreage of 12.8 acres is broken down by mining permit as follows: 27-5(A) = 6.7 acres; 27-5(A1) = 2.8 acres; 27-5(A2) = 3.3 acres[1]. We shall eliminate Copper Valley from

1. It appears that mining permit 27-5(A) in Commonwealth Exhibit 6 really is 27-5 while 27-5(A1) is 27-5(A).

this controversy by limiting the affected acreage at the Rapach site to the restored acreage claimed in Commonwealth Exhibit 6.

The final bond at issue, no. 2391363, which also bears a face amount of $5,000.00, was related to mining permit 27-6 and mine drainage permit 2967BSM35 (both issued to Morrone) which covered the land of Merle Strong and Viola Bland, a separate parcel of property although also located in Cherryhill Township of Indiana County (Strong site); according to Commonwealth's Exhibit 6A, Morrone affected 6.3 acres on the Strong site. Two of the bonds in question, nos. 234934 and 2356161, were executed, as surety, by the appellant Fireman's Fund Insurance Company while the remaining two, nos. 2391363 and 2376219 were executed, as surety by the appellant American Insurance Company. Morrone, of course, was the principal on all four bonds.

After affecting the amount of acreage set forth above on each of the said mining sites Morrone began, back in 1972, to backfill each site. According to DER's inspection reports and the testimony of John Serian, who was the relevant DER mine inspector at the time, by November 15, 1972 backfilling on the Strong site was nearly complete with approximately one week of work still remaining to be completed. Similarly by February 28, 1972 according to DER inspection reports and Mr. Serian, backfilling was completed on the Rapach farm with the exception of the area left open for Copper Valley.

It is undisputed that Morrone went out of the mining business on November 2, 1972 and the weight of the evidence supports the conclusion that no backfilling was conducted upon either the Strong or the Rapach site thereafter. Nevertheless, appellants argue that DER's forfeiture of the said bonds is improper.

A. DER shouldered its burden of proof

We agree with DER that it has the burden of proving that all reclamation requirements have not been complied with in order to support its forfeiture of the said bonds and that the appellants have the burden of proving any affirmative de-

fenses they have chosen to raise.

1. The Strong site was not completely backfilled

DER has clearly shouldered its burden of demonstrating that, on the Strong site, the reclamation requirements have not been complied with. *Ohio Farmers, infra.* Mr. Serian and Mr. Wissinger respectively, described the Strong site, in 1972 and today, as being only roughly backfilled, being replete with large rocks and uneven ground and slumping off the permitted area. Indeed, Mr. Serian was so disturbed about the condition of the Strong site that he contemplated forfeiting Morrone's bonds back in 1972.[2]

2. Neither the Strong nor the Rapach site was properly revegetated

Revegetation of areas affected by mining is clearly contemplated as a part of the reclamation process by the Open Pit Mining Act, *infra*, and as part of the obligation of said bonds. Thus, DER properly supported its forfeiture on both the Strong and Rapach sites by demonstrating a failure of planting and seeding at each site. In spite of Mr. Marsh's testimony that each site had been planted and seeded, the countervailing testimony of more credible witnesses as described below and the photographic evidence supported DER's burden on this case by showing a failure of planting and seeding at both sites. The view also demonstrated that the grass and other vegetation now growing on the terraced area of the Rapach site and on the Strong site is best characterized as volunteer growth, i.e., it was not planted by Morrone. Further, the sharp slopes on the Rapach site in general contained very little volunteer grass growth and although Mr. Rapach testified to planting some pine and fruit trees on the slope adjacent to his farmhouse, both his testimony, the testimony of Mr. Serian, as well as the view, demonstrated that very little of the slope area had been planted. Areas of the Strong site also evidenced little or no vegetation.

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2. Even the appellants, in their brief at page 11 were "...candid to admit that DER...does at least have something to talk about on Strong."

Finally, in this regard, §12 of the Open Pit Mining Act requires as precondition of the release of the planting portion of each bond that the operator must file a planting report with DER. Not only do DER's files fail to include such a report for either site, the completion reports which Morrone did file with DER indicate that seeding was not complete. Even Mr. Marsh, who certainly demonstrated his loyalty to Morrone Coal Company during his testimony (see discussion below), admitted that he never talked with any governmental officials concerning planting and he gave no indication that a planting plan had ever been prepared, yet alone approved by DER, as required by the Open Pit Mining Law.

In sum, we find that DER has shouldered its burden of proof with regard to each of the said sites, and all of the said bonds, that at least one of the obligations upon which said bonds were issued had not been fulfilled. Unless the appellants have posed an adequate affirmative defense, DER's forfeitures must be upheld. Thus, we shall turn to examination of appellants' defenses.

B. DER did not approve backfilling on either site in a legally binding manner

While not so articulated in their brief, the board understands the appellants' first argument to be that DER, having already approved the backfilling at each site, is estopped now to forfeit bonds on the basis of incomplete reclamation. In this regard, Quay Marsh who was Morrone's superintendant on both sites testified that "someone" from DER told him that both jobs were "o.k." and permitted him to remove Morrone's earthmoving equipment from the sites. Frankly, the board accords very little weight to Mr. Marsh's testimony. Not only did he fail to remember who from DER gave him his or her blessing but also his memory of the supposed seeding of the Rapach farm impeached his memory, in general, of events now a decade removed. For example, Mr. Marsh confidently first testified that the Rapach site had been seeded, then he retreated to testifying that Mr. Rapach had seeded the site and finally Mr. Marsh admitted that he never saw Mr. Rapach seed the Rapach site.

Moreover, Mr. Rapach, who has lived on the farm encompassing the Rapach site since 1945, admitted talking to Mr. Marsh about planting and seeding this site but denied that a contract was entered into for this purpose, or that he had been paid to plant or seed this site, or that he or any other person had planted or seeded this site, except for some fruit and pine trees he planted without compensation, on a portion of the steep slope overlooking his house. Finally, Mr. Serian testified that neither the Rapach nor the Strong site had been planted or seeded by Morrone or anyone else as late as 1975 when he left DER.

The appellants also produced Sarah Morrone who was president and sole-owner of the ill-fated Morrone Coal Company. Mrs. Morrone testified that she remembered receiving approval from DER of backfilling at the Rapach site but that she has purged her files and has no written confirmation of her memory. Although the hearing examiner found Mrs. Morrone to be a credible witness, her testimony, standing alone, would not support a finding that the Rapach site was completely backfilled in 1972 and that DER had approved this backfilling. However, Mrs. Morrone's testimony does not stand alone. Mr. Rapach, DER's witness, also testified, presumably against his own interest, that to the best of his knowledge Morrone had backfilled its portion of his farm in accordance with existing regulations.

Also, Mr. Serian, who, as a former DER mine inspector cannot be presumed, and who definitely wasn't shown to have had a bias against DER, or an interest in the outcome of this matter, testified that Morrone had backfilled the Rapach site in accord with DER regulations. His memory is supported by his 1972 inspection report to this effect which is of record in this matter. Finally, in this regard, we note that DER's brief on page 14 admits that Inspector Serian "initially approved the backfilling on the Rapach site..." Thus, we find that backfilling had been completed by Morrone Coal Company in 1972 on the Rapach site in the manner then prescribed by law.

To ascertain the legal consequences of this fact we must look to the language of the bonds at issue in this matter and the act under which they were issued. *American Casualty v. DER*, EHB Docket No. 78-157-S (Adjudication issued January 16, 1981) (Affirmed by the Commonwealth Court, March 10, 1982); *Rockwood Insurance Company v. DER*, EHB Docket No. 78-168-S (Adjudication issued February 18, 1981); *Ohio Farmers Insurance Company v. DER*, EHB Docket No. 80-041-G (Adjudication issued August 25, 1981)

All four bonds in question contained identical language which is as follows:

> "Liability upon this bond shall accrue in proportion to the area of land affected by open pit mining at the rate of five hundred ($500.00) dollars per acre but in no case shall such liability be for an amount less than five thousand ($5,000.00) dollars, as provided in said Act of Assembly as amended, and shall continue thereon for the duration of open pit mining at the operation registered hereunder for a period of five (5) years thereafter, unless the area of land affected for which liability has been charged against the bond has been backfilled and leveled and reports filed by the inspector certifying that it has been done in the manner prescribed by law. The Secretary of Mines and Minerals Industries shall release the bond at the rate of four hundred and no/one hundred ($400.00) dollars per acre in proportion to the area backfilled and leveled. The remaining one hundred ($100.00) dollars per acre shall remain in full force and effect until such time as the planting is completed and certified by the Director of Bituminous Bureau of Conservation and Reclamation or the Land Reclamation Board as being done in a workmanlike manner, or otherwise in accordance in the manner prescribed by law, at which time the Secretary of Mine and Minerals Industries shall release the bond or declare forfeited the remaining amount of one hundred ($100.00) dollars per acre."

All the bonds in question were issued under and to insure that the operator faithfully performed all the requirements of the Act of Assembly, approved May 31, 1945, P.L., as amended, known as the Bituminous Coal Open Pit Mining Conservation Act (Open Pit Mining Act).

The initial Open Pit Mining Act became law on May 31, 1945. See the Act of May 31, 1945, P.L. 1198, No. 418. The initial law was amended by the Act

of July 16, 1963, P.L. 238, No. 133. The 1963 law was again amended on January 19, 1968 and December 10, 1968. Relevant sections of the Open Pit Mining Act include:

> "Section 4(g). After receiving notification from the Secretary of Mines and Mineral Industries that an application for a permit has been approved, but prior to commencing open pit mining, the operator shall file with the Department of Mines and Mineral Industries a bond for each operation on a form to be prescribed and furnished by the department, payable to the Commonwealth and conditioned that the operator shall faithfully perform all of the requirements of this act. The amount of the bond required for each operation shall be dependent upon the overburden and the contour and shall be determined by the Secretary of Mines and Minerals Industries, but such bond shall not be less than five hundred dollars ($500.00) nor more than one thousand dollars ($1000.00) per acre based upon the number of acres of land in each operation, which will be affected by open pit mining during the following year: Provided, that no bond shall be filed for less than five thousand dollars ($5000.00). Liability under such bond shall be for the duration of open pit mining at each operation, and for a period of five years thereafter, unless released prior thereto as hereinafter provided...
>
> Section 10. Within six months after the operation is completed or abandoned, the operator shall backfill all pits in accordance with the plan previously approved by the secretary or by the Land Reclamation Board. Such backfilling shall be terraced as previously described or shall begin at or beyond the top of the highwall and be sloped to the toe, of the spoil bank at a maximum angle not to exceed the approximate original contour of the land with no depressions to accumulate water...All backfilling shall be completed before necessary backfilling equipment is moved from the operation. Within three months after the backfilling is completed, the operator shall file with the Department of Mines and Mineral Industries a completion report on a form prescribed and furnished by the secretary.
>
> ...When the backfilling and leveling on that portion of the entire area of land affected by the operation for the previous years have been completed and reports filed by the inspector certifying that it has been done in the manner prescribed by law, the secretary shall release the bond which was filed for that portion of such operation in its full amount less one hundred dollars ($100.00) per acre, which shall be retained by

the secretary until such time as the planting is completed and certified by the Land Reclamation Board as being done in a workmanlike manner, at which time the secretary shall release the bond in the remaining amount of one hundred dollars ($100.00) per acre.

Section 11. Within one year after the operation has been backfilled in compliance with the plan earlier submitted, the operator shall plant trees, shrubs or grasses upon the land affected by open pit mining; Provided, however, that the operator shall be relieved from the obligation to plant trees, shrubs or grasses required by this section if the Land Reclamation Board shall find as a fact that such planting is not reasonable, practicable or likely to succeed, or if the Land Reclamation Board, upon application by the land owner, approves the use of the land for a purpose other than the growing of trees, shrubs or grasses, or if the operator, in lieu of planting trees, shrubs or grasses, shall pay to the Secretary of Mines and Mineral Industries one hundred dollars ($100.00) per acre of land affected by open pit mining...The operator shall plant only seeds, plants, or seedlings secured from a source approved by the Land Reclamation Board.

Section 12. When the planting is completed the operator shall file a planting report with the Secretary of Mines and Mineral Industries, on a form to be prescribed and furnished by the secretary, giving the following information: (a) Identification of the operation; (b) The type of planting; (c) The date of planting; (d) The area of land planted; and (e) Such other relevant information as the secretary may require. The Secretary of Mines and Mineral Industries shall submit such report to the Land Reclamation Board which shall inspect the premises, either in person or by its duly authorized representative, within one (1) year after the planting report is filed. If the Land Reclamation Board finds that the planting has been done in a workmanlike manner and that the area reported has been planted in accordance with the prescribed plan or procedure, or if the operator has been relieved from the obligation to plant trees, shrubs or grasses as hereinabove provided, it shall so notify the Secretary of Mines and Mineral Industries who shall release the bond and collateral in proportion to the area planted or relieved from planting. Upon such release, the State Treasurer shall immediately return to the operator the amount of cash or securities specified therein."

Analysis of the above-quoted bond and statutory language persuades this board that with regard to the Rapach site DER is under a mandatory duty

to release four hundred dollars ($400.00) of the $500.00 bond on each acre affected by Morrone Coal Company if but only if the inspector, Mr. Serian, had filed a completion inspection report certifying that backfilling had been conducted at this site in the manner prescribed by law.

Unfortunately, the factual posture of this crucial issue is unclear. Inspector Serian's final inspection report indicating satisfactory backfilling at the Rapach site does not qualify as the certification required by the Act because it preceeded the filing of a completion report by Morrone Coal Company pursuant to §10 of the Act. Also, although DER's files include a memo from his superior to Mr. Serian requesting him to conduct a completion inspection of both the Strong and Rapach sites, there is no completion inspection report in the DER file for the Rapach site. Inspector Serian testified that he believed that he had submitted a completion inspection report to DER for the Rapach site and Mr. John Moore, the chief of DER's Ebensburg Office, explained that due to chaotic conditions existing in Indiana County in the 1970's it was possible that the completion inspection report might have been misplaced. Yet we note that Inspector Serian wasn't certain that he had filed a completion report and it has been ten years since he would have filed it. In addition, we feel that the presumption of administrative regularity protects DER in this instance, i.e., the absence of the Rapach completion report in DER's files strongly affirms DER's assertion that it was not filed.[3] Since the burden of affirmative defenses is upon the appellants their failure to produce the completion inspection report is fatal to their argument.

C. DER is barred by the statute and bond from forfeiting the reclamation portion of the Rapach site bonds

The second affirmative defense raised by appellants was that DER was barred by the five-year limitation of action contained in the bonds and the Open

3. We need not consider whether Inspector Serian's final inspection report which approved backfilling on the Rapach site, creates an estoppel because of our decision below but it does appear that Morrone changed position in response to Inspector Serian's report by removing its backfilling equipment.

Pit Mining Act. Both counsel have pointed out that *American Casualty, supra*, is not controlling of the instant matter since, *American Casualty, supra*, involved the construction of the Anthracite Strip Mining and Conservation Act of June 27, 1947, P.L. 1095, as amended, 52 P.S. § 681.1 *et seq.* and the instant case involves construction of the Open Pit Mining Act of 1963. While we acknowledge this difference it appears that the operative language as contained in §4(g) of the Open Pit Mining Act is identical to that in the Anthracite Strip Mining and Conservation Act, to wit, "[L]iability under such bond shall be for the duration of open pit mining, and for a period of five years thereafter unless released prior thereto as hereinafter provided".

Thus, we find here as we did in *Rockwood Insurance Company, supra*, which involved the construction of a third surface mining statute bearing virtually identical operative language, that the reasoning of *American Casualty, supra*, controls backfilling the instant matter. One difference between this case and *American Casualty, supra*, is that here a completion report was filed by the operator on each site whereas no such report had been filed in *American Casualty, supra*. A second difference is that the Open Pit Mining Act, unlike the Anthracite Strip Mining and Conservation Act, calls for separate completion reports for backfilling and seeding and planting to be filed by the operators and separate releases of the reclamation and planting portions of the bonds. Thus, we hold adopting *American Casualty* to the instant matter the Open Pit Mining Act contemplates that separate 5-year limitation periods begin to run with the filing of the operator's backfilling and revegetation completion reports. DER asserts that the limitation period should not begin to run until backfilling was completed and the seeding had taken. However, the Open Pit Mining Act simply does not support DER's claim. When the General Assembly chose to precondition the running of the 5-year limitation period upon satisfactory

backfilling and seeding regardless of whether a completion report had been filed, it did so in express language.[4]

In January of 1973, Morrone filed a backfilling completion report on each site. DER didn't forfeit any of the instant bonds until March of 1981, i.e., much more than five years later. Thus, as appellants assert, if the filing of the completion report starts a limitation period which may be tolled only by bond forfeiture that period has passed and DER's forfeiture of none of said bonds is supported by the language of the bonds and the Open Pit Mining Act.[5] However, we agree with DER that if its inspector responds to a mine's completion report within 5 years by filing a report either certifying that backfilling has been done in the manner prescribed by law or that backfilling has not been so accomplished, the 5-year period is tolled.

In the instant matter DER did respond to Morrone's backfilling completion report for the Strong site. DER's inspector, James Straw, on September 1, 1975 following his inspection of the Strong site, recommended that said bond not be released. (See Commonwealth's Exhibit 11) While Mr. Straw's inspection hardly followed hard on the heels of Morrone's report, following DER's receipt of said report by over 2 years, it did fall within the five-year period set by the statute and, we hold, tolled that period because it indicated that mining had not been completed on the Strong site. However, as to the Rapach site, since we have discounted Inspector Serian's testimony, that he filed a completion report (as per

4. See the operative language of the Surface Mining Conservation and Mining Act, as amended, Act of November 30, 1982, P.L. 554, No. 147 52 P.S. 1396.1 *et seq.* "liability under such bond shall be for the duration of five full years after the last year of augmented seeding and fertilizing and any other work to complete reclamation to meet the requirements of law and protect the environment..." 52 P.S. §1396.4(d).

5. Appellants have characterized this argument in terms of a limitation of action. We have serious questions as to whether any such limitation operates against the Commonwealth but conversely we are aware that DER's power to forfeit the bonds in question cannot exceed the provisions of said bonds and the Open Pit Mining Act.

DER's request), the record demonstrates that the 5-year limitation period on the backfilling portion of the Rapach bonds ran after Morrone filed its backfilling completion report and before Mr. Wissinger inspected the Rapach site in 1980.

With regard to the planting portion of each bond, since no completion report was filed for any of the bonds we hold, consistently with *American Casualty, supra*, that the limitation period did not even begin to run on these portions of the bonds.

In this matter, unlike the other bond forfeiture cases which have come before this board, the appellants have not raised the manner in which liability on the bonds accrues or is discharged yet we must decide these issues in order to render a complete adjudication. We agree with DER that the accrual of liability is controlled by *Southwest Pennsylvania Natural Resources, Inc. v. DER*, EHB Docket No. 81-001-H (Adjudication issued March 11, 1982), i.e., total liability is equal to the affected area multiplied by the rate per acre so that the planting liability on the Rapach bond is $1280.00 and the total liability on the Strong bond is $5,000.00 since this minimum exceeds the $3,150.00 one would calculate on the basis of affected acreage. We also agree with DER that the instant bonds are penal in nature so that the entire forfeited amount of the bond is recoverable by DER upon forfeiture. *American Casualty, supra.*

CONCLUSIONS OF LAW

1. This board has jurisdiction over the subject matter of the parties.

2. The standard of review by the EHB of the DER determination that Morrone failed to comply with its reclamation obligations and thereby violated the Open Pit Mining Act is whether DER acted arbitrarily and in abuse of discretion; DER has the burden of proving that Morrone failed to comply with its reclamation obligations.

3. Fireman's Fund and American have the burden of proving all affirmative defenses raised by their appeals.

4. The bonds in this matter being conditioned on compliance with the law and given to the State in consideration for granting permits, the full penalty of each bond, in this case an amount equal to $500.00 multiplied by the area affected but in no event less than $5,000.00 for backfilling, may be recovered for the breach of any of the conditions of the said bonds except for the barred amount described below in conclusion 7.

5. Morrone failed to comply with all the requirements of the Open Pit Mining Act at both the Rapach and Strong sites as it was obligated to do by said bonds.

6. The events on which liability was conditioned have occurred and therefore DER's action in declaring forfeit of the surety bonds was reasonable for that area affected by Morrone exclusive of the area left open for deep mining as described in conclusion 8 below.

7. The five-year period of responsibility for backfilling under bonds issued under the Open Pit Mining Act begins to run with the filing of a completion report alleging backfilling. A separate five-year period of responsibility for planting and seeding begins to run with the filing of a completion report alleging planting and seeding. In this matter DER is barred from collecting

the backfilling portions of bonds 234394, 2356161 and 2376219 since it failed to reinspect the areas covered by these bonds within 5 years from receiving Morrone Coal Company's backfilling completion report on the Rapach site covered by these bonds.

8. Where a bonded area is left open for deep mining by a third party, the original principal on a bond executed pursuant to the terms of the Open Pit Mining Act is not released from liability until expressly released by DER after completion by the third party.

O R D E R

AND NOW, this 12th day of January , 1983, it is ordered that:

1. The department's Order declaring forfeit Morrone Coal Company and American Insurance Company bond (surety bond #2391363 in the amount of $5,000.00) which had been posted and pledged to guarantee compliance with the obligations assumed under Mining Permit 27-6 in Cherryhill Township, Indiana County was reasonable, proper, and legally authorized and, therefore, it is ordered that American Insurance Company's appeal is dismissed as to said bond.

2. Morrone Coal Company and American Insurance Company are ordered to pay, promptly and in full, the minimum liability set forth in the aforesaid surety bond totaling $5,000.00.

3. The department's Order declaring forfeit American Insurance Company bond (surety bond #2376219 in the amount of $5,000.00) which had been posted and pledged to guarantee compliance with the obligations assumed under Mining Permit 27-5(A2), was reasonable, proper, and legally authorized with regard to the planting portion of said bond and, therefore, it is ordered that American Insurance Company's appeal is dismissed pro tanto.

4. Morrone Coal Company and American Insurance Company are ordered to pay, promptly and in full, the accrued portion aforesaid surety bond relating to planting and seeding totaling $330.00.

5. The department's Order declaring forfeit Fireman's Fund Insurance Company bonds (surety bonds #234394 in the amount of $5,000.00 and #2356161 in the amount of $5,000.00) which had been posted and pledged to guarantee compliance with the obligations assumed under Mining Permit(s) 27-5 and 27-5(A), was reasonable, proper, and legally authorized and, therefore, it is ordered that Fireman's Fund Insurance Company's appeal is dismissed pro tanto.

6. Morrone Coal Company and Fireman's Fund Insurance Company are ordered to pay, promptly and in full, the aforesaid surety bonds totaling $670.00 and $280.00, respectively.

The department is directed to initiate collection of the aforesaid collateral bonds and deposit the proceeds in the appropriate Commonwealth account as provided by law.

ENVIRONMENTAL HEARING BOARD

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CAMBRIA COAL COMPANY : Docket No. 82-109-H

: Surface Mining Permit

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By: Dennis J. Harnish, Chairman, February 16, 1983

This is an appeal by Cambria Coal Company from DER's failure to issue mine drainage permit 11810109 to appellant for a proposed mining site in Reade Township, Cambria County.

FINDINGS OF FACT

1. Cambria Coal Company (Cambria) is a Pennsylvania corporation with an address of P.O. Box 69, Clarion, PA 16214.

2. The Commonwealth of Pennsylvania, Department of Environmental Resources (DER) is the Commonwealth agency authorized to issue mining permits required by the Pennsylvania Clean Stream Law, Act of June 26, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, and the Pennsylvania Surface Mining Conservation

and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.* (Surface Mining Act).

3. Sometime before April 15, 1982, Cambria applied to DER to operate a surface coal mine on the property of Eugene and Helen Rudzinski, in Reade Township, Cambria County by submitting mine drainage permit application no. 11810109.

4. Both the Anthony Matthews' home and the Terry Matthews' home use a water supply that draws water from an underground spring that surfaces on the property of Eugene and Helen Rudzinski and then flows by pipes to the homes of Terry and Anthony Matthews.

5. Anthony and Terry Matthews (Matthews) are tenants at will of the Rudzinskis.

6. Since the mining plan shows that Cambria proposes to mine directly through the spring located on the Rudzinski property, Cambria does not dispute the DER conclusion that the spring serving as the basis for the Matthews' water supply will be diminished by the mining and consequently that the Matthews' water supply will be diminished.

7. Cambria and Rudzinskis have executed an agreement under which the Rudzinskis authorized Cambria to mine through the said spring provided that Cambria would furnish a replacement water supply of a specified quality after mining was concluded. The said agreement also provided that it would not be necessary for Cambria to provide a temporary replacement water supply during mining.

8. The Matthews have been directed by the Rudzinskis to cease using the said spring.

9. On April 15, 1982, Mr. P. J. Shah, Chief of the Permit Review Section of DER's Ebensburg Office notified Cambria by letter that the said agreement between the Rudzinskis and Cambria, wherein Cambria agreed to replace the Rudzinski water supply only at the conclusion of mining, did not satisfy Cambria

permitting obligations because: (1) the agreement did not include agreements from either Terry or Anthony Matthews; and (2) the agreement did not provide for replacing the affected water supply during mining.

10. The April 15, 1982 letter then said:

> "Submit an acceptable agreement signed by the water users indicating their acceptance of the proposed water supply which does not have quantity and/or quality equal or better than the original spring, or document the availability of a replacement supply of equal or better quantity and quality." (emphasis added). (See DER letter of April 15, 1982)

11. The DER letter of April 15, 1982 did not require Cambria to obtain written agreement from all users prior to mining as the only means of satisfying its obligations because said letter indicated that either documentation or an agreement would be acceptable by DER.

12. Cambria appealed from the DER letter of April 15, 1982.

13. Cambria has in and by its answer to DER's interrogatory 12 supplied the information requested by DER.

DISCUSSION

The issue joined in the instant appeal concerns DER's legal authority to require an applicant for a mine drainage permit to either obtain written agreements from all users of a spring which will be affected by mining or, in the alternative, to document replacement water supplies prior to issuance of said permit.

There is little or no dispute between the parties that appellant's proposed mining, pursuant to mine drainage permit 11810109, will affect a spring located on property owned by Eugene and Helen Rudzinski in Reade Township, Cambria County. Indeed, it appears that according to Cambria's proposed mining plan, the spring will be mined out. It is also not in dispute that Cambria has entered

an agreement with the Rudzinskis whereby Cambria will provide a permanent replacement water supply after mining but is not required to provide a temporary water supply during mining.

The Cambria-Rudzinski agreement apparently did not satisfy DER because it did not bind either Terry or Anthony Matthews who have used the spring as a water supply and because Cambria had not documented where it would obtain a post-mining water supply to satisfy the said agreement. Thus, on April 15, 1982, DER, through P. J. Shah, issued the presently appealed letter wherein DER stated that the requested mine drainage permit cannot be issued until Cambria submitted

> "...an acceptable agreement signed by the water users indicating their acceptance of the proposed water supply which does not have quantity and/or quality equal or better than the original spring, or document the availability of a replacement supply of equal or better quantity and quality." (emphasis added). (See DER letter of April 15, 1982)

DER has chosen not to press its authority to require agreements from the Matthews. Rather, DER points out that its April 15 letter sets forth alternate means to comply, the latter being by Cambria documenting the availability of a replacement water supply and DER maintains that as long as it has the authority to require such documentation its authority to require the agreement is irrelevant.

Cambria suggests that DER has overstepped its authority by requiring documentation of a replacement water supply prior to mining. Cambria admits that the Surface Mining Conservation and Reclamation Act requires that

> "Any surface mining operator who affects a public or private water supply by contamination or diminution shall restore or replace the affected supply with an alternate source of water adequate in quantity and quality for the purposes served by the supply. If any operator shall fail to comply with this provision, the secretary may issue such orders to the operator as are necessary to assure compliance." (52 P.S. §1396.4 b (f))

However, Cambria points out that this provision, on its face, only applies after a surface mining operator has affected a water supply, i.e., this section does not require the operator to demonstrate anything during the application phase. This argument is much too sweeping. We do not believe that the General Assembly intended that in cases like the instant one where it could be predicted with certainty by review of an applicant's mining plan that a water supply would be affected that the Commonwealth had to wait until this event happened. Commonwealth Court has held that the Commonwealth doesn't have to wait until mining produces the acid mine drainage (AMD) which is forbidden by statute and regulation, but rather, may deny a mine drainage application which fails to demonstrate that mining can be accomplished without the production of AMD *Harman Coal Company v. DER*, 34 Pa. Cmwlth. Ct. 610, 384 A.2d 289 (1978). Likewise, Commonwealth Court also held that even in the absence of specific statutory authority, DER can legally refuse to issue a mining permit when it determines that an aspect of the operation of that surface mine (blasting) would create a public nuisance, i.e., that DER need not issue the permit and then move to abate the nuisance by order after it has occurred. *Glascow Quarry, Inc. v. DER*, 23 Pa. Cmwlth. Ct. 270, 351 A.2d 689 (1976). These holdings of Commonwealth Court, we believe, are in line with the general legal principle that a court of equity may enjoin a nuisance before it occurs so long as the nuisance is demonstrated to be likely to occur. *Edwards v. Duff*, 280 Pa. 355, 124 A. 489 (1924).

We are also persuaded that the above-cited section of SMCRA is not the only applicable law. We agree with DER that the information requested in the appealed letter of April 15, 1982 is expressly required by the surface mining regulations administered by DER, especially by 25 Pa. Code §§87.41, 87.47 and 87.119 and thus must be submitted even if we were to accept Cambria's narrow construction of Section 4.2(f) of SMCRA, 52 P.S. §1396.46(f).

Since we have held that the information requested by DER is required to demonstrate compliance with statutes and regulations relevant to the protection of the Commonwealth's public natural resources, it follows that DER also has a constitutional duty to seek this information under Article 1, Section 27 of the Pennsylvania Constitution, *Payne v. Kassab*, 11 Pa. Cmwlth. Ct. 14, 312 A.2d 86 (1973) aff'd 468 Pa. 226, 361 A.2d 263 (1976).

In sum, we hold that DER has demonstrated abundant legal authority, streaming from various sources, to support its request for information on alternate water supplies contained in the April 15, 1982 letter. Cambria has submitted the information to DER in the form of an answer to DER's interrogatory 12, and DER, in paragraph 9 of its motion to dismiss, has acknowledged that the answer submitted by Cambria substantially provides the information sought by DER in its April 15, 1982 letter.[1]

While Cambria has not, officially, amended its application to include its answer to interrogatory 12 the board shall do so on its own motion in the remand order set forth below in order to expedite DER's issuance of the said permit.

CONCLUSIONS OF LAW

1. The board has jurisdiction over the subject matter and parties.

2. DER has legal authority to require an applicant for a mine drainage permit, whose mining plan shows that it will affect a public or private water supply, to submit documentation of alternate water supplies.

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1. Since we have upheld DER's authority to require documentation of a replacement water supply we need not and do not reach DER's authority to require agreements from the Matthews.

O R D E R

AND NOW, this 16th day of February, 1983, Cambria's appeal is dismissed and Cambria's application is remanded to DER to be treated as including the information contained in Cambria's answer to DER's interrogatory 12.

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DATED: February 16, 1983

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CAMBRIA COAL COMPANY : Docket No. 82-071-H

: Surface Mining
: Mining Permit
v. : DER Policy

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By: Dennis J. Harnish, Chairman, March 11, 1983

This case is an appeal of a DER letter of February 2, 1982, from P. J. Shah, of the Bureau of Mining and Reclamation relating to an application by Cambria Coal Company to perform surface coal mining on 53 acres of land owned by Mr. and Mrs. Steven Bosar in Chest Township, Cambria County. The letter being appealed from required Cambria to delete 18.0 acres of the Bosar property from said application because those 18.0 acres were currently under permit and bond to Lechene Coal Company under Mining Permit No. 892-4.

FINDINGS OF FACT

1. Cambria Coal Company (Cambria) is a Pennsylvania corporation with an address of P. O. Box 69, Clarion, PA 16214.

2. The Commonwealth of Pennsylvania, Department of Environmental Resources (DER) is the Commonwealth agency authorized to issue mining permits re-

quired by the Pennsylvania Clean Streams Law, Act of June 26, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, and the Pennsylvania Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.* (Surface Mining Act).

3. On May 21, 1975, the DER issued mine drainage permit 4275SM7 to Cambria Coal Company covering 187.5 acres in Chest and White Townships, Cambria County.

4. Thereafter, this mine drainage permit was amended numerous times to include additional acreage (the final amendment being dated March 24, 1982) and eventually cover 1083 acres.

5. On November 9, 1981, Steve and Mary Catherine Bosar (Bosars) executed a coal mining lease to GRC Coal Mining Company covering 110 acres, more or less, situate in Chest Township, Cambria County, Pennsylvania.

6. GRC Coal Mining Company is a subsidiary or sister company of Cambria.

7. A memorandum of lease from Bosars to Cambria was recorded.

8. By deed dated August 23, 1974, Mrs. Annie Powell conveyed the coal under various lands in Chest Township to GRC Coal Company. This deed was recorded.

9. A title examination dated December 4, 1981 by the Olympia Title Company indicated that the surface of approximately 110 acres was owned by Bosars and the coal under the northern portion thereof was owned by GRC Coal Company.

10. On January 18, 1982, Cambria applied to DER to operate a surface coal mine on 53 acres of property owned by Steven Bosar in Chest Township, Cambria County (i.e., the northern portion of the Bosar property) by submitting mine permit application no. 101206-427SM7 which application proposed to amend mining permit no. 1206-37 issued by DER on February 13, 1979, for 50 acres and mining

permit no. 101206-4275SM7-0-1 issued on January 6, 1982 for 106 acres. The said 53 acres was within mine drainage permit 4275SM7.

11. The Cambria application included 18 acres which had been previously included in mining permit 892-4 issued to Lechene on August 31, 1978. Both Cambria and Lechene have mine drainage permits which cover the 18 acres in question.

12. Bosars had leased other lands they owned to Lechene Coal Company, Inc. (Lechene) for the mining of coal to the southwest of the 53 acre tract of land.

13. At no time did Cambria grant Lechene any right to mine the coal it owned under the 53 acre tract of land.

14. Lechene applied to the DER and had been granted a mining permit and a mine drainage permit on 18 acres of the 53 acre tract of land even though Lechene did not have the surface or coal mining rights thereto.

15. Lechene has not mined nor produced any coal since 1977. Lechene has placed spoil or topsoil on the 18 acres but has never mined any coal nor otherwise disturbed the same.

16. The 18 acre area of overlap in the Cambria application included a spoil pile and a topsoil storage area which must be reclaimed by Lechene and part of this area had been mined by the Cambria Mills Coal Company (not Cambria).

17. The Lechene permit no. 892-4 included reclamation responsibilities of Cambria Mills Coal Company as the Lechene permit was issued after transfer of the permit from Cambria Mills Coal Company.

18. Reclamation is now being completed by Lechene Mining Company on mining permit no. 892-4 and backfilling work was observed by DER Mining Inspector Tom Holencik on September 16, 1982.

19. Reclamation on the 18 acre area of overlap was not completed as of September 22, 1982 by Lechene Coal Company.

20. On the area of overlap, regrading spoil piles and spreading topsoil had not been completed by Lechene as of September 22, 1982.

21. On August 3, 1982, DER issued an Order to Lechene Coal Company which provided that "within ten days of receipt of this order Lechene shall have a D-9 dozer or equivalent on the referenced permit area and commence backfilling, regrading and restoration of mining permit no. 892-4, a minimun of 40 hours a week. All backfilling, regrading and restoration including topsoil spreading, top lining, fertilizing, seeding and mulching shall be completed by September 30, 1982."

22. DER does not review ownership of the land or minerals as part of the permit review process.

23. DER has had a verbal policy in effect for at least two years which prohibits the issuance of mining permits which overlap preexisting uncompleted mining permits; this policy does not apply to mine drainage permits where overlapping is permitted and DER has ignored this policy on at least 5 occassions since 1981 by issuing permits to and accepting bonds from Cambria at other sites.

24. On February 2, 1982, DER notified Cambria that in order to complete processing of permit application no. 101206-4275SM7-01-2, it was necessary to delete the 18 acres of the property presently under bond and permit to Lechene Coal Company.

25. Cambria's application no. 101206-4275SM7-01-2 was complete in all respects and included the surety bond and supplemental "C" landowner's consent executed by Bosars.

DISCUSSION

Most of the relevant facts in this case are not in dispute. Mine permit no. 892-4 was issued by DER to Lechene on August 31, 1978. Cambria applied for mine permit 101206-427SM7 on January 18, 1982. Eighteen acres of the Cambria mining permit application overlap the previously issued Lechene mining permit. Cambria appeals from DER's refusal to grant it a mine permit covering the said 18 acre portion.

The Lechene permit was acquired by permit transfer from Cambria Mills Coal Company (not related to the appellant Cambria herein). The terms of the permit transfer to Lechene included that Lechene would assume all reclamation responsibilities of Cambria Mills Coal Company. Included in the outstanding reclamation responsibilities that must be completed by Lechene before its bonds may be released are requirements to regrade spoil and spread topsoil on the 18.0 acre overlap area. Lechene is currently performing reclamation work on permit no. 892-4. Lechene has not completed reclamation on permit no. 892-4 and an order has been issued by DER to Lechene to complete reclamation by September 30, 1982.

Even when this reclamation work is completed, however, DER will not release Lechene's bond until it was satisfied that the revegetation of the 18 acre tract had been completed by observing the growing vegetation. By DER estimates this cannot happen before the late spring of 1983. In addition, since the Lechene bond covers not only the 18 acre tract in issue but also a contiguous area which had been mined by Lechene and from which acid mine drainage (AMD) is (allegedly) being discharged, DER will not release Lechene's bond even after Lechene has completed all work necessary to reclaim the 18 acre tract in question unless and until the AMD discharge ceases which could take 15 years or more.

DER sees a connection between permitting and bonding the 18 acres to Cambria and releasing the liability of Lechene and its surety on this area, DER has therefore applied its policy, not to issue more than one mining permit covering any area, to Cambria. Cambria argues that this policy is legally ineffective and is arbitrary and caprious.

A. DER'S NO DOUBLE PERMITTING POLICY IS EFFECTIVE

Appellants' initial attack on DER's presently appealed action is that DER's action, being based upon a policy rather than a statute or a regulation is void. We disagree with Cambria that all policies are *ipso facto* ineffective because they are not regulations. We acknowledge that the Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, No. 240, Art. I (45 P.S. §1208) provides, in relevant part, that:

> "An administrative regulation or change therein promulgated after the effective date of this act shall not be valid for any purpose until filed by the Legislative Reference Bureau, as provided in Section 409."

However, as we have held in *ALCOSAN v. DER*, EHB Docket No. 78-053-H (issued March 10, 1982) and *Chemclene Corporation, et al. v. DER*, EHB Docket No. 81-168-M (issued September 21, 1982), a policy is merely a reason DER uses to justify the action in question. If it is a good and sufficient reason we will honor it notwithstanding its designation as a policy but since it is a policy, we cannot accord it a presumption of validity. Rather, we will review the application of the policy on a case by case basis and will substitute our discretion for that of DER if we find that DER has abused the exercise of its discretion, *Warren Sand and Gravel Company v. DER*, 20 Pa. Commonwealth Ct. 186, 341 A.2d 556 (1975). In this regard, we seem to be within the rule enunciated by Commonwealth Court. In *Pa. Human Relations Commission v. Norristown Area School District*, _____ Pa. Commonwealth Ct. _____, 342 A.2d 464 (1975), which was cited to the board by Cambria, the court held:

"The distinction between a regulation and a statement of policy is that the former is an exercise of delegated power to make a law and is as binding on a reviewing court as a statute while the latter is merely interpretive, not binding upon the reviewing court but pursuasive if it tracks the meaning of the statute."

B. DER's "NO DOUBLE PERMITTING" POLICY IS ARBITRARY AND CAPRICIOUS AS APPLIED TO CAMBRIA

While it was not determiniative to our decision concerning the validity of DER's "no double permitting" policy as applied to Cambria in the instant matter, we did take into consideration the peculiar nature of the "policy" in question. First of all, this policy is not written much less disseminated in any form which could enlighten the regulated industry. Secondly, there seems to be a conflict within DER ranks as to just how old the policy is. Mr. John Moore, the manager of DER's District Mine Office in Ebensburg, testified that the policy went back to the early 1970's whence it was enunicated by the then Assistant Director of DER's mining bureau, the late Walter Kohler. This testimony was at variance with the DER's answers to Cambria's interrogatories which placed the genesis of the policy at the time the mining bureau was decentralized, i.e., in 1980. Mr. Moore explained this discrepancy to the satisfaction of the board by pointing out that the 1980 policy statement was merely a reiteration of an on-going policy for the benefit of those newer District Managers who did not have the benefit of hearing it from Mr. Kohler's lips.

Thirdly, we are perplexed that DER issues mine drainage permits to more than one operator for the same area but refuses to issue overlapping mine permits. Indeed, both Lechene and Cambria have a mine drainage permit covering the 18 acres in question, but (at least in Mr. Moore's district) DER refuses to issue a new mining permit where a mining permit covering said area has already been issued to another company. DER would distinguish mining permits from mine drainage permits

by pointing out that only the former (plus bonding) actually permits an area to be mined whereas the mine drainage permit is more in the nature of an environmental impact study of what would happen if the area would be mined. We acknowledge the distinction but we wonder, considering the expense of preparing and sponsoring a mine drainage application, whether DER should not let operators know, at the time the mine drainage application is reviewed, that it has no intention to permit mining on all or a part of the area covered thereby. Fourthly, DER did not contest Cambria's evidence that Cambria had received mining permits from DER in five instances since 1981 where the areas in question were already permitted to and bonded by other mining companies. Mr. Moore had no explanation for DER's failure to consistently follow this policy except that these variances did not occur within his mining district. While, as stated above, these factors are not determinative, they do affect the weight we give the reasons DER proffers to support its policy. For example, DER cites administrative and enforcement difficulties with double permitting but if the arguments DER poses in its brief concerning administration and enforcement of double permitting areas had decisive weight to DER, they would preclude double permitting on <u>any</u> site. Since DER has permitted double permitting on other sites, it cannot be too greatly inconvenienced by the additional administrative burden imposed by double permitting, if any. Moreover, for any of these administrative problems to arise, Cambria and Lechene would have to both mine on this area. The present record discloses that Lechene never has removed any coal from this area and has no right to do so since it has no legal rights to either the coal under or surface of the 18 acres in question. Similarly, it would be naive to assume that Cambria would commit the resources necessary to actually mine this area without coming to terms with Lechene. If only Cambria mines on the 18 acres DER's administration and enforcement are no more difficult then for any other mined area.

DER's concerns with regard to releasing Lechene's surety are in a different category than its administrative and enforcement arguments since they are site specific in nature. Further, the board is aware of the doctrine of surety release *Rockwood Insurance Company v. DER*, EHB Docket No. 78-166-S and 78-168-S (issued February 18, 1981), however, we cannot see how this doctrine would hinder DER's legitimate enforcement efforts in the instant matter. In the first place, DER's own witnesses testified as to the progress Lechene is making in complying with the administrative order issued by DER which directed Lechene to reclaim affected portions of the 18 acre tract. To the extent that Lechene complies with this order, DER is relieved of both the reason for necessity of forfeiting Lechene's bond for failure to reclaim the said 18 acres.

Even if it were to be assumed, for the sake of argument, that Lechene would not complete reclamation of the 18 acre parcel, one cannot see why the Commonwealth and the environment would not be better served by issuing Cambria a mining permit and requiring it to post new bonds (which would issue at a higher rate than the Lechene bonds). According to DER witnesses Cambria would be re-affecting virtually the entire 18 acre parcel by mining a lower seam and thus it would be Cambria's responsibility to reclaim this parcel in accordance with law or face forfeiture of its bonds.[1]

On the other hand, should DER, at some point in the future, forfeit Lechene's bonds because of the above-described discharge of AMD we do not see how anything that happened on the 18 acre site would be relevant since the AMD discharge is not located on the 18 acre site and there was no testimony in this matter that there is any hydrological connection between the discharge and the parcel. Should DER continue to harbor a concern over the issue its remedy is

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1. The Commonwealth's concern that the new surety would avoid responsibility by reason of the outstanding bonds could easily be remedied by requiring that the bonds include a legally sufficient waiver of this prospective defense.

obvious, it need only forfeit Lechene's bond before accepting Cambria's bond. The record discloses abundant support for such a forfeiture. Thus, while the doctrine of surety release might provide sufficient support for DER's no double permitting policy in some situations, it does not in the instant circumstances.

Considering all the above-described factors together we hold that DER has abused its discretion by applying its "no double permitting" policy to Cambria in the circumstances of this case.

C. PERMIT TRANSFER PROVISIONS DO NOT APPLY TO THE INSTANT MATTER

Before concluding this opinion we shall address the argument raised by DER which was not discussed above. DER argues that Cambria has not met its burden of proof because it has not shown that it satisfied applicable provisions of the Clean Streams Law and the Surface Mining Act. In support of this argument, DER cites §18.1 of the Surface Mining Act and 25 Pa. Code §86.56. Section 18.1 of the Surface Mining Act, covers the manner in which the original operator's liability may be released, not whether a subsequent operator may also become liable which is the issue before us. Thus, this section is simply not relevant. Similarly, 25 Pa. Code §86.56 describes the situation where one operator succeeds another operator <u>under the same permit</u> which is not relevant to the instant matter. Here Cambria has submitted a new application, one which complies with all of DER's rules and regulations, as well as its own bond (which is at a higher rate than Lechene's bonds). Therefore, all the discussion in 25 Pa. Code §86.56 which deal with the "...transfer, assignment, or sale of rights granted under any permit..." is simply not relevant to our consideration.

CONCLUSIONS OF LAW

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

2. DER's application of a policy to a particular situation constitutes a specific exercise of discretion on each occasion in which said policy is applied.

3. In the circumstances of this case DER's application of its policy against issuing multiple mining permits covering the same area is arbitrary, capricious and unreasonable.

4. Permit transfer provisions do not have application to the instant matter where Cambria is applying for an entirely new permit.

O R D E R

AND NOW, this 11th day of March, 1983, Cambria's appeal is sustained. The matter is remanded to DER for the issuance of an amendment to Mining Permit No. 101206-4274SM7-0-1 in accordance with the above opinion, in particular, to avoid future disputes, Cambria shall be required to waive prospective defenses as we have discussed (see footnote 1, *supra*).

ENVIRONMENTAL HEARING BOARD

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DATED: March 11, 1983

COMMONWEALTH OF PENNSYLVANIA

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AMITY TOWNSHIP MUNICIPAL AUTHORITY

Docket No. 81-082-H

Federal Clean Water Act
Construction Grants Program

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By: Dennis J. Harnish, Chairman, March 31, 1983

Amity Township Municipal Authority (authority or appellant) appeals from DER's refusal to certify the authority's request for amendment to its federal construction grant to cover the collection facilities portion of its sewerage project.

FINDINGS OF FACT

1. On February 15, 1972, the Amity Township Municipal Authority (authority) submitted an application to the Department of Environmental Resources (DER) for a federal grant for the construction of certain sewage treatment facilities.

2. The February 15, 1972 application sought funding for a sewage treatment plant, certain pumping stations, force mains and trunklines or interceptors.

3. The February 15, 1972 application did not seek funding for the construction of a sewage collection facility which would be tributary to the sewage treatment plant, and other sewage facilities.

4. On April 9, 1973, DER issued Water Quality Management Permit No. 0672409 to the authority, which permit approved the construction of the sewage treatment plant, certain pump stations, force mains, interceptors and sewage collection facilties.

5. On April 23, 1973, DER certified the authority's February 15, 1972 grant application to the United States Environmental Protection Agency for funding.

6. The April 23, 1973 DER certification did not include a certification for the sewage collection facility for funding.

7. The authority did not appeal DER's certification to EPA for funding of the February 15, 1972 grant application, which certification did not include a grant request for funding of the sewage collection facilities, even though the federal law and regulations had been changed prior to the date of DER's certification so as to allow Amity to apply for federal grant funding of the collection system at issue.

8. On November 1, 1974, Federal Grant No. C-420727-01 was awarded to the authority in the amount of $1,291,720.00; the grant was subsequently amended so that the total amount of the grant was $2,792,100.00.

9. Grant funding for the sewage collection facilities was not included in the initial grant award, and was not included in any subsequent grant amendment.

10. Between February 15, 1972 and November 1, 1974, the authority did not amend its grant application to include a request for grant funding of the sewage collection facilities.

11. The authority did not appeal the November 1, 1974 grant award, which grant award did not include a grant award for funding the sewage collection facilities, even though federal law and regulations had been changed prior to the date of the grant award so as to allow Amity to apply for federal grant funding of the collection system at issue.

12. On or about March 27, 1975, DER received a form from the authority entitled "Part B (Offer and Acceptance of Federal Grant for Sewage Treatment Works)" and dated March 25, 1975, which indicated that the authority had accepted construction bids for the grant project, and that an increase in the amount was necessary because the construction bids (for the facilities for which grant support was given) were higher than the estimates, contained in the February 15, 1972 application, on which the grant offer was based.

13. The March 25, 1975, Part B did not contain a request for grant funding of the sewage collection system.

14. By the end of 1978, the construction of the sewage collection facilities was completed.

15. The authority did not obtain a written pre-construction or pre-award approval from either EPA or DER for the sewage collection factility prior to the time of its construction.

16. On December 31, 1980, the authority submitted a request to DER for a grant amendment to Federal Grant No. C-420727-01, in order to obtain grant funding for the construction of the sewage collection facilities.

17. On November 9, 1981, DER notified the authority that the grant amendment request was denied.

18. Title 25 Pa. Code 103.14, was in effect prior to the date of the authority's December 31, 1980 request for an amendment to Federal Grant No. C-420727-01.

19. DER did not advise or represent to Amity that Amity's grant would be amended, changed or increased, after the date of the grant issuance, in order to add federal funds for the collection system (which system was not originally proposed for funding in Amity's grant application for federal funding).

20. DER advised Amity that, until the date of grant issuance, (November 1, 1974), Amity had an opportunity to amend or change its grant application to include the collection system as a candidate or eligible facility for federal funding. Amity did not avail itself of this opportunity.

21. Amity was required to list the costs for the construction of the collection system in the original grant application (even though the collection system was not proposed for funding) because DER did not approve applications for federal construction grants unless the grant applicant could demonstrate that the resulting project would be viable (in Amity's case, a federally supported treatment plant, pumping stations and connecting mains would not be viable without a companion sewage collection system), and the applicant had the financial ability to construct the non-federally supported facilities.

DISCUSSION

This case involves the federal construction grants program for sewage collection and treatment facilities which has been discussed by the board in *Latrobe Municipal Authority, et al. v. DER*, EHB Docket No. 75-211-C (October 22, 1975); *Abington Township v. DER*, EHB Docket No. 78-012-S (October 17, 1980) and *Bethlehem Township Municipal Authority v. DER*, EHB Docket No. 80-155-H (June 25, 1981). In this matter, as in *Bethlehem, supra*, the appellant Municipal Authority

seeks to obtain a federal grant for a sewage collection which is already built. The authority's original grant application, filed on February 15, 1972, sought funding for a sewage treatment plant, pumping stations, force mains and interceptors but not for the in street sewer lines (or collectors) tributary to those interceptors. The grant was amended from $1,291,270 to $2,792,100 still without covering sewers and it was awarded by EPA. The authority did not appeal from the November 1, 1974 grant award (which, of course, did not cover sewage collections facilities). On March 25, 1975 the authority accepted the award and shortly thereafter began to construct the entire sewerage project financing the collection facilities with private funds. The construction of the sewerage facilities was completed by the end of 1978. On December 31, 1980 the authority submitted a request for an amendment to Grant No. C-420727-01. It is from DER's refusal to certify this amendment to EPA that the instant appeal lies. In this matter, as in *Bethlehem, supra*, DER has refused to certify an authority's submission for an additional construction grant to the United States Environmental Protection Agency (EPA) pursuant to §204(3) of the Clean Water Act, 33 U.S.C. §1284(3). Here, as in *Bethlehem, supra*, DER relies, at least in part upon 25 Pa. Code §103.14 of its regulations which provides in relevant part, that:

> "(a) All changes in the scope of a grant project must be submitted in writing to the Department for approval.
>
> (b) Grant funding for changes in the scope of a grant project will be approved by the Department in the following circumstances:
>
> (1) The change in scope is the result of new or revised requirements of 42 U.S.C. §§4342, 4343, 4346A, 4346B and 4347; the Federal Act and the Federal regulations promulgated thereunder; this subchapter; other changes directed by EPA or DER; or
>
> (2) In the case of a Step 3 grant project:

(i) where the change in scope is necessary to protect the structural or process integrity of the facilities; or

(ii) where adverse conditions are identified during the construction of the facilities which could not have been foreseen by the design engineer prior to encountering the condition."

DER argues that since appellant's requested grant amendment was not "necessary to protect the process integrity of the facilities" and was not necessitated by "adverse conditions...identified during construction of the facilities" and was not the result of new or revised portions of the federal act it was not a fundable change in scope of the project, pursuant to the above criteria of §103.14.

We must agree with DER that if its construction and application of 25 Pa. Code §103.14 is sound it must prevail in this matter. We have found as DER asserted in its brief that Amity, in making its request for a change in the scope of its grant project, does not contend that the change in scope is necessary due to any of the conditions or criteria contained in 25 Pa. Code 103.14(b)(1) and 103.14(b)(2) (See Exhibit J, Answers to Request for Admissions, EHB Exhibit 1). No new or revised requirements of the Clean Water Act or of the federal construction grant regulations are asserted, nor does Amity claim that EPA and DER ordered any material changes in the grant project. In addition, Amity does not assert that the change in scope is necessary to protect the structural or process integrity of the facilities, or that the change in scope is necessary due to adverse conditions which were encountered during construction of the facilities which could not have been foreseen.

DER apparently believes that in order for it to prevail in this matter on its §103.14 theory this board must reverse or overrule its Adjudication in *Bethlehem, supra*. To this effect, a considerable portion of DER's brief is directed to tracing the legal underpinings of the federal construction grants

program and to explicating the (argued) identity between a "formal grant amendment" as discussed in 40 CFR §30.900(c) of the federal construction grants regulations and a "change in scope" as utilized in 25 Pa. Code §103.14 of DER's construction grants regulations. In this matter we don't have to necessarily agree with DER's line of reasoning in order for it to prevail.[1] We feel that the instant matter is governed by *Bethlehem, supra* and that *Bethlehem, supra,* as properly applied to the facts of this case, supports dismissal of the appellant's appeal.

In *Bethlehem, supra* the authority's original application for construction grants funding for its sewerage project included certain interceptors and DER certified the said project including said interceptors to EPA for construction funding. While it is true that the authority in *Bethlehem, supra,* responding to EPA pressure, reduced its requested grant amount to exclude the amount of the grant directed to building the contested interceptors, there was no indication, in *Bethlehem, supra,* that DER ever withdrew or modified its certification of the full project or even that EPA ever required the authority to change the scope of its project.

The facts in this case are different at several critical points. In this case, the appellant authority's original application for construction grant funds did not request funding for the sewage collection facilities. These sewage collection facilities were mentioned in this application but were to be funded from local funds. Furthermore, since it was not requested to do so, by and through, Amity's original application, DER did not certify Amity's collection facilities to EPA for funding. This is the second crucial point of distinction between *Bethlehem, supra* and the instant matter.

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1. We don't necessarily disagree with DER either. Rather, we hold that it is not necessary to reach this issue in order to resolve the instant matter.

Even when the authority submitted an amendment to its (second) grant application on March 25, 1975 it did not ask for inclusion of the sewage collection facilities in that grant and this was so even though the Clean Water Act had been changed prior to November 1, 1974 so as to make certain collection facilities fundable and the authority knew of this change in the law. (See pagraph 38, Answer to Request for Admissions EHB Exhibit 1). Mr. Eways, an engineering consultant for Amity, admitted that DER's Marshall Cashman, former Chief of Program Services Section at DER, advised him that prior to the date of grant issuance, Amity had an opportunity to amend its application, but that a delay in the award of funding probably would result. Notwithstanding this advise, which Cashman corroborated, Amity elected to proceed with the original grant application, and forego the opportunity to amend the grant application.

Mr. Eways alleged that DER's Mr. Cashman advised Amity that the sewage collection system could be added to the original grant after construction of the sewage collection system. Mr. Cashman testified that although he did not recall the conversation in detail, he could not imagine giving the alleged advice to Mr. Eways, as DER never considered or allowed amendments of this nature to grant applications for which an award already had been made. Mr. Cashman further testified that DER entertained amendments to grant applications prior to the date of any award, though that usually resulted in some delay in a grant award. In addition, Mr. Cashman stated that several other municipalities had grant application problems similar to Amity's, and that they properly revised their applications, before the date of grant award, to include the new desired facilities. Amity, of course, did not.

The evidence adduced at trial shows that Amity and Mr. Eways either misinterpreted Mr. Cashman's advice, or simply chose to ignore it. Amity asserts (see Answers to First Set of Interrogatries, (see paragraphs 1 and 2, EHB Exhibit

2)) that the conversation between Eways and Cashman in which the alleged advice was transmitted, occurred on March 21, 1975, several months after the date of the grant award. Mr. Eways, contrary to Amity's admission, stated that the alleged telephone conversation occurred sometime prior to the date of grant award (November 1, 1974).

Eways' recollection as to the date of the conversation (though inconsistent with Amity's contention) accords with Mr. Cashman's testimony to the effect that amendments were possible prior to the date of grant award, but were not allowed after the date of the grant award. In addition, Mr. Eways testified that while Amity was aware that an amendment to its application, prior to the date of grant award, might result in funding delays, Amity nevertheless decided to proceed with the original grant application. The fact that almost six years elapsed from the time of the grant award to the time of Amity's request for funding for the sewage collection system, that Mr. Eways made no note or memorandum concerning Mr. Cashman's valuable and important alleged advice, and that Amity had arranged to finance the construction of the sewage collection system without federal funds, strongly suggests that Amity's amendment request is merely an afterthought, or is designed to remedy a mistake in Amity's judgment which occurred in 1974, when Amity failed to request that its original grant application be amended to include the sewage collection system.

In sum, in this matter, unlike in *Bethlehem, supra*, the authority applied to amend its construction grant application to cover facilities for which it had not previously applied to EPA and which had not been certified by DER and which it had indicated to DER and EPA that it would construct with other resources. We believe that the instant application constitutes a "change in scope" as provided in §103.14 and, for the reasons set forth above it fails to conform to the criteria set forth in that regulation.

As we said in *Bethlehem, supra*:

> "...our approval of Section 103.14 herein, when properly applied, eliminates the only other argument raised in *Abington, supra*, i.e., DER's need to allocate scarce construction grant funds in reasonable manner. We would expect that in most cases applicants will not be able to demonstrate, as the authority did here, that DER certified and EPA acknowedged a project including the facilities for which these applicants now seek grant monies. Section 103.14 would, of course, apply to these applicants and would generally prohibit the award of grant amendments thereto."

This is one of the cases we foresaw in *Bethlehem, supra*.

Since we have held that §103.14 precluded DER from certifying the requested grant amendment *Newport Homes, Inc. v. Kassab*, 17 Pa. Cmwlth. Ct. 329, 332 A.2d 568 (1975) and we have no jurisdiction to second guess DER's action, *Commonwealth v. Harmar Coal Company*, 452 Pa. 77, 306 A.2d 308 (1973), appeal dismissed, 415 U.S. 903 (1974), we need not reach DER's other arguments and we do not.

CONCLUSIONS OF LAW

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

2. The authority's grant amendment request of December 31, 1980, DER's denial of which gave rise to the instant appeal was a "change in scope" of the sewerage project as that term is used in 25 Pa. Code §103.14.

3. Since the authority's grant amendment did not satisfy the criteria set forth in 25 Pa. Code §103.14 for a fundable sewerage project, DER's refusal to certify this amendment to EPA was proper.

O R D E R

AND NOW, this 31st day of March , 1983, the authority's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

DENNIS J. HARNISH
Chairman

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: March 31, 1983

COMMONWEALTH OF PENNSYLVANIA

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221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
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GENERAL INVESTMENT AND DEVELOPMENT COMPANY INC., et al. :

: Docket No. 81-120-M

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By: Anthony J. Mazullo, Jr., Member, May 6, 1983

This matter comes before the board upon an initial appeal by General Investment and Development Company, Inc., (GID), West 202 Corporation (202), and subsequently prosecuted solely by Apex Financial Corporation (APEX), appellant herein, from the action of the Department of Environmental Resources (DER) in rejecting a request for a modification or exeception to the June 21, 1979 ban imposed on further connections to the Chalfont-New Britain Treatment Plant in Bucks County, Pennsylvania.

In rejecting the appellant's request for thirty-two additional units in the development known as Olde Colonial Green located in Doylestown Township, Bucks County, Pennsylvania, DER was of the opinion that appellant's consulting engineers' estimate of water savings was "overly optimistic", and therefore did not constitute "sufficient information to waive the requirements" of a consent order and agreement entered into between DER and GID and 202 dated February 8, 1980 wherein GID and 202 "agreed not to seek further exceptions to the ban on connections to the Chalfont-New Britain plant."

After an evidentiary hearing, at which hearing DER offered no testimony, post-hearing briefs were filed, and the matter is ripe for decision by this board.

FINDINGS OF FACT

1. Appellant is Apex Financial Corporation (APEX), Benjamin Fox Pavilion, Jenkintown, Pennsylvania.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), the agency of the Commonwealth authorized to administer the provisions of The Pennsylvania Clean Streams Law, the Act of June 22, 1937, *as amended*, 35 P.S. §691.1, *et seq.*, and the provisions of regulations promulgated in furtherance thereof and specifically relating to Municipal Wasteload Management, 25 Pa. Code Chapter 94.

3. On May 23, 1973, General Investment and Development Company, Inc., (GID) entered into an agreement with the Bucks County Water and Sewer Authority (BCWSA) whereby BCWSA agreed to provide sewage treatment for 344 dwelling units contemplated to be constructed in a development known as Olde Colonial Greene, located in Doylestown Township, Bucks County, Pennsylvania.

4. On August 17, 1978 GID and BCWSA entered into a supplemental agreement (to the May 23, 1973 agreement) whereby BCWSA agreed to accept sewage from 317 dwelling units in the development provided that the total daily flow would be restricted to 55,500 gallons per day.

5. Pursuant to the supplemental agreement of August 14, 1978 GID paid to BCWSA the sum of $57,766.07, which sum represented, *inter alia*, payment for connecton fees and reserve capacity charges for 317 lots in the Olde Colonial Green development.

6. As of June 21, 1979, and for some time prior thereto, GID had been issued building permits for at least 22 lots in the developments, although no construction had proceeded on these dates.

7. On June 21, 1979, DER issued an order prohibiting "additional discharge into the Chalfont-New Britain Township Joint Authority plant and the tributary municipal sewer systems unless written authorization for the discharge has been granted by the Department (DER) under Section 94.52 for new building permits issued prior to ban and replacement of a discharge as described in Sections 94.55 and 94.59."

8. On September 20, 1979 GID requested that BCWSA seek an exception from the ban of June 21, 1979 from DER for 22 dwelling units, for which units building permits had been issued within one year prior to the said ban.

9. On December 20, 1979 DER denied the request for an exception to the ban for the 22 dwelling units above referenced.

10. After discussion between DER and GID of the December 20, 1979 denial by DER, GID entered into a Consent Order and Agreement dated February 8, 1980 which provided for the connection of 22 dwelling units within Old Colonial Green to the sewage collection system of BCWSA.

11. APEX was not a party to the consent order and agreement of February 8, 1980, and was not advised by GID, 202, or DER of the negotiations and execution of the agreement.

12. Under the terms of the consent order and agreement of February 8, 1980, GID and 202 did "agree and promise not to pursue or request any more exceptions to the Ban...."

13. On October 21, 1980 GID and 202 made application to DER for an exception to the ban on the basis that the proposed utilization of water-saving devices in both the existing and the proposed residential dwelling units within the development would permit the construction of 62 additional dwelling units within the development without increasing the total sewage flows from the development.

14. APEX acquired title to the subject premises, after mortgage foreclosure proceedings, by virtue of a deed from the Sheriff of Bucks County, John P. Mitchell, to APEX dated November 12, 1981.

15. On July 8, 1981, DER denied the application of GID and 202 of October 21, 1980 on the basis that their estimate of water savings was "overly optimistic."

16. The estimate of water savings to be realized at the subject development was prepared by Robert C. Schmauk, a registered professional engineer.

17. At the time the estimate was prepared, in May, 1981, the net number of occupied dwelling units in the development amounted to 245 units, and the total population was 560 persons.

18. The number of persons per dwelling unit amounted to 2.3 persons, the product of the total population divided by the total number of occupied units.

19. The average daily flow from the development was derived from the daily and monthly metered records of the Olde Colonial Green Water Company, a public utility; and the average daily flow was calculated at 45,000 gallons per day.

20. By dividing the average daily flow by the number of dwelling units, Schmauk arrived at the figure of 185 gallons per day per dwelling unit of water consumption.

21. The average use per day per dwelling unit was further divided by the number of residents per dwelling to arrive at the figure of 80 gallons of consumption per day per person in the development.

22. All existing plumbing fixtures in the development were audited for water use, including toilets, showers, sinks, dishwashers and clothes washers.

23. Manufacturers' materials and specifications on flow rates were further augmented by actual measurements of flow rates of the fixtures found in the development.

24. In preparing flow rates per unit, Schmauk assumed each unit contained 3 toilets, 2 showers, 4 sinks, one dishwasher, one clothes washer.

25. In determining what percentage of water usage from a typical dwelling unit was attributable to each fixture, Schmauk used as guidelines the circulars published by DER entitled "Use Water Wisely".

26. Schmauk projected for each of the fixtures, excepting the dishwasher and clothes washer, flow rates for fixtures equipped with water-saving devices.

27. Flows attributable to showers, toilets and sinks equipped with water-saving devices are derived from manufacturers' publications and the aforementioned DER circular.

28. By using saving devices, the average daily flow per dwelling unit was 135 gallons per day, and 59 gallons per day per person in the dwelling unit, as compared with flows of 185 gallons per day per dwelling unit, and 80 gallons per day per person in the unit.

29. The pamphlet published by DER estimated an average daily per capita usage of 40 gallons per day by the use of water-saving devices.

30. Schmauk's estimate of 59 gallons of flow per person per day per dwelling unit is a conservative opinion based on manufacturers' and DER's guidelines.

31. If appellant's proposals on water savings at the development were implemented, a saving on water flow of 27% would be realized.

32. A reduction in flow of 27% would amount to the flow of approximately 62 units, by use of the guidelines and the aforementioned analysis.

33. Prior to the preparation of the water savings analysis on behalf of appellants, Schmauk had prepared similar water savings analyses for three other clients for submission to DER as a basis for exceptions to DER's ban on connections to existing sewage treatment facilities, especially, the Chalfont-New Britain facility.

34. In all three instances, the analysis prepared by Schmauk served as the basis for the grant by DER of an exception to the ban, and additional construction was thereby allowed for office expansion, school expansion, and 19 additional dwelling units in a residential development.

35. In the matter of the expansion of the residential development, called "Westwyk" and located in Doylestown Township, Bucks County, the same fixtures and water-saving devices were analyzed as those used in the instant appeal, e.g., toilets, showers, sinks, clothes and dishwashers.

36. The relief sought by appellant herein, an exception based upon the use of water-saving devices, is the same relief applied for and granted by DER in the three other matters analyzed by Schmauk for clients other than appellants herein.

37. In the three instances where Schmauk submitted applications for exceptions to the ban on additional connections to the Chalfont-New Britain treatment facility, based on the use of water-saving devices, DER granted exceptions despite the fact that the said facility was, as in the instant matter, hydraulically overloaded at the time exceptions were granted.

38. At the time GID and 202 applied for an exception to the sewer ban based upon the fact that building permits had been issued for the 22 requested connections, the appropriate DER officials knew or should have known that under the provisions of 25 Pa. Code §94.55 an exception was mandated to be granted by DER.

39. The consent order and agreement of February 8, 1980 contemplated relief from the ban on connections in approximately six to nine months therefrom by the construction of an interim treatment plant (ITP) as an auxiliary to the Chalfont-New Britain facility to handle "additional sewage".

40. GID and 202 paid a small subscription fee for the right to be considered a participant in the construction of the ITP.

41. As of the date of the evidentiary hearing, March 31, 1982 the principal of GID and 202, William A. Clarke, was not aware of ITP, Inc., being granted any permits to build the auxiliary interim treatment facility.

42. All sewage emanating from the development, whether in existence or contemplated, must connect to the Chalfont-New Britain Township Joint Sewer Authority sewer system.

43. The addition of 62 additional dwelling units to the existing development would not increase the daily average flow from the development to the sewer system if the proposed water-saving devices were installed and used by the present occupants of the development.

44. A fair reading of the consent order and agreement of February 8, 1980 makes it abundantly clear that the parties to the agreement intended that GID and 202 would be precluded from seeking any additional connections which would generate additional and increased flows to the Chalfont-New Britain treatment facility.

45. DER offered no testimony at the hearing, and offered no witnesses on its behalf at the hearing.

46. The agreement of February 8, 1980 was not presented to the Board for review and approval.

47. The agreement of February 8, 1980, was not published in the Pennslyvania Bulletin.

D I S C U S S I O N

Appellant herein seeks an exception to DER's ban on additional connections to an already overloaded sewage facility. The basis for the requested exception is the projected use of "water-saving devices" for the existing, and projected, units in the development known as Olde Colonial Green located in Doylestown Township, Bucks County, Pennsylvania.

DER argues that the appellant is barred from seeking additional connections for the development under the terms of a consent order and agreement entered into between DER and appellant's predecessors in title and dated February 8, 1980.

However, the final action appealed from is DER's decision of July 8, 1981, which stated that the anticipated water savings "is overly optimistic" and not sufficient to waive the requirements of the consent order and agreement of February 8, 1980.

Did DER intend, had it determined appellant's projections to be reasonable, that the consent order and agreement prohibition would have been waived and the exception would have been granted? Or did DER intend that appellant did not possess any right to seek any exceptions to the ban of June 21, 1979 by reason of the consent order and agreement of February 8, 1980?

The legal theory presented to the board by DER is that the consent order and agreement of February 8, 1980 is final and enforceable and bars appellants from even seeking exceptions to the ban. We agree with the position of DER that DER consent orders are final and enforceable, but that proposition is not at issue in the instant appeal.

At issue in this appeal are the following:

1. Is Apex bound by the agreement of February 8, 1980; and
2. Did DER act arbitrarily and capricously in concluding that the estimates of water savings were overly optimistic.

If Apex is held to be bound by the terms of the February 8, 1980 agreement, the basis of such a finding can only be grounded upon privity of contract, or knowledge or notice of the agreement.

It is undisputed that Apex was not a party to the agreement in question. Therefore, the agreement of February 8, 1980 cannot be enforced against Apex on that basis.

Was Apex in privity with the parties and therefore subject to the terms of the agreement? Privity of contract has been defined as:

> "that connection or relationship which exists between two or more contracting parties."

Black's Law Dictionary, Revised Fourth Edition, 1968.

Apex was not one of "two or more contracting parties", and had no connection or relationship with the contracting parties to that agreement of February 8, 1980.

The record clearly shows that not only was Apex not involved in the negotiation and execution of the agreement, Apex had no knowledge or notice of the negotiation and execution of the agreement.

In concluding the agreement, the parties did not submit the finished product to this Board for review and approval. Neither did the parties submit the agreement to the Pennsylvania Bulletin for publication therein.

Not having had actual knowledge of the concluding of the agreement, Apex cannot be held bound by the terms of the agreement unless it had notice of the agreement.

There is no doubt but that publication in the Pennsylvania Bulletin may have constituted such notice to Apex. Without publication, there is no notice to Apex.

In an appeal decided by this Board within the past year (1982), the Board held that publication in the Bulletin "constituted notice of the CD&A (consent decree and agreement) to affected parties...." *Lower Paxton Township Authority, et al. v. Commonwealth of Pa., Department of Environmental Resources,* EHB Docket No. 80-205-W, (Decided July 16, 1982).

Since Apex was not in privity with the contracting parties, and had no knowledge of the agreement, and had no notice, actual or constructive, of the agreement, the agreement cannot be enforced against Apex, and we so hold. However, we do hold that the agreement is binding and enforceable against the parties to the agreement.

We are now left with the question of whether or not DER was arbitrary and capricious in determining that Apex estimates of water savings was "overly optimistic".

The evidence adduced by Apex at the evidentiary hearing was given by a registered, professional engineer whose qualifications were not questioned. He answered questions put to him in an honest and forthright manner, and we have no reason to question his expertise or integrity. Not only did the witness outline in detail his reasons why he felt that the use of water-saving devices would not increase the flow from the development, he also outlined in detail the methods used to arrive at his conclusions. The estimated water savings were based on manufacturers' specifications for each such device, and on DER published pamphlets concerning the use of water-saving devices and consequent reduced flow from the development. In addition, the testimony of the expert witness revealed that he had used the same estimates on the use of the same water saving devices on behalf of other clients, in requests to DER by clients for additional sewer connections to the Chalfont-New Britain plant after the ban had been imposed, and that DER granted such requests.

Further, the witness testified that the projected water savings had proven to be conservative in practice in those instances where DER had allowed additional connections based on the use of water-saving devices.

In the face of all of the above testimony, DER chose not to introduce any testimony to substantiate its conclusion that the estimate of water savings submitted by Apex

was "overly optimistic". DER offered no witnesses and no exhibits on its behalf, at the hearing on this appeal, although it was represented at the hearing by one of its officials and by counsel.

The only effort made by DER to defend its position was to move that summary judgment be enforced in its favor for the reason that the agreement of February 8, 1980 acted as a bar to appellants' position. The hearing examiner denied the motion, and, we think, properly so, for the reasons stated hereinbefore in this adjudication.

Despite the fact that DER did not offer any testimony in the course of the hearing, Apex, nevertheless, bears the burden of proof in this proceeding since it is appealing from the action of DER in refusing to grant an exception to a sewer ban. This has not been contested by Apex.

The burden of proof in the instant appeal required Apex to establish by a preponderance of the evidence that the use of water-saving devices would enable Apex to construct 62 additional housing units at the development without adding any additional load to the Chalfont-New Britain plant.

As discussed above, the testimony of the professional engineer, Robert C. Schmauk, established, without contradiction by DER, that the present average daily flow at the development is 45,000 gallons per day and that the present average use per day per person at the development is 80 gallons. Mr. Schmauk's testimony also demonstrated that the use of water saving devices would reduce the present average use per person per day to 59 gallons and that the use of water-saving devices in the development would cause a reduction of flow from the development equivalent to the use of 62 units, which is the number of additional units appellants seek to construct at the development. (See Findings of Fact 19, 21, 27, 31).

In light of the above uncontradicted testimony, we hold that Apex has met its burden of proof with regard to the savings in water and flow from the development to be realized if the water-saving devices were installed at the development.

Our review now proceeds to the determination of the action of DER in determining that the estimates of savings by the appellant's use of water-saving devices was "overly optimistic". The board's review of a DER action is to determine whether DER has committed

an abuse of discretion or an arbitrary exercise of its duties or functions. *Apollo Corporation v. DER*, EHB Docket No. 81-130-G, adjudication dated April 26, 1982, citing *Warren Sand & Gravel v. DER*, 20 Pa. Cmwlth Ct. 186, 341 A.2d 556 (1975), and if DER has acted arbitrarily or abused its discretion, this board can substitute its discretion for that of DER. *Warren*, supra.

In this appeal, DER chose not to offer any testimony or exhibits to support its conclusion that the use of water-saving devices by appellant Apex would effect the savings estimated by appellants' expert. The record is devoid of any factual or legal reason upon which DER based its decision to refuse to grant approval for the requested connections. In contrast to this void, appellant's witness testified, in addition to the expected reduction in flow to be realized by the use of the water-saving devices, that DER has accepted such estimates in previous submissions by the same expert on behalf of other clients, as the basis for granting requests for additional connections to the Chalfont-New Britian plant after the ban was imposed.

In the face of such uncontroverted facts, we can only conclude that DER had no reasonable basis for denying appellant's request, and without evidence of a reasonable basis for denying appellants request, DER is found to have acted arbitrarily and therefore abused its discretion.

DER argued strenuously during the course of this proceeding, and in its post-hearing brief, that Apex was barred as a matter of law from any relief from the terms of the agreement, basing its arguments upon the conclusiveness of the agreement, and also asserting the directive of res judicata as being applicable herein.

The res judicata argument is not applicable herein since Apex, the only party in interest at the time of the hearing, was not a party to the agreement and therefore the identity of the persons requirement has not been established.

By making its decision to not present any testimony at the hearing, DER assumed the risk that the appeal might be decided, in part, on the facts established by appellant. While we are reluctant to move to final adjudication without a full presentation of all the relevant facts in any proceeding, we cannot force a party to participate fully in the

introduction of testimony and evidence. Since DER was represented at the hearing and was given the opportunity to present its case, we can only reason that it had its own reasons for not contesting appellant's evidence and testimony, and must therefore accept the consequences of its action, or nonaction.

CONCLUSIONS OF LAW

1. The board has jurisdiction over the subject matter and the parties.

2. Appellants met their burden of proof in the instant appeal.

3. DER's rejection of appellant Apex request for sixty-two (62) additional connections at its Olde Colonial Green development in Doylestown Township, Bucks County, Pennsylvania was arbitrary and capricious.

4. Appellant Apex is legally entitled to the grant by DER of approval of their request for sixty-two (62) additional sewer connections based upon the use of water-saving devices in the constructed and projected units at the development.

O R D E R

AND NOW, this 6th day of May , 1983, appellant's appeal is granted and DER is directed to issue approval of appellant's request for sixty-two (62) additional sewer connections at its development, Olde Colonial Green, located in Doylestown Township, Bucks County, Pennsylvania, upon the conditions requested by appellants in its submission to DER.

ENVIRONMENTAL HEARING BOARD

Dennis Jay Harnish

DENNIS J. HARMISH
Chairman

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: May 6, 1983

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

CHEMCLENE CORPORATION, et al. :

:

Docket No. 81-168-M

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By: Anthony J. Mazullo, Jr., Member, May 9, 1983

This matter comes before the board in the form of many appeals, consolidated under the above docket number, from an order of DER requiring that hazardous waste transporters (appellants herein) submit a collateral bond as a precondition to the issuance by DER of a license to transport hazardous waste in the Commonwealth of Pennsylvania after July 7, 1982.

By agreement of the parties, the matter was bifurcated so as to allow, in the first phase of proceedings, the expeditious review of the issues involving constitutionality of the statute in question, and the constitutionality and reasonableness of DER's regulations and policies and procedures establishing and administering the collateral bond program.

After presenting a stipulated record to the board, oral argument was heard by the Board en banc, and briefs were submitted.

After the board entered its Opinion and Order Sur Amended Motion for Summary Judgment of September 21, 1982, several of the appellants chose to end their participation in this matter, while others sought to have the matter concluded before the board without the taking of testimony of the reasonableness of the assessment of the individual collateral bonds required by DER.

On its own motion, the board, in the person of the member of the board assigned to hear the matter, issued a Rule To Show Case, requiring all parties to show cause why the matter should not be terminated and the docket marked discontinued and ended as to each and every individual appeal.

Some individual appellants chose not to respond to the Rule and those appeals are therefore terminated. (See paragraph 1 of the attached Order). Other appellants responded and requested that their appeals be terminated at this stage of the proceedings.

Several appellants responded and requested that those portions of their appeals relating to the reasonableness of the amount of their individual collateral bonds be marked discontinued, but that the board issue an adjudication upon the issues submitted upon the stipulated record.

DER has objected to a final disposition of this appeal, at this stage of the proceedings, in essence alleging that DER should be allowed to demonstrate its reasonableness in applying its policies in the assessment of each individual compliance bond. Since all appellants have notified the board that they do not wish to contest this particular aspect of DER's final action, and have therefore waived their right to raise these issues in a future appeal, DER cannot possibly be adversely affected if evidence is not presented and a decision not rendered on the reasonableness of the assessment of each individual compliance bond. Therefore, the board is of the opinion that no further evidence need be adduced to determine those issues which appellants have now placed before the board for final disposition.

Accordingly, this matter is ready for final action by the board, based upon the stipulated record and the briefs presented by the parties.

FINDINGS OF FACT

1. Appellants are "persons" who have submitted themselves to the jurisdiction of the board by reason of the filing of their appeals in this matter.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, the agency of the Commonwealth authorized to administer the provisions of the Solid Waste Management Act (SWMA), 35 P.S. 6018.101, *et seq.*, 1980, July 7, P.L. 380, No. 97.

3. Pursuant to, and in furtherance of the SWMA, DER promulgated regulations outlining duties and responsibilities of DER and persons subject to the SWMA and the regulations, specifically, 25 Pa. Code §75.263(i)(3), which regulation(s) became effective after publication in the November 29, 1980 issue of the Pennsylvania Bulletin.

4. In addition to the regulations promulgated by DER in furtherance of the mandate of Section 505(e) of the SWMA, DER established unpublished policies relating to licensing of transporters of hazardous wastes, e.g., bond forfeiture procedures, bond table and bond matrix.

5. By letter dated October 1, 1981, DER advised appellants herein that collateral bonds would be required to be submitted to DER as a precondition of issuance of hazardous waste transporters' licenses after July 7, 1982 in Pennsylvania.

6. Chemclene filed a timely appeal of the October 1, 1981 final action by DER, and other appellants filed timely appeals or intervened in Chemclene's appeal, and the Environmental Hearing Board (Board) consolidated all appeals with the Chemclene appeal.

7. All appellants are transporters of hazardous waste within the meaning of the SWMA, and are subject to the SWMA and the regulations and policies of DER regarding issuance of licenses for the transport of hazardous waste in Pennsylvania.

8. Section 505(e) of the SWMA (35 P.S. §6018.505(e)) provides in pertinent part:

"(e). Prior to the issuance of any license for the

> transportation of hazardous waste, the applicant for a license shall file with the department (DER) a collateral bond on a form prescribed and furnished by the department. Such bond shall be payable to the Commonwealth and conditioned upon compliance by the licensee with every requirement of this act, rule and regulation of the department, order of the department and term and condition of the license. The amount of the bond required shall be in an amount determined by the secretary, but in an amount no less than $10,000. The department may require additional bond amounts if the department determines such additional amounts are necessary to guarantee compliance with this act...."

9. The pertinent regulation promulgated by DER pursuant to Section 505(e) of the SWMA is found at 25 Pa. Code §75.263(i)(3) which provides:

> "The amount of the bond shall be $10,000 at a minimum and shall be in an amount sufficient to assure that the licensee shall faithfully perform all of the requirements of the act, the rules and regulations promulgated thereunder, the terms and conditions of the license and a Department order issued to the licensee."

10. Appellants have not attacked, in this appeal, the promulgation of regulations adopted by DER pursuant to the SWMA.

11. DER established a bond assessment program, consisting, inter alia, of a bond table and bond matrix, to determine the amount of the bond to be required of each transporter licensee.

12. The kind, quality and amount of wastes to be transported by appellants were factors used by DER, in conjunction with the bond table and bond matrix, in determining the amounts of the collateral bonds to be required of transporter-licensees.

13. The Secretary of DER established the bond assessment program in direct response to the mandate of statutory and regulatory requirements.

14. The hazards associated with the different categories of waste was the basis used by DER for distinguishing between different waste categories for purposes of deriving deterrent bond figures.

15. The varying bond amounts assessed by DER, under its bond assessment program was an interpretation by the Secretary of DER that the kind and quality of waste transported was an important factor in determining the proper bond amount to be assessed to insure compliance with the Act (SWMA).

16. Under the bond assessment program, the Secretary of DER reserves the right to adjust the amount of the collateral bond depending upon the characteristics of the applicant.

17. Compliance history of a prospective licensee may, in the future, be a factor to be considered by DER in assessing the amount of bond to be required.

18. The policy and procedure used by DER in the bond assessment program was not published by DER.

19. The policy and procedure used by DER in the bond assessment program was developed internally by staff personnel of DER who considered "available information...experience and history of the transportation industry".

20. The bond requirement by Section 505(e) of SWMA provides that the bond shall be "...conditioned upon compliance by the licensee with every requirement of this Act, rule and regulation of the department, order of the department and term and condition of the license."

21. The bond form utilized by DER requires a licensee's faithful performance of:

> "...all of the requirements of (1) the "Solid Waste Managment Act" (2) "The Clean Streams Law", Act of June 2, 1937, P.L. 1937, No. 394, as amended, (3) The "Air Pollution Control Act", Act of January 8, 1969, P.L. 2119 as amended, (4) "The Dam Safety and Encroachment Act," Act of November 26, 1978, P.L. 1375, No. 325, (5) Any other state or federal statute relating to environmental protection or to the protection of the public health safety and welfare, (6) the applicable rules and regulations promulgated thereunder, (7) any order of the department and (8) the provisions and conditions of the license issued thereunder and designated in this bond."

22. Section 505(e) of the SWMA does not specifically set forth bond forfeiture procedures.

23. The bond form utilized by DER requires faithful compliance by transporters of legislation and regulations not required by Section 505(e) of the SWMA, or by the provisions of 25 Pa. Code §75.263(i)(3).

D I S C U S S I O N

The appeals filed in this matter raise significant issues concerning constitutionality of state statutes, and regulations promulgated pursuant to such statutes, as well as the reasonableness and validity of DER "policies" in the assessment of each individual transporter's collateral bond in furtherance of its bonding program for transporters of hazardous waste.

The question of the constitutionality of the statute in question must first be addressed, since regulations and departmental policies can only emanate from constitutionally enacted legislation.

The pertinent statute in question in Section 505(e) of the Solid Waste Management Act (SWMA), 35 P.S. §6018.505(e), which section requires that, prior to issuance of a license an applicant must file a collateral bond made payable to the Commonwealth in an amount not less than $10,000 or more if the Secretary of DER determines that a greater amount is required to guarantee compliance with the Act (SWMA).

Appellants argue strenuously that the bond requirement is unconstitutional on the grounds that, *inter alia*, such requirements have been preempted by federal legislation and federal judicial precedent. While this board is impressed by the analysis and reasoning employed by appellants in their exposition of the issue of constitutionality of Section 505(e), we are, nevertheless, cognizant of the jurisdictional limitations imposed upon the board in this area.

Despite appellants' demonstrated desire to have the board rule on the constitutional question, and despite appellants' assertion that this board has jurisdiction to decide the constitutionality of state legislation, the consideration of constitutional issues related to legislation is beyond the scope of review granted to this board. Only courts, not executive tribunals, have the authority to decide constitutional issues. There is no doubt that this board is an executive tribunal, despite the fact that it exercises quasi-judicial functions. However, the exercise of such quasi-judicial functions has not thereby endowed this board with the jurisdiction requisite to decide con-

stitutional issues. The limitation suggested by DER, i.e., the board's exercise of jurisdiction to decide constitutional issues, was first enunciated in the case of *St. Joe Minerals Corporation v. Goddard*, 14 Pa. Commonwealth Ct. 624, 628-629, 324 A.2d 800 (1974). The case was followed by *Delaware Valley Apartment House Owners' Assn. v. Department of Revenue*, 36 Pa. Commonwealth Ct. 615, 620 fn. 4, 389 A.2d 234 (1978).

Since Commonwealth Court rendered those decisions, this board has consistently held that it lacks jurisdiction to decide such issues. For specific citations of the board's decisions, the board's yearly edition of Adjudications and Opinions will provide many instances of this view of the subject, see, e.g., *West Penn Power Company v. DER*, EHB Docket No. 73-330-D, 1977 EHB 328, at 332.

It should also be noted that DER, in its pretrial brief, makes mention of Board member Mazullo's approval of appellant's presentation of its constitutional arguments for consideration by the board. At first blush one might surmise that such so-called "approval" was a presumptuous effort to assert jurisdiction over the constitutional issues involved herein. However, the intent in so doing was solely to provide appellants the assurance that they would have the opportunity to preserve their constitutional issues should they decide to appeal this board's decision to an appellate court of this Commonwealth; under the authority of *Tancredi v. State Board of Pharmacy*, 54 Pa. Commonwealth Ct. 394, 421 A.2d 507 (1980), citing 2 Pa. C.S.A. §703(a), this approval was unnecessary for the purpose of preserving the constitutional issue, but surely did no harm. For the board to have risked denying appellants the opportunity to present the constitutional issues would have constituted palpable error, despite the board's equally firm opinion that it possesses no jurisdiction to declare legislation unconstitutional.

In view of the above cited precedents we hold that, for purposes of this opinion, and any relief granted hereunder, Section 505(e) of the SWMA must be presumed by this board constitutional and binding upon appellants.

Appellants further argue that regulations which were adopted by the Environmental Quality Board are unconstitutionally vague, and are arbitrary, capricious and

constitute an abuse of discretion on the part of the Secretary of DER.[1]

The pertinent regulation is found at 25 Pa. Code §75.263(i)(3) as follows:

> "The amount of the bond shall be $10,000 at a minimum and shall be in an amount sufficient to assure that the licensee shall faithfully perform all of the requirements of the act, the rules and regulations promulgated thereunder, the terms and conditions of the license and a Department order issued to the licensee."
>
> 25 Pa. Code §75.263(i)(3).

Regulations which are properly adopted and promulgated by DER are accorded a presumption of validity. *Allegheny County Sanitary Authority v. Department of Environmental Resources*, EHB Docket No. 78-053-H (Dated March 10, 1982). No attack has been made upon the process of adoption of the above cited regulation, therefore we will look only to the regulation in question, on its face, to determine if it is a proper exercise of authority by DER.

The authority of DER under the regulation to require a bond in the minimum amount of $10,000 is in direct response to the legislative requirement of Section 505 (e) of SWMA. There is no question that the requirement in the regulation of a bond in the minimum amount of $10,000 is a proper exercise of authority by DER.

Section 263(i) also authorizes DER to require bonds of amounts in excess of $10,000 to the extent that said larger bond amounts are necessary to ensure compliance with the act (SWMA). DER relies upon this section to support its position, that the bonds in question, each of which is in excess of $10,000, are properly assessed. We hold DER's reliance upon section 263(i) to be misplaced.

In essence Section 263(i) merely paraphrases the relevant portion of 35 P.S. §6018.505(e) which provides that "[t]he department may require additional bond amounts if the department determines such additional amounts are necessary to guarantee compliance with the act." Neither Section 263(i), nor the act, requires DER to set a bond

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1. Appellant also asserted that Section 105(j) of SWMA (35 P.S. 6018.105(j)) required that the Environmental Quality Board set standards, by regulations, based on the degree of hazard. This argument is without merit since the cited section states unequivocally that "Regulations...may...establish classes of hazardous waste...". (Emphasis added). Clearly, there is no legislative mandate to promulgate regulations wherein classes of hazardous waste must be provided for.

amount higher than $10,000. This case is not analgous to *Rochez Bros., Inc. v. DER*, 18 Pa. Commonwealth Ct. 137, 334 A.2d 790 (1975) wherein both DER and this board were bound by DER's mandatory regulations, but, rather, is similar to *Warren Sand & Gravel*, infra, wherein DER exercised its discretion. In short, we hold that Section 263(i), standing alone, no more supports DER's action of assessing bonds in excess of $10,000 than does the Act (SWMA).

This is not to say, however, that DER is therefore prohibited from assessing bonds in excess of $10,000. We hold only that the regulation, standing alone, does not provide DER with the necessary authority to assess bonds in excess of $10,000.

In order that assessments of bonds in excess of $10,000 be upheld as a proper exercise of discretion by DER, DER established a policy, or program, to determine which transporters would be required to post bonds which would exceed $10,000.

The bond assessment program, admitted by DER to be unpublished, and not a regulation, is therefore not accorded a presumption of validity, and this board may substitute its discretion for that of DER when considering the bond assessment program. *Warren Sand & Gravel, et al. v. DER*, 20 Pa. Commonwealth 186, 341 A.2d 556 (1975). The record discloses that the bond assessment program was established by DER to implement the legislation and the regulations promulgated pursuant to the legislation. (Section 505(e) of SWMA and 75 Pa. Code 263(i)(3). It consists of a bond table and a bond matrix. The appellants' and all other transporters' bonds were assessed by DER pursuant to application of these devices to the kind, quality, and amount of wastes to be transported by haulers per year.

By establishing this procedure, the Secretary of DER exercised the discretion authorized by the legislation and the regulations, and the record clearly establishes that the bond assessment program was established by the Secretary to implement the mandate of statutory and regulatory requirements.

The varying amounts of bonds to be assessed under DER's program is an interpretation by the Secretary that "the kind and quality of waste transported was an important factor in interpreting the proper bond amount to be assessed to assure compliance

with the Act (SWMA)". In further justification of the bond assessment program, DER asserts that its basis for distinguishing between different waste categories for purposes of deriving a deterrent bond figure was: "the hazards associated with the different categories of waste".

The Secretary has also reserved, according to the record, the right to adjust each bond assessment up or down depending on the characteristics of the applicant. In addition, the Secretary may take compliance history into account when an appropriate data base is avaliable; may make exemptions and deviations for small quantity transporters; and may make other adjustments.

Appellants contend that the bond assessment program established by DER is rule-making, and because the policy was not promulgated in accordance with the Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, 45 P.S. 1101, *et seq.*, the program is unenforceable. Their basis for this argument is their assertion that the bonding program is of general application and future effect and therefore subject to the regulatory enactment procedure. Appellants further argue that the program assessed bond amounts based solely upon the matrix and the additional amounts table which were hard and fast requirements, and therefore the program is not an exercise of interpretive regulation but a statement which set absolute standards which must be met. [See the discussion of difference between regulations and policy statements in *Pa. Human Relations Commission v. Norristown Area School District*, 20 Pa. Commonwealth Ct. 555, 343 A.2d 464 (1975].

A fair reading of the record does not support appellants' assertion that the implementation of the bond assessment program constitutes rulemaking and is therefore unenforceable, since the rulemaking process was admittedly not employed by DER in the establishment of the program.

The record clearly reveals that exceptions, adjustments, deviations and exemptions in the bond assessment are available to individual transporters in the assessment of each bond. In providing for flexibility in the assessment for each bond, DER has given each transporter the opportunity to present to DER such information as will

enable DER to tailor the amount of each transporter's bond to the needs of each situation. Such flexibility distinguishes the program from one which is of general application setting absolute standards which must be met. (Emphasis supplied). *Pa. Human Relations Commission, supra.*

The final issue raised by appellants which would require decision by the board concerns the bond form used by DER in the bond assessment program. Specifically, appellants assert that the bond form requires compliance with various legislative enactments, which compliance is beyond the limits established by Section 505(e):

> "...Such bond shall be payable to the Commonwealth and conditioned upon compliance by the licensee with every requirement of this Act, rule and regulation of the department, order of the department and term and condition of the license."

The legislative mandate is clear and unambiguous in terms of what a licensee's bond is conditioned upon. DER, however, has required a bond conditioned upon faithful performance of:

> "...all of the requirement of (1) the "Solid Waste Management Act" (2) "The Clean Streams Law," Act of June 2, 1937, P.L. 1937, No. 394, as amended, (3) the "Air Pollution Control Act," Act of January 8, 1969, P.L. 2119 as amended, (4) "The Dam Safety and Encroachment Act," Act of November 26, 1978, P.L. 1375, No. 325, (5) Any other state or federal statute relating to environmental protection or to the protection of the public health, safety and welfare, (6) the applicable rules and regulations promulgated thereunder, (7) any order of the Department and (8) the provisions and conditions of the license issued thereunder and designated in this bond."

There is no doubt that DER acted arbitrarily and capriciously in requiring a bond conditioned upon compliance with laws, rules and regulations which were not provided for, or specified in, the legislation authorizing a bond to be required of hazardous waste transporters.

The record reveals that a DER employee used a bond form required for a permit to store, process, or dispose of hazardous waste as a guide for the transporters' bond at issue here. It is readily apparent that lack of DER staff expertise in the formulation of bond requirements is the basic reason for the transparently improper

difference between statutory conditions for bonding compliance, and DER's proposed bond form.

DER also argues that this language (in the bond) is not ripe for review, because the appellants will have the opportunity to appeal a bond forfeiture based upon the bond language. However, an appellant under bond should not be expected to ignore language in the bond on the basis that the language eventually might be ruled unlawful. The language of the bond is an appealable action of DER, and we believe it is appropriate to review it in the context of the present appeal.

A sub-issue on the bond form is the assertion by appellants that forfeiture of the bond is not specifically provided for in the legislation requiring a bond to be posted, and therefore forfeiture of the bond may not be effected by DER for violation of conditions of the bond.

DER admits that there is no specific mention of forfeiture procedures in Section 505(e) of the act (SWMA).

While appellants have cited several cases as precedent for the proposition that "it is not for the judiciary to add to a statute that which the legislature did not see fit to include", we are of the opinion that the cited decisions are inappropriate in the context of this appeal. Rather, we accept the argument of DER, that courts will construe a statute so as to give effect to all its provisions (1 Pa. C.S. §1921(A)(a)), and that all powers necessary and incidental to make legislation effective are included by implication. *United States v. Sischo*, 262 U.S. 165(1923); *2A Sutherland Statutory Construction*, §55.04).

To hold that bond cannot be forfeited renders the bond requirement meaningless and defeats the intent of the legislature. The Department promulgated a regulation providing for bond forfeiture (25 Pa. Code 75.263(i)(9) under its implied authority to effect the stated purposes of the act, namely, to protect the public health, safety and welfare of Commonwealth citizens from the danger of transportation of hazardous wastes. (35 P.S. §102(4)). See *City of York v. Commonwealth*, 26 Pa. Commonwealth Ct. 603,364 A.2d 978(1976). *Commonwealth v. J. & A. Moeschlin, Inc.*, 314 Pa. 34, 179 A.119 (1934), and *Commonwealth v. Eclipse Literary and Social Club*, 117 Pa. Superior 339 (1935).

CONCLUSIONS OF LAW

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

2. The Environmental Hearing Board does not possess jurisdiction to decide questions of constitutionality of state statutes.

3. DER did not act arbitrarily or capriciously in establishing the bond assessment program for hazardous waste transporters pursuant to Section 505(e) of the SWMA.

4. The provisions of 25 Pa. Code §75.263(i)(3) do not, standing alone, empower DER to assess compliance bonds in excess of $10,000 upon transporters of hazardous waste.

5. 25 Pa. Code §75.263(i)(9) relating to bond forfeitures is a proper exercise of authority by DER to effect the stated purposes of the SWMA.

6. The bond form utilized by DER for transporters of hazardous waste is an arbitrary exercise of authority insofar as it requires compliance with legislation and regulations and DER policy which are beyond the express language of Section 505(e) of the SWMA and 25 Pa. Code §75.263(i)(e).

O R D E R

AND NOW, this 9th day of May, 1983, it is hereby ORDERED that:

1. All appeals consolidated at EHB Docket No. 81-168-M are hereby terminated and marked withdrawn, with the exception of the following-named appellants:

a. Chemclene Corporation

b. Industrial Waste Removal, Inc.

c. Frontier Chemical Waste Process, Inc.

d. South Jersey Pollution Control, Inc.

e. Tonowanda Tank Transport Service, Inc.

f. Mid-State Trading Company

g. Buffalo Fuel Corporation

h. Radiac Research Corporation

2. The appeals of the appellants named in paragraph No. 1 of this order, insofar as those appeals contest the amount of the collateral bonds assessed against each such appellant, are terminated and marked withdrawn.

3. Applicants, including appellants herein, for hazardous waste transporters' licenses are specifically required to conform to the mandates of Section 505(e) of the SWMA, 35 P.S. 6018.505(e), the regulation promulgated by DER at 25 Pa. Code §75.263(i)(3), DER's bond assessment program, and other pertinent statutory and regulatory mandates, in the application for, and use of, licenses to transport hazardous wastes of the Commonwealth of Pennsylvania.

4. DER may not base its assessment of hazardous waste transporters' compliance bonds in excess of $10,000 solely upon the provisions of 25 Pa. Code §75.263(i)(3).

5. The compliance bond form utilized by DER in the collateral bond program pursuant to Section 505(e) of the SWMA may not require compliance with statutes, regulations and DER policy which are beyond the express language of Section 505(e) of the SWMA.

ENVIRONMENTAL HEARING BOARD

DENNIS J. HARKISH
Chairman

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: May 9, 1983

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
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VENANGO TOWNSHIP and LAKE PLEASANT ACTION COMMITTEE :

:

Docket No. 81-074-M

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and FOSTER GRADING COMPANY, Permittee

ADJUDICATION

By: Anthony J. Mazullo, Jr., Member, June 2, 1983

On April 23, 1981, the Bureau of Air Quality Control of the Department of Environmental Resources approved plans for the construction by Foster Grading Company (Permittee) of a batch asphalt plant in Venango Township, Erie County, Pennsylvania.

The appellants, Venango Township and the Lake Pleasant Action Committee, received notice of the approval on April 29, 1981, and filed their appeal with the board on May 26, 1981.

Permittee filed a Motion to Dismiss, which was answered by appellants, and by Order dated July 9, 1981, the said motion to dismiss was denied.

On April 19, 1982, appellants filed a Petition for Supersedeas with the board, and an evidentiary hearing on the petition for supersedeas and on the merits was held on May 4, 1982 in Erie, Pennsylvania.

Both parties submitted post-hearing briefs, and based on the evidence adduced at the hearing and the briefs submitted by the parties we hereby find as follows:

FINDINGS OF FACT

1. Appellant is Lake Pleasant Action Committee, ostensibly an association of persons residing in the area adjacent to the location of the proposed plant and Lake Pleasant, although no testimony was offered to substantiate the same.

2. Venango Township, a political subdivision of Erie County and the Commonwealth of Pennsylvania, filed its appeal concurrently with Lake Pleasant Action Committee, but at the evidentiary hearing the board was advised that Venango Township had withdrawn from the appeal, and the township was not present, nor was it represented, at the said hearing.

3. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, specifically the Bureau of Air Quality Control, the agency of the Commonwealth authorized to administer the provisions of the Air Pollution Control Act, The Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §4001, *et seq.*

4. On May 26, 1981 appellant filed an appeal with the board contesting the grant on April 23, 1981 of a permit, No. 25-303-0007, to Foster Grading Company (Foster) to construct a batch asphalt plant in Venango Township, Erie County, Pennsylvania.

5. The batch asphalt plant is located "right on the watershed of Le Boeuf Creek and Lake Pleasant", which area has been designated by the Erie County Planning Department as environmentally sensitive.

6. The term "environmentally sensitive area" was not defined in the Erie County Environmental Protection Plan other than as "an area which when impacted could be altered from its natural state".

7. Lake Pleasant is approximately fifty (50) acres in size, "has difficult access", and there are native flora in the area.

8. It is not known if a discharge from the asphalt plant would reach Lake Pleasant.

9. It is not known if there are any high quality streams in the Lake Pleasant watershed area.

10. Limnology is the study of lakes and streams and their interaction physically, chemically, and geologically, including biological organisms.

11. Lake Pleasant is a eutrophic lake, which is located in a "glacially choked valley", and could be rapidly transformed into a bog or a swamp as the result of environmentally degrading industrial activity.

12. Emissions of fugitive dust, if deposited in Lake Pleasant in significant quantities, could carry algae out of the "water column and into the bottom" making the algae unavailable for organisms in the lake, and could also interfere with the process of photosynthesis in the lake.

13. Appellant did not produce any testimony as to the kind, quality and quantity of dust which may emanate from the approved batch asphalt plant.

14. Appellant did not produce any testimony as to any emmissions or discharge from the Foster plant, either within or in excess of DER regulations.

15. Without any "mankind activity" Lake Pleasant will, as the result of natural forces alone, evolve into a bog or swamp.

16. Fugitive dust is that dust which emanates from other than stack emissions in the operation of a plant.

17. An accidental oil spill into the lake would have the potential to upset the delicate balance of Lake Pleasant and contribute significantly to cause the lake to be transformed into a swamp or quagmire.

18. Traffic patterns, if located "right next to the lake" could adversely impact upon nesting waterfowl.

19. Foster included in its construction plans a dual-control system for control of emissions from the plant, consisting of scrubber and multi-cyclone systems.

20. Foster has formulated a pollution incident prevention plan "to cover spilling of oil and asphalt at the plant".

21. Foster has formulated an air pollution episode strategy for the plant.

22. There are no state or federal statutes or regulations requiring onsite facilities to continuously monitor and record emissions from asphalt plants.

23. Stack testing is the method used to determine if the plant is in compliance with DER regulations concerning particulate part emissions.

24. The main parameters used to determine the efficiency of a scrubber are "the pressure drop and waterflow rate to the scrubber".

25. A significant "pressure drop", or a significant "drop" in waterflow rate indicates that a scrubber is not operating properly.

26. Visual observance of emissions from a stack, "the plume," enables a trained observer to determine if dust is emanating from a stack.

27. Foster did not submit a plan for reduction of emission in its application for approval to construct the plant.

28. Foster submitted an air pollution episode plan, i.e., a plan for reduction of emissions, prior to start-up of the plant.

29. The Foster plant is located outside the Erie Basin.

30. DER does not require submission of emergency episode plans in areas outside the Erie Basin because it does not possess ambient air quality monitoring facilities outside the basin.

31. Tests conducted by DER at the plant showed that the plant scrubber "controlled emissions well below the state (Pennsylvania) regulation and the federal Environmental Protection Agency performance standards".

32. In its review of Foster's application DER considered the possibility of the impact of operations at the asphalt plant upon Lake Pleasant and the surrounding area.

33. Emissions of particulate matter and potential for water discharges from the plant and potential for oil and asphalt spills were considered by DER in its review of Foster's application for construction and operation of a batch asphalt plant at its present site.

34. Water from the stack scrubber is recycled, with no resultant discharge from the plant.

35. Settlement ponds at the plant site are lined with asphalt to prevent percolation of water from the scrubber into the ground water.

36. Erie County Health Department approved Foster's pollution prevention plan, which plan provided for containment of spills on the plant site.

37. Production at the plant was limited by DER to that production accomplished during stack tests.

38. Foster's emergency episode plans complies with DER regulations, 25 Pa. Code §137 (chapter 137), regarding production curtailment at various levels for different stages of an air alert or emergency.

39. DER has been sampling air in the Erie basin since approximately 1972, and no air alerts have been called by DER from 1972 to present.

40. In its review of Foster's application, DER conducted dispersion modelling for the purpose of getting estimates of ground level concentrations, based on stack parameters and emission rates, due to the location of the plant near the lake.

41. As a result of the use of dispersion modelling, DER estimated that the concentration of particulate matter in the air over the center of Lake Pleasant, attributable to the Foster plant, would be 3.3 micrograms per cubic meter.

42. The ambient standard used by DER is 260 micrograms per cubic meter.

43. Foster's plant contributes approximately 1.3 percent of the ambient standard per twenty-four (24) hour operating period, although Foster operates only eight (8) hours per day.

44. In the initial review of Foster's applications for construction and operation of the batch asphalt plant, DER noted deficiencies in the plant which would render the plant incapable of operating within standards imposed by regulations, especially with regard to fugitive dust emissions, scrubber efficiency, sand specification, and deteriotion of the control system.

45. When advised by DER of the deficiencies specified in Finding of Fact 44, Foster repaired, modified and otherwise improved the batch plant so that, in operation, all applicable standards imposed by DER regulations would be met or exceeded.

46. When tested and observed, the Foster plant, after repair and modification, met or exceeded all applicable operational standards, except in the production of asphalt mix FJ-1.

47. As a condition for approval of construction and operation, asphalt mix FJ-1 may not be manufactured at the Foster plant.

D I S C U S S I O N

In its notice of appeal, appellant noted numerous deficiencies on the part of DER in the review process conducted upon Foster's application for permits to construct and operate a batch asphalt plant.

At the evidentiary hearing, appellants presented testimony and evidence limited to the possible degradation of the Lake Pleasant watershed area, considered to be an environmentally sensitive area by the Erie County Planning Commission and by a recognized biologist who specialized in limnology. Appellant contends that the plant could not operate within prescribed limitations, and that the mere location of the plant in close proximity to the lake was in violation of state statute and DER regulations.

In its brief, appellant argues only one issue, namely, that the grant of the permit to construct the plant was arbitrary and capricious because Foster had not presented a plan for reduction of emissions as of April 23, 1981. However, appellant does not deny that the specified plan was submitted, reviewed by the appropriate authority, and approved by DER prior to commencement of operations at the plant.

In arriving at a decision on this appeal, the board must initially determine if this appellant has met its burden of proof.

Where one contests the grant of a permit by DER the burden of proof rests upon the appealing party to prove that DER actions were arbitrary and capricious and therefore in violation of the statutes and regulations governing the conduct of DER in permit issuance. 25 Pa. Code §21.101(c)(3), *Warren Sand & Gravel Company, Inc. v. Commonwealth of Pennsylvania, DER*, 341 A.2d 556, 20 Pa. Cmwlth Ct. 186(1975), *Milan Melvin Sabock and Concerned Citizens of Garlow Heights v. Commonwealth of Pa., DER*, 1979 EHB 229, 238.

Appellant herein offered evidence that the Lake Pleasant watershed area is environmentally sensitive, and that the lake itself is presently in a delicate state of balance and likely to change from a stratified body to either a bog or a swamp, depending upon impacts made upon the lake, natural or otherwise. The board finds these assertions to be based on fact and accepts them to be true.

Appellant also asserted that the mere location of the plant in close proximity to the lake was in violation of applicable regulations, thereby rendering DER's action arbitrary and capricious. The board cannot accept this argument as valid, in view of the testimony of appellants' expert witness, Dr. Mosteller, who testified that despite his concerns, he could not determine whether the operation of Foster's asphalt plant would be environmentally degrading to Lake Pleasant or to the watershed area. His main objection was directed to the location of any industrial operation in close proximity to the lake, whether asphalt manufacturing or other industrial operations, because of the possibility of accidental spills, excessive noise, or particulate emissions being carried to the lake and watershed area. Dr. Mosteller was sincere, forthright, and entirely credible, and openly admitted that if his aforementioned concerns were properly addressed it was surely possible that the supposed environmental degradation would not occur.

In answer to the concerns expressed by Dr. Mosteller, DER's staff employes testified that the very concerns, with perhaps the exception of noise, were the very concerns which DER considered in the review of Foster's application. The record is clear that DER did not overlook the location of the plant as a necessary consideration in determining the sufficiency of Foster's application. In no instance is this more clear than in the use by DER of dispersion modelling to determine the concentration of particulate matter in the air over Lake Pleasant during any given twenty-four hour period, which resulted in an estimate of 3.3 micrograms per cubic meter against an ambient standard of 260 micrograms per cubic meter.

Taking the testimony of DER's employes as a whole, the board is convinced that the location of the plant was considered by DER as one of the many important factors to be considered in the review of Foster's application.

In weighing appellant's evidence against that of DER and the appellee, the conclusion is unavoidable that appellant has not met its burden of proof.

However, even assuming, arguendo, that appellant had met its burden of proof, the board must determine if DER acted capriciously and arbitrarily in approving the application for construction of the plant given that the plan for reduction of emissions was not presented by Foster prior to the grant of the permit for construction of the plant.

DER admits that the said plan was not submitted prior to the grant of the permit allowing construction. Appellant does not deny that the plan was submitted, reviewed and approved prior to start-up of the plant.

Appellant asserts that the approval by DER to construct the plant without submission of the said plan is violative of the requirement of Chapter 127.12 (25 Pa. Code §127.12).

The pertinent regulation requires:

> (a) Applications for approval shall:
>
> ...
>
> (7) contain a plan of action for the reduction of emissions during each level specified in Chapter 137 of this title (relating to air pollution episodes).

25 Pa. Code §127.12.

In its brief, appellant presents one, and only one, issue to the board for consideration, and therein argues that the plan must be submitted in the application and no approval may be granted by DER if no plan is submitted.

Appellant assumes that approval of construction, alone, is defective if no such plan has not been submitted. The board views such construction of the cited regulation as being altogether too restrictive and narrow.

The permit issued by DER clearly grants approval for construction only. The permit also clearly requires approval and permit issuance subsequent to completion of construction and prior to start of operations. (See Permit No. 25-303-0007, with conditions).

The plan for reduction of emissions is not related to the construction phase of the project. The plan is relevant only to the operational phase of the project, and would only be used if the plant were in operation.

The regulation (25 Pa. Code §127.12) states, "Applications for approval shall ...". It does not specify which application requires submission of the plan therein. The testimony revealed that approximately three applications were filed by Foster in this process, and that the plan was contained in one of the applications submitted before start-up of the plant.

So long as the plan was submitted prior to start-up, the requirement of the pertinent regulation was met, and not violated.

We therefore hold that DER acted within its discretion in issuing permits for the Foster plant.

CONCLUSIONS OF LAW

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

2. Appellant, Lake Pleasant Action Committee, did not meet its burden of proof in the instant appeal.

3. The grant by DER of Permit No. 25-303-0007 to Foster Grading Company did not constitute an abuse of discretion by DER.

4. The provisions of 25 Pa. Code §127.12 were satisfied by Foster Grading Company by reason of their submission of a plan for reduction of emissions prior to operation of the batch ashphalt plant.

5. Venango Township failed to prosecute its appeal as required by law.

O R D E R

AND NOW, this 2nd day of June , 1983, it is hereby ORDERED that the appeal of Venango Township and Lake Pleasant Action Committee, at EHB Docket No. 81-074-M be and is hereby dismissed, with prejudice.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: June 2, 1983

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

WESTERN HICKORY COAL COMPANY :

:

: Docket No. 82-141-G

: Surface Mining Conservation and Reclamation Act

v. : Penalty for Mining Without Permit

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By: Edward Gerjuoy, Member, June 2, 1983

On May 3, 1982, the Department of Environmental Resources ("DER") assessed a civil penalty of five thousand dollars ($5,000) against Western Hickory Coal Company ("WHCC") for allegedly "conducting surface mining on an approximately three-acre site on or about September 11, 1981, without having first obtained a permit" pursuant to the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1361.1 et seq. ("SMCRA").

WHCC filed a timely appeal of this assessment, and a hearing on the merits of the appeal was held on December 14, 1982. At the termination of the hearing, a briefing schedule was set up. By March 7, 1983, all permitted post-hearing briefs had been filed. On March 14, 1983, WHCC filed a Motion for Argument Before the Board En Banc, alleging that there are issues of first impression in this appeal, whose outcome will have an effect upon the statewide

coal industry. The Board denied this Motion in an Opinion and Order dated March 25, 1983. We now adjudicate this appeal, on the basis of the evidence presented on December 14, 1982 and the parties' post-hearing briefs. DER's brief included suggested Findings of Fact and Conclusions of Law, as required by our Rules and Regulations, 25 Pa. Code §21.116(b). WHCC's brief fully argued its case, but did not explicitly list suggested Findings of Fact or Conclusions of Law.

FINDINGS OF FACT

1. The Appellant is Western Hickory Coal Company ("WHCC"), a Pennsylvania corporation with a business address of R. D. 2, Box 19, Portersville, Pennsylvania 16051.

2. WHCC's business includes the mining of coal by the surface mining method.

3. The Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), which is the agency of the Commonwealth having the duty and responsibility of administering the provisions of the SMCRA.

4. On August 18, 1981, WHCC submitted application No. 100152-3076SM21-01-2 ("01-2") to DER for a mining permit ("MP") to conduct surface mining at a site in Cherry Valley Borough, Butler County.

5. On September 29, 1981, MP 01-2 was issued to WHCC.

6. On or about September 11, 1981, WHCC conducted surface mining on the site covered by the application for MP 01-2 notwithstanding that said permit had not yet been issued to WHCC.

7. On or about September 11, 1981, WHCC conducted blasting, the removal of spoil and overburden, the removal of coal, and otherwise affected

(through its surface mining activities) a portion of the site covered by the application for MP 01-2.

8. The area which, though unpermitted, was affected as described in Finding of Fact 7 equaled approximately three (3) acres.

9. No actual pollution or environmental harm, other than the disturbance of the natural ground surface and rock strata, resulted from WHCC's unpermitted mining.

10. On September 11, 1981, DER's Mine Inspector Marvin W. Snyder("Snyder") issued a cessation order to WHCC, requiring WHCC to cease mining on the unpermitted area (which was not permitted until September 29, 1981, see Finding of Fact 5).

11. WHCC's president Vernon Kerry ("Kerry") testified that on September 3, 1981 he informed Snyder in a telephone conversation that WHCC was mining in the area covered by MP 01-2.

12. Kerry further testified that Snyder then gave him oral permission to continue mining in that area, because the permit was "in process" (N.T. 79).

13. Snyder recalled having a telephone conversation with Kerry on September 3, 1981, but denied giving Kerry permission to mine an area for which WHCC had not yet received a mining permit (N.T. 98-99).

14. WHCC had been mining the unpermitted site for some days prior to August 29 or 30, 1981.

15. On August 29 or 30, 1981, Kerry was aware that WHCC was mining the unpermitted site.

16. WHCC did not claim to have received permission to mine the area covered by MP 01-2 until September 3, 1981.

17. Before September 3, 1981, WHCC did not inform DER it was mining outside its permit.

18. In August-September 1981, when the unpermitted mining occurred, there were no regulations covering the assessment of civil penalties under the SMCRA.

19. On May 3, 1982, DER issued the $5,000 civil penalty assessment which forms the subject of this appeal.

20. Regulations covering civil penalty assessments under the SMCRA first became effective on July 31, 1982.

21. The $5,000 penalty was assessed on the basis of guidelines issued November 5, 1981 by J. Anthony Ercole, director of DER's Bureau of Mining and Reclamation.

22. According to the guidelines, for mining an area which has not been permitted the penalty was to be $2,000 plus $1,000 for each acre mined.

23. The $5,000 assessment was precisely the penalty prescribed by the guidelines for mining three acres of an unpermitted site (see Finding of Fact 8).

24. The aforementioned guidelines never were filed as provided for under the Commonwealth Documents Law.

25. The aforementioned guidelines never were promulgated as regulations.

26. The aforementioned guidelines were essentially an internal memorandum of DER's, not widely circulated outside DER.

27. If the penalty had been assessed under the presently applicable regulations (see Finding of Fact 20), the minimum assessed penalty would have been $6,000.

28. The aforementioned guidelines were established with due regard for the criteria for assessing civil penalties set forth in the SMCRA.

29. The guidelines' formula yielding WHCC's $5,000 penalty assessment was established on the assumption that any operator who mined beyond his

previously permitted boundary must be doing so willfully.

30. The guidelines would have allowed an assessment exceeding $5,000 had WHCC caused any actual pollution or environmental harm (see Finding of Fact 9).

31. During the course of its mining the unpermitted site, WHCC placed topsoil within one hundred (100) feet of Legislative Route 60006.

32. This violation of WHCC's was overlooked by DER in assessing the aforementioned $5,000 penalty.

33. Under the guidelines, the penalty for this violation above, irrespective of the penalty for mining three (3) unpermitted areas, was set as $5,000.

DISCUSSION

I. Introduction

Prior to the hearing, the parties stipulated to our Findings of Fact 1-2, 4-7 and 9 (N.T. 5-6). Finding of Fact 3 is undisputed. Based on the testimony, the Board has made its Findings of Fact 8 and 10, which Findings are substantially conceded by WHCC (WHCC's post-hearing brief pp. 1 and 14). WHCC does not contest DER's contention that the statutory foundation for DER's civil penalty assessment (assuming a statutory authority indeed does exist) must be the SMCRA. WHCC further concedes (WHCC brief, pp. 5 and 10-12) that the applicable section of the SMCRA (still assuming the SMCRA is a valid authority for DER's action) is 52 P.S. §1396.22, the Civil Penalties section.

In relevant part, §1396.22 reads:

> In addition to proceeding under any other remedy available at law or in equity for a violation of a provision of this act, ...the

> department may assess a civil penalty upon a person or municipality for such violation. Such a penalty shall be assessed whether or not the violation was willful. The civil penalty so assessed shall not exceed five thousand dollars ($5,000) per day for each violation. If the violation leads to the issuance of a cessation order, a civil penalty shall be assessed...When the department proposes to assess a civil penalty, the secretary shall inform the person or municipality within a period of time to be prescribed by rule and regulation of the proposed amount of said penalty.

Moreover, 52 P.S. §1396.4(a) and various presently valid regulations implementing the SMCRA, namely 25 Pa. Code §§77.84, 86.11 and 86.13, prohibit any person from conducting surface mining operations on any area for which that person does not have a surface mining permit. Sections 86.11 and 86.13 are new regulations, effective July 31, 1982; however, §77.84, which reads "The permit requirements of section 4 of the act (52 P.S. §1396.4) shall apply to the surface mining of coal effective January 1, 1972," was adopted December 16, 1971. Section 4 of the SMCRA, 52 P.S. §1369.4, states:

> (a) Before any person shall hereafter proceed to mine minerals by the surface mining method, he shall apply to the department, on a form prepared and furnished by the department, for a permit for each separate operation.

Section 4.3 of the SMCRA, 52 P.S. §1396.4c, authorizes DER to issue enforcement orders, including orders "requiring persons to cease operations immediately."

In general, our review of a DER action is to determine whether DER has committed an abuse of discretion or an arbitrary exercise of its duties or functions. Warren Sand and Gravel v. DER, 20 Pa. Cmwlth 186, 341 A.2d 556 (1975), Ohio Farmers Insurance Co. v. DER, Docket No. 80-041-G, 1981 EHB 384, affirmed 457 A.2d 1004 (Pa. Cmwlth. 1983). In the context of the present appeal "an

arbitrary exercise by DER of its duties or functions" would be an abuse of discretion as well, so that we can and will focus on the "abuse of discretion" clause in the Warren standard. The burden of showing that there has been no abuse of discretion in this matter falls on DER, as DER concedes (post-hearing reply brief, p. 5). Although it speaks only to a "complaint" for civil penalties, 25 Pa. Code §21.101(b)(1) should apply. Recently the Board implicitly has ruled that DER has the burden of proof in appeals of civil penalty assessments. Lawrence Rose v. DER, EHB Docket No. 82-013-H (Opinion and Order, January 19, 1983).

DER argues that the Findings of Fact 1-10 already mentioned in this discussion make it manifest that DER did not abuse its discretion. In particular, DER argues that the SMCRA, as quoted above:

> a. Gives DER the discretion to issue a cessation order for a violation of the SMCRA, such as mining without a permit.
>
> b. Required DER to assess a civil penalty, once DER decided to issue a cessation order.

The Board finds these arguments a - b of DER's irresistible, always assuming the SMCRA is pertinent, an assumption WHCC has challenged however. We begin, therefore, by examining WHCC's challenge to DER's reliance on the SMCRA in this matter.

II. Whether the SMCRA May Be Employed

WHCC argues that the SMCRA is void for failing to include certain minimum procedural requirements set forth in the Federal Surface Mining Control and Reclamation Act (the "Federal Act"). WHCC points particularly to 30 U.S.C. §1268(c), which requires that an operator be notified within thirty (30) days of the proposed amount of any penalty for violation of the Federal Act. This thirty day requirement of the Federal Act is not embodied in the SMCRA. Instead

§1396.22 of the SMCRA merely states, as quoted above, that the secretary shall give notification of the proposed amount of the penalty "within a period of time to be prescribed by rule and regulation." According to WHCC, this deficiency (as compared with the Federal Act) violates 30 U.S.C. §1268(i), and therefore voids the employment of the SMCRA in primary enforcement of the surface mining of coals and other minerals in Pennsylvania.

In ruling on this contention of WHCC's, we note first that WHCC did not raise this contention in its Notice of Appeal or in its pre-hearing memorandum. Nor does the Board recall any argument on this contention during the hearing. In other words, WHCC appears to be raising this contention for the first time in its post-hearing brief. Issues not set forth in an appellant's Notice of Appeal or pre-hearing memorandum may be deemed waived (see Pa. Code §21.51(e) and paragraph 4 of our Pre-Hearing Order No. 1). In the past, the Board indeed has ruled that issues first raised at the hearing on the merits of an appeal are not part of the subject matter of that appeal. R. Czambel, Sr. v. DER and Independent Enterprises, Docket No. 80-152-G, 1981 EHB 88 at 102.

Furthermore, under the authority of St. Joe Minerals v. Goddard, 14 Pa. Cmwlth. 624, 324 A.2d 800 (1974), this Board consistently has refused to rule on the validity of statutes enacted by the Pennsylvania Legislature. See, e.g., Pennsylvania Mines Corporation v. DER, EHB Docket No. 82-176-G (Adjudication, September 9, 1982) and Chemclene Corp. et al. v. DER, EHB Docket No. 81-168-M (Adjudication, May 9, 1983). It is true that St. Joe's and these just-cited EHB Adjudications deal with requests that the Board declare statutes unconstitutional. The theory on which WHCC asks us to void the SMCRA is not unconstitutionality, but rather (it seems) the SMCRA's failure to be consistent

with procedural requirements of the Federal Act. However, in Philadelphia Life Insurance Co. v. Commonwealth, 410 Pa. 571, 190 A.2d 111 (1963), on which St. Joe's relied, the Supreme Court made it clear that administrative tribunals like this Board "are not competent tribunals to pass upon questions of the validity or constitutionality of statutes" (emphasis added).

Therefore, for the reasons just stated, we reject WHCC's contention that the SMCRA is not pertinent to this appeal; the contention is not part of the subject matter of this appeal and is outside our jurisdiction as well. Nevertheless we add that were we to rule on the merits of this contention of WHCC's, we again would reject it. As DER argues, WHCC really is not challenging the validity of the SMCRA. Rather, WHCC is challenging the discretion of the U. S. Secretary of the Interior in accepting the SMCRA as the basis for granting the Commonwealth primary enforcement powers over surface mining. If WHCC believes the U. S. Secretary of the Interior has abused his discretion, that complaint should be addressed to the Federal courts.

III. Whether the Assessed Penalty of $5,000 Was an Abuse of DER's Discretion

Having ruled (in effect) that DER was and is entitled to rely on the SMCRA in this matter, the issues in this appeal reduce to (see DER's arguments a and b supra):

1. Was the cessation order an abuse of DER's discretion?

2. If the cessation order was not an abuse of discretion, then was the assessed penalty of $5,000 an abuse of discretion?

However, this first issue has not been explicitly addressed by WHCC, in its Notice of Appeal, its pre-hearing memorandum, or its post-hearing brief, although the DER's pre-hearing memorandum contends (p. 2):

5. The Department acted reasonably and according to law in ordering the cessation of mining activities at Appellant's mining operation which is the subject of this appeal. 52 P.S. §1396.4c.

Moreover, the Board sees no basis for holding that the cessation order was an abuse of DER's discretion. Surely DER cannot be expected to allow an operator to mine without a permit, in the face of 52 P.S. §1396.4(a) and the regulation 25 Pa. Code §77.84 (quoted supra), which was effective on September 11, 1981 when the correction order was issued.

WHCC does contend that mining on the unpermitted area occurred only because WHCC had received verbal approval for such mining from DER's Inspector Snyder (N.T. 79). Snyder disputes WHCC's assertion that he, Snyder, had given WHCC oral permission to mine the unpermitted area (N.T. 98-99). But whether or not Snyder actually had given the alleged permission is irrelevant to the reasonableness of the cessation order. Whatever Snyder may have said about WHCC's unpermitted mining prior to September 11, 1981, Snyder was entitled to decide that he would not allow WHCC to continue mining the unpermitted site after September 11, 1981.

Therefore we hold that the cessation order was not an abuse of DER's discretion, and turn to the major issue in this appeal, namely whether assessing a $5,000 penalty for WHCC's unpermitted mining was an abuse of discretion. Because §1396.22 of the SMCRA clearly states that "a civil penalty shall be assessed" if a cessation order is issued, we now can and do reject out of hand WHCC's contention that no civil penalty at all should have been assessed against WHCC. Assessing a civil penalty was not an abuse of discretion. However, it may have been an abuse of discretion to set the penalty as high as $5,000; it is on this issue that we

now concentrate.[1]

A. Whether the Penalty Should Be Set According to the Present Regulations

DER admits that in September 1981, when the unpermitted mining occurred, there were no regulations covering the assessment of civil penalties under the SMCRA (DER post-hearing Brief, p. 18). Applicable regulations, which presently are in force, became effective July 31, 1982, after the May 3, 1982 assessment (the subject of the instant appeal) was imposed. Nevertheless DER argues that in the context of this appeal, which involved a de novo hearing after July 31, 1982, the Board must apply the present regulations, embodied in 25 Pa. Code §§86.193 and 86.194, to determine WHCC's penalty. WHCC contends it would be unlawful to apply the present regulations retrospectively, in our review of the May 3, 1982 penalty assessment for WHCC's September 1981 violations.

DER grants that as a general rule new legislation is not to be applied retroactively. However, DER argues, when new legislation does not subject individuals to new liabilities, but merely redefines the remedy, the legislation can be supplied retrospectively. DER offers a number of citations in support of its thesis, namely Doraville Enterprises v. DER, Docket No. 79-002-H, 1980 EHB 489 (Opinion and Order); Kille v. Reading Ironworks, 134 Pa. 225 (1890); Costa v. Lair, 241 Pa. Super. 517,363 A.2d 1313 (1976); Pennsylvania Power and Light Co. v. PUC, 128 Pa. Super. 195, 193 A.427 (1927); In re Star Transit Co., Inc.,

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1. Note that we are ignoring the possibility that it was an abuse of discretion not to set the penalty higher than $5,000. DER urges us to increase the penalty on two distinct grounds. First, the $5,000 assessment overlooked a possible penalty against WHCC for having conducted its unpermitted surface mining activities within 100 feet of Legislative Route 60006 (see Findings of Fact 31-33). Second, under the regulations presently in effect the penalty could be much higher than $5,000 (DER argues). However, even if DER's original May 3, 1982 penalty assessment could have been above $5,000 without constituting an abuse of discretion, we are very reluctant to let WHCC's non-frivolous appeal of its actual $5,000 assessment become the vehicle for an increase of the assessment by this Board's order at DER's urging.

55 Pa. Cmwlth. 46, 423 A.2d 751 (1980); Ashbourne School v. Commonwealth, 43 Pa. Cmwlth. 593, 403 A.2d 161 (1979). WHCC maintains these citations are not pertinent to the instant appeal.

We are inclined to agree with WHCC on this question, although with some qualification. The holdings cited by DER pertain to fact situations very different from the facts presently before us. For instance, Doraville, supra, deals with an appeal of a mine drainage permit application denial; Pa. Power and Light, supra, was concerned with procedural changes in rate fixing appeals. Arguments which might justify retrospectivity in such cases seem quite irrelevant to the question of whether the May 3, 1982 civil penalty assessment against WHCC--an assessment which surely created a liability WHCC did not possess before that date--now should be based on regulations which became effective after May 3, 1982.

In fact, Ashbourne, supra, cited by DER, which clearly permits the retroactive application of administrative regulations in appropriate circumstances, delineates these circumstances as follows:

> Agencies may, of course, adopt retroactive regulations so long as they do not disturb vested rights, the impairment of contracts, or the principles related to due process.

Underlying the principles of due process is the concept of "fundamental fairness". Bryant v. Edwards, 14 D.&C.3d 474 (1980); 7A P.L.E. 174, Constitutional Law §273. Although we recognize that the constitutional proscriptions against ex post facto punishments do not apply to civil penalties [Padgett v. Stein, 406 F.Supp. 287 (D.C. Pa. 1975; Commonwealth v. Riley, 253 Pa. Super. 260, 384 A.2d 1333 (1978).], we feel it would offend fundamental fairness to use the present regulations as a basis for assessing a penalty which is larger than WHCC reasonably might have

anticipated when it committed its violations of the SMCRA. A similar viewpoint was expressed in Costa v. Lair, supra, wherein the court, in refusing retroactive application of Pennsylvania's comparative negligence statute, wrote:

> Certainly, no one has an accident upon the faith of the then existing law. However, it would come as a shock to some one who has estimated his probable liability resulting from a past accident, and who has planned his affairs accordingly, to find that his responsibility therefor is not to be determined as of the happening of the accident but is also dependent upon what the legislature might subsequently do. (Emphasis in original)

In other words, although use of the present regulations to assess WHCC's penalty could be appropriate, we do not agree that such use automatically became appropriate when those regulations went into force on July 31, 1982. The reasonableness of the resultant assessment still would have to be examined. To put it another way, we still would have to decide whether the magnitude of the resultant assessment was an abuse of discretion. Consequently we reject DER's request that we compute WHCC's penalty assessment on the basis of the present regulations; certainly ruling otherwise would not simplify the issues in this appeal. Because of this ruling we need not rule on WHCC's contention that the presently effective regulations exceed the scope of the SMCRA, a contention which WHCC also (see Section II supra) failed to raise prior to its post-hearing brief.

B. Computation of the Penalty

Mr. Vayansky, DER's cognizant district mining manager, explained that the $5,000 penalty was assessed on the basis of guidelines sent to district mining managers by J. Anthony Ercole, director of DER's Bureau of Mining and Reclamation (N.T. 43-44). These guidelines, introduced into evidence as DER's Exhibit 3, were dated November 5, 1981 and read (in pertinent part):

> During our meeting last week we discussed uniformity of penalties for mining and/or affecting areas off the permit or bonded area or both.
>
> It was agreed the penalties assessed would follow the guidelines listed below:...
>
> Mining area which has not been bonded or permitted. The penalty shall be $2,000 plus $1,000 for each acre mined.

As Vayansky further explained, the $5,000 civil penalty assessed May 3, 1982 (from which WHCC is appealing) was calculated precisely as the guidelines direct: $2,000 plus $1,000 for each of three acres mined (see Finding of Fact 8) equals $5,000 (N.T. 52).

The guidelines never were filed as provided for under Section 208 of the Commonwealth Documents Law, 45 Pa. C.S. §1101 et seq. In other words, the guidelines never were promulgated as DER regulations, and constituted no more than unpublished criteria for deciding the magnitudes of civil penalty assessments. Indeed, DER's post-hearing brief (p. 18) admits, as already stated supra, that there were no civil penalty regulations of any kind on May 3, 1982, when the assessment was issued. Unpublished quidelines do not have the presumption of validity afforded properly promulgated regulations, as DER concedes (post-hearing reply brief, p. 7). Allegheny County Sanitary Authority v. DER, Docket No. 78-053-H (Adjudication, March 10, 1982); Chemclene Corp., supra.

On the other hand, as Allegheny County Sanitary Authority or Chemclene clearly imply, the mere fact that the aforesaid guidelines were not published as regulations does not justify the conclusion that the guidelines-based $5,000 penalty assessment was unreasonable. This conclusion (in effect) is urged by WHCC, but it would be invalid. DER may be able to meet its burden of showing

the $5,000 civil penalty was reasonable under the facts of the present appeal, without reliance on any presumptions about the reasonableness of the guidelines which led to that figure. Old Home Manor and W. C. Leasure, EHB Docket Nos. 82-006-G and 82-007-G (Opinion and Order, April 11, 1983).

In attempting to meet this burden, DER argues that the actually assessed $5,000 penalty is less than the $6,000 minimum penalty called for under the presently effective regulations. In particular, according to 25 Pa. Code §86.193(e), the minimum penalty for WHCC's surface mining activities on an unpermitted area is $2,000 per acre; on this basis the minimum assessment for the three acres WHCC affected (see Finding of Fact 8) would be $6,000. We already have explained supra that we do not agree WHCC's penalty necessarily should be set on the basis of the present regulations. Nevertheless, the finding that the present regulations would lead to a penalty assessment exceeding the actually assessed $5,000 supports DER's contention that the $5,000 assessment was not an abuse of discretion. The presently effective regulations were duly promulgated as required by the Commonwealth Documents Law, after serious consideration by the Environmental Quality Board (see 12 Pa. Bull. 2473-4, July 31, 1982), and therefore enjoy the presumption that penalties based thereon are not unreasonable. If use of the present regulations had led to a penalty less than $5,000, WHCC rightly would have argued that this result suggested the $5,000 penalty was unreasonably large; DER is entitled to the contrary suggestion from the fact that the penalty under the new regulations actually turns out to exceed $5,000.

C. Criteria Employed in Setting the Penalty

WHCC argues that in using the guidelines to set the $5,000 penalty assessment DER failed to comply with the criteria for assessing civil penalties

set forth in the SMCRA. These criteria are stated in a portion of 52 P.S. §1396.22 which we did not quote supra. The relevant language is:

> In determining the amount of the civil penalty the department may consider the willfulness of the violation, damage or injury to the lands or to the waters of the Commonwealth or their uses, cost of restoration and other relevant factors.

WHCC points to Finding of Fact 9, to which the parties stipulated, and with which Snyder's testimony agreed (N. T. 33-34). According to Finding of Fact 9, no actual pollution or environmental harm, other than the disturbance of the natural ground surface and rock strata, resulted from WHCC's unpermitted mining. Snyder stated (N.T. 34) that no cost of restoration was incurred as a result of WHCC's unpermitted mining activities. Therefore, WHCC contends, the only remaining possible basis for assessing a penalty against WHCC was "the willfulness of the violation." WHCC further contends that it did not "willfully" violate the SMCRA, because it had received oral permission from DER's Inspector Snyder to mine the unpermitted area while awaiting receipt of its mining permit 01-2 (N.T. 79).

We agree with WHCC that DER has the burden of showing that the $5,000 penalty was based on criteria consistent with those set forth in the SMCRA. The penalty actually was set via a faithful adherence to the formula in DER's Exhibit 3, as has been explained supra (Section III B). DER maintains that the formula in DER's Exhibit 3 was arrived at after consideration of criteria which were consistent with the SMCRA (DER post-hearing brief, pp. 14-15 and N.T. 45, 55-57, 63-66). However, the legal conclusion that the guidelines do not have a presumption of validity means DER has the burden of showing the guidelines-based

$5,000 penalty was consistent with SMCRA requirements under the facts of the instant appeal, not merely under most or typical facts. Old Home Manor and W. C. Leasure, supra.

The last few sentences of DER's Exhibit 3 read:

> In assessing penalties repeat violations of the same nature should be considered. Any violations other than off the permit would be considered also when assessing penalties.

Vayansky testified that willfulness[2] was taken into account in setting the guidelines' formula for mining an unpermitted site, in that any operator who mined beyond his previously permitted boundary was assumed to be doing so willfully (N.T. 56). Vayansky also testified that the just-quoted last few sentences of DER's Exhibit 3 were intended to make possible the imposition of additional penalties (beyond the $5,000 assessed WHCC for mining the unpermitted three acres) for, e.g., stream degradation (N.T. 64). The deterrent effect of the penalty also was considered in setting the formula (N.T. 45). The quoted language from 52 P.S. §1396.22 permits consideration "of other relevant factors" in setting the amount of the civil penalty. We rule, as DER urges, that deterrence is a relevant factor in civil penalty assessments. DER v. Trevorton Anthracite Co., Docket No. 76-116-CP-W, 1978 EHB 8, affirmed 42 Pa. Cmwlth. 84, 400 A.2d 240 (1979).

The testimony of Vayansky's summarized in the preceding paragraph was not disputed by WHCC. Therefore, taking into account the thrust of our analyses in earlier paragraphs of this Section III C, we conclude that DER has shown the

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2. In this Adjudication, we use "willful" to mean "knowing", "deliberate" or "intentional", although other definitions of "willful" have been recognized by us. DER v. Donald Cox, EHB Docket No. 81-083-CP-H (Adjudication, December 10, 1982).

guidelines' formula for civil penalties assessments was consistent with the precepts of the SMCRA. In particular, as the formula was arrived at, the $5,000 penalty was intended to apply to willful mining of the three unpermitted acres, without actual pollution, environmental harm or required costs of restoration. We do not agree with WHCC's seeming contention that the formula's failure to mention explicitly the criteria listed in 52 P.S. §1396.22 makes the formula inapplicable. We do agree, however, that DER's reliance on the formula would be misplaced if DER were unable to show that WHCC's violation really was "willful".

There was testimony bearing on this willfulness issue. WHCC's president, Vernon Kerry, testified that by August 29 or 30, 1981, WHCC already had mined the unpermitted site (N.T. 82-83). Kerry knew that WHCC was mining outside its permitted boundaries, but did not so inform DER's Inspector Snyder until September 3, 1981 (N.T. 79). We take these admissions to be confirmation of the previously stated assumption about willfulness underlying the guidelines' formula, namely that any operator who mined beyond his previously permitted boundaries must be doing so willfully. In other words we feel DER has met its threshold burden of showing WHCC's mining of the unpermitted area was willful; correspondingly, we take WHCC's excuse for having mined outside its permitted area between September 3 and September 11, 1981, namely that Snyder had given WHCC permission to so mine, to be in the nature of an affirmative defense, wherein WHCC has the burden of proof. WHCC has not met this burden. Kerry's testimony that he had received permission was contradicted by Snyder's testimony that he had not given permission, as already discussed supra. Neither witness's testimony in this regard received any corroboration; the Board found both these

witnesses to be equally credible. In any event there is no doubt that WHCC mined the unpermitted area without permission for some time prior to September 3, 1981. Moreover, WHCC has not shown--and we do not grant--that WHCC justifiably could rely on Snyder's alleged oral permission in the face of the clear statutory and regulatory provisions forbidding mining without a permit (which were in force as of August-September 1981, see the opening paragraphs of our introductory Section I).

IV. Conclusion

Our task now is almost completed. Although WHCC argues otherwise, we rule that DER has met its burden of showing that WHCC committed the violation for which the $5,000 penalty was assessed; WHCC did willfully mine an area of approximately three acres before it received a permit to mine that area.

With respect to the magnitude of the assessed penalty, we note the following. 52 P.S. §1396.22, quoted in Section I supra, permits a civil penalty as high as $5,000 per day. WHCC admits it mined the unpermitted area without informing DER for some days prior to August 29, 1981 until September 3, 1981, a period not less than five days. Thus WHCC knew from the SMCRA that it faced civil penalties considerably larger than $5,000, not to mention the fines which are chargeable under the criminal penalties Section 18.5 of the SMCRA, 52 P.S. §1396.23(a) or (b). DER could have assessed a penalty as high as $25,000 without exceeding the per diem limits of 52 P.S. §1396.22. Although WHCC was expecting to receive a permit to mine the area, and did get one a few weeks after the September 11, 1982 cessation order was issued, nevertheless mining without a permit always is a serious violation (as Vayansky asserted, N.T. 44-45) which

DER cannot be expected to countenance. The $5,000 penalty was not larger than the minimum penalty that would have been assessed on the basis of the presently effective regulations.

The assertions in the preceding paragraph would not be altered even if WHCC had sustained its burdens of showing that Snyder had given WHCC permission to mine the site covered by MP 01-2 after September 3, 1981, and that WHCC justifiably had relied on that permission. Therefore we rule that DER's $5,000 penalty assessment was not so large as to consitute an abuse of discretion, nor so much larger than WHCC reasonably could have expected as to offend "fundamental fairness". We see no reason to substitute our discretion for DER's. The appeal is dismissed.

CONCLUSIONS OF LAW

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

2. Our review of this matter is to determine whether DER has committed an abuse of discretion or an arbitrary exercise of its duties and powers.

3. DER has the burden of proof in this civil penalty assessment appeal.

4. The SMCRA and pertinent regulations prohibiting surface mining without a permit were in effect in August-September 1981 when the complained-of unpermitted mining occurred.

5. DER's issuance of a cessation order to WHCC was not an abuse of discretion.

6. Having issued the cessation order, DER had a mandatory duty under the SMCRA to assess some civil penalty against WHCC.

7. This Board does not have the power to rule on the validity of the SMCRA.

8. Therefore the SMCRA will be considered pertinent to this appeal.

9. Issues not set forth in an appellant's Notice of Appeal or Pre-Hearing Memorandum may be deemed waived.

10. The Board will not automatically apply the currently effective regulations for assessing civil penalties to this appeal, involving a civil penalty assessment before the effective date of the present regulations.

11. Retrospective use of regulations for computing civil penalties must not violate the concept of fundamental fairness underlying the principles of due process.

12. Retrospective use of presently effective regulations to assess a civil penalty which is larger than WHCC reasonably might have expected when it committed its violations of the SMCRA would offend fundamental fairness.

13. DER guidelines for computing civil penalty assessments, never promulgated as regulations, constitute no more than unpublished criteria and do not enjoy a presumption of validity.

14. Nevertheless, under the facts of this appeal, the civil penalty arrived at using such guidelines can be reasonable.

15. The finding that the presently effective regulations would have led to a minimum penalty exceeding the actually assessed $5,000 penalty supports the thesis that the $5,000 penalty was not so large as to constitute an abuse of discretion.

16. Because the guidelines were intended to apply to willful mining of unpermitted areas, DER's reliance on the guidelines as a basis for its $5,000 penalty assessment would be misplaced if DER were unable to show WHCC's violation really was "willful".

17. DER met its burden of showing WHCC's unpermitted mining was willful.

18. WHCC did not meet its burden of showing that it had a defense to DER's showing of willful unpermitted mining by WHCC.

19. WHCC did not show--and the Board does not grant--that WHCC justifiably could have relied on permission from DER's Mining Inspector Snyder to mine an unpermitted site.

20. The $5,000 penalty was not so large as to be an abuse of discretion.

21. The $5,000 penalty did not offend fundamental fairness (see Conclusion of Law 12).

22. The Board will not substitute its discretion for DER's under the facts of this appeal.

O R D E R

WHEREFORE, this 2nd day of June , 1983, the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: June 2, 1983

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

VIK-KEL CORPORATION : Docket No. 82-157-H

: Solid Waste Management Act
v. : Denial of Solid Waste
: Permit Applications

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and CONCERNED CITIZENS OF MADISON and THE TOWNSHIP
OF SEWICKLEY, Intervenors

ADJUDICATION

By the Board, July 13, 1983

This matter arises from the appeal of Vik-Kel Corporation from the denial, by DER, of three applications for solid waste management permits. One of the applications involved a disposal site for sludge generated in sewage treatment plants. This site was to be located in Hempfield Township, Westmoreland County. The other two applications covered contiguous parcels of property located in Sewickley Township, Westmoreland County. One of the Sewickley applications was for an oil separator facility, the other was for an agricultural disposal site for septic tank pumpings. Separate petitions to intervene in this matter were filed and granted on behalf of Sewickley Township (township) and an unincorporated citizens group identified as the Concerned Citizens of Madison (citizens). Madison is an unincorporated settled area located within Sewickley Township a portion of which is within a few hundred yards of the proposed sludge

and oil separator sites. The township and citizens are, along with DER, parties appellees in the above matter.

A hearing was held in the above-matter on February 22, 23 and 24, 1983 before the Honorable Dennis J. Harnish, then Chairman of the board. Following receipt of briefs Mr. Harnish, as hearing examiner authorized by this board, prepared a proposed adjudication in the above-matter which adjudication has been reviewed and approved by both the sitting members of the board.

FINDINGS OF FACT

1. Charles E. Lutz, Basil Lutz, Basol Lutz and Basilous Lutz are the same person.

2. Dorothy C. Lutz, Dorothy Lutz, Dorothy C. Baker, Dorothy Catherine Lutz, and Mrs. Charles E. Lutz are the same person.

3. Charles E. Lutz and Dorothy C. Lutz are husband and wife, and the parents of Gregory Lutz and Charles P. Lutz, who is also known as Paul Lutz.

4. Appellant Vik-Kel Corporation (Vik-Kel) is a corporation organized by Charles E. Lutz and existing under the laws of the State of Delaware with a place of business located at Box 333, Madison, Pennsylvania 15663.

5. Charles E. Lutz was the president of Vik-Kel prior to November of 1981.

6. Dorothy C. Lutz was formerly the vice-president of Vik-Kel and is presently its secretary-treasurer.

7. Gregory Lutz was formerly an employee of Vik-Kel and is currently its president.

8. Charles P. Lutz was formerly an employee of Vik-Kel and is currently its vice-president.

9. Charles E. Lutz continues to be involved in the business affairs of Vik-Kel.

10. On or before May 16, 1974, Charles E. Lutz, doing business as Keystone Septic Tank Service, disposed of septic tank pumpings and waste oil on the hill above Placid Manor Mobile Home Park along Beaver Road, Hempfield Township, Westmoreland County, without authorization by permit and in a manner which resulted in runoff onto Placid Manor Mobile Home Park, pollution of waters of the Commonwealth and a nuisance condition.

11. On or before May 27, 1976, Charles E. Lutz dumped five truckloads of septic tank pumpings and other wastes on his property adjacent to U.S. Route 30 between the house and barn without authorization by permit.

12. On June 18, 1980, the department issued Solid Waste Permit 601690 to Basil and Dorothy C. Lutz, authorizing the disposal of 275,000 gallons of sewage sludge on 9.9 acres of land in Hempfield Township, Westmoreland County (Lutz Recycling Site). Between May, 1980 and June, 1981 Vik-Kel disposed of approximately 1.7 million gallons of sewage sludge at and adjacent to the Lutz Recycling Site.

13. Soil analyses of the Lutz Recycling Site indicate that following this sludge dumping the concentrations of copper, nickel, mercury, cadium, chromium, lead and zinc exceed the maximum safe levels for soils.

14. On or before February 26, 1981, Vik-Kel disposed of sewage sludge on land adjacent to the Lutz Recycling Site not authorized by Solid Waste Permit 601690 or any other permit.

15. On February 26, 1981 Vik-Kel had failed to incorporate all sewage sludge within twenty-four (24) hours after application at and adjacent to the Lutz Recycling Site.

16. On or before February 26, 1981, Vik-Kel applied sewage sludge to frozen ground at and adjacent to the Lutz Recycling Site.

17. On or before February 26, 1981, Vik-Kel applied sewage sludge to saturated ground at and adjacent to the Lutz Recycling Site.

18. On or before February 26, 1981, Vik-Kel allowed sewage sludge to pond on the surface and run off the fields at and adjacent to the Lutz Recycling Site.

19. On or before February 26, 1981, Vik-Kel failed to contour plow the fields at and adjacent to the Lutz Recycling Site.

20. On and before February 26, 1981, Vik-Kel failed to properly revegetate the Lutz Recycling Site and affected adjacent areas.

21. On and before February 26, 1981, Vik-Kel failed to maintain its operational records in proper order.

22. On June 18, 1981, Solid Waste Permit 601690 expired.

23. On or before April 22, 1982, Vik-Kel dumped sewage sludge at and adjacent to the Lutz Recycling Site without authorization by permit.

24. On April 22, 1982, Charles E. Lutz hindered department employees' performance of their duty to investigate unauthorized dumping of solid waste.

25. During the fall and winter of 1981, Charles E. Lutz cleaned up a fuel oil spill and contaminated soil at the Jeannette Sewage Treatment Plant which fuel oil came from the adjacent Hockensmith plant.

26. When first approached by the department, Charles E. Lutz refused to show the department records of the disposition of this clean-up waste.

27. Charles E. Lutz finally told the department that he had disposed of the clean-up waste at Kelly Run Sanitation, Inc.

28. Kelly Run Sanitation, Inc. did not receive all, if any, of the clean-up waste.

29. The department never received a Module I application requesting authorization nor did it even issue a Module I granting authorization to dispose of the clean-up waste.

30. The records submitted by Charles Lutz to prove that he took said clean-up waste to Kelly Run Sanitation, Inc. were forgeries.

31. Charles Lutz on several occasions admitted to lying with regard to phonebook descriptions of his business activities then attempted to recant this testimony.

32. Charles Lutz also attempted to recant his testimony concerning gallonage of sludge spreading figures he had allegedly shown the department's inspector.

33. Mr. Lutz's testimony concerning Mary Zakutney was refuted by Mary Zakutney, a disinterested witness.

DISCUSSION

On April 3, 1981 DER received an application from Vik-Kel Corporation in which Vik-Kel sought a permit to utilize septic tank wastes for agricultural purposes (Ag site). This application, which was identified by DER as No. 601976, was denied by a letter dated June 1, 1982. Mr. Charles A. Duritsa, the draftsman of this letter cited various technical reasons for denying the Vik-Kel application, but most of the letter recited the alleged unlawful conduct of Vik-Kel Corporation, its officers, associates or agents (most especially including Charles Lutz) and based denial upon Sections 503(c) and 503(d) of the Solid Waste Management Act, Act 97, Act of July 7, 1980, 35 P.S. §6018.503 (c) and (d).

On February 3, 1981 Vik-Kel applied to DER for a permit for an oil separation plant which plant was to be located in that portion of Sewickley Township, Westmoreland County known as Madison. The Ag site and the oil separation plant were proposed to be located on contiguous parcels. This application, identified by DER as No. 600828, was denied by Mr. Duritsa in a separate letter dated June 1, 1982 solely upon the compliance history reasons cited in the 601976 denial.

Vik-Kel appealed both of the above denials, along with DER's denial, bearing the same date, of application 601690 for a site located in Hempfield Township, Westmoreland County. Vik-Kel sought to use the Hempfield Township site for agricultural application of sewage sludge. Vik-Kel withdrew its appeal from DER's denial of application 601690 during the first day of hearings and this denial, therefore, will not be discussed further in this adjudication.

With regard to each of the other denials, Vik-Kel and DER both chose to focus on the compliance history portion of the denials. Neither of these parties offered any testimony concerning the technical issues raised by the denial of 601976. Because we hold, for the reasons set forth below, that DER's denial, on the basis of compliance history, was well supported by the applicable law and facts, we will not reach the technical issues. Likewise, we do not need to address the issue raised by the intervenor Sewickley Township, i.e., Vik-Kel's admitted failure to comply with various land use ordinances of the township.

The starting point of our analysis of DER's compliance history denial is to set forth the portion of Act 97 which authorizes and, in some circumstances, requires, DER to consider compliance history under reviewing applications for solid waste management permits.

Sections 503(c) and 503(d) of Act 97 read as follows:

> "§ 6018.503 Granting, denying, renewing, modifying, revoking and suspending permits and licenses
>
> * * *
>
> (c) In carrying out the provisions of this act, the department may deny, suspend, modify, or revoke any permit or license if it finds that the applicant, permittee or licensee has failed or continues to fail to comply with any provision of this act, the act of June 22, 1937 (P.L. 1987, No. 394), known as "The Clean Streams Law," the act of January 8, 1960 (1959 P. L. 2119, No. 787), known as the "Air Pollution Con-

trol Act," and the act of November 26, 1978 (P.L. 1375, No. 325), known as the "Dam Safety and Encroachments Act," or any other state or Federal statute relating to environmental protection or to the protection of the public health, safety and welfare; or any rule or regulation of the department; or any order of the department; or any condition of any permit or license issued by the department; or if the department finds that the applicant, permittee or licensee has shown a lack of ability or intention to comply with any provision of this act or any of the acts referred to in this subsection or any rule or regulation of the department or order of the department, or any condition of any permit or license issued by the department as indicated by past or continuing violations. In the case of a corporate applicant, permittee or licensee, the department may deny the issuance of a license or permit if it finds that a principal of the corporation was a principal of another corporation which committed past violations of this act.

(d) Any person or municipality which has engaged in unlawful conduct as defined in this act, or whose partner, associate, officer, parent corporation, subsidiary corporation, contractor, subcontractor or agent has engaged in such unlawful conduct, shall be denied any permit or license required by this act unless the permit or license application demonstrates to the satisfaction of the department that the unlawful conduct has been corrected..."

In the instant matter the applicant is Vik-Kel Corporation, a Delaware Corporation formed by an individual variously known as Charles E. Lutz, Basil Lutz, Basol Lutz and Basilous Lutz. Mr. Lutz was president of Vik-Kel when the instant applications were filed. Mr. Lutz initially owned 50% of the shares of Vik-Kel; his wife, Dorothy owned the remaining 50%.

Sometime after filing applications 600976 and 600828, Mr. Lutz, transferred 25% of the shares of Vik-Kel to his son Gregory Lutz who became president of Vik-Kel and Mr. Charles Lutz[1] transferred the remaining 25% of the shares

1. Although one of his sons also has the name Charles, Charles Lutz as used throughout this adjudication refers to the father.

of Vik-Kel to his son Paul Lutz who became vice-president of Vik-Kel. Dorothy Lutz remained as secretary-treasurer of Vik-Kel.

To all intents and purposes Mr. Charles Lutz continues to exercise control of this corporation. His dominion over the affairs of Vik-Kel was frequently demonstrated on the record. Mr. John J. Schubert of Duncan, Lagnese and Associates, who was Vik-Kel's engineering consultant, and who appeared as a Vik-Kel witness, testified that he had always been paid by Mr. Charles Lutz and that even though he had held conversations with both the younger Lutzes, he considered Charles Lutz to be "the boss" of Vik-Kel. In addition, Paul Lutz couldn't remember whether it was November of 1981 or November of 1982 when he became vice-president of Vik-Kel and Gregory Lutz couldn't recite any action be had taken as president of this corporation.

In sum, it is apparent that Mr. Charles Lutz was and remains so closely associated with Vik-Kel Corporation that DER was correct to examine his record to see whether Vik-Kel failed to comply with any provision of the acts and permit conditions enumerated in §503(c) of Act 97 or to determine from Mr. Lutz's record, whether Vik-Kel had demonstrated a lack of ability or intention to comply with Act 97.

The review of Mr. Charles Lutz compliance history which follows should, lamentably, better be phrased as a non-compliance history, precious little compliance has been demonstrated. On May 14, 1974 Mr. Lutz was sent a Notice of Violation by DER for dumping septic tank wastes and oily wastes on property along Beaver Road in Hempfield Township. Vik-Kel admitted the violations in this notice. Among other items, this notice informed Mr. Lutz of the necessity to obtain a permit from DER before dumping any similar wastes in the future.

Nevertheless, some two years later, on June 2, 1976, Mr. Lutz received a second Notice of Violation (N.O.V.) from DER. This second N.O.V. de-

scribed the dumping of at least five loads of septic tank waste without a permit. Again Vik-Kel and Mr. Lutz admitted that this incident occurred. Mr. Lutz tried to mitigate this second incident by testifying (N.T. 184) that he had submitted an application for a solid waste disposal permit to DER in 1976 after receiving the second N.O.V. This testimony, like much of Mr. Lutz's testimony, however, seemed to weave a tangled web in which he caught himself.

Neither of DER's custodians of records, Mr. Charles A. Duritsa or James Brahosky, could remember receiving the 1976 application and Mr. Duritsa testified that it was not presently in DER's files.

Also, it seems strange that if Mr. Lutz paid Duncan, Langese and Associates over $30,000.00 to prepare the instant applications (as per Mr. Schubert's testimony) that he would not have hired someone to submit a complete application in 1976. The application allegedly submitted to DER was a handwritten, incomplete application.

In any event, even had Mr. Lutz obtained a dumping permit after the fact in 1976 (which even he admits he did not) this would only have mitigated and not eliminated his knowing violation of the Solid Waste Management Act.

By 1980, Mr. Lutz had at last become aware of the necessity to obtain a permit before depositing solid waste. On June 18, 1980 Mr. Lutz and his wife and/or mother obtained a permit to land dispose of sewage sludge for agricultural purposes. This permit 601690 covered a 4.4 acre site and a 5.5 acre site both being located in Hempfield Township, Westmoreland County. The layout of these sites, known collectively as the Lutz Recycling Site, is most easily apprehended by reference to Exhibit A in the Appendix to this Adjudication, a map which formed a portion of the application for permit 601690.

Mr. Lutz needed permit 601690 because he had a bid upon and entered a contract with the City of Jeannette to dispose of the sewage sludge produced

by the sludge digesters of Jeannette's sewage treatment plant. However, Mr. Lutz knew or should have known that permit 601690 would not have created a sufficient disposal capacity for Jeannette's sludge. The contract was for approximately 1.2 million gallons of sludge to be removed from the sewage treatment plant on a call basis over the year from May of 1980 to June 1981. Permit 601690 authorized disposal of 275,000 gallons of sludge per year to be applied as per Exhibit B attached hereto (which exhibit also formed a portion of the application for permit 601690).

Mr. Paul Lutz testified that the sewage sludge he pumped from the Jeannette plant was a lot more dilute and thus more voluminous than anticipated because he had to introduce great quantities of fresh water into the sludge (via a fire hydrant) in order to pump the sludge out of the digester.

Paul Lutz's testimony was effectively rebutted by the testimony of Mr. Robert Frye, Jeannette's City Engineer and a disinterested witness in this matter, who testified that fresh water was added only at the end of a pumping cycle when the sludge at the bottom of the digesters became too thick to pump. Mr. Frye estimated that only a couple of hundred gallons of water were added to 200,000 gallons of sludge.

In any event, the rate of sludge loading set forth in its application was within the control of Vik-Kel's consultant when preparing the application for permit 601690 and although Paul Lutz testified that he didn't know that it would be necessary to dilute the sludge until after the permit was issued, it is instructive that Vik-Kel's consultant was never contacted by Vik-Kel with this new information so that its permit could be amended. The relevant DER officials also testified that they also had not been told about this dilution condition.

Here again Mr. Charles Lutz's convenient memory caused him problems. Mr. Lutz testified, at least three places in the record,[2] that on July 30,

2. N.T. see 97, 155 and 157.

1980 he had shown DER's solid waste inspector, Gale Campbell, the gallonage figures for sludge disposal on the Lutz Recycling Site for several months which gallonage figures greatly exceed the total amount which was supposed to be spread by the entire year.[3] Mr. Lutz identified appellant's Exhibit 11, the back of an envelope which had contained Inc. Magazine, as the envelope he had shown Mr. Campbell. When Mr. Lutz was confronted with the fact, to which his counsel stipulated, that the envelope in question was not printed, let alone distributed, until long after July 30, 1980, Mr. Lutz again attempted to recant his testimony.

In summation of this section, we find (on the basis of the admissions of Vik-Kel and the Lutzes) that Vik-Kel, with Mr. Lutz's knowledge and intent, far exceeded the sludge loading rates for the Lutz Recycling Site. Instead of the 275,000 gallons called for in the permit Vik-Kel, applied all of the approximately 1.5 million gallons of sludge it removed from Jeannette during the period of May 1980 to June 1981 to the said Lutz Recycling Site. Moreover, we find, on the basis of an analysis of composite soils samples taken by DER soils scientist, William Graham, that this over-application of sludge caused DER's guidelines for the maximum life time loading of this site to be exceeded for each of the heavy metals; cadmium, copper, chromium, lead, mercury, nickel and zinc on the 5.5 acre portion of the Lutz Recycling Site and to be exceeded for all metals except cadmium on the 4.4 acre site. In evaluating the effects of Lutz's violations it must be borne in mind that the projected life of the Lutz Recycling Site had been almost 30 years; it was more than used up in 1 year.

---

3. Vik-Kel was attempting to set up the factual underpinnings for an estoppel argument against DER.

The next incidents of noncompliance by Mr. Lutz were documented in the N.O.V. of March 13, 1981 which N.O.V. listed a number of operational violations at the Lutz Recycling Site observed during a February 26, 1981 site inspection, see Findings of Fact 16 through 22. Rather than contest the validity of these operational violations which included dumping off the permit, dumping sludge on frozen and/or saturated ground, ponding, runoff, failure to plow and failure to maintain operational records, Vik-Kel admitted them too.

Mr. Lutz testified that in late 1981 or early 1982 he cleaned-up some kerosene which had spilled at the Hockensmith Company site contiguous to the Jeannette STP. Under contract with Hockensmith Mr. Lutz testified that he removed four 8-ton truck loads of oily dirt from the Hockensmith site. Mr. Lutz denied to DER officials that he dumped this oily dirt on his own site or another unpermitted area. Rather, testified Mr. Lutz, he took all 4 loads to the Kelly Run Sanitation site after clearing it with Mr. Gary Fiore, Kelly Run's superintendent. Mr. Lutz even produced receipts from Kelly Run to corroborate his testimony. (See Exhibit C attached hereto which was introduced as Commonwealth Exhibit 6 in the hearing). Mr. Lutz accounted for the poor handwriting on these landfill receipts by noting that the gatekeeper of Kelly Run had a broken writing hand at the time.

Mr. Lutz's testimony was again rebutted by the testimony of other, more credible, witnesses. Mr. Gary Fiore did remember talking with a man who identified himself merely as Charles but instead of oily dirt, Mr. Fiore testified that Charles said he had cleaned a gas station and had a load of mostly rubbish with only a small amount of oily dirt from floor sweepings. Nevertheless, Mr. Fiore's suspicions were aroused by this conversation and he alerted his gateman, Michael Dworek, to be on the lookout for such a load and to give it uncommon scrutiny.

Apparently, when Charles Lutz did show up at Kelly Run, on January 20, 1982, his load did not arouse Michael Dworek's suspicion. According to receipt 10 on Commonwealth's 6, which Mr. Dworek identified as bearing his printing, Mr. Lutz paid $15.00 to dump this load and was not required to supply a DER Module 1 or to pay a special fee, both of which would have been required for oily dirt.

Mr. Dworek, however, denied writing the script portion of landfill receipt 10 or any portion of any of the other three landfill receipts on Commonwealth 6. Indeed, both Mr. Dworek and Mr. Fiore testified that Mr. Dworek only printed and never wrote in script. Mr. Dworek did agree that the other landfill receipts on Commonwealth 6 were on Kelly Run forms. However, since every cashbook is numbered 1 through 50 and since Mr. Dworek had a number of such cashbooks in plain view in his gatehouse the use of the Kelly Run landfill receipts does not give rise to a necessary inference that these receipts were issued by Kelly Run; it is also possible that someone purloined a cashbook and forged three of the four receipts. We find these receipts to be forgeries and the submission of these forgeries by Mr. Charles Lutz undermines any remaining credibility he might have in our eyes.[4] At the risk of redundancy the record also discloses two other slips of Mr. Lutz's tongue. Mr. Lutz testified that former Sewickley Township Supervisor, Mary Zakutney had come to the site of Lutz's proposed oil separator and told him at that place and time that he need not comply with Sewickley Township's ordinances. Mary Zakutney, now a retired supervisor of Sewickley Township and an acquaintance of Mr. Lutz since 1935, who was not alleged to have had, yet alone demonstrated to have, any bias or interest

4. The board commends Mr. Fiore for appearing and testifying since prior to testifying Mr. Fiore received a phone call from a person claiming to represent Vik-Kel Corporation who told him that "I should be sick the day of the hearing and that if they went down the tubes they would take someone else with them."

adverse to Mr. Lutz, or Vik-Kel, testified that she had never been to the site of the proposed oil separator and that she had never had any conversation at any time or place with Mr. Lutz regarding his proposed oil separator.

Finally, on the issue of Mr. Lutz's credibility, he is condemned by his own testimony. When confronted with an entry in the Greensburg telephone directory which alleged that he was a licensed transporter of hazardous waste, Mr. Lutz admitted three times to lying in his phone advertisement (lying was his phrase) (see N.T. 150-152) his only excuse being that his competitors lied too. The next morning Mr. Lutz tried to recant his testimony by alleging that he had obtained a license from EPA. The problem with this recantation is that EPA simply does not license transporters of hazardous waste; it has no authority to do so under its enabling legislation. DER, which does have the authority to license such transporters under Act 97, denied Mr. Lutz's application for a transporter's license.

It's hard to believe that this recitation of Mr. Lutz's noncompliance is not yet concluded but one more incident needs to be discussed. On April 22, 1982 Mr. Charles E. Lutz violated the Solid Waste Management Act by dumping sewage sludge without a permit at his property off Route 30 in Hempfield Township. The DER employees who investigated this incident, Rita A. Coleman, a soils scientist and Randall Walton, a solid waste specialist, were able, by using their eyes and noses to ascertain that sewage sludge and an oily substance had been dumped on Mr. Lutz's property. Unfortunately, they were not able to document this unpermitted dumping with photographs and samples.

Mr. Walton did take samples of the ponded substance in a sample bottle but Mr. Charles Lutz, after rushing to the scene in his truck, grabbed the sample bottle from Mr. Walton's hand and threw it in the back of his (Mr. Lutz's) truck. Then he wrestled with Miss Coleman--a physically slight woman--when she refused to hand her camera to Mr. Lutz. When Miss Coleman tossed the camera to

Mr. Walton in an effort to be rid of Mr. Lutz's harsh embrace, Mr. Walton dropped the camera and Mr. Lutz, moving with surprising force and swiftness for one 60-years of age retrieved and opened the camera. The most surprising thing about this incident is that Mr. Lutz did not seriously deny any of the above conduct. He merely described his anger at DER for not granting him any more permits.

This sorry record of flagrant misconduct and duplicity satisfies both parts of §503(c). Not only does it demonstrate multiple violations of the Solid Waste Management Act, it also demonstrates a complete lack of trustworthiness on behalf of Mr. Lutz--i.e., a decided lack of ability and intention on the part of Mr. Lutz, and therefore of his alter-ego, Vik-Kel, to comply with the Solid Waste Management Act.

CONCLUSIONS OF LAW

1. The board has jurisdiction over the parties and subject matter.

2. In a permit denial case the applicant has the burden of proving that DER abused its discretion or violated law in denying the application; Vik-Kel has failed to meet this burden.

3. The disposal of solid waste without a permit from the department is unlawful under Section 501 and 610 of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, 35 P.S. §§6018.501 and 6018.610.

4. The disposal of solid waste contrary to the rules and regulations of the Environmental Quality Board is unlawful pursuant to Section 610 of the Solid Waste Management Act, 35 P.S. §6018.610.

5. The disposal of solid waste contrary to permit conditions is unlawful pursuant to Section 610 of the Solid Waste Management Act, 35 P.S. §6018.610.

6. The department may deny a permit if it finds that the applicant has failed or continues to fail to comply with the Solid Waste Management Act; any

other environmental statutes or conditions in a permit issued by department; or if the department finds that the applicant has shown a lack of ability or intention to comply with environmental statutes, regulations or permit conditions, as indicated by past or continuing violations. See Section 503(c) of the Solid Waste Management Act, 35 P.S. §6018.503(c).

7. Hindering department employees in the performance of their duty to investigate unauthorized disposal of solid waste is unlawful. See Section 610 of the Solid Waste Management Act, 35 P.S. §6018.610.

8. The department has a duty to ensure that the land disposal of sewage sludge does not create environmental harm, a public health hazard or public nuisance. Article I, Section 27 of the Pennsylvania Constitution; Sections 102 and 104 of the Solid Waste Management Act, 35 P.S. §§6018.102 and 6018.104.

9. The department has the authority to establish the standards and conditions under which an activity which creates a danger of pollution of Commonwealth waters shall be conducted. Section 104(7) of the Solid Waste Management Act, 35 P.S. §6108.104(7); Section 402 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.402.

10. The department cannot issue a permit that would have the effect of increasing the heavy metal concentrations in soil that already exceeds the maximum safe levels of heavy metals. Article I, Section 27 of the Pennsylvania Constitution; 25 Pa. Code §75.32(c)(1).

11. Sewage sludge must be incorporated within twenty-four (24) hours after application. 25 Pa. Code §75.32(c)(2).

12. Sewage sludge is not be be applied to saturated or frozen ground. 25 Pa. Code §75.32(c)(3).

13. Sewage sludge shall be applied so as to prevent ponding. 25 Pa. Code §75.32(c)(4).

14. Sewage sludge shall be applied so as to prevent runoff. 25 Pa. Code §75.32(c)(8).

O R D E R

AND NOW, this 13th day of July , 1983, Vik-Kel's appeals from DER's denial of Vik-Kel's applications 600828 and 600976 are both dismissed.

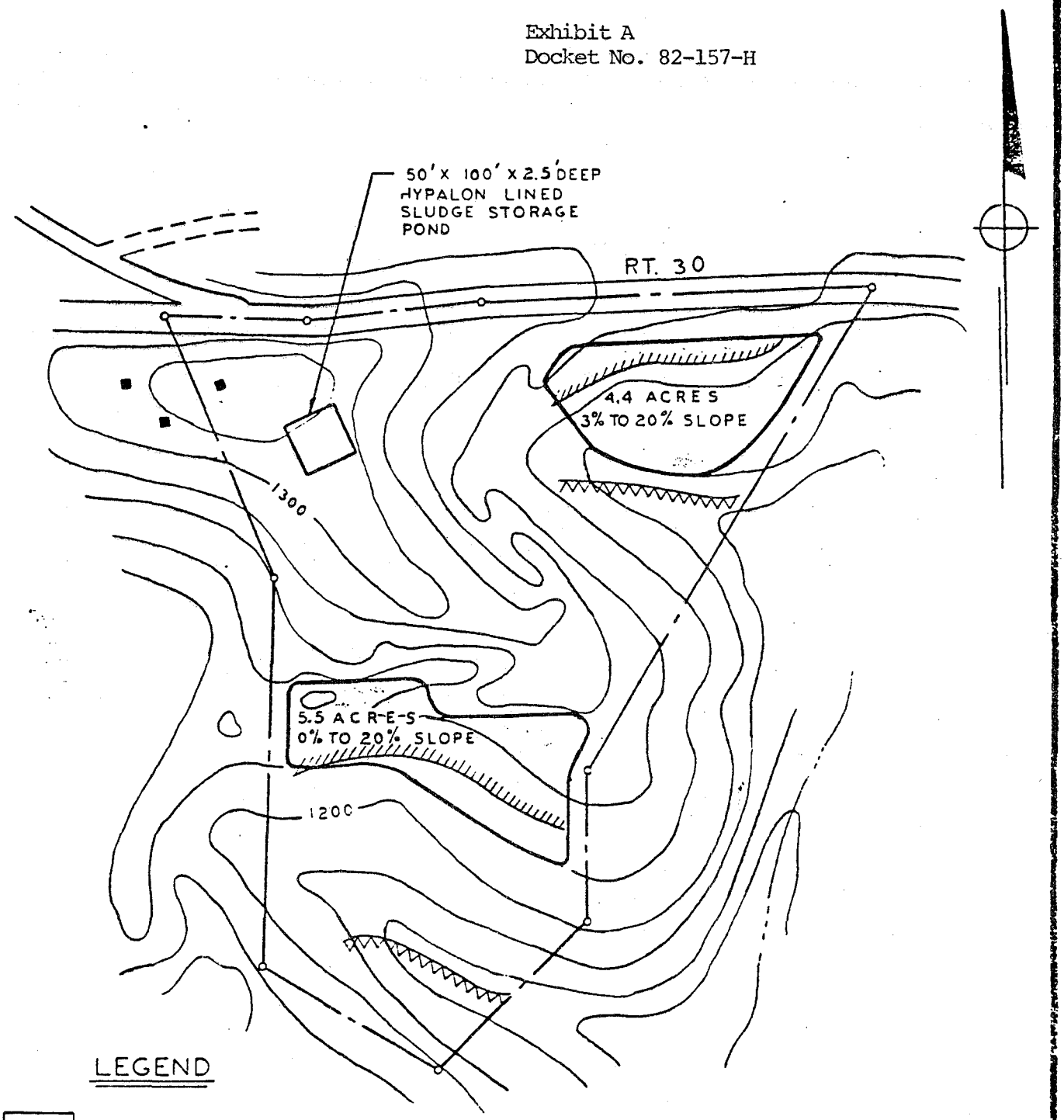
ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: July 13, 1983

Exhibit A
Docket No. 82-157-H



LEGEND

- SLUDGE APPLICATION AREA
- 52.2 - TOTAL ACRES OF THE PROPERTY
- 9.9 - NUMBER OF ACRES FOR SLUDGE DISPOSAL
- DIVERSION DIKE
- DIVERSION TERRACE

EXHIBIT II

U.S.G.S TOPO MAP

LUTZ SLUDGE RECYCLING SITE

DOROTHY C. BAKER & BASILOUS LUTZ

HEMPFIELD TWP. WESTMORELAND CO.

DATE: APRIL 1980 SCALE: 1" = 400'

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

NORTHEAST LAND DEVELOPMENT COMPANY, INC. : Docket No. 82-210-H

: Solid Waste Act
: Permit denial

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and MR. AND MRS. STANLEY MISLITSKY, et al. and
SENATOR JAMES J. RHOADES, Intervenors

ADJUDICATION

By the Board, July 15, 1983

PROCEDURAL HISTORY

Sometime prior to May 7, 1982 Northeast Land Development Company, Inc. (Northeast or appellant) filed with DER an application for a permit for a solid waste disposal site proposed to be located in a mine pit owned by Beltrami Enterprises, Inc. located in Kline Township, Schuylkill County. On May 7, 1982 DER, through its solid waste facilities supervisor, David J. Lamereaux, issued a letter identifying the above application as I.D. No. 300690 and requesting additional information concerning side slopes and compliance history. By letter dated July 28, 1982 DER denied Northeast's application I.D. No. 300690 citing 6 reasons. Four of these reasons discuss alleged problems with the site, the sixth reason asserts that complete answers have not been provided to DER's compliance history questionnaire, module 10. The final reason stated is that "[t]he

Department has determined that the applicant lacks the ability or intention to comply with the Solid Waste Management Act". Northeast promptly filed an appeal from DER's denial and on November 17, 1982 it filed its pre-hearing memorandum.

DER answered appellant's pre-hearing memorandum by filing its own pre-hearing memorandum on December 2, 1982. DER asserted and Northeast did not deny that a copy of DER's pre-hearing memorandum was served upon Northeast on or about December 3, 1982.

In its pre-hearing memorandum DER asserts that Mr. Louis Beltrami, a principal of Beltrami Enterprises, Inc. and Northeast, had a long standing association with organized crime. DER attached to its pre-hearing memorandum a 1980 Pennsylvania Crime Commission report upon which it relied to support its assertions concerning Mr. Beltrami. It was not until the morning of the first date set for hearing in the above matter, March 15, 1983 (3 1/2 months after its receipt thereof) that Northeast brought to the attention of either DER or the EHB that it considered DER's pre-hearing memorandum to contain scandalous or inpertinent subject matter. Even then, Northeast did not attempt to have the DER pre-hearing memorandum stricken in whole or part but rather presented a motion ..."that each and every member of the Environmental Hearing Board disqualify himself from sitting in determination of this hearing by reason of adverse interest or prejudice". The motion asserted no grounds for any adverse interest. The motion for recusation stated as a ground for prejudice, that the members of the Environmental Hearing Board, having read the pre-hearing memorandum and attached 1980 Crime Commission Report would be so "inflame[d]" as to completely lose their "ability to make a fair and reasonable decision".

The hearing examiner at the hearing of March 15, 1983, then Chairman of the EHB, the Honorable Dennis J. Harnish, allowed oral argument at side bar by

counsel for DER and Northeast on Northeast's motion. During this side bar conference counsel for Northeast was informed that Mr. Harnish had read the DER pre-hearing memorandum but not the attached Crime Commission Report and that, to the best of his understanding, neither of the other two members of the board had read even DER's pre-hearing memorandum. Mr. Harnish also informed Northeast's counsel that reading DER's pre-hearing memorandum had not, in his opinion, robbed him of his ability to make a fair and impartial determination. Mr. Harnish also volunteered, as a courtesy to Northeast's counsel, that in his opinion recusal of the entire EHB would deprive Northeast of a meaningful opportunity to obtain review of DER's permit denial, i.e., that Commonwealth Court and the various Courts of Common Pleas would probably refuse to take jurisdiction over any original action filed by Northeast to obtain review of DER's permit denial on the basis of such doctrines as (Northeast's) failure to exhaust statutory and administrative remedies.

In spite of the above statements and advice, Northeast's counsel failed to withdraw his motion or limit its applicability to Chairman Harnish. Therefore, after hearing argument from both counsel, Mr. Harnish recessed the proceeding and repaired to his office where he conducted legal research on the motion and discussed the matter with one of the two other members of the EHB, the Honorable Anthony J. Mazullo, Jr.,

On the basis of this research and this discussion, Mr. Harnish, upon reconvening the hearing, denied Northeast's motion. Mr. Harnish's reasons for denial as stated on the record on March 15, 1983 were as follows:

> "At this point in time, we're going to deny the motion. The reasons for denying the motion are basically two. The first reason is that it's the duty and function of the Environmental Hearing Board, as I understand it, to hold hearings and issue adjudications on matters that have been properly appealed to it. It's a duty we take quite seriously.

And we note, and have, in fact, advised the Appellant's attorney that if we did recuse ourselves, all three members of the Board, it's quite probable that the Appellant would have no legal chance to obtain the relief that they solicit here, because Commonwealth Court would probably turn them down on the legal grounds.

The second reason is that even though the Board is very -- and each of the members of the Board -- are very concerned about Motions for Recusation and are very concerned that the public at large doesn't perceive us and, in fact, that we don't sit on cases that we shouldn't sit on, we have to put this matter in perspective.

I should state for the record that I have reviewed the pre-trial memorandum of the Commonwealth, but I have not reviewed the portions of the Crime Commission report that are apparently attached to that pre-trial memorandum.

It has been the position of the Board in other matters that a pre-trial memorandum does not even rise to the dignity of a pleading. It's merely for the Board's convenience so that we know what positions the various parties are likely to take in a matter.

However, assuming for the sake of this argument that a pre-trial memorandum is a pleading, we feel that the relief requested by the Appellant goes beyond the relief that could be requested, for example, in a Common Pleas Court.

There are motions to strike scandalous and impertinent matter from pleadings, and such motions are sometimes granted by the court. But after research, I am unaware of any situation in which a court has been so prejudiced by merely reading a pleading that they decided that they wouldn't sit on the case.

And I think the reason for that goes to the basis of the adversarial system of law in this country: namely, that pleadings are pleadings, and evidence is evidence; and they are two very different concepts.

So the fact that somebody puts something even in a pleading, which is sworn to, as opposed to a pre-trial memorandum, which is not, doesn't make it evidence in a matter.

And for this other reason, we are also going to deny the Motion for Recusation."

Following the above denial of the motion for recusation on the record, the hearing examiner, without objection, granted the petitions to intervene of Mr. Richard P. Misliktsky, Esquire (in absentia) and of the Honorable James Rhoades, Senator from the 29th Senatorial District.

DISCUSSION

In cases where a disappointed applicant appeals from DER's denial of its application, the board's regulations imposes the burden of proceeding and burden of proof upon the applicant, 25 Pa. Code §21.101(c)(1). In spite of this requirement, of which its counsel was advised, Northeast failed to call a single witness.

Instead, Northeast's counsel made the following statement on the record:

> "The point that I would like to bring forth is that, under the circumstances, despite your denial of the motion, the Appellant stills feels that it cannot have a fair presentation of its burden to overcome the denial of the DER because of its pre-trial memorandum.
>
> While it may not have the dignity of evidence, it's still a prevasive document which has been submitted to the trier-of-fact, and that as a result of which, the Appellant, Northeast Land Development Company, no matter what it presents and no matter how high its burden is met as concerns the allegations listed in the denial, it could not prevail; and that without saying or even intoning that perhaps the Board would be prejudiced, the mere fact that the document exists, the aura of prejudice has been raised, and the inability of the Board to make an impartial decision is patent in the document; and as such, the Appellant will not proceed further and will elect to stand on the records and documents that have been submitted or will be submitted by stipulation here." (Emphasis supplied)

Following Northeast's election not to present testimony, the entire application for Northeast's proposed landfill site was admitted by stipulation

as Exhibit No. S-1. The only other exhibit which was admitted (as appellant's Exhibit 1) was a letter dated May 20, 1982 which Northeast's counsel asserted sending to DER but which DER denied receiving.

The record in this matter was then closed and DER's counsel made an oral motion for summary judgment. A briefing schedule was set and briefs have now been received from Northeast and DER. This Adjudication was drafted by Dennis J. Harnish, Esquire, upon request and under authorization of the EHB and has been reviewed and approved by the sitting members of the EHB.

A. The merits

Due to the somewhat unusual procedural posture of this case there can be little or no summation of the testimony since there was almost none presented. Moreover, little or no discussion of the documentary evidence is merited. Northeast's brief failed to demonstrate how the application and/or its letter of May 20, 1982 supplied the information stated to be missing by DER's denial letter of July 28, 1982.

Northeast as the would-be permittee clearly has the burden of proof in this matter. *Township of Middle Paxton, et al. v. DER*, EHB 80-127-W, (issued June 30, 1981) 1981 EHB 315. It has just as clearly failed to make any showing that DER has abused its discretion or violated law in denying Northeast's permit. Thus, we uphold DER's denial.

B. The recusation issue

The parties have chosen to answer and brief the Northeast's motion for recusation even though that motion had been denied at the hearing. In one

sense there is no need for a further discussion of this matter. Northeast sought no reconsideration of the motion by the hearing examiner or by the board *en banc*. 25 Pa. Code §21.122. The propriety of the hearing examiner's ruling is therefore not for this board, but rather, for a reviewing court (if any) to determine. Nevertheless, as a courtesy to any reviewing court and by way of accomodation to the parties, we adopt the hearing examiner's ruling on Northeast's motion for recusation as well as the reasons he stated for said denial.

In so doing we start from and adopt the proposition, cited by Northeast's counsel, that:

> "A fair trial in a fair tribunal is a basic requirement of due process...that due process applies to administrative agencies just as it does to courts...that administrative tribunals must be unbiased and must avoid even the appearance of bias to be in accordance with principles of due process. *Dayoub vs. Commonwealth of Pennsylvania, State Dental Council and Examining Board*, 453 A.2d 751 (Pa. Commonwealth 1982)"

This general proposition, however, doesn't resolve the question of whether the hearing examiner's review of DER's pre-hearing memoranda impaired Northeast's ability to obtain a fair hearing before that examiner.

In this regard we note that Northeast has the burden to show both that the complained of matter in DER's pre-hearing memorandum was scandalous and impertinent and that exposure of the trier-of-fact thereto caused bias and prejudice. *Commonwealth v. Council*, 491 Pa. 434, 421 A.2d 623 (1980). We do not believe that Northeast has shouldered either part of this twofold burden. Turning first to the issue of whether the allegations in DER's pre-hearing memorandum were scandalous and impertinent we note, as stated in Goodrich-Amram 2d §1017(b):8 (at page 59) "Facts not material to the issue are impertinent and if reproachful, are scandalous." Conversely, of course, even reproachful facts are not scandalous if relevant and material.

The instant appeal arises from DER's denial of Northeast's application for a solid waste disposal site. Pursuant to §503(c) of the Solid Waste Management Act, 35 P.S. §6018.503(c), when reviewing a permit application for a solid waste management permit DER is empowered to and its duty shall be to consider whether the applicant and, in the case of corporate applicants, the principals thereof, have demonstrated the ability or intention to comply with the Solid Waste Management Act, as well as other cited acts. On-going close contact between an applicant and organized crime certainly would seem to be relevant to and material to the issue of whether said applicant possessed the requisite intention or ability to comply with any statute. Therefore assertions of such contacts even though "reproachful" would not fall within the definition of scandalous and impertinent subject matter and thus would not be stricken from pleadings. *Quick v. Lichtenwalner*, 84 D & C 546 (1952); *DeMeo v. Bullock*, 55 D & C 2d 789, 60 Del. C. Rep. 40 (1972).

Even assuming arguendo, that DER's pre-hearing memorandum did contain scandalous and impertinent assertions, Northeast still has failed to demonstrate that the mere exposure of the hearing examiner to these assertions caused him to become biased or prejudiced against Northeast.

In *Council, supra*, the prosecutor, in seeking a continuance, made representations to the trial court concerning the testimony of a witness he could not locate. Counsel asserted that the missing witness drove the defendant's getaway car. The continuance was granted but this witness remained unavailable at the time of trial. Defendant-appellant contended that the trial judge should have recused himself on the ground that his knowledge of the proposed testimony prejudiced him against the defendant-appellant. In affirming the trial court's verdict, the Supreme Court noted that a judge's refusal to recuse himself will not be reversed absent a clear abuse of discretion. *Crawford's Estate*, 307

Pa. 102, 160 A. 585 (1931). Moreover, the court held that as between judicial fact-finders and lay juries, the former were more capable of disregarding prejudicial evidence. Indeed, the court stated "...it is the essence of the judicial function to hear or view proferred evidence...and to decide whether or not it should be admitted into evidence...For us to accept appellant's contention [that the mere exposure to prejudicial evidence is enough to disqualify a judge] would be, in effect, to find disqualification of a judge to be a judge." *Commonwealth v. Green*, 464 Pa. 557, 561 347 A.2d 682, 683 (1975).

Northeast attempts to distinguish *Council, supra* by asseting that the pre-hearing memorandum in this case is somehow more prejudical than the summarized testimony in *Council, supra*. It's hard to imagine how something could be more prejudicial in a criminal trial than statements implying that the defendant "did it". This would-be distinction doesn't wash. Also inapposite is Northeast's suggestion that because *Council, supra* involves a criminal matter (which involves a higher standard of proof than an administrative hearing) a little prejudice isn't so harmful. We agree with DER that if any distinction should be made about the impact of prejudicial evidence on a trier-of-fact as between criminal and administrative matters, the higher standard should be assigned to the criminal matters where the potential for loss of liberty (and perhaps even of loss of life) is present. Finally, with regard to this argument, we note that according to EHB practice a pre-hearing memorandum does not even constitute a pleading much less evidence. Just because a party makes assertions in a pre-hearing memorandum doesn't mean that the hearing examiner assigns probative value to such assertions. As the trial judge said in *Council, supra* (as quoted by the Supreme Court in its opinion), "[T]he difference between the expectations of counsel as to what their witnesses will say and the realities of their testimony are a phenomenon well known to Court and counsel." Thus, we hold that even

if Northeast had demonstrated that DER's pre-hearing memorandum contained scandalous matter the hearing examiner's review of this matter would not support Northeast's motion.

FINDINGS OF FACT

1. The application #300690 submitted by Northeast for a landfill permit in Kline Township, Schuylkill County was not complete for the reasons stated in DER's denial letter of July 28, 1982 - a copy of which is attached hereto as Exhibit A.

CONCLUSIONS OF LAW

1. The board has jurisdiction over the parties and subject matter.

2. The applicant (Northeast) has the burden of proof in a permit denial case.

3. The appellant (Northeast) has failed to demonstrate that DER's denial of its application was arbitrary, capricious or in violation of law.

4. In order to support its motion for recusation, the moving party (Northeast) had the burden of proving that DER's memorandum contained scandalous and impertinent matter and that exposure to this pre-hearing memorandum had caused the hearing examiner to become biased against Northeast.

5. Northeast failed to sustain its burden on both the above stated issues.

6. A hearing examiner's decision on a motion to recuse will not be disturbed unless it constitutes an abuse of discretion. No such abuse of discretion took place in the instant case.

O R D E R

AND NOW, this 15th day of July, 1983, Northeast's appeal is dismissed and DER's denial of Northeast's landfill permit application I.D.#300690 is sustained.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: July 15, 1983

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

BOROUGH OF LAKE CITY : Docket No. 80-156-S

: Solid Waste Act Order

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By the Board, July 15, 1983

A proposed adjudication in this matter was drafted by Dennis J. Harnish, Esquire, formerly Chairman of the Environmental Hearing Board who has been appointed as a hearing examiner in the above-captioned matter. In preparing the proposed adjudication Mr. Harnish reviewed the notes of testimony taken during a hearing held on March 9, 1981 as well as the exhibits introduced during that hearing and the post-hearing briefs filed by the appellant and DER. This proposed adjudication has been reviewed and adopted by the board.

FINDINGS OF FACT

1. The Borough of Lake City is a municipality located in Erie County, Pennsylvania.

2. For a period from at least April 20, 1970 until August 8, 1980, the Borough of Lake City operated a solid waste disposal site within the Borough,

located on property owned by the Lake City Municipal Sewer Authority along Maple Road and situate on the bank of Elk Creek, a tributary to Lake Erie.

3. The Lake City solid waste disposal site required a solid waste management permit.

4. Lake City Borough has never obtained a permit to operate the solid waste disposal facility as required by the Solid Waste Management Act, the Act of July 31, 1968, P. L. 788, as amended, 35 P.S. 6001 *et seq.*

5. Lake City Borough officials knew that such a permit was necessary to operate the facility.

6. The Borough sold dumping permits to persons wishing to dispose of wastes at the site. These permits were sold at least during the period from 1973 through 1979. The price for a dumping permit was $7.50 per year and approximately 200 permits were sold each year.

7. The wastes deposited at the site included appliances, commercial wastes, lumber, trees, brush, cans, pallets, oil cans, car tires, and residential wastes.

8. In 1970 Lake City Borough made application for a permit to operate a solid waste disposal facility at the subject site; however, the application was incomplete and not pursued by the Borough to permit issuance.

9. By letter dated December 4, 1978, the Borough was again advised to either close the site or obtain the proper permit.

10. Lake City Borough officials agreed to close the solid waste disposal facility no later than November 1, 1979.

11. On October 22, 1979 a meeting was conducted among DER, Lake City Borough and Erie County Department of Health officials to discuss the closure of site. The date for closure of the site was postponed to November 30, 1979.

12. At this meeting, Borough officials were advised of the disposal alternatives available to them.

13. On or about July 16, 1980, a portion of the solid waste disposal site including wastes, soil, and vegetation broke away and slid into Elk Creek.

14. Solid wastes from the site were observed having entered into Elk Creek.

15. Approximately sixty (60) to one hundred (100) feet of stream bank was strewn with wastes and the wastes extended approximately ten (10) to twenty (20) feet into the stream.

16. Approximately two-thirds of the solid waste site had slid down the hillside.

17. By certified letter, dated July 22, 1980, Lake City Borough was formally advised by the DER's representative that the site had slid into Elk Creek and that that constituted a violation of the Solid Waste Management Act.

18. Lake City Borough received the July 22, 1980 letter as evidenced by a signature on a return receipt card.

19. On August 8, 1980, the site was still open and wastes were being deposited by Borough employees.

20. The wastes being deposited on August 8, 1980 were Class II wastes as defined at 25 Pa. Code §75.33.

21. Subsequent to the July, 1980 incident wherein portions of the site broke away into Elk Creek, the DER's Office of Resources Management agreed to undertake certain remedial activities to aid Lake City Borough in effecting a solution to the problem.

22. Lake City Borough and the DER's Office of Resources Management entered into an agreement for the removal of the wastes from Elk Creek and its flood plain and redeposition of the wastes onto the site.

23. The agreement did not address entirely the concerns of the Bureau of Solid Waste Management.

24. Scrap metals and appliances were stored at the site and were still being so stored as of March 2, 1981.

25. On August 26, 1980, DER issued an order closing the site and requiring various remedial measures, including stabilization of slopes and providing a vegetative cover.

26. The August 26, 1980 order is the subject of this appeal.

27. A principal purpose for the issuance of the order on August 26, 1980 was to supplement the obligations of Lake City Borough under its agreement with DER's Office of Resources Management.

28. The site did not receive two feet of final cover material as required by 25 Pa. Code §75.24(c)(2)(xxi) and as required by the DER's order.

29. The determination of inadequate cover was made by the Regional Solid Waste Manager by observation of wastes being exposed and by the Acting Regional Solid Waste Operations Supervisor.

30. Full compliance with the vegetation and seeding requirements of the order could not be determined until a full growing season expired.

31. The Borough did not utilize the services of its engineer in closing the site.

32. The consensus of the Borough Council in order to close the dumping site was to just close the access way and prohibit further dumping.

33. Located on the parcel is a building described as a "smokehouse" for firefighter training, and near the smokehouse are barrels with contents that give off the odor of oil.

34. Oil stains were seen on the ground adjacent to said smokehouse.

DISCUSSION

Like many municipalities throughout this Commonwealth, Lake City Borough, Erie County, (appellant), for many years after the effective date of the Solid Waste Management Act, the Act of July 31, 1968, P.L. 788, as amended, 35 P.S. §6001 *et seq.*, operated a municipal landfill without the authorization of a permit issued by DER.

As long ago as April of 1970, Mr. Russell L. Crawford, who was at that time an inspector for DER, advised the appellant that it was required to obtain a permit from DER for the appellant's landfill located on a parcel of property defined on the south by Route 5, on the east by Maple Street and on the west by Elk Creek (a tributary of Lake Erie which reports to the lake within a mile of the site).

DER, on the basis of Mr. Crawford's inspection, also advised appellant of certain operational violations including the dumping of wastes on the flood plain of Elk Creek as well as on the steep hillside leading from the (roughly flat) top of the site down to said flood plain.

A reinspection by Mr. Crawford, on July 1, 1970, indicated that the appellant had undertaken certain efforts to correct the problems noted in DER's notice of violation. It had opened a small trench on the top of its site and had placed some soil on the waste on the hillside. Mr. Crawford, however, noted the absence of even a six inch daily covering of earth on the waste in the trenches and that the waste deposited therein was burning. Thus, on November 19, 1970, Mr. Crawford again wrote to appellant concerning its violations and again emphasized the necessity for the appellant to obtain a permit for its site.

Appellant again made an attempt to comply with DER's directive, this time by having Hill and Hill engineers prepare and submit an application for a Solid Waste Management permit to DER on December 11, 1970. Unfortunately, the said application was incomplete and although the Borough was so informed, its application was never revised and no solid waste management permit was ever issued for the site.

Notwithstanding appellant's failure to comply with DER's directives, a lengthy period of benign neglect followed the flurry of action in 1970. Indeed, it was not until December 4, 1978 that appellant was again informed of the need to obtain a permit or close its landfill. This notice was contained in a letter from the Erie County Health Department (ECHD) which was performing inspections, as DER's agent, under the Pennsylvania Solid Waste Management Act.

On October 9, 1979, ECHD, again wrote to the appellant and this time the ECHD ordered appellant to close its landfill by November 1, 1979.

This letter finally attracted the attention of appellant's elected officials and on October 22, 1979 a meeting was held among representatives of DER, ECHD and appellant at which meeting the appellant agreed to close its site by November 30, 1979.

Appellant's secretary, Joyce Andrews, and Mr. George Bax, President of appellant's council testified that the appellant did close its site promptly after the October 22, 1979 meeting. However, Mr. Bax admitted, on cross-examination, that the site had not been closed in accordance with DER's regulations; e.g., the appellant did not even attempt to provide two feet of earth as a final cover (N.T. 151).

Appellant's view of what was involved in closing its site is succinctly summarized by the following colloquy between Mr. Bax and the Hearing Examiner. (At N.T. 153)

> "THE HEARING EXAMINER: Do you think that you could just close the gate one day and not do a darn thing with it thereafter and that that would be legal?
>
> THE WITNESS: Yes. I believe that was the consensus of council.
>
> THE HEARING EXAMINER: No matter what was sitting there, all you had to do was close the gate, not let anybody on there, and you'd have no more problems?
>
> THE WITNESS: If we had no more dumping, we figured we had no more problems."

Appellant figured incorrectly. On or about July 17, 1980 a section 60 to 100 feet wide of the solid waste which had been dumped on the steep hillside slipped into Elk Creek. Moreover, on the day Mr. Crawford witnessed the aftermath of this "waste slide", August 6, 1980, he also witnessed the dumping of additional solid wastes at the allegedly closed site from one of appellant's trucks. The testimony of Sean D. Johnston driver of the truck and at that time a CETA employee of appellant's as well as the testimony of his supervisor, Dale Vogt, appellant's superintendant, indicate that this was an isolated incident and involved only tree branches. This incident, nevertheless, provides a paradigm of the rather cavalier attitude displayed over the years by the appellant toward its responsibilities under the Solid Waste Management Act.

We are not unmindful of the appellant's limited resources and we commend the appellant for continually attempting to address its problems.[1] We also commend DER's Division of Stream Improvement which Division cooperated with appellant, after the waste slide, to redeposit some of this waste in new trenches on top of the site and to insure that this area was covered and reseeded.

Unfortunately, the appellant's efforts, even as aided by the Division of Stream Improvement, were just not sufficient to bring its site into compliance with the Solid Waste Management Act and the regulations thereunder. The entire site was not covered with two feet of earth; wastes protrude from the ground in places. Moreover, a substantial pile of scrap metal including a box car, water tanks, appliances, spouting and scrap metal is located on the site. The site also includes a number of drums of an oily substance and a reservoir of the same substance which substance is allegedly utilized to produce smoke in the fireman's training shanty located on the site. It is not clear from the record what official connection, if any, the fireman have with the appellant, but as owner

1. In this regard, we note that appellant charged users of its dump permit fees over the many years it operated this site in violation of the Solid Waste Management Act. Perhaps had appellant plowed some of this money back into its landfill by plowing under the waste exposed thereat, the instant order need never have been issued.

and occupier of the site the appellant has responsibility under both common law and The Clean Streams Law and Pennsylvania Solid Waste Management Act to police all activities thereupon. That this material had not been properly handled is evidenced by the oily ground surrounding these drums.

On August 26, 1980 DER issued an order closing the site and requiring certain remedial steps including removal of the scrap metals, refraining from burning solid wastes on the site, diverting surface water to and stabilizing steep slopes thereon to minimize the chance of further slides, providing a final compacted cover of 2 feet throughout the site and seeding and mulching all disturbed areas on the site.

As to the closure position of the order there can be no doubt that it is supported by the law and facts; no person or municipality can operate a landfill on its property without a permit from DER. *Joseph C. Delenick d/b/a St. Clair Landfill v. DER*, 24 Pa. Cmwlth. Ct. 577, 357 A.2d 736 (1976); *John T. Ryan v. DER*, 30 Pa. Cmwlth. Ct. 180, 373 A.2d 475 (1976). With regard to the remedial portion of the order we are mindful that it is DER which has the expertise in fashioning orders to address violations of the acts it enforces; this board will reverse or modify a DER order only if we find that DER abused its discretion in issuing that order; *Baughman v. Commonwealth, DER*, 1979 EHB 1; *Agosta v. Commonwealth, DER*, 1977 EHB 88; *Pisani v. Commonwealth, DER*, 1975 EHB 117.

In view of the circumstances discussed above we can't find DER's order to be excessive. If anything DER has been too lenient with appellant. Had appellant's landfill been properly closed in 1970 or even in 1978 the unfortunate "waste slide" of 1980 may never have occurred.

Appellant argues that DER is somehow estopped by virtue of the contract between the DER Division of Stream Improvement and appellant from insisting upon compliance with the Solid Waste Management Act. We disagree. Not only would

this be bad public policy, chilling the desireable cooperation between levels of government faced with a common problem, we also hold that on this affirmative defense the appellant has the burden of proof. Appellant failed to point out any provision of the aforesaid contract which in any manner limits the authority DER exercises in the instant order and thus failed to shoulder its burden of proof.

Appellant also argues that pursuant to §11(a) of the SWMA, 35 P.S. §6011(a), DER may only issue an order against a municipality if it makes certain findings and appellant asserts that DER failed to make these findings.[2] Appellant apparently ignores the fact that there is no such procedural precondition to §6(9) of the SWMA 35 P.S. §6006(9), the section of that act under which the order in question was issued. Note that in *City of York, et al v. Comm., DER*, 26 Pa. Cmwlth. Ct. 603, 364 A.2d 978 (1976), orders issued to municipalities under §6(9) were upheld without any such showings. Moreover, DER did make findings in its order that contents of the appellant's solid waste disposal site entered waters of the Commonwealth and this is nuisance per se under Section 307 of the Pennsylvania Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.307.

Appellant finally argues that it has been unconstitutionally deprived of its property by the limitation of access provision of the order. In the first place, municipalities, as creatures of the state, simply have no due process rights vis á vis the Commonwealth of Pennsylvania. *DER v. Borough of Carlisle*, 16 Pa. Cmwlth. Ct. 341, 330 A.2d 293 (1974). In addition, the clear import

2. The Solid Waste Management Act in effect on the date the instant order was issued was repealed by a new Pennsylvania Solid Waste Management Act, Act 97, July 7, 1980, P.L. 380, 35 P.S. §6018.101 *et seq.* but note in the current pocket part of Purdon's at page 35 a SAVINGS CLAUSE which specifically states that orders issued under the old Solid Waste Management Act remain in full force and effect. For what its worth, the new act, in §§104(7) and (13), continues to supply DER with the authority to issue the order in question without making a finding of nuisance as a condition precedent.

of the access limitation portion of the order is to ensure that the site will stay closed "as a solid waste site". Once the remedial activities contemplated by the order have been completed, nothing therein prevents appellant from utilizing its site in any other lawful manner.

Finally, with regard to the scrap pile described above, while it may be true that 25 Pa. Code §75.28(h) permits the storage of scrap metal under conditions intended to prevent vector and rodent harborage, the scrap metal on appellant's site is not stored in this manner and, in addition, appellant has failed to demonstrate, as required by 25 Pa. Code §75.28(h), that it has a market for said scrap.

CONCLUSIONS OF LAW

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

2. Lake City Borough has operated the solid waste disposal facility from at least April 20, 1970 until August 8, 1980 without a permit in violation of the Solid Waste Management Act.

3. Lake City Borough has not properly closed the site in compliance with the regulations.

4. Elk Creek is a water of the Commonwealth as defined in The Clean Streams Law.

5. The entry of the solid wastes into the waters of the Commonwealth on July 17, 1980 constituted pollution of said waters of the Commonwealth.

6. The order under appeal was a reasonable exercise of the department's enforcement powers.

O R D E R

AND NOW, this 15th day of July , 1983, the appellant's appeal is dismissed and DER's order is sustained.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: July 15, 1983

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

COOLSPRING TOWNSHIP, et al. :

:

: Docket No. 81-134-G

:

: Solid Waste Management Act
Residential Septage Agricultural
v. : Utilization

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and HIGBEE/STRUTHERS, Permittee

ADJUDICATION

By: Edward Gerjuoy, Member, August 8, 1983.

This matter comes before the Board under the following circumstances. On July 31, 1981, under the authority of the Solid Waste Management Act, 35 P.S. §§6018.101 et seq. ("SWMA"), the Department of Environmental Resources ("DER") issued a permit to Jeffrey Higbee ("Higbee") allowing him to dispose of "sewage sludge" on farm land owned by Richard Struthers ("Struthers") in Mercer County (the "site"). Issuance of this permit was timely appealed by Coolspring Township ("Township") at EHB Docket No. 81-134-H, and by Reverend and Mrs. Donald Lintelman and other residents in the area of the site (the "Citizens"), at EHB Docket No. 81-151-H. The Citizens allegedly also petitioned for supersedeas, although the docket does not list any such petition.

In any event, hearings on this matter began on February 4, 1982 and did not conclude until October 27, 1982, after thirteen days of hearings. During these hearings the Citizens' appeal was consolidated with the Township's appeal, under the single Docket No. 81-134-G (EHB Order, February 10, 1982). The parties also agreed that the hearing on the Citizens' supersedeas petition would be consolidated with the hearings on the merits of the consolidated appeal at Docket No. 81-134-G (N.T. 416). At the close of the hearings, on October 27, 1982, the Board was informed (N.T. 2539) that the Common Pleas Court of Mercer County had issued a stay preventing Higbee from exercising his permit. Shortly thereafter the Board received a copy of an order dated November 19, 1982, from DER to Higbee, suspending the permit until March 15, 1983. Since this March 15, 1983 date was past the date when the parties' post-hearing briefs on the merits of this consolidated appeal were due, the Board decided a separate ruling on the supersedeas petition would be pointless; a ruling on the merits could be produced almost as rapidly as a ruling on the supersedeas petition and (until March 15, 1983 anyway) the Board's failure to rule on the supersedeas petition could not cause harm to any of the parties. Actually, because of various requested and granted extensions of time, filings of post-hearing briefs were not completed until April 21, 1983. All of the parties filed post-hearing briefs, and they all included suggested findings of fact and conclusions of law, as required by the Board's Rules, 25 Pa. Code §21.116(b).

The Board's intention to defer a ruling on the supersedeas petition in favor of a ruling on the merits was explained to the parties on several occasions (N.T. 2540, EHB Order, October 28, 1982 and letter from Board to the parties, December 14, 1982). No objection to this intention has been filed by

any of the parties. Therefore, this adjudication is concerned solely with the merits of this consolidated appeal, and moots the petition for supersedeas originally filed (if indeed it ever was filed) by the Citizens at Docket No. 81-151-H. For reasons explained below, we have not overturned the permit, but have modified it somewhat.

FINDINGS OF FACT

1. The appellants in this consolidated appeal are Coolspring Township and various citizens residing and/or owning property in Coolspring Township.

2. Appellant Coolspring Township is located in Mercer County, Pennsylvania.

3. The citizen appellants include, inter alia, Reverend and Mrs. Donald Lintelman, Mr. and Mrs. William Oehlbeck, Jr. and Mr. Joseph Hill.

4. Appellants Reverend and Mrs. Donald Lintelman are individuals who reside at 3524 Raspberry Street, Erie, Pennsylvania 16508, and own property located in Coolspring Township, Mercer County.

5. Appellants Mr. and Mrs. William Oehlbeck, Jr. and Mr. Joseph Hill are individuals who own property and reside in Coolspring Township, Mercer County.

6. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, which has the duty and responsibility of administering the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, No. 97, 35 P.S. §6018.101 et seq., and the regulations duly promulgated thereunder.

7. Permittee is Jeff Higbee, 278 Latonka Drive, Mercer, Pennsylvania 1613

8. On July 31, 1981, DER issued Higbee solid waste permit No. 601886 ("permit") for the agricultural utilization of residential septic tank waste on property owned by Richard Struthers in Coolspring Township, Mercer County.

9. The permit was issued in response to an application submitted to the Department's Bureau of Solid Waste Management, 1012 Water Street, Meadville, Pennsylvania 16335, by Todd Giddings and Associates ("Todd Giddings"), consulting hydrogeologists on behalf of Higbee.

10. The permit actually used the phrase "sewage sludge" instead of "residential septic tank waste" (also termed "residential septage" or "household septage").

11. The permit application requested permission to dispose of residential septage only.

12. Page one of the permit makes the permit application part of the permit DER granted.

13. Page one of the permit requires compliance with the provisions of the application.

14. DER never intended that the permit would allow deposition of any material other than residential septage.

15. During the hearing counsel for DER, after consulting his client, stipulated that the permit applied only to residential septage.

16. The Common Pleas Court of Mercer County has issued a stay preventing Higbee from exercising his permit.

17. On November 19, 1982, DER issued an order to Higbee, suspending the permit until March 15, 1983.

18. This November 19, 1982 order has been appealed by the Township and by the Citizens, in appeals now consolidated at Docket No. 82-295-G, under this Board's Order dated March 4, 1983.

19. The appeals at Docket No. 82-295-G maintain that Higbee's permit should have been revoked by DER, not merely suspended.

20. The Township has charged that the proceedings in this matter have been marred by bias and prejudice against the appellants.

21. The record does not support this charge (Finding of Fact 20).

22. Higbee's permit application was prepared primarily by Matthew H. Kenealy III ("Kenealy"), a geologist for Todd Giddings.

23. DER's review of the permit application was conducted primarily by Steven Socash ("Socash") and Donna Skinner ("Skinner").

24. Socash is a soil scientist employed by the Department for the Bureau of Solid Waste Management at its Meadville Regional Office.

25. Skinner is a hydrogeologist employed by the Department for the Bureau of Solid Waste Management at its Meadville Regional Office.

26. Socash began working for DER in June 1980.

27. Socash is 24 years old.

28. Socash graduated from Penn State in 1979, with a B.S. in agronomy.

29. Socash is a member of the Pennsylvania Association of Professional Soil Scientists.

30. Socash's review of the permit application relied largely on his own examination of the site.

31. Socash's examination of the site included excavating backhoe pits and digging auger borings.

32. Socash's review of the permit application relied largely on data he himself had gathered during his examination of the site.

33. Socash visited the site a total of six times prior to DER's issuance of the permit.

34. During these visits Socash excavated at least 5 backhoe pits and made between 50 and 100 auger borings.

35. Skinner began working for DER in February 1980.

36. Skinner graduated from Allegheny College, Meadville, Pennsylvania with a major in geology and a minor in chemistry.

37. Skinner's review of the permit application relied largely on her own examination of the site.

38. Skinner's examination of the site included walking the site and observing the backhoe pits and auger borings Socash had studied.

39. Skinner's review of the permit application relied largely on data she herself had gathered during her examination of the site.

40. Skinner visited the site a total of three times.

41. DER did not file a pre-hearing memorandum in this appeal.

42. In letters docketed by the Board on October 28, 1981 and November 9, 1981, DER's counsel stated "It is the Department's position that the permittee should defend this permit action."

43. Nevertheless, DER participated fully in the hearings, including calling its own witnesses, cross examining appellants' witnesses and filing a post-hearing brief.

44. Dr. Fred Brenner ("Brenner") testified for the appellants, as an expert witness.

45. Brenner is an Associate Professor of Biology at Grove City College.

46. Brenner received a Ph.D. degree in biological sciences from Penn State University in 1964.

47. Brenner has published numerous articles in professional scientific journals.

48. Richard Crowley ("Crowley") testified for the appellants as an expert witness.

49. Crowley is employed by the U. S. Department of Agriculture, Soil Conservation Service.

50. Crowley's title is Supervisor of Conservation, Mercer County.

51. Crowley was one of the persons responsible for preparation of the "Soil Survey of Mercer County, Pennsylvania," issued April 1971 by the U. S. Department of Agriculture.

52. Appellants maintain that operation of the permit will subject them to the following adverse environmental effects:

a. Infection of the human population near the site via surface migration of harmful microorganisms in the septage.

b. Contamination of the ground water near the site by harmful microorganisms and dangerous chemical species in the septage.

c. Contamination of the ground water by harmful nitrogen compounds building up in the soil.

d. Buildup of heavy metals in the soil at the site, with ultimate contamination of the ground water in the area, or even penetration of the food chain.

e. Erosion and sedimentation at the site, stemming from inadequate crop rotation plans.

53. The testimony by Brenner, Crowley and appellants' other witnesses in support of the foregoing claims (paragraphs 52a - 52e) was speculative and inconclusive.

54. The record, taken as a whole, does not support appellants' claims stated in paragraphs 52a - 52e.

55. Brenner could cite no instances of the spread of disease due to the practice of spreading septage for agricultural utilization in Pennsylvania in accordance with DER's regulations.

56. Brenner could cite no instances of water wells being contaminated due to the spread of septage for agricultural utilization in accordance with DER's regulations.

57. Untreated residential sewage contains harmful microorganisms, i.e., "pathogens".

58. A properly operating septic tank digests, i.e., destroys, the bulk of the pathogens in the raw sewage entering the tank.

59. Mainly, it is the aerobic pathogens which are destroyed in the septic tank.

60. The anaerobic pathogens which are living in the septic tank pumpings Higbee furnishes Struthers mainly will be destroyed in the soil.

61. The record, taken as a whole, offers only speculations about the survivability of harmful pathogens in the septage Struthers will have been injecting under the permit.

62. The permit requires very limited monitoring of water wells serving residents near the site.

63. The permit does not require chemical analyses of the septage applied to the site, or of the soil on the site.

64. Brenner and Crowley recommended regular testing of the septage, the soil and neighboring water wells.

65. Brenner even recommended chemical analysis of every tank of septage collected by Higbee.

66. DER's witnesses denied any need for chemical analyses of the septage or of the soil.

67. DER's witnesses felt the permit already provided for more than adequate monitoring of possible groundwater contamination.

68. The testimony by DER's experts, to the effect that monitoring of the soil and of additional water wells is not needed, was not backed up by any hard evidence.

69. Under the facts of this appeal, the regulations (25 Pa. Code Chapter 75, especially Section 75.32) governing the appeal are attempting to allow for complex natural phenomena, such as the rate of flow of ground water and the lifetimes in soils of harmful microorganisms found in residential septage.

70. The Environmental Protection Agency September 21, 1979 Criteria for Classification of Solid Waste Disposal Facilities and Practices provide that septic tank pumpings shall not be incorporated into the soil without treatment to further reduce pathogens.

71. Oehlbeck's sources of water include a spring and a well.

72. Oehlbeck's spring already is contaminated with fecal coliform bacteria

73. Residents of the area and their children walk on the roads bordering the Struthers property.

74. School buses pick up children and travel on the roads bordering the Struthers property.

75. At times, children will play in Struthers' fields.

76. The record, taken as a whole, offers only speculations about the possible hazards to children in the neighborhood stemming from operation of the permit.

77. The initial permit application, dated November 21, 1980, was made on a form furnished by DER (Lintelman Exhibit 1).

78. The cover page of the initial permit application was signed by Higbee in the presence of a notary.

79. On April 23, 1981, Higbee submitted a revised permit application (Lintelman Exhibit 2).

80. The revised application was not signed in the presence of a notary.

81. Appellants allege that failure to have the revised application notarized (Finding of Fact 79) was a violation of applicable statutory and regulatory provisions.

82. Appellants have alleged numerous other procedural violations, of the environmentally inconsequential sort just described (Finding of Fact 79).

83. Many of these alleged procedural violations have been raised for the first time in appellants' post-hearing briefs.

84. Maps admitted into evidence purport to show that there is "occasional flooding" in the vicinity of the site (Lintelman Exhibit 7).

85. There was no evidence that portions of the site where septage application is allowed lie inside the "active flooding" areas, if any, included within these Lintelman Exhibit 7 maps (Finding of Fact 84).

86. The permit incorporates the condition that "all plowing will be to contour."

87. It will be extremely difficult, if not impossible, to contour farm much of the site, because of its shape.

88. Struthers does not practice contour farming.

89. At certain times of the year there is heavy runoff of surface water from the site, onto the properties of Struthers' neighbors.

90. The permit requires that septage be applied by injection under the surface of the soil.

91. The permit forbids injection of septage during periods of rain.

92. The record, taken as a whole, does not support appellants' claims that surface water runoff from the site will carry harmful pathogens onto their properties.

93. It is probable that "ancient" tile drains underlie much of the site.

94. The presence of tile drains can affect drainage from the site.

95. The record, taken as a whole, does not support the claim that under operation of the permit the public health, safety and welfare will be endangered by the possible presence of ancient tile drains.

96. Socash made the general recommendation that tile drains in the vicinity of septage injection be monitored.

97. The original application proposed to apply sludge to four fields on Struthers' farm, known respectively as the North, Middle, Upper and Lower Fields (Lintelman Exhibit 1).

98. The revised application eliminated the Lower Field, and deleted certain areas of the North Field and the Upper Field (Lintelman Exhibit 2).

99. The modifications (of the original application) incorporated into the revised application were made by Kenealy, largely in response to DER's review of the original application.

100. Socash concluded that the soil at the site is Canfield silt loam.

101. Socash concluded that the depth to the seasonal high water table is at least 20 inches at all portions of the site.

102. Crowley contests these conclusions (Findings of Fact 100 and 101) of Socash's.

103. Crowley's objections to these conclusions were directed solely to the methodology or reliability of DER's investigation of the site's soil types and water table levels.

104. Crowley made no actual field observations at the site.

105. Crowley testified that he had no reason to disagree the soil generally underlying the site was Canfield loam, except for a "yellow area" in the Middle Field.

106. The "yellow area" is an area in the Middle Field, roughly 15 by 30 feet, where Socash observed the grass to be slightly yellow, suggesting to Socash that there were saturated conditions or poor drainage in that area.

107. In the "yellow area" Socash found soil mottling at depths of 10 to 12 inches.

108. Soil mottling, or change of color, is the normal indicator Socash uses to determine the height of the seasonal high water table.

109. Socash concluded that the seasonal high water table in the "yellow area" was deeper than 20 inches below the surface.

110. Socash decided the soil in the yellow area was Canfield silt loam.

111. Crowley believes the soil in the yellow area is Ravenna, not Canfield.

112. Crowley and Socash appear to agree that Ravenna soils are not suitable for septage injection sites.

113. Appendix B of the now superseded (as of January 22, 1983) 25 Pa. Code Chapter 73 classifies Ravenna soils as being poorly drained, having high water tables, and being unsuitable for subsurface disposal systems.

114. 25 Pa. Code Chapter 73 pertains to sewage disposal systems, e.g., septic tanks, not to the agricultural uses of septage.

115. Socash did not have hard evidence in support of his conclusion that the mottling within the yellow area was a spurious indicator of the depth to the seasonal high water table.

116. Socash's reasons for rejecting mottling as an indicator of seasonal high water table level in the "yellow area" were merely speculative.

117. Crowley testified that the crop rotation plan embodied in the permit is unsatisfactory for E & S control.

118. Crowley criticized the adequacy, for E & S controls, of the 50-foot grass buffer strips which, under the permit, must be maintained at site boundaries.

119. The permit conditions provide for compliance with all applicable regulations, including regulations governing the required isolation distances between septage application and neighboring property lines.

120. The record does not support the contention that the 50-foot grass buffer strips are inadequate to control erosion and sedimentation at the site boundaries.

121. Socash, after reviewing the permit application, concluded that it provided satisfactorily for E & S controls.

122. Crowley's and Socash's views on the adequacy of E & S controls under the permit depended largely on calculations using the same "Universal Soil Loss Equation".

123. Crowley calculated much larger soil losses than did Socash.

124. Socash's calculation more accurately took into account the specific features of the site than did Crowley's.

125. The maps in the revised application (Lintelman Exhibit 2) do not accurately depict the required buffer strips (Finding of Fact 118).

126. The areas where septage injection is allowed under the permit will be staked off on the site.

127. Socash will check that the areas where septage injection is allowed have been properly staked off.

128. Struthers is one of the better farmers Crowley has seen.

129. Struthers presently is operating his farm in accordance with good soil conservation practice.

130. Struthers presently fertilizes his farm with pig manure using precisely the same injector machine with which he plans to inject Higbee's septage.

131. The injector machine is a Better Built Model 1500 tank trailer.

132. The revised permit application indicates the injection depth is adjustable, up to a depth of 12 inches.

133. In practice, injection is difficult at depths greater than 10 inches.

134. Struthers is not a co-permittee with Higbee.

135. The septage is neither "agricultural waste" nor "food processing wastes".

136. Under the present permit, Higbee must rely on Struthers to fulfill many of the permit conditions.

137. Struthers is not, and has not been, a party to this appeal.

138. Struthers was not advised to obtain counsel during these hearings.

139. Struthers has been given no indication that an adjudication of this appeal might result in an order directed to him.

140. Paragraph 18 of the permit specifically states that the permit does not supersede applicable local laws, such as zoning ordinances.

141. DER's review of the application was careful and detailed.

142. The record does not support the thesis that the environmental harm from operation of the Higbee permit will outweigh its benefits.

143. Environmentally benign agricultural uses of septage can provide important benefits to farmers and to society as a whole.

144. During the hearings, the appellants raised for the first time the issue of Higbee's fitness to receive the permit.

145. In the course of his normal business activities, Higbee pumps non-residential as well as residential septic tanks.

146. Higbee presently keeps little or no records of the sources of the septage he presently transports in his hauling trucks.

147. It can take the pumpings from three or four septic tanks to fill Higbee's 1500-gallon hauling truck.

148. A few gallons (perhaps five) do remain in Higbee's truck after it has been "emptied."

149. The same tank truck is used to transport both residential and non-residential septic tank pumpings.

150. The interior of the tank truck is cleaned no more than two or three times a year.

151. The permit's record keeping requirements are very far from specific.

DISCUSSION

The appellants (under which term we lump the Township and the Citizens) have set forth a veritable plethora of arguments in favor of their thesis that the permit was improperly granted and should be reversed. These arguments, which are so varied as to be not readily classifiable, will be examined seriatim, but in no particular order.

Our analysis of this matter is based on two fundamental principles. First, the scope of our review is to determine whether DER committed an abuse of discretion or an arbitrary exercise of its duties or functions.[1] R. Czambel, Sr. v DER, EHB Docket No. 80-152-G, 1981 EHB 88; Ohio Farmers Insurance Co. v. DER, Docket No. 80-041-G, 1981 EHB 384, affirmed 457 A.2d 1004 (Pa. Cmwlth 1983). Second, the burden of showing that there has been an abuse of discretion falls on the appellants. 25 Pa. Code §21.101(c)(3); Czambel, supra; Doris J. Baughman v. DER, Docket No. 77-180-B, 1979 EHB 1; Brookhaven-Aston-Middletown Conservation Association, Docket No. 73-026, 1973 EHB 178.

I. Did The Proceedings Deny Appellants Their Due Process Rights?

The Township argues that the proceedings in this matter have been marred by bias against the appellants, amounting to a denial of appellants' due process rights. Indeed the Township implies, although it does not say so explicitly, that the Board was biased against the appellants, and manifested its bias by its rulings during the hearings. Clearly these claims of the Township must be addressed before we can proceed any further in this matter.

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1. In the interests of brevity the phrase "abuse of discretion" will be employed to denote our complete scope of review, recognizing that in the context of the instant appeals "an arbitrary exercise by DER of its duties or functions" would be an abuse of discretion as well.

In its brief, p. 63, the Township writes:

> In the present case, it is respectfully submitted that prejudice has in fact been shown in this case. The appellants in this case initially presented testimony from two individuals who were eminently qualified to testify on the subject presented. Their expertise was continually questioned by the attorney for the Department of Environmental Resources and on many occasions these individuals were not allowed to testify. On the other hand, the Department of Environmental Resources presented witnesses who had few if any qualifications to establish their expertise in the field and were allowed to testify extensively. Throughout the case, the attorney for DER made amendments to the permit as testimony warranted.
>
> The whole proceedings in this matter smack of bias and prejudice to the participants of the Township of Coolspring and the adjoining property holders who were continually made aware of the extreme conflict of interest which was presented in this case.

The Board has reviewed the record, and finds no basis whatsoever for the assertion that "The whole proceedings in this matter smack of bias and prejudice..." The Township offers no factual details in support of this very serious implicit charge against the Board, other than its suggestion (quoted above) that the Board favored DER's witnesses, a suggestion not borne out by the transcript. Therefore the Board rejects any charge that it has been biased against the appellants; indeed, even merely implicitly charging the Board with bias on so flimsy a basis seemingly is inconsistent with the spirit of the Code of Professional Responsibility Canon 8 Ethical Consideration EC 8-6.

The Township's claim that DER has manifested bias against the appellants is somewhat more explicit. According to the Township, this bias stems largely from the fact that DER, instead of relying solely on data furnished by Higbee's consultant engineer, itself had actively gathered much of the data on which

issuance of the permit ultimately was based. In the Township view, DER's data gathering role caused DER to have a conflict of interest:

> Because of their activities, the Department of Environmental Resources was placed in the position of an advocate not only protecting the permit issue but protecting all of the data and materials which went into the granting of the permit (Township post-hearing brief, p. 61).

Under the SWMA, DER is empowered to issue permits after reviewing permit applications for their compliance with the law. 35 P.S. §§6018.104(7) and 6018.502. In reviewing permit applications, it obviously is desirable that DER make its own independent check of the data furnished by the applicant, and DER's power to do so was granted by the Legislature in 35 P.S. §6018.104(13). Therefore the Township's criticisms of DER for having gathered data used to evaluate the application are rejected as unsound. Under 35 P.S. §6018.104(13) it was DER's duty to do whatever it deemed necessary to guarantee that its evaluation of the permit application was based on accurate data.

We also reject as unsound the Township's claim that DER's gathering of its own data created a "conflict of interest" for DER, as that term normally is used, even granting arguendo that such gathering caused DER to become "an advocate...protecting all of the data and materials which went into the granting of the permit" (quote, supra, from Township brief, p. 61). The Township seemingly is pointing to DER's vigorous defense of the permit during the hearings as support for its thesis that the aforementioned conflict of interest existed. The Township feels this defense by DER was improper:

> The Department of Environmental Resources did not file a pre-trial memorandum and indicated, quite properly because of its action, that it would not participate. At the time of the hearing, not only did the Department of Environmental Resources participate, but through their counsel

> placed in all evidence in the case. This most properly should have been placed in by the permittee. This type of action has been sharply criticized by the Pennsylvania Supreme Court. [Cite to Horn v. Township of Hilltown, 461 Pa. 745, 337 A.2d 858 (1975).] (Township brief, p. 62)

In the immediately preceding quote, the assertion that DER "indicated quite properly" it would not participate in the hearings alludes to a letter dated October 26, 1981, from DER's attorney to the Board, stating: "It is the Department's position that the permittee should defend this permit action." This letter was not placed in evidence, but was referred to at the hearing by the Township's attorney without contradiction by DER's attorney (N.T. 1146). Under the circumstances, we see no error in our recognizing the existence of this letter, a copy of which was docketed by us at Docket No. 81-134-G on October 28, 1981; an essentially identical letter was docketed by us at the original (pre-consolidation) Docket No. 81-151-G on November 9, 1981.

However, granting that DER originally stated it would not participate in these hearings, we still see no reasons to hold that DER's participation in these proceedings involved a conflict of interest or bias against the appellants. The appellants themselves have named DER the "appellee" in these appeals. 25 Pa. Code §21.51(b). Having been so named, it was DER's legal right to defend the DER action being appealed-from (namely issuance of the permit), and the appellants must have expected DER to defend. DER's decision to leave the defense up to the permittee, embodied in the aforesaid letters of October 28, 1981 and November 9, may have been a pleasant surprise to the appellants, but hardly amounted to a guarantee that DER would play a passive role. DER was entitled to change its mind about the nature of its participation, if it felt it was in DER's interests to do so. DER's actual change of mind, and its subsequent full-scale participation

in the hearings, cannot be equated to "bias" against the appellants, amounting to denial of appellants' due process rights, without much additional evidence which appellants wholly failed to provide. Similarly, this change of mind by DER scarcely can be regarded as evidence supporting the existence of a conflict of interest. Hilltown, cited by the Township (see the quote supra) is quite inapposite. In Hilltown, a zoning board's solicitor also was the solicitor for a township opposing an application for a zoning variance being heard by that very same zoning board; the solicitor conducted the hearing by the zoning board, and ruled on objections to evidence he himself had presented in his capacity as township solicitor.

In summary, we reject the claim that there was a conflict of interest or bias against the appellants, and assuredly reject the charge that the appellants' due process rights were denied during these proceedings.

II. Were The Regulations Employed By DER Invalid, Insufficient, Or Otherwise Inappropriate?

Higbee's application to DER (Lintelman Exhibit 1) requested a permit for disposal of household septic tank waste ("septage") on the Struthers site. The septage was to be transported to the site by Higbee, after being pumped by Higbee from residential septic tanks. The permit (DER Exhibit 4) speaks of "sewage sludge", however, not of residential (which we here take to be synonymous with "household") septage. Apparently for this reason, the appellants insisted during the hearings that under the permit Higbee would be allowed to deposit not merely residential septage, but also non-residential septage and sewage treatment plant sludge (N.T. 116, 690, 1279).

On the other hand, Arthur Provost, who supervises DER's Bureau of Solid Waste Management's technical staff in DER's Meadville regional office (N.T. 1149),

explained that there never was any intention on DER's part that the permit would allow deposition of any material other than residential septage (N.T. 1280). As Mr. Provost points out, page one of the permit explicitly requires compliance with the provisions of the application, which is made part of the permit. Moreover, septic tank pumpings are encompassed within the definition of sewage sludge in the applicable regulations. 25 Pa. Code §75.1. In view of this definition and the limitations provided by the application, it was sufficient and satisfactory —Mr. Provost asserted and this Board agrees—to issue the Higbee permit on a standard form used for all kinds of sewage sludge (N.T. 1279). Furthermore, to allay any possibility that the Higbee permit's restriction to residential septage was ambiguous, during the hearing counsel for DER, after consulting his client, stipulated that the permit applied only to residential septage (N.T. 121, 691-7).

Perhaps the appellants were reassured by this stipulation from DER's counsel. In any event, the contention that the permit would be a health hazard because it allowed deposition of non-residential septage and sewage treatment plant sludge, was not renewed by the appellants in their post-hearing briefs. Nevertheless, although it is not necessary, we shall rule explicitly that the Higbee permit pertains to residential septage only, and therefore does not pertain to other forms of sewage sludge, such as non-residential septage and sewage treatment plant sludge.

DER maintains that the permit was issued to Higbee because his proposal to spread residential septage on the Struthers site comported with the applicable regulations. The Citizens, though now apparently recognizing the permit is restricted to residential septage, argue that the regulations do not meet their intended objective, namely to protect residents near the site from the environmental hazards of sludge disposal on the site. The Township echoes this argument, but from a somewhat different perspective. The Township points out that in 35 P.S.

§6018.102(4) the Legislature has declared that the purpose of the SWMA includes:

> (4) [to] protect the public health, safety and welfare from the short and long term dangers of transportation, processing, treatment, storage, and disposal of all wastes.

Therefore, the Township infers, this Board should rule that the regulations employed by DER were invalid, because (as the Township agrees with the Citizens) those regulations do not protect the public health, safety and welfare in the instant circumstances.

A. The Board's Jurisdiction in Challenges to Regulations.

The Board's jurisdiction to rule on the validity of regulations adopted by the Environmental Quality Board has been examined on numerous occasions. St. Joe Minerals v. Goddard, 14 Pa. Cmwlth. 624, 324 A.2d 800 (1974); Rochez Bros. v. DER, 18 Pa. Cmwlth. 137, 334 A.2d 790 (1975); U. S. Steel Corp. v. DER, 442 A.2d 7 (Pa. Cmwlth. 1982); DER v. Metzger, 22 Pa. Cmwlth. 70, 347 A.2d 743 (1975); East Pennsboro Township Authority v. DER, 18 Pa. Cmwlth. 58, 334 A.2d 798 (1975); Arsenal Coal v. DER, 445 A.2d 658 (Pa. Cmwlth. 1983); Scott Paper v. DER, EHB Docket No. 78-107-D, 1978 EHB 237; DER v. Locust Point Quarries, 396 A.2d 1205 (Pa. 1979). The past holdings have not been wholly consistent or transparent, but we believe the immediately following is a fair summary of the presently valid law. It was not the intent of the Legislature that the Environmental Hearing Board should review either the "wisdom" or the validity, including constitutionality, of regulations duly promulgated by the Environmental Quality Board ("EQB"). Hearings before our Board are adjudicative, not rule-making; objections to the general validity of a DER regulation, outside the context of an appeal of a specific DER action, should have been addressed to the EQB during the rule-making process, while preserving the right to appeal promulgation of the regulation to Commonwealth Court.

Pennsylvania Association of Life Underwriters v. Commonwealth Department of Insurance, 29 Pa. Cmwlth. 459, 371 A.2d 564 (1977), aff'd 482 Pa. 330, 393 A.2d 1131 (1978). Temple University v. Pa. Department of Public Welfare, 30 Pa. Cmwlth. 595, 374 A.2d 991 (1977).

However, this Board can assess the validity or the constitutionality of a regulation in the context of a given appeal, e.g., the appeal presently before us. The EQB cannot envision all the complex factual circumstances which may occur. A regulation which passes constitutional muster may induce violations of constitutional guarantees in special circumstances; similarly, in special circumstances a regulation which normally faithfully implements a statute may prove contrary to the statute's intent. It would be an abuse of discretion for DER to insist on enforcing a regulation which produces such unwonted effects.

To meet his burden of showing DER has abused its discretion, an appellant need not show that the undesired and undesirable effects discussed in the preceding paragraph are certain to occur, or even very probably will occur. Requiring such a showing often would be inconsistent with the basic objectives of protecting the public's health, safety and welfare. If the effects, once they have occurred, are sufficiently calamitous, then even a small probability of occurrence may be intolerable; a nuclear power plant meltdown is a compelling, though extreme, illustration. But in any given fact situation, whatever the tolerable probability of occurrence of unwonted effects may be, it is the appellant's burden to show convincingly that this probability will be exceeded. The mere speculative possibility of undesirable effects, without the additional showing just described, cannot overcome the presumption of validity attached to duly promulgated regulations of the EQB.

In the instant appeal, the appellants are not challenging the validity of a regulation. Instead, they are challenging the absence of regulations. More

precisely, the appellants are arguing that under the facts of the instant appeal the regulatory scheme available to DER was insufficient to protect the public health, safety and welfare. Notwithstanding this novel feature of appellants' challenge to the regulations, we believe the scope of appellants' burden in the instant appeal can be inferred from the foregoing discussion, which remains pertinent. Where there exists an applicable regulatory scheme, duly promulgated by the Environmental Quality Board, there is a presumption that the regulatory scheme does meet the objectives of the underlying statute. Such a regulatory scheme does exist in the instant appeal [see 25 Pa. Code chapter 75, especially Section 75.32]; therefore there is a presumption that in the instant appeal the regulations DER applied do meet the objectives of the SWMA, including protection of the public health, safety and welfare.

B. Appellants' Challenges to the Regulations

Appellants offer a large variety of arguments against the sufficiency of the regulations. We have examined these arguments in the light of the immediately preceding discussion (Section IIA supra), which appears to be consistent with oral rulings by the Board during the hearings (N.T. 1022-35, 1746-8). We find that many of appellants' arguments are addressed to the general sufficiency or "wisdom" of the regulations, rather than to their failure to protect the public health, safety and welfare under the facts of the instant appeal. For instance, the Township writes (brief, p. 60):

> Surely the Regulations' arbitrary standards do not take into consideration that there are ample areas located within the same township or the same county wherein waste may be disposed of in this manner which are not so readily available to the public, nor has it been shown anywhere that any environmental harm would result in making a more strict set of Regulations to assure the protection of the public.

We deem the issues raised in this quotation to be outside our jurisdiction.

But not all of appellants' attacks on the regulations fall outside our jurisdiction. Appellants properly do argue that operation of the Higbee permit will subject them to adverse environmental effects. These adverse environmental effects, which (according to appellants) are not prevented by the present regulations, fall into the following general categories:

> 1. Infection of the human population near the site via surface migration of harmful microorganisms in the septage, e.g., by surface water runoff and soil erosion.
> 2. Contamination of the ground water near the site by harmful microorganisms and dangerous chemical species in the septage.
> 3. Contamination of the ground water by harmful nitrogen compounds building up in the soil because of insufficient nitrogen uptake by the crops which would be fertilized by the septage.
> 4. Buildup of heavy metals in the soil at the site, with ultimate contamination of the ground water in the area, or even penetration of the food chain.
> 5. Erosion and sedimentation at the site, stemming from inadequate crop rotation plans.

However, the evidence adduced by the appellants in support of the foregoing alleged adverse environmental effects is inconclusive and/or unconvincing. Space simply does not permit us to document this assertion for the entire mass of testimony cited by appellants in their attacks on the regulations, but Dr. Fred Brenner's testimony illustrates the deficiencies of appellants' case. The Citizens' brief (p. 33) maintains that "The record in this case clearly established that the project is potentially hazardous and endangers the safety of the residents." However, Dr. Brenner, the appellants' expert biologist, actually testified as follows under cross examination by DER (N.T. 2509-10):

> Q. Are you familiar with any instances, documented instances of the spread of disease due to the practice of spreading septage for agricultural utilization in Pennsylvania in accordance with the Department's regulations?

A. No.

Q. Are you familiar with any wells actually being contaminated due to the spread of septage in accordance with the Department's regulations for agricultural utilization.

A. No.

Q. Okay. Based upon those last two statements, how do you conclude that there is a hazard to human health associated with the spread of septage in accordance with the Department's regulations?

A. Because the potential still exists that persons either coming onto the site or the movement of material off the site still exists.

Q. Allright. Well, when you say—are you saying a hazard now or a potential hazard?

A. Well, it's a potential hazard. ...

Q. How great of a potential hazard is it?

A. Well, that you can't answer, you know. It may be, it may be only 1 percent, which is a very low hazard unless you're in the 1 percent. Then it's a high hazard.

Testimony of this sort simply cannot be the basis for concluding that DER's reliance on the 25 Pa. Code chapter 75 regulations governing the Higbee permit was an abuse of discretion. Appellants have not met their burden in this regard. Appellants' challenge to the sufficiency or validity of the regulations is rejected, except in one respect, which we immediately proceed to discuss.

C. Testing and Monitoring

The appellants complain that the permit granted to Higbee does not require chemical analysis of the septage or of the soil on the site, and requires very limited monitoring of water wells serving residents near the site (see the permit, Commonwealth Exhibit 4, paragraph 14). Appellants point to the testimony of their experts Brenner and Crowley, who specifically recommended regular testing

of the septage, the soil and water wells (N.T. 110-11, 128-31, 260, 2482-83). Brenner even recommended chemical analysis of every tank of septage collected by Higbee (N.T. 143-44). DER's experts denied any need for chemical testing of the septage or soil, and felt that the permit already provided for more than adequate monitoring of possible groundwater contamination (N.T. 1907, 2120-25).

The regulations do not require monitoring of water wells or soil testing. The same regulations explicitly exclude the requirement that the sewage sludge be chemically analyzed when the source of the sludge is residential septic tank pumpings. 25 Pa. Code §75.32(h). For reasons akin to those given earlier in Section IIB, the appellants' expert testimony does not meet the burden of showing that their recommended testing and monitoring programs are needed to protect the health, safety and welfare of residents in the vicinity of the site. This conclusion does not close this issue, however, because for water well monitoring and soil testing we do not believe appellants have the burden just stated.

As we have explained at the outset of our discussion, appellants have the burden of showing DER abused its discretion in granting the permit. However, DER certainly has the responsibility of seeing to it that the permit, once granted, is operated in a fashion which preserves the public health, safety and welfare, including conducting necessary inspections. 35 P.S. §§6018.104(1) and (7). We regard water well and soil monitoring during operation of the permit as akin to inspection of the operation. Admittedly, DER's discretionary powers in enforcing the Higbee permit, or any permit, are very broad. But where appellants have produced as much expert testimony about the need for monitoring as they have in this appeal, and where the monitoring would be inexpensive and unoppressive (as it would be in the instant appeal), we feel the burden falls on DER to show that adding monitoring requirements to the permit is unlikely to additionally protect the public health, safety and welfare.

DER has not met this burden. The testimony of its experts that monitoring of wells and soil is not needed is as unconvincing, and as unsupported by hard evidence, as appellants' expert testimony criticized supra. After all, the EQB cannot envision all the factual circumstances which may occur, as we already have remarked. Therefore, to insist that readily achievable monitoring of the permit operation is not needed because adherence to the regulations must guarantee protection of the public safety, is overly blind reliance on the regulations and an abuse of discretion, expecially when--as in this appeal--the regulations are attempting to allow for complex phenomena such as the rate of flow of ground water and the lifetimes in soils of harmful microorganisms found in residential septage. Indeed, concerning this latter objective of the regulations, we cannot ignore the fact that the Environmental Protection Agency September 21, 1979 Criteria for Classification of Solid Waste Disposal Facilities and Practices, admitted into the record as Coolspring Exhibit 2 (N.T. 2236-37), provide that septic tank pumpings shall not be incorporated into the soil without treatment to further reduce pathogens (Coolspring Exhibit 2, §257.3-6). There has been no suggestion that DER is bound by Coolspring Exhibit 2, and we will not permit Coolspring Exhibit 2 to be the basis of a challenge to the wisdom of DER's regulations, for reasons explained supra (Section IIA). But the existence of such EPA provisions certainly supports our thesis that feasible monitoring of the permit operation should be undertaken.

Consequently, under the authority of Warren Sand and Gravel Company, Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975), we substitute our discretion for DER's and modify the permit's conditions concerning monitoring. In particular, paragraph 14 of the permit (DER Exhibit 4) is revised so that it reads substantially as follows:

> 14. Monitoring reports must be submitted to the Department as specified below.

a. For a period of no less than five years following initiation of septage application to any portion of the facility, monitoring reports must be submitted to the Department quarterly for monitoring point HF-3 and [at least six other monitoring points], as identified and proposed in the revised application dated April 23, 1981; [these other monitoring points shall be set by DER after consultation with residents living near the facility, with the objective of monitoring, in several different directions from the facility, the possible contamination of neighboring properties via ground water or surface water runoff.] The sample analysis shall include the following parameters: Total Kjeldahl Nitrogen, Ammonia Nitrogen, Organic Nitrogen, pH, Total Coliform, Fecal Coliform, BOD, Total Phosphorus, Lead, Cadmium and Mercury [and any other heavy metals DER shall specify].

b. For a period of no less than five years following initiation of septage application to any portion of the facility, soil analysis monitoring reports must be submitted to the Department annually, for [at least three monitoring points, including at least one point from each of the three fields (Upper, Middle and North) identified in the permit application as comprising the facility]; these monitoring points [shall be set by DER after consultation with Mr. Higbee and Mr. Struthers], shall be the same each year, and the analyses shall be performed at about the same time each year [with the objective of ascertaining whether the septage application is causing dangerous heavy metal buildup in the soil.] The sample analysis shall include Lead, Cadmium, Mercury [and any other heavy metals specified by DER] and pH.

c. [Monitoring of tile drains, see infra, section IIIA].

The soil monitoring requirements in paragraph 14b supplement, but do not replace, the requirement that soil pH be maintained as in paragraph 10.

After five years of the prescribed monitoring, the permittee may petition DER to suspend the monitoring in whole or in part, as having been demonstrated to be unnecessary.

All monitoring reports are to be submitted to the Bureau of Solid Waste Management, Department of Environmental Resources, 1012 Water Street, Meadville, Pennsylvania 16335.

In the foregoing revision of the permit's paragraph 14, phrases in brackets are in the nature of instructions to DER, to be replaced (by DER) with more specific delineations of the required monitoring points. The additional ground water monitoring points are needed to cover flows in several directions from the site; a single water well monitoring point scarcely is representative, and the point HF-3 mentioned in the permit is particularly unsuitable because it already is contaminated with fecal coliform bacteria (N.T. 598-99). The water monitoring prescribed by the original permit did not include heavy metals; while these really may be no problem for agricultural utilization of residential septage, as DER's experts assert (N.T. 1917, 1676, 2190), there is no harm, and much psychological relief for the neighboring residents, in verifying this assumption of DER's. The heavy metals lead, cadmium and mercury are among the trace elements which may prove to be problems during agricultural utilization of sewage sludge, though not necessarily when the sewage sludge is agricultural septage, see DER's Interim Guidelines for Sewage, Septic Tank, and Holding Tank Waste Use on Agricultural Lands, Comm. Ex. 3 (N.T. 1156-58).

We stress that we are not requiring DER to take any particular actions on the basis of the monitoring reports ordered in the permit's revised paragraph 14 supra, whatever these reports may show. The Board leaves such actions where they belong, within DER's enforcement discretion, which is subject to challenge by injured parties in appropriate circumstances. 71 P.S. §510-21; 25 Pa. Code §21.2(a); William Penn Parking, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). The Board does believe, however, that it is an abuse of discretion for DER to deny itself readily accessible information on which proper enforcement of the Higbee permit operation reasonably could be based. Our revision supra of paragraph 14 is consistent with this belief.

III. Were the Regulations Correctly Employed?

The appellants claim that--even assuming the regulations are valid (as we have held them to be, Section IIB supra)--DER has incorrectly employed the regulations in evaluating the Higbee application and granting the permit. Most of appellants' claims in this regard have little or no merit, and can be dismissed with little or no mention. For example, the Citizens list a number of ways in which Higbee's permit application fails to comport with the requirements of 25 Pa. Code §75.23. However, as DER and Higbee point out, Section 75.23 is concerned with solid waste facilities; the Higbee permit application is governed by 25 Pa. Code §75.32, as we previously have stated.

The appellants also point to actually applicable regulations, or to sections of the SWMA, which allegedly were violated during preparation of the permit application. But the violations pointed to often were purely procedural, easily correctable, and quite irrelevant to the real merits of the appeal, namely the allegedly harmful environmental consequences of the Higbee permit operation. For instance, 35 P.S. §6018.502(a) and 25 Pa. Code §75.32(b)(1) require that permit applications be made on forms supplied by DER. The initial application, dated November 21, 1980, was made on such a form, and its cover page was signed by Higbee in the presence of a notary, as the form required (Lintelman Exhibit 1). However, on April 23, 1981, after DER had communicated to Higbee its review of his November 21, 1980 application, Higbee submitted a revised application (Lintelman Exhibit 2), to which explicit reference is made in paragraph 14 of the original permit (DER Exhibit 4). This revised application did not include a second cover sheet, and accordingly was not signed in the presence of a notary. The appellants argue that for this deficiency, and for other procedural deficiencies of this sort, DER should have rejected the revised application, and that DER's failure to do so

was an abuse of discretion. The appellants therefore call on us to overturn the permit.

We reject this request. In the first place the appellants have not met their burden of showing that the procedural deficiencies they allege really amount to violations of the SWMA or applicable regulations; to illustrate, the appellants have not shown that the requirements of 35 P.S. §60.18.502(a) and 25 Pa. Code §75.32(b)(1) were not satisfied by the notarized signing of the original application. Moreover, even assuming arguendo that the alleged procedural violations did occur, surely the proper remedy at this stage of these proceedings is to order correction of these easily correctable environmentally inconsequential deficiencies, e.g., to order notarization of the revised application, rather than to overturn the permit. We also note that, as DER points out, many of these alleged procedural violations have been raised for the first time in appellants' post-hearing briefs. Therefore, DER argues and we agree, these procedural violations should be considered waived under the terms of 25 Pa. Code §21.51(e) and paragraph 4 of our Pre-Hearing Order No. 1 in this matter. We fail to see how, within our discretion, we can require faithful adherence to all procedural requirements from DER and the permittee, but not from the appellants.

Our discussion in the preceding two paragraphs illustrates the weaknesses of very many of appellants' claims that the regulations pertinent to the Higbee permit have been incorrectly employed. These few illustrations will have to do; as in Section IIB supra, space simply does not permit us to document the weaknesses of each and every one of the numerous contentions appellants make concerning employment of the regulations. Some of appellants' criticisms of the ways the regulations have been employed do deserve some discussion, however; this discussion follows, in the remaining subsections of this Section III. Any of appellants'

contentions (concerning employment of the regulations) which are not discussed under this section's heading "Were the Regulations Correctly Employed?" have been rejected as being wholly insufficient grounds for holding DER abused its discretion in granting the Higbee permit.

A. Is the Site Suitable?

The appellants strongly argue that the site is unsuitable for the septage disposal envisioned by the permit. The alleged deficiencies of the site include, inter alia: improper soil type, the presence of "ancient" tile drains, being subject to flooding, being the source of large amounts of surface water runoff, overly high water table levels and very irregular configurations of the fields comprising the sites. Appellants' contentions that these alleged deficiencies stem from improper employment of the pertinent regulations are examined in this subsection IIIA. Any contentions about the site's alleged unsuitability that cannot be related to improper employment of existing regulations are not germane, and will not be considered in this subsection, for reasons discussed in Section II.

The pertinent regulations are found in 25 Pa. Code §75.32, especially §75.32(c). It is appellants' burden to show that these regulations have been incorrectly employed by DER, i.e., that the actual conditions at the site are not consistent with the regulations. Appellants have not met this burden, as will be amplified (except for the "yellow area", see infra).

Flooding. The regulations state that the septage shall not be applied to areas subject to active flooding. 25 Pa. Code §75.32(c)(10). This regulation is incorporated verbatim as special condition 12 of the permit. The phrase "subject to active flooding" is not defined in the regulations, and therefore presumably has to be construed in accordance with the usual plain meanings of the words therein.

1 Pa. C.S.A. §1903(a); 1 Pa. Code §1.7. The appellants offered no convincing evidence that in evaluating the site DER has not heeded the prescription against sludge application to areas of active flooding. Appellants do point to Figures following pages 10 and 11 of Lintelman's Exhibit 7, which Figures were admitted into evidence (N.T. 346). These Figures purport to show that there is "occasional flooding" in the vicinity of the site (N.T. 284, 340-341). However, no evidence was presented that the portions of the site where DER is allowing septage application lie inside the "active flooding" areas, if any, included within the maps from Lintelman Exhibit 7. We cannot overturn the permit on such evidence, but will state unqualifiedly here, so all parties will understand, that application of septage to areas subject to active flooding would be a categorical violation of the permit.

Configuration. The regulations impose no restrictions on the configurations of areas where septage application is allowed. The appellants' objections to the shapes of the fields comprising the sites apparently stem from paragraph 11 of the revised permit application Higbee submitted (Lintelman Exhibit 2). This paragraph, which is incorporated as a condition of the permit, includes the statement, "All plowing will be to contour." Appellants' expert Crowley testified that it would be extremely difficult, if not impossible, to contour farm much of the site, because of its shape. (N.T. 231-233, 310-311). Moreover Struthers, who actually farms the site and therefore presumably is responsible for plowing it, testified that he does not practice contour farming. Nevertheless, these are not grounds for overturning the permit. We reiterate, failure to abide by conditions such as the requirement of contour plowing would be a categorical violation of the permit. In the future, Mr. Struthers will have to contour farm wherever he intends to inject Higbee's septage.

Runoff. Appellants maintain that at certain times of the year there is heavy runoff of surface water from the site, onto the properties of Mr. Struthers' neighbors (N.T. 532-534, 579-580, 622-623). The Board accepts this assertion, but does not agree one can infer therefrom that the site is unsuitable. The regulations in 25 Pa. Code §75.32 do not limit the amount of surface water runoff from a site of septage injection into the soil. Especially in view of the fact that the septage is to be injected under the surface of the soil, and will not be injected during periods of rain (permit conditions 3 and 4), appellants have not met their burden of showing that failure to proscribe surface water runoff will endanger the health, safety and welfare of residents in the vicinity (recall Sections IIA and IIB). The possibility feared by these residents, that the surface water runoff will carry harmful pathogens onto their properties (N.T. 331, 492-494), will be monitored (recall Section IIC). The appellants also object to surface water runoff on the basis that the runoff will cause erosion and sedimentation ("E & S") problems (N.T. 234, 315-317). Appellants' E & S objections to the permit are discussed infra; such objections involve the regulations in 25 Pa. Code Chapter 102, not the regulations in 25 Pa. Code Chapter 75 under immediate discussion.

Ancient Drains. The appellants presented much testimony (cf. especially the testimony by Crowley and Oehlbeck) purporting to prove that "ancient" tile drains underlie the site; this testimony was not refuted by DER. According to the appellants, these tiles can affect drainage from the site (N.T. 330). However, the regulations, 25 Pa. Code §75.32, make no mention of tile drains; apparently the EQB did not feel their presence or absence was germane to the suitability of the site for septage injection. The appellants have not come close to showing that the presence of tile drains will make the probability of degrading the public health, safety and welfare intolerably high (recall Section IIA).

Therefore we will not overturn the permit merely because tile drains may underlie the site. On the other hand, DER appears to have ignored the recommendation of its own expert that tile drains in the vicinity of septage injection be monitored (N.T. 1451-1453). For reasons we have explained, failure to require such monitoring was an abuse of discretion. DER, after consulting with the Citizens, shall identify at least three points at which drainage, if any, through tile drains underlying the site may be monitored; if possible, these points shall monitor tile drainage from each of the three fields comprising the site. The tile drains monitoring points shall be in addition to those already required in the revised paragraphs 14a and 14b of the permit (see supra). Monitoring shall be as specified in revised paragraph 14a, i.e., quarterly, for a period of five years, for the parameters specified in paragraph 14a. After five years, the permittee may petition DER to suspend monitoring, as provided in paragraph 14. The requirement just stated shall be embodied in the revised permit, preferably as paragraph 14c (as suggested supra). Our remarks supra, concerning DER's broad discretion to act or not to act on the basis of monitoring reports, apply to the tile drains monitoring we are ordering.

Soil Type and Water Table. The regulations provide that suitable soils (for the proposed septage) must fall within specified textural classes, and that a minimum depth of 20 inches to seasonal high water tables shall exist. 25 Pa. Code §§75.32(c)(6)(i) and (iii). DER's expert witnesses testified that the site met these requirements. Appellants' expert witness Crowley contests this conclusion of DER's. But Crowley's objections were directed solely to the methodology or reliability of DER's investigation of the site's soil types and water table levels. Crowley does not point to any actual errors made by DER; his criticisms are confined to the claim that DER could have more thoroughly bolstered DER's findings that the

site met the regulations governing soil types and seasonal water table levels. DER's findings were based on actual observations on site—auger borings and backhoe pits; Crowley made no actual field observations (N.T. 354). Much of Crowley's testimony on the soil types and seasonal water table levels scarcely contradicted DER's testimony, e.g. (N.T. 2349, 2362):

> Q. Well, do you basically agree that that soil generally underlying the site is Canfield silt loam?...
>
> A. I have no reason to disagree with it.
>
> Q. So basically then you can concur with Mr. Socash's conclusion...?
>
> A. With the exception of the one area where he did investigate.
>
> Q. You mean the yellow area?
>
> A. Yes. ...
>
> Q. You don't have any reason then to dispute Mr. Socash's statement that [the soil type] is Canfield?
>
> A. I think he neither proved nor disproved it.
>
> Q. But you cannot dispute it?
>
> A. The issue's still in doubt in my mind.
>
> [bracketed phrase added for clarity]

Therefore, except for the "yellow area" we are about to discuss, the appellants have not met their burden with respect to the site soil types and water table levels. In the Middle Field Mr. Socash observed an area where the grass was slightly yellow, suggesting to him "saturated conditions or poor drainage" (N.T. 1418). In this "yellow area", roughly 15 by 30 feet (N.T. 1503), Socash found soil mottling at depths of 10 - 12 inches (N.T. 1501). Soil mottling, or change of color, is the normal indicator Socash uses to determine the depth of the seasonal high water table (N.T. 1392-1393). Nevertheless, Socash decided the "yellow area" did not have a

seasonal high water table within 20 inches of the surface. Socash also decided that the soil in the yellow area was Canfield silt loam (N.T. 1501), although normally mottling at depths less than eighteen inches would be more characteristic of Ravenna silt loam, not Canfield (N.T. 1459, 1651, Lintelman Exhibit 3, p. 46).

In other words, Socash decided that the "yellow area" met the regulations, notwithstanding the depth of the observed mottling within that area (N.T. 1419). On the other hand Crowley—who is the Mercer County Supervisor of Conservation for the U. S. Department of Agriculture, Soil Conservation Service (N.T. 9), and who supervised preparation of the Mercer County Soil Survey (Lintelman Exhibit 3) on which Socash relied (N.T. 15-16, 1470-1471)--disagreed with Socash's reasons for believing the soil mottling at 10 - 12 inches depth in the yellow area was a spurious indicator of the seasonal high water table level. Accordingly, Crowley believes that the soil type in the yellow area is Ravenna, not Canfield (N.T. 2286-2289). Crowley testified that Ravenna soils are not suitable for septage injection sites (N.T. 293), as Socash appeared to agree (N.T. 1621-1623).

In this connection the Board takes judicial notice of Appendix B of the now superseded (as of January 22, 1983) 25 Pa. Code Chapter 73. According to this former Appendix B, Ravenna soils fall under the classification:

> F. Somewhat poorly, poorly and very poorly drained soils on upland sites. These soils have high water tables and are unsuitable for subsurface disposal systems.

The presently valid Chapter 73 has dropped the former Appendix B, but has reserved space for a new Appendix B. However, there is no reason to believe that the new Appendix B will invalidate the above categorization of Ravenna soils. Therefore the Board feels judicial notice of the former Appendix B is legitimate, especially since the Board agreed to do so, without objection from any party, during the May 6, 1982 hearing on this appeal (N.T. 1498-1499); on May 6, 1982, Appendix B

quoted supra was in force. On the other hand, we must state that we have taken judicial notice of former Appendix B to 25 Pa. Code Chapter 73 because we promised to do so, not because the relevance of the above-quoted categorization of Ravenna soils is apparent. Chapter 73 pertains to sewage disposal systems, e.g. septic tanks, Section 73.31. Appellants nowhere have explained why a description of Ravenna soils pertinent to septic tank design should be equally pertinent to the agricultural use of septage.

The foregoing discussion of soil and water table issues has been rather involved. Nevertheless, our conclusions therefrom seem straightforward, and can be stated simply. We believe, and feel the EQB intended, that where there is doubt whether the regulations are being satisfied, DER should err on the side of caution. This precept translates into the holding that for the yellow area, where (as in this appeal) appellants' competent experts claim the regulations have been violated (N.T. 2348-2349), and where at first sight DER's own measurements appear to indicate the regulations are not satisfied, the appellants have met their burden of proof, absent convincing countervailing evidence from DER. Socash did not have hard evidence that the mottling was spurious within the yellow area; his reasons for rejecting the mottling as an indicator of the seasonal high water table in the yellow area were merely speculative, though not illogical (N.T. 1505-1511). Therefore we rule that retaining the "yellow area" in the permit was an abuse of discretion. Substituting our discretion, Warren supra, we delete this Middle Field "yellow area" from the permit. However, although this ruling is res judicata on the basis of the evidence presented in this hearing, we explicitly will not foreclose DER's re-instating the yellow area at a later time, on the basis of future measurements or other evidence clearly implying the seasonal high water table is deeper than 20 inches in the yellow area.

In sum, with the exception of the "yellow area", the appellants have not met their burden of showing that the site is unsuitable under the applicable regulations, 25 Pa. Code §75.32.

B. Will There Be Impermissible Erosion and Sedimentation?

The appellants argue that the permit operation will lead to impermissible erosion and sedimentation at the site. These arguments are based on testimony by appellants' expert Crowley that the crop rotation plan embodied in the permit application, and therewith embodied in the actual Higbee permit, is unsatisfactory (N.T. 367-372). Crowley also criticized the adequacy, for E & S controls, of the grass buffer strips which, under paragraph 13 of the permit, must be maintained at certain site boundaries (N.T. 207, 243-246).

Neither the regulations governing septage injection, 25 Pa. Code §75.32, nor the regulations governing E & S controls, 25 Pa. Code Chapter 102, explicitly require Higbee to file or follow a specific crop rotation plan. However, operation of the permit must not violate the E & S control regulations in Chapter 102. DER's expert Socash testified that he had reviewed the permit application to make sure it did not violate the E & S regulations, and that these regulations indeed were not violated (N.T. 1445).

Appellants did not carry their burden of showing the Higbee permit operation would violate the E & S control regulations in 25 Pa. Code Chapter 102. Crowley's estimate of the rate of soil loss from the site, on which estimate he partially based his criticism of the permit's E & S control features, was much larger than Socash's (N.T. 234, 1447-1449); we find Socash's estimate to be the more sound, because it more accurately takes into account the specific features of the site (N.T. 235-236, 369-372, 1445-1447, 2386-2390, 2395). Paragraph 16 of

the permit requires its operation to comply with the applicable regulations. These applicable regulations forbid injection of septage within various distances of specified entities; in particular, injection is forbidden within 50 feet of property lines. The regulations do not require grass buffer strips; the requirement that grass strips comprise the isolation from certain property lines was added by DER to reassure the Citizens that the injected material would not run off the site (N.T. 1488-1492). Appellants' witnesses gave no convincing reasons for challenging the adequacy of 50 foot grass buffer strips to control erosion and sedimentation.

Appellants also complain (Coolspring post-hearing brief, p. 33) that the maps in the revised application (Lintelman Exhibit 2) do not accurately depict the required buffer strips. However, these maps do not alter the permit's requirements of compliance with all applicable regulations (paragraph 16 of the permit), and of maintaining grass buffer strips at certain boundaries (paragraph 13 of the permit). Socash explicitly testified, without contradiction, that the maps in the permit application were not required to be completely accurate, because before the permit went into operation the areas where septage injection was allowed would be staked off by the permittee, under Socash's watchful eye to ensure that the regulations were being followed (N.T. 1471-1472, 1684-1685; Commonwealth Exhibit 4, paragraph 15).

The preceding two paragraphs suffice to reject appellants' complaints about erosion and sedimentation under the permit operation. But the weakness of appellants' case with respect to this E & S issue is best illustrated by Crowley's admissions that Struthers is one of the better farmers Crowley had seen (N.T. 365), who would want to manage his farm to conserve his soil (N.T. 365), and who presently is operating his farm in accordance with good soil conservation practice (N.T. 364). Appellants have given absolutely no reasons why Struthers, who presently injects

pig manure using the very same injector with which he expects to inject the septage (N.T. 1041), should become careless about soil loss when he starts to use septage as a fertilizer instead of pig manure.

C. The Permissible Depth of Injection

Paragraph 10 of the revised application (Lintelman Exhibit 2), which is incorporated into the permit (Commonwealth Exhibit 4), specifies that the septage "will be applied to the soil using a Better Built Model 1500 tank trailer..." This is the injector machine owned by Struthers, employed by him to inject pig manure during his present farming operations at the site (N.T. 1041-1042). Paragraph 10 of the revised application goes on to say that the depth of injection is adjustable, up to a depth of 12 inches. Struthers testified that in practice injection is difficult at depths greater than about 10 inches (N.T. 1071).

The appellants contend it is the intent of the regulations, 25 Pa. Code §75.32, that the septage filter through at least twenty inches of soil before reaching the groundwater. Therefore, judging by the preceding paragraph, appellants want the permit to specify that septage shall not be applied unless the seasonal high water table lies some thirty inches below the ground surface, rather than the twenty inches depth actually specified in paragraph 11 of the permit.

This contention must be rejected. On this issue the permit is in complete conformity with the applicable regulation, 25 Pa. Code §75.32(c)(6)(iii). Appellants have not made the necessary showing (see Section II supra) that this regulation fails to protect the public health, safety and welfare under the facts of the instant appeal. Moreover the Environmental Quality Board apparently was well aware--when setting the minimum 20 inch to seasonal high water table standard--that the septage might be injected into the soil; 25 Pa. Code §75.32(c)(9) specifically permits injection.

Nevertheless, appellants' arguments in this regard are not wholly meritless. It is unreasonable to believe the EQB, in promulgating §75.32(c)(6)(iii), intended to allow injection at depths exceeding 20 inches. To so believe would appear to make §75.32(c)(6)(iii) pointless; such a construction of §75.32(c)(6)(iii) would be contrary to the precepts of the Statutory Construction Act. 1 Pa. C.S.A. §1922(1); 1 Pa. Code §1.7. Therefore we hold that the EQB, in promulgating §75.32(c)(6)(iii), expected injection depths to be well short of 20 inches. The record does not permit us to say how close to 20 inches would have been impermissible from the EQB's standpoint, but it is clear from Socash's own testimony that little is gained, and much may be risked, by injecting at a greater depth than the injector conveniently allows (N.T. 1542).

For this reason we rule it was an abuse of discretion not to have embodied a maximum injection depth in the permit conditions. The permit will be remanded to DER for such modification (along with the other modifications we have described), consistent with the thrust of the preceding paragraph. Our reading of the testimony suggests six inches would be a reasonable maximum injection depth (N.T. 1071, 1538), but we feel this figure is best set by DER's technical staff. So that there may be no doubt in the parties' minds, we explicitly state that DER has full discretion to set the maximum injection depth at any figure less than or equal to ten inches; furthermore, any such figure for this Higbee permit is res judicata and not appealable to this Board, because the maximum depth issue has been fully litigated in the instant appeal.

D. Struthers' Responsibilities

The appellants maintain that the permit should be overturned because it has been issued to Higbee alone and not to Struthers as well. In the alternative, the appellants ask us to require that Struthers accept the status of a co-permittee,

along with Higbee. The appellants argue that in not requiring Struthers to obtain a permit, DER has violated the SWMA, 35 P.S. §6018.501, which reads:

> (a) It shall be unlawful for any person or municipality to use, or continue to use, their land or the land of any other person or municipality as a solid waste processing, storage, treatment or disposal area without first obtaining a permit from the department as required by this act: Provided, however, that this section shall not apply...to agricultural waste produced in the course of normal farming operations nor the use of food processing wastes in the course of normal farming operations provided that such wastes are not classified by the board as hazardous.

The septage which is the subject of the Higbee permit is neither "agricultural waste" nor "food processing wastes". Consequently it does appear that Struthers should be a permittee in the instant septage injection operation. On the other hand, the EQB has examined this question, and has decided that Struthers does not require a permit. The duly promulgated regulation 25 Pa. Code 75.32(a) gives Struthers an exemption from permit requirements, as the appellants and DER agree. DER suggests that the inconsistency arises because the present version of Pa. Code §75.32(a) was effective as of June 10, 1977, whereas 35 P.S. §6018.501 only became effective on July 7, 1980. This suggestion seems to imply that Pa. Code §75.32(a) was superseded by passage of the SWMA, and therefore that DER should have required Struthers to be a co-permittee with Higbee.

Nevertheless, we will not rule that DER's grant of the Higbee permit was an abuse of discretion merely because DER did not insist on a permit application from Struthers. We have several reasons for this decision. In the first place we do not see how DER's exercise of its discretionary authority to enforce or not to enforce a permit requirement against Struthers is part of the subject matter of the instant Higbee permit appeal. To make the issue of Struthers' permit part of

the subject matter of the instant appeal, the appellants should show that failure to require a permit from Struthers will adversely affect DER's ability to protect the public health, safety and welfare through the Higbee permit, e.g., by adversely affecting DER's enforcement of the Higbee permit. The appellants have not met this burden, although they have shown that with the present permit Higbee must rely on Struthers to fulfill many of the permit conditions (N.T. 1051-1052). This reliance may be a problem for Higbee, but it does not affect DER's ability to hold Higbee responsible for full compliance with all conditions of his permit.

Furthermore, the SWMA gives DER very broad powers to specify the terms and conditions of permits. 35 P.S. §6018.104(7). Even if we were to order DER to require a permit application from Struthers, we do not believe we have the authority to fix the conditions in the Struthers' permit, provided the public health, safety and welfare is being protected by the Higbee permit. We do not promulgate regulations—the EQB does. Our discussion to this point in this long adjudication has been to the effect that there has been no showing the Higbee permit alone, as modified in this adjudication, will not protect the public health, safety and welfare. In other words, we believe that under the present regulations, even removing the exemption for farmers in 25 Pa. Code §75.32(a), DER could grant Struthers his permit essentially pro forma, with little or no specific performance requirements on him. On this basis, there is not much point in ordering DER to require a permit application from Struthers.

We further remark that requiring Struthers to apply for a permit would be an adjudication of his rights by us (1 Pa. Code §1.4), although Struthers is not a party to this action, was not advised by the Board or any party to obtain counsel during the hearings or to participate in brief writing, and was given no indication that we might require DER to issue an order directed to him. Moreover, the appellants

did not raise the issue of the dichotomy between the SWMA and 25 Pa. Code §75.32(a) in their notices of appeal or their pre-hearing memoranda. Under the circumstances we have just described concerning failure to fully protect Struthers' rights, and recalling the terms of 25 Pa. Code §21.51(e) and paragraph 4 of our Pre-Hearing Memorandum No. 1, we believe this SWMA vs. §75.32(a) issue should be deemed waived in this appeal, irrespective of the issue's legal merits as discussed in the two preceding paragraphs.

IV. Article I Section 27

The appellants maintain that granting Higbee his permit has been a violation of the requirements implied by Article I Section 27 of the Pennsylvania State Constitution. However, the appellants completely fail to show that DER has not complied with the threefold standard of Payne v. Kassab, 11 Pa. Cmwlth. 14, 312 A.2d 86 (1973), affirmed 468 Pa. 226, 361 A.2d 263 (1976):

> (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
>
> (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
>
> (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

Our entire discussion supra indicates our view that DER has complied with the applicable statutes and regulations, namely the SWMA and the Clean Streams Law (concerned with E & S controls) and the regulations thereto; moreover, as DER points out, paragraph 18 of the permit says the permit does not supersede applicable local laws such as zoning ordinances (which are within the jurisdiction of the Court of

Common Pleas, not DER or this Board). Therefore, insofar as DER and this Board can be concerned, the first prong of the Payne v. Kassab test has been satisfied.

The record demonstrates that DER has made a reasonable effort to reduce the environmental incursion of the Higbee permit operation to a minimum. DER gave careful attention to the details of the proposed operation, with the result that large portions of the originally proposed site were deleted from the actual permit; DER did not rely solely on the tests conducted by Higbee's engineer, but performed many tests on its own; the monitoring called for in this adjudication will make it possible for DER to remedy environmental incursions which by mischance have not been wholly precluded by the permit's adherence to the applicable statutes and regulations. Therefore, there has been compliance with the second prong of the Payne v. Kassab test.

The Township appears to challenge this conclusion with the contention that DER could have found other "more suitable sites removed from the public" (Township post-hearing brief, p. 66). But the Township cites no authority holding that under the second prong of the Payne v. Kassab standard it is DER's affirmative duty to seek out alternative possibly more suitable sites than the site Higbee originally proposed. Although the holdings of the Pennsylvania courts on this issue are not completely clear, it does seem that DER only has the duty to minimize the "immediate" environmental incursion, i.e., the environmental incursion produced by the immediate project DER is evaluating. Swartwood v. DER, 56 Pa. Cmwlth 298, 424 A.2d 993 (1981); Mignatti v. DER, 49 Pa. Cmwlth 497, 411 A.2d 860 (1980); Delaware County Community College v. Fox, 20 Pa. Cmwlth. 335, 342 A.2d 468 (1975). In fact, requiring DER to perform its own search for alternative sites every time it receives a permit application would put an almost impossibly heavy burden on DER. As the Township rightly argues, if DER had the affirmative duty of finding alternative sites, it hardly

could rely on the applicant's assurances that there are no superior alternatives; such assurances actually were received from Higbee (Lintelman Exhibit 1, page 4). A search for alternative sites might be DER's duty when the proposed operation is expected to produce serious environmental incursions, but no such expected incursions have been shown under the facts of the instant appeal. See also Maskenozha Rod and Gun Club v. DER, EHB Docket No. 79-155-S, 1981 EHB 244 at 293-4.

As for the third prong of the Payne v. Kassab test, it is the appellants' burden to show that the environmental harm from operation of the Higbee permit clearly will outweigh its benefits. The appellants have not shown that operation of the Higbee permit will cause environmental harm. DER argues, and we agree, that the hopefully environmentally benign agricultural use of septage proposed by Higbee can point the way to important benefits for farmers and society alike. Thus appellants have not met their burden of showing the third prong of the Payne v. Kassab test was not satisfied.

V. Higbee's Fitness to Receive the Permit

During the hearings, appellants raised for the first time the issue of Higbee's fitness to receive the permit under appeal. Appellants offered into evidence a Consent Order and Agreement (Coolspring Exhibit 3), executed by DER and Higbee on June 30, 1982, wherein Higbee admitted:

> (i) Before May 17, 1980, Higbee had been disposing of septic tank wastes in an abandoned strip mine located in Jackson Township, Mercer County, without a permit to do so.
>
> (ii) On or about May 17, 1980, DER advised Higbee that lawful disposal of septic tank wastes required a permit.
>
> (iii) As a result of this advice Higbee applied for, and eventually received, the permit which is the subject of the instant appeal.

(iv) Nonetheless, on approximately 50 occasions between May 17, 1980 and May 1982 Higbee again had disposed of septic tank wastes on the aforementioned strip mine property, though still without a permit to do so.

The appellants also have pointed to testimony under oath by Higbee, given on March 30, 1982, as evidence he perjured himself during these hearings. The testimony, under cross examination, was (N.T. 714):

Q. And you haven't in the last few months been dumping at any other sites, coal sites and so forth in any township?

A. No.

Appellants argue (in effect) that the evidence just cited shows:

a. DER's original grant of the permit to Higbee was an abuse of DER's discretion.

b. Our refusal to revoke the permit grant to Higbee would be an abuse of our discretion.

When the above-cited evidence concerning Higbee's past violations and probity were offered by the appellants, toward the close of the hearings, the Board ruled that the appellants' post-hearing briefs would have to explain why this evidence was relevant to the subject matter of this appeal (N.T. 2530). The Board further ruled that if it then appeared additional evidence (beyond Coolspring Exhibit 3) was required on the issue of Higbee's fitness, the Board would reopen the hearings for the limited purpose of securing such evidence (N.T. 2535-2537). A formal request that we do reopen the hearings for just this purpose has been made by the Citizens, on June 17, 1983.

Unfortunately, the appellants' briefs have not been very illuminating on the question of why evidence concerning Higbee's past violations and his answers under oath would be germane to this adjudication. It is true that under the SWMA, 35 P.S. §6018.503, DER:

> may deny, suspend, modify or revoke any permit if it finds that the applicant, permittee or licensee has failed to comply with any provision of this act...or any rule or regulation of the department...; or if the department finds that the applicant, permittee or licensee has shown a lack of ability or intention to comply...

On the other hand, since DER only learned in May 1982 that Higbee had been unlawfully disposing of septic tank wastes during May 1980 and May 1982, the appellants have not shown why evidence of such disposal made the original permit grant an abuse of DER's discretion.

It also is true that our hearings are de novo, and that our adjudication can be based on facts not available to DER at the time DER took its appealed-from action. Township of Salford v. DER, Docket No. 76-135-C, 1978 EHB 62 at 77. But in previous appeals we have been reluctant to base our rulings on evidence and/or legal theories which had not been set forth in the parties' pre-hearing memoranda, i.e., which did not assuredly avoid surprise and prejudice to other parties. Melvin D. Reiner v. DER, Docket No. 81-133-G (Adjudication, July 28, 1982); R. Czambel, Sr. v. DER, Docket No. 80-152-G, 1981 EHB 88 at 102; Old Home Manor and W. C. Leasure v. DER, Docket No. 82-006-G (Opinion and Order, April 11, 1983).

Although the considerations summarized in the preceding paragraphs hardly can be said to point in any definite direction, we have decided to hold that the issue of Higbee's fitness to receive the permit is outside the scope of the instant appeal. This ruling is consistent with our past practice in, e.g., Reiner, Czambel and Old Home Manor, supra. However, the issue is germane to our de novo hearing under 35 P.S. §6018.503, and the appellants cannot be faulted for not having given Higbee notice before February 1982 (when these hearings began) that appellants would be introducing evidence of a consent agreement executed by Higbee on June 30, 1982. Thus we would be much more hesitant to exclude Higbee's fitness from the instant

appeal, were it not for the fact that the appellants will have full opportunity to litigate this issue of Higbee's fitness in other appeals presently before us.

To be specific, on November 19, 1982, DER--based on Higbee's admissions (quoted supra) in the aforementioned June 30, 1982 Consent Order and Agreement--suspended Higbee's permit (the permit which is the subject of this adjudication) until March 15, 1983. The Township and the Citizens each filed timely appeals of this suspension, docketed respectively at 82-299-G and 82-295-G. In these appeals, the appellants argue that revocation of Higbee's permit, not suspension, was the proper penalty for Higbee's admitted unlawful dumping of septic tank wastes; these arguments by appellants also made reference to Higbee's allegedly perjured testimony, discussed supra.

Consequently these two new appeals (which now have been consolidated at Docket No. 82-295-G by order of this Board dated March 4, 1983) involve precisely the issue we have ruled outside the scope of the instant appeal, namely whether Higbee's past violations and his testimony concerning them on March 30, 1982 imply it is an abuse of discretion to allow him to operate the appealed-from permit. Excluding the issue from the instant appeal will not preclude the appellants from fully litigating it under their appeal at Docket No. 82-295-G. If they win their new appeals, the result will be the same as if they were to win in the instant appeals: Higbee's permit will be revoked.

Exclusion of the issue of Higbee's fitness from the instant appeal is logical in that the present adjudication now is concerned only with the environmental pros and cons of the Higbee permit; these pros and cons are quite independent of Higbee's fitness to have his permit. Any possible prejudice to appellants from putting off the issue of Higbee's fitness to the appeal at Docket No. 82-295-G will be minimized by our decision (which has been announced to the parties) to expedite the hearing on the 82-295-G appeal, and by the fact that (as Higbee's counsel informs

us) Higbee still is under the Mercer county Court of Common Pleas stay preventing him from exercising his permit.

A. Record Keeping

The issue of Higbee's fitness to receive a permit does bear on another issue which is a legitimate part of the subject matter of this appeal, and which we have not yet discussed. This issue is whether the record keeping required by the permit is adequate.

The permit's conditions (paragraph 16, DER Exhibit 4) incorporate 25 Pa. Code §75.32(b)(5), which requires Higbee to maintain records of quantities, dates and locations of sludge application. Module 4 of the original permit application (Lintelman Exhibit 1), prepared by Todd Giddings on November 18, 1980, does ask for a narrative discussion of record keeping, including "date, areas used for disposal, sources and volumes of waste applied." However, the sole narrative in the permit application on this subject is:

> Records
> Clear records will be kept by the applicant, noting date, time, weather and gallonage. A set of records will also be kept by Mr. Struthers, as he is paid by Mr. Higbee on a gallonage basis.

The foregoing appear to be the only references to record keeping in the permit or the permit applications (Lintelman Exhibits 1 and 2) incorporated into the permit. These references hardly suffice to explain—to Higbee or to the appellants—what records will be required under the permit. Moreover, this lack of specificity concerning record keeping must be examined in the light of Higbee's own testimony about his present business practices. Presently Higbee keeps little or no records of the sources of the septage he transports in his hauling trucks. Furthermore, Higbee pumps non-residential as well as residential septic tanks, and it can take as many as four septic tank pumpings to fill Higbee's 1500-gallon

hauling truck. He uses the same truck to transport non-residential and residential septage, cleans the interior of the truck no more than two or three times a year, and admits that "emptying" the truck still leaves a few gallons (perhaps five) inside.

We reiterate our statement in Section IIC: DER has the responsibility of seeing to it that the permit, once granted, is operated in a fashion which preserves the public health, safety and welfare. Proper record keeping by the permittee is an important component of DER's ability to fulfill this responsibility. Under the facts of this appeal, therefore, especially in view of the June 30, 1982 Consent Order and Agreement and of DER's November 19, 1982 suspension of Higbee's permit, it would be an abuse of discretion to leave Higbee's record keeping responsibilities as vaguely specified as they presently are. DER is ordered to add permit conditions which will spell out unmistakably the records Higbee is required to maintain. The required records at least shall enable DER to ascertain whether applicable regulations and permit conditions governing the amounts, times, weather conditions, gallonage, application locations and sources of septage used in the Higbee-Struthers operation are being obeyed. How this objective is to be accomplished, i.e., precisely what records shall be required, how they are to be maintained and reported, etc., is left to DER's discretion.

CONCLUSIONS OF LAW

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

2. Our review of this matter is to determine whether DER has committed an abuse of discretion or an arbitrary exercise of its duties and powers.

3. Appellants have the burden of proof in this appeal.

4. This adjudication moots any petition for supersedeas filed by either appellant.

5. Under 35 P.S. §6018.104(13) it was DER's duty to do whatever it deemed necessary to guarantee that its evaluation of the permit application was based on accurate data.

6. DER's gathering of its own data during its evaluation of the permit application did not create a conflict of interest for DER.

7. DER had the legal right to defend its issuance of the permit as vigorously as it wished.

8. These proceedings have not shown a conflict of interest or bias against the appellants.

9. Appellants' due process rights have not been denied during these proceedings.

10. The Higbee permit pertains to residential septage only.

11. It was not the intent of the Legislature that this Board should review either the abstract "wisdom" or the validity, including constitutionality, of regulations duly promulgated by the Environmental Quality Board.

12. This Board can assess the validity or constitutionality of a regulation in the context of a given appeal.

13. It would be an abuse of discretion for DER to insist on enforcing a duly promulgated regulation which, in the given circumstances, is inducing violations of constitutional guarantees or is producing results contrary to the underlying statutory intent.

14. To meet his burden of showing DER has abused its discretion in insisting on enforcing a duly promulgated regulation, appellant need not show

that undesired and undesirable effects are certain to occur, or even very probably will occur.

15. To meet his burden of showing that DER has abused its discretion in insisting on enforcing a duly promulgated regulation, an appellant must show that the probability of undesired and undesirable effects will be untolerably high.

16. When there exists an applicable regulatory scheme, duly promulgated by the Environmental Quality Board, there is a presumption that the regulatory scheme meets the objectives of the underlying statute.

17. Except with respect to the need for more monitoring, appellants have not met their burden of showing that DER's reliance on the 25 Pa. Code Chapter 75 regulations governing the Higbee permit was an abuse of discretion.

18. DER has the responsibility of seeing to it that the permit, once granted, is operated in a fashion which preserves the public health, safety and welfare, including conducting necessary inspections.

19. Water well and soil monitoring during operation of the instant permit is akin to inspection of the operation.

20. Where appellants have produced as much expert testimony about the need for monitoring as they have in this appeal, and where the monitoring would be inexpensive and unoppressive, the burden falls on DER to show that adding monitoring requirements to the permit is unlikely to additionally protect the public health, safety and welfare.

21. The actions to be taken by DER as a result of the monitoring we have ordered remain within DER's enforcement discretion.

22. It is an abuse of discretion for DER to deny itself readily accessible information on which proper enforcement of a permit reasonably could be based.

23. In the circumstances of the instant appeal, procedural violations raised for the first time in appellants' post-hearing briefs should be considered waived.

24. The regulations governing the agricultural disposal of residential septage are found in 25 Pa. Code §75.32, especially §75.32(c).

25. Especially in view of the fact that the septage is to be injected under the surface of the soil, and will not be injected during periods of rain, appellants have not met their burden of showing that failure to proscribe surface water runoff will endanger the health, safety and welfare of residents in the vicinity.

26. Except in the "yellow area," appellants have not met their burden of showing that the applicable regulations governing allowable soil types and ground water table levels have been incorrectly applied.

27. Where there is doubt whether regulations designed to protect the environment are being satisfied, DER should err on the side of caution, i.e., on the side of ensuring protection of the environment.

28. Inclusion of the "yellow area" in the permit was an abuse of DER's discretion.

29. Operation of the permit must not violate the erosion and sedimentation controls in 25 Pa. Code Chapter 102.

30. Even though the septage will be injected below the ground surface, under the facts of this appeal there is no requirement that the seasonal high water table should lie more than twenty inches below the surface. 25 Pa. Code §75.32(c)(6)(iii).

31. It is unreasonable to believe that the EQB, in promulgating §75.32(c)(6)(iii), intended to allow injection of septage at depths exceeding twenty inches.

32. Rather, the EQB, in promulgating §75.32(c)(6)(iii), expected injection depths to be well short of 20 inches.

33. Under the facts of the instant appeal, it was an abuse of discretion for DER not to have embodied a maximum injection depth in permit conditions.

34. Under the facts of the instant appeal, DER has full discretion to set the maximum injection depth at any figure less than or equal to ten inches.

35. Despite the terms of 35 P.S. §6018.501, DER's failure to insist on a permit application from Struthers cannot be regarded as an abuse of discretion in the context of the instant appeal.

36. To make the issue of Struthers' permit part of the subject matter of the appeal of Higbee's permit, the appellants should show that failure to require a permit from Struthers will adversely affect DER's ability to protect the public health, safety and welfare through the Higbee permit.

37. Provided the public health, safety and welfare is being protected by the Higbee permit, DER has the authority to grant Struthers--and the Board does not have the authority to countermand--a permit embodying purely pro forma requirements on him.

38. Where the appellants' notices of appeal and pre-hearing memoranda did not raise the issue that Struthers should be required to apply for a permit, and where Struthers was not a party to the appeal, was not advised to obtain counsel, and was given no indication that the result of this adjudication might be an order directing him to apply for a permit, the aforesaid issue should be deemed waived.

39. The appellants have not met their burden of showing that DER failed to comply with the requirements of the Pennsylvania State Constitution Article I Section 27.

40. DER's duty, under the second prong of the Payne v. Kassab standard, is to minimize the environmental incursion produced by the immediate project DER is evaluating.

41. Under the second prong of the Payne v. Kassab standard, DER does not have the duty to search for alternative sites, except possibly when the proposal before DER is expected to produce serious environmental incursions.

42. Our hearings are de novo, and our adjudication can be based on facts not available to DER at the time DER took its appealed-from action.

43. Under the instant facts, the issue of Higbee's fitness to receive his permit is outside the scope of the instant appeal.

44. The issue of Higbee's fitness to receive his permit will be fully litigated in the new appeal by these appellants, docketed at 82-295-G.

45. Under the facts of this appeal, it would be an abuse of discretion to leave Higbee's record keeping responsibilities as vaguely specified as they presently are.

O R D E R

WHEREFORE, this day of , 1983, it is ordered that:

1. The appeals of Coolspring Township and of the various Citizens are dismissed, but the permit is remanded to DER for modification in accordance with this Opinion.

2. Modifications are required as follows:

a. Paragraph 14 of the permit shall include provisions for ground water and soil monitoring, as discussed in Section IIC of this Opinion.

b. Paragraph 14 of the permit shall include provisions for monitoring "ancient" tile drainage, as discussed in Section IIIA of this Opinion.

c. The "yellow area" in the Middle Field shall be deleted from the permit, but may be reinstated at a later time on the basis of appropriate new evidence (see Section IIIA of this Opinion).

d. The maximum depth of septage injection shall be specified, at a figure less than or equal to ten inches (see Section IIIC of this Opinion).

e. The records which must be kept shall be spelled out in detail (see Section VA of this Opinion).

3. The issue of Higbee's fitness to receive and/or to operate his permit has been removed from the subject matter of this appeal, but can be fully litigated in the appeal docketed at 82-295-G.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED:

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

INDIANA MINING AND DEVELOPMENT, INC. : Docket No. 82-155-H

: Mining
: Bond Forfeiture

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By the Board, August 15, 1983

This matter concerns an appeal made by Indiana Mining and Development, Inc. (Indiana) of a forfeiture of a bond by Anthony J. Ercole, Director of the Bureau of Mining and Reclamation which bond was submitted to DER by Indiana as a condition for obtaining a permit to perform surface mining in East Wheatfield Township, Indiana County, Pennsylvania. The hearing in this matter was held before Dennis J. Harnish, Esquire, then the chairman of this board, who at the request and approval of the board prepared a proposed adjudication in this matter which has been reviewed by and adopted as the adjudication of the board.

FINDINGS OF FACT

1. Appellant in this matter is Indiana who has a mailing address of P. O. Box 264, Homer City, Pennsylvania 15748.

2. Appellee in this matter is the Commonwealth of Pennsylvania, DER which has a duty and responsibility of administering, *inter alia*, the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 *et seq.* (SMCRA) and regulations promulgated thereunder.

3. On March 11, 1980, Indiana filed with DER a request to operate a special reclamation coal mining operation in East Wheatfield Township, Indiana County, Pennsylvania within 100 feet of State Route 711.

4. Indiana also submitted to DER, as part of the permit application process, a permit map, Cross Section A-A, showing backfilling contours, Cross Section B-B, showing certain terrace backfilling, Cross Section C-C showing crossing of haul road and S. R. 711, Cross Section D-D showing road surface, a schematic of neutralizing plant, a sedimentation and erosion control plan, and two drawings showing sedimentation ponds.

5. On April 18, 1980, Indiana executed and submitted to DER, a certificate of deposit No. 10-00027387 in the amount of $10,000.00 as a reclamation bond payable to the Commonwealth upon the failure of Indiana to perform all the reclamation requirements of SMCRA, The Clean Streams Law, regulations promulgated thereunder and the terms of the mining permit.

6. On May 8, 1980, DER issued to Indiana Special Reclamation Project No. 32800901. Said permit required Indiana to, *inter alia*, abide by any plans or sketches filed with the permit, to have all reclamation completed within 12 months, obtain adequate revegetation, discharge all water into sedimentation and erosion ponds in accordance with the plan, and establish temporary and permanent sedimentation and erosion facilities as indicated on maps submitted to DER.

7. On May 22, 1980, Marvin E. Witt, president of Indiana signed an acceptance form relating to Permit No. 32800901 whereby he agreed, on behalf of Indiana, to abide by all special and standard conditions of the permit.

8. On March 16, 1981, DER Mine Conservation Inspector Harry Barnes inspected the Indiana mining operation and found that the mine operation had not been reclaimed in accordance with the permit and in particular that the backfilling was not in accordance with grade requirements. In addition, Mr. Barnes cited Indiana for the following violations: (1) backfilling not concurrent; (2) backfilling equipment being removed; and (3) removing topsoil equipment from area not bonded.

9. Backfilling not concurrent was cited by Mr. Barnes because the backfilling was not performed according to plans.

10. Copies of the March 16, 1981 inspection reports were mailed to Indiana.

11. In the March 16, 1981 inspection, Mr. Barnes recommended to DER that bond forfeiture proceedings be initiated.

12. On March 18, 1981, a meeting with Mr. Barnes, Mr. Witt and Mr. John Moore, supervisor of the Ebensburg Office of DER, was held in Ebensburg. At this meeting the violation for affecting an unbonded area was removed but violations for backfilling equipment removed and backfilling not concurrent remained in effect.

13. Inspector Barnes prepared an inspection report on March 18, 1981, which was handed to Mr. Witt, who signed the report.

14. On April 14, 1981 and May 22, 1981, Mr. Barnes again inspected the Indiana site, prepared inspection reports which stated that all violations remained in effect and mailed the reports to Indiana.

15. On July 10, 1981, Mr. Barnes determined that some backfilling had been performed on the area of the permit on the south side of S. R. 711 but that the area north of S. R. 711 had not been graded to plans and that backfilling was still not concurrent, that backfilling equipment had been removed

from the site, and that an additional violation of failure to maintain adequate soil and erosion controls should be added to violations previously cited because there was a large amount of runoff which was accumulating between Mr. Miller's house on the north end of the permit area and the highwall.

16. Mr. Barnes prepared an inspection report on July 10, 1981 which was signed by Mr. Witt and which stated "any changes from the original plans would need approval from the permit review section of DER".

17. On August 12, 1981, Mr. Barnes, Mr. Chulick of DER and Mr. Witt, and Mr. Smith an employee of Indiana, met with property owner Mr. Miller to discuss Mr. Miller's refusal to allow Indiana to perform certain reclamation work because he was concerned that the water accumulation problem would not be corrected to his satisfaction.

18. During the meeting of August 12, 1981, Mr. Witt made a proposal concerning how he would drain the water from behind the Miller residence.

19. The proposed corrective work was to be done by cutting a ditch toward S. R. 711 in an attempt to get enough drop to drain the area.

20. At the meeting of August 12, 1981, Mr. Barnes told Mr. Witt that if the ditch worked for purposes of draining the water, Mr. Witt would have to get the plans approved by DER.

21. At the August 12, 1981 meeting, Mr. Barnes prepared an inspection report which was signed by Mr. Witt and which stated "All violations previously cited shall stay".

22. On September 3, 1981, Mr. Barnes again inspected the site, wrote an inspection report, which was signed by Mr. Witt, and which said that all changes in reclamation plans must be sent to Ebensburg for approval and that violations for inadequate backfilling equipment on the site and backfilling equipment shall remain.

23. On September 17, 1981, Mr. Barnes inspected the site. His inspection report for this day included the following notice concerning failure to correct drainage problems: "Sediment and erosion controls have not been completed as the ditch draining the area at the rear of the Miller residence has no sediment pond or trap to control or prevent sediment from entering State Route 711". This report also said "No change in reclamation has been submitted, therefore, all work shall be done according to approved plans and all violations previously cited shall stay".

24. On October 13, 1981, Inspector Barnes inspected the site. Mr. Barnes found that "Violations previously cited shall stay" and that "Planting of the permit has not been completed nor has (sic) for a change of reclamation been resubmitted to DER. Operator is made aware that no bonds shall be released until a good permanent growth is established over the entire site and a change in reclamation is received and approved by DER."

25. On October 22, 1981, Inspector Barnes again inspected the East Wheatfield site. Again Inspector Barnes cited the operation for backfilling nonconcurrent and inadequate soil and erosion controls.

26. On November 6, 1981, Inspector Barnes determined that all violations remained in effect and that water was accumulating on the site because of the failure of the operator to install adequate drainage controls.

27. On December 29, 1981, Mr. Barnes found that water accumulation on the site still existed because of the failure of the operator to properly drain the mining site.

28. On February 16, 1981 and March 3, 1983, Inspector Barnes determined that all violations previously cited existed.

29. Indiana has failed to correct the highwall, sedimentation and erosion, and vegetation violations as of March 7, 1983.

30. Water accumulates on the mining site because there is not a sufficient drop in the ditch that was installed by Indiana (18") to correct the drainage problems on the site. There is not enough fall in the ditch to allow the water to drain over its 400 foot length.

31. The original sedimentation and erosion plans submitted by Indiana to DER contained a proposal to install both a temporary and permanent sedimentation basins but no sediment basins were ever installed by Indiana.

32. Reclamation plans submitted by Indiana to DER included provisions that backfilling would be completed in accordance with several cross sections which show final contour, but backfilling has never been completed in accordance with the reclamation plans.

33. Although Indiana submitted reclamation plans which included certain provisions relating to backfilling, draining, erosion control and revegetation, Indiana has not complied with these plans and has no intention of complying with these plans because of financial reasons.

34. On May 21, 1982, DER sent Indiana a notice of forfeiture which is the subject of this appeal.

DISCUSSION

In March of 1980 Indiana Mining and Development Company, Inc., (IMD) filed with DER a request to operate a special reclamation coal mining operation in East Wheatfield Township, Indiana County. The site of the proposed operation straddled Pennsylvania State Route 711, (S. R. 711) in an area where that road bent sharply (270°) from a southeasterly direction to essentially due north. (The main acreage of the operation lies north of S. R. 711 with approximately 1 acre being located to the south of S. R. 711.) One of the purposes of the recla-

mation project was to cut back a hillside on the inside of S. R. 711's bend so as to improve visability for traffic rounding the bend on S. R. 711. Another purpose was to correct an area which already had been partially mined. More specifically, the project was supposed to recontour the site and especially the unstable fifteen (15) foot highwall behind Mr. William C. Miller's house, so as to form more stable slopes which would support vegetation. This reclamation project was also designed to improve surface drainage and thus to alleviate future water problems. This proposal contemplated transfer of excess overburden from the north side of S. R. 711, and to fill in the existing depression on the south side of S. R. 711 up to the road level.

In addition to its request, as described above, IMD submitted to DER a permit application including a permit map and a series of schematic cross sections related to that map demonstrating the proposed contours of the site after reclamation.

From these materials and others submitted as part of IMD's application, it is apparent that as mining progressed back from S. R. 711 IMD was initially, to provide a diversion ditch, from a point behind Mr. Miller's house which ditch would run roughly parallel to S. R. 711 and terminate at a point north of and adjacent to the sharpest portion of S. R. 711 bend in a temporary sedimentation basin. It was, likewise, apparent that, after the hill located on the inside of S. R. 711 had been cut back so as to permit greater visability, this diversion ditch was to be extended fully around the bend and northward, still parallel to S. R. 711, to a point north of the bend where a permanent sedimentation basin was to be constructed.

IMD also submitted, along with its application, a certificate of deposit (No. 10-00027387) in the amount of $10,000.00 as a reclamation bond payable to the Commonwealth upon the failure of IMD to perform all the reclamation requirements of the permit and applicable law.

Following its receipt and review of the above IMD submissions, on May 8, 1980, DER issued Special Reclamation Project Permit No. 32800901 to IMD. This permit required IMD *inter alia* to recontour the permitted area in conformance with the various plans and schematics included in IMD's application, to conduct concurrent reclamation and to complete reclamation within 12 months, to obtain adequate revegetation and to establish temporary and permanent sedimentation and erosion controls in accordance with the representations in IMD's application. IMD, by and through, its President Marvin E. Witt formally accepted this permit on May 22, 1980 whereby IMD agreed to abide by all the terms and conditions of said permit.

IMD thereafter began operations under the permit but, as is not infrequently the case in heavy construction in general and mining in particular, IMD ran into certain unforeseen difficulties. The rock layers underlying the hill which forms the inside of S. R. 711 bend proved to be harder and thicker than IMD anticipated.[1] Moreover, these rock layers, according to Mr. Witt's uncontradicted testimony, dipped at such an angle (13%) that heavy equipment could not safely be operated thereupon. The direction of this dip also caused a problem. Because the rock dipped away from the road it could not be easily "ripped".[2]

Mr. Witt also testified that, in spite of being authorized by his DER permit, he was precluded by PennDOT from conducting excavation within 30' of the

1. Because this was a special reclamation project IMD had not been required to and had not conducted any preliminary test boring.

2. IMD could not blast on this site because a) it had no blaster's license and b) the hill was in close proximity to certain residences.

center line of S. R. 711. A final problem which arose regarding reclamation of the site was that there was too much overburden on the north side of S. R. 711. After the portion of the site south of S. R. 711 had been raised by filling it with overburden from the north side of S. R. 711, IMD had no place on the site to dispose of the additional overburden which still remained north of S. R. 711.

Not surprisingly, the effects of the above-described problems soon became manifest. DER's inspections, beginning with the March 16, 1981 inspection of the site by DER Mine Conservation Inspector Harry Barnes, disclosed a continued failure by IMD to keep concurrent with its backfilling.

IMD, from March of 1981 through July 10, 1981, did make some sporadic progress in reclamation at the site but even as of this date the area north of S. R. 711 had not been graded to plans and backfilling equipment had been removed from the site. Moreover, a new problem had developed on the site, to wit, a large amount of water was accumulating in the area behind Mr. Miller's house and the highwall behind his house.[3]

At an August 12, 1981 meeting on-site among Mr. Miller, Mr. Witt and DER officials, Mr. Witt proposed to correct this water problem by cutting a ditch from the area behind Miller's residence to the drainage ditch which paralleled the north side of S. R. 711. Mr. Witt had this ditch constructed, at a cost of over $4,000.00, but, although there was some conflict between the testimony of Mr. Witt and DER's inspector, Mr. Barnes, as to how well this ditch worked, even Mr. Witt had to admit that it did not work very well. Indeed,

3. This highwall had been moved back from Mr. Miller's house by IMD but it still remained (and remains) at a height of appoximately 15 feet above and a distance of some 60' from the Miller residence. The highwall had not (and has not) been contoured as per IMD's application.

Mr. Witt adopted the somewhat unusual position that DER should have known that the ditch wouldn't have worked very well because it had a drop of only 18" in 443 feet. Mr. Witt also asserted that DER officials by approving the construction of this ditch, accomplished a *de facto* amendment of his reclamation plan. Mr. Witt's assertion, which basically constitutes IMD's only defense in this action, is not supported by either the facts or the law.[4]

Mr. Witt admitted that he never submitted any written amendment to his reclamation plan and that he never received any written approval thereof. Moreover, he admitted receiving the various inspection reports authored by Inspector Barnes. Mr. Barnes' inspection reports of March 16, 18, April 14, May 22 and July 10, 1981 all cited violations including failure to reclaim in accordance with the reclamation plan. Mr. Barnes' inspection report of August 12, 1981 prepared and signed by Mr. Witt during the very meeting at which, Mr. Witt asserted, DER approved his change in reclamation plan, specifically continued all previously cited violations. This contemporaneous writing is highly inconsistent with Mr. Witt's interpretation of the August 12, 1981 meeting but rather supports Mr. Barnes' view that the ditch was proposed by IMD and accepted by DER as a temporary solution to the water problem behind Mr. Miller's residence, not as a permanent change in IMD's reclamation plan.

Mr. Barnes' inspection reports of September 3, 1981 and September 17, 1981 which, of course, follow the August 12, 1981 meeting also support his version. The September 17, 1981 report specifically notes that "[n]o change in reclamation [plan] has been submitted and therefore all work shall be done according to approved plans".

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4. As proponent of this affirmative defense, IMD bore the burden of proving the facts necessary to sustain it, *Ohio Farmers, infra.*

Even if we were to find that Mr. Barnes had verbally approved a change in Mr. Witt's reclamation plan (which we do not), DER would still prevail on this issue.

This case is not unlike those involving municipalities having approved sewage facilities plans which they later sought to avoid when DER ordered them to build the projects set forth in these plans. These municipalities argued to this board, and on appeal, to Commonwealth Court, that due to changed circumstances their sewerage facilities plans were no longer valid and should not be binding as written. This board, and Commonwealth Court, rejected these arguments. In essence we held that a plan is a plan until formally changed. If there are changed circumstances (we held) it is incumbent upon the entity with the plan to submit an amendment thereto to DER and to appeal from DER's refusal of that amendment (if necessary). *Carroll Township v. Commonwealth of PA, DER*, 48 Pa. Cmwlth. Ct. 590, 409 A.2d 1378 (1980); *Kidder Township v. DER*, 41 Pa. Cmwlth. Ct. 376, 399 A.2d 799 (1979). We see no reason why this body of law, which developed under one of the laws under which the instant permit was issued (The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended 35 P.S. §691.1 *et seq.*), should not apply with equal force to the instant situation.[5] Since we have determined that a mine operator must fully comply with all the terms and conditions of his permit unless or until any proffered amendments thereto have been approved by DER by issuing an amended permit, it follows that Mr. Barnes was powerless to ver-

5. This result also follows from a reasonable construction of Pennsylvania's Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 *et seq.* Section 5(a)(2) of this Act, 52 P.S. §1396.4(a)(2), and regulations promulgated thereunder provide for complete written reclamation plans. If reclamation plans can be amended in the informal manner here suggested by appellant, the protection to the public contemplated by the General Assembly by a thorough review of a complete plan would be undermined. We do not believe that the General Assembly intended such a result.

bally amend IMD's permit. An administrative officer cannot abrogate the laws of the Commonwealth or exempt individuals from the general operation of the law, *Commonwealth v. A. M. Byers*, 346 Pa. 355, 31 A.2d 530 (1943) cert. denied, 320 U.S. 757 (1943); *Commonwealth v. Barnes & Tucker Coal Company*, 455 Pa. 392, 319 A.2d 871 (1974).

DER acknowledges that since this is a forfeiture case, (IMD's certificate of deposit having been forfeited on May 21, 1982), it has the burden of proof. Thus, the failure of IMD's affirmative defense of estoppel does not necessarily dispose of IMD's appeal. We agree with DER, however, that its burden is to show that the reclamation requirements set forth in the relevant law and IMD's permit have not been complied with, *Rockwood Insurance Company v. DER*, EHB Docket No. 78-168-S (issued February 18, 1981); *Ohio Farmers Insurance Company v. DER*, EHB Docket No. 80-041-G (issued August 25, 1981).

We further agree with DER that, in this case, there is no dispute that backfilling has not been completed according to IMD's permit. A highwall remains behind Mr. Miller's house; the hill impairing visability around S. R. 711 retains substantially the same size and shape it had before IMD began operations—it has not been cut back as per the contour in IMD's application; none of the site has been revegetated (on portions there is little or no topsoil to support vegetation) and neither temporary nor permanent sedimentation basins have been installed. Clearly DER has met its burden of showing that the reclamation requirements of IMD's permit have not been complied with and thus DER has proven its forfeiture of IMD's certification of deposit to be reasonable.

CONCLUSIONS OF LAW

1. This board has jurisdiction over the parties and subject matter.

2. DER satisfied its burden of proving that IMD had failed to reclaim its site in accordance with its permit. Thus, DER's forfeiture of IMD's permit is lawful and reasonable.

3. IMD had the burden of proving the affirmative defense raised in its appeal, to wit, that DER's mine inspector had verbally amended IMD's permit. IMD failed to prove this defense.

4. A reclamation plan in a mine drainage permit remains effective unless or until DER issues an amendment to said permit authorizing an altered mining plan. No DER official or employee has legal authority to verbally alter a reclamation plan.

O R D E R

AND NOW, this 15th day of August, 1983, IMD's appeal at the above is dismissed and DER's forfeiture of certificate of deposit No. 10-00027387 in the full face of $10,000.00 is upheld.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: August 15, 1983

COMMONWEALTH OF PENNSYLVANIA

BEFORE THE

ENVIRONMENTAL HEARING BOARD

CLYMAR SANITARY LANDFILL	:	Docket No. 81-185-M
	:	
	:	Solid Waste Management Act
v.	:	
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and NORTH BRANCH CONCERNED CITIZENS,	:	
Intervenors	:	

ADJUDICATION

By: Anthony J. Mazullo, Jr., Member, September 22, 1983

Procedural History

By order dated November 17, 1981, the Department of Environmental Resources (DER) suspended Solid Waste Management Permit No. 101019 of Clyde Wilson, t/d/b/a Clymar Sanitary Landfill (appellant), for a site in Middletown Township, Susquehanna County, Pennsylvania, and ordered the immediate cessation of landfilling operations at the site, as well as requiring appellant to engage in other post-operations activities so as to bring the site into conformity with the Solid Waste Management Act (SWMA), 35 P.S. §6018.101 et seq., and the regulations promulgated thereunder, 25 Pa. Code §75.1 et seq.

Appellant received the order of DER on November 24, 1981, and appealed same by notice of appeal filed with this board on November 27, 1981.

Thereafter, appellant filed a Petition for Supersedeas on December 4, 1981, and pursuant thereto hearings were held on December 17 and 18, 1981.

On December 15, 1981, North Branch Concerned Citizens, an unincorporated citizens group, filed a Petition to Intervene, and intervention was allowed over the objection of appellant whose answer thereto was filed January 13, 1982.

At the conclusion of the hearings on appellant's Petition for Supersedeas, in which Intervenor's participated with counsel, the board issued a Supersedeas order which was transcribed and later executed by the board on January 5, 1982.

Following the supersedeas hearings, and during discussions among the parties aimed at an amicable settlement of the entire appeal, Intervenors filed on January 20, 1982 a Petition to Vacate Supersedeas and Enforce Bond, to which appellant and DER filed responsive pleadings.

A hearing on Intervenor's Petition of January 20, 1982 was held on February 11, 1982, and a view of the premises was held on February 12, 1982.

The parties have not filed post-hearing briefs, and the matter is now ready for adjudication by this board.

FINDINGS OF FACT

1. The appellant is Clyde Wilson, t/d/b/a Clymar Sanitary Landfill, an individual who operates the landfill and a dairy farm in partnership with his son, Robert Wilson, in Middletown Township, Susquehanna County, Pennsylvania.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, the agency of the Commonwealth charged with the responsibility of administration of the Solid Waste Management Act, Act of July 7, 1981, P.L. 380, No. 97, effective September 5, 1980, 35 P.S. §6018.101 et seq., and of the regulations promulgated pursuant thereto, as contained in 25 Pa. Code §75.1 et seq.

3. Intervenors are North Branch Concerned Citizens, an unincorporated group of citizens who reside adjacent to, or in close proximity to, the site of the landfill and dairy farm operated by appellant.

4. On January 5, 1976, DER issued Solid Waste Management Permit No. 101019 to appellant.

5. From January 5, 1976 until November 17, 1981, appellant operated the site as a sanitary landfill.

6. On November 17, 1981, DER issued the following order upon appellant:

"1. Permit No. 101019 is suspended effective immediately upon receipt of this ORDER.

2. Clyde Wilson shall immediately upon receipt of this ORDER cease receiving, delivering, processing, storing or disposing of solid wastes or permitting the receipt, delivery, processing, storage or disposal of any solid wastes other than those wastes already present at the Clymar Sanitary Landfill as of the date of receipt of this ORDER.

3. Within twenty-one (21) days of the date of receipt of this ORDER, Clyde Wilson shall:

A. Regrade and replace wastes disposed at the Clymar Sanitary Landfill as provided in the application plans submitted by Wilson pursuant to which Permit No. 101019 was issued; and

B. Cover the completed portions of the landfill in accordance with the permit plans, provided that seeding may be delayed due to weather conditions if requested by Wilson and approved in writing by the DER.

4. Within twenty-eight (28) days of the date of receipt of this ORDER, Clyde Wilson shall submit to the DER a closure/post closure plan providing for maintenance of the completed site in accordance with Permit No. 101019, which shall include but not be limited to erosion and sedimentation control, grading of depressions, and construction and maintenance of diversion ditches.

5. On or before January 1, 1982, Clyde Wilson shall submit to the DER a plan to identify and eliminate or otherwise intercept any leachate seeps at the Clymar Sanitary Landfill. Such plan must contain, inter alia, a leachate collection and treatment proposal complete with conceptual design of all facilities and a schedule to be followed in the event the Department determines implementation is necessary.

6. Clyde Wilson shall immediately implement the leachate collection and treatment proposal upon receipt of notification of DER approval.

7. Clyde Wilson shall submit to the Department a proposal for groundwater quality assessment and abatement capable of determining and abating any groundwater contamination attributable to Clymar Landfill.

8. In addition to Item 7, Clyde Wilson shall monitor the groundwater quality at the Clymar Sanitary Landfill by collecting and analyzing samples at the existing monitoring points and submitting quarterly and annual reports to the DER for a minimum of five (5) years after final closure.

9. All plans or specifications required by this ORDER shall be prepared by and bear the seal of a professional civil engineer licensed to do business in Pennsylvania."

7. Appellant received DER's order of November 17, 1981 on November 24, 1981.

8. Appellant filed this appeal with the board on November 27, 1981.

9. Section 610 of the Solid Waste Management Act (SWMA) 35 P.S. §6018.610, provides that it is unlawful for any person or municipality to:

> "(2) Construct, alter, operate or utilize a solid waste storage, treatment, processing or disposal facility without a permit from the department as required by this act or in violation of the rules or regulations adopted under this act, or orders of the department, or in violation of any term or condition of any permit issued by the department.
>
> * * *
>
> (4) Store, collect, transport, process treatment or disposes of, or assist in the storage, collection, transportation, processing, treatment, or disposal of solid waste contrary to the rules or regulations adopted under this act, or orders of the department, or any term or any condition of any permit, or in any manner as to create a public nuisance or to adversely affect the public health, safety and welfare."

10. Under the provisions of the SWMA, Section 103, Definitions, 35 P.S. §6018.103, the following terms are defined:

> ""Agricultural waste"-Poultry or livestock manure... generated in the production...of livestock...and their products, provided that such agricultural waste is not hazardous."
>
> ""Solid Waste." Any waste, including but not limited to municipal, residual or hazardous wastes, including solid liquid, semisolid or contained gaseous materials."

11. The regulations promulgated by DER, pursuant to the SWMA, are contained

at 25 Pa. Code §75.1 et seq., and under the provisions of 25 Pa. Code §75.1(b) agricultural waste is defined as:

> "Poultry and livestock manure..in liquid or solid form, generated the production and marketing of...livestock,..., and their products...."

12. Section 75.1(a), 25 Pa. Code §75.1(a) provides:

> "(a) the definitions contained in the Pennsylvania Solid Waste Management Act...shall apply in this chapter."

13. Section 75.1(b), 25 Pa. Code §75.1(b) provides:

> "Solid Waste-Garbage, refuse, and other discarded materials including, but not limited to, solid and waste materials resulting from municipal, industrial, commercial, agriculture, and residential activities."

14. Permit No. 101019, issued to appellant, contained a condition that lifts in the landfill area would not exceed eight (8) feet.

15. Section 75.21(8), 25 Pa. Code 75.21(g) provides:

> "(g) No person shall operate a solid waste processing or disposal facility area or system which is not in compliance with the provisions of this chapter."

16. Section 75.26(i) of the SWMA regulations, 25 Pa. Code §75.26(i) provides:

> "(i) The size of the working force shall be confined to an area no greater than can be easily compacted and covered daily with available equipment."

17. Section 75.26(n) of the SWMA regulations, 25 Pa. Code §75.26(n) provides:

> "(n) A layer of intermediate cover material, compacted at a minimum uniform depth of one foot and having the characteristics specified in this chapter, shall be done as soon as weather permits and season conditions are suitable for the establishment of the type of vegation to be used. Reseeding and maintenance of cover material shall be mandatory until adequate vegetative cover is established to prevent erosion."

18. Section 75.26(o) of the SWMA regulations, 25 Pa. Code §75.26(o), provides:

> "(o) Completed portions of the landfill shall be graded as specified in this chapter within two weeks of completion."

19. Section 75.26(p) of the SWMA regulations, 25 Pa. Code §75.26(p), provides, in pertinent part, as follows:

> "(p) Seed bed preparation and planting operations to promote stabilization of the final solid cover shall be done as soon as weather permits and season conditions are suitable for the establishment of the type of vegetation to be used. Reseeding and maintenance of cover material shall be mandatory until adequate vegetative cover is established to prevent erosion."

20. The area permitted for landfilling under Permit No. 101019 was approved by DER and accepted by appellant as being "Area 1 upgradient of finished contour 1375." (N.T., December 17, 1981, Volume 1), as indicated on Exhibit P-8, final site plan drawing number S-2.

21. The registered professional engineer who prepared the application for the permit eventually issued to appellant did not establish the survey control point, as shown on Exhibit P-9.

22. Landfilling within the approved and permitted area was limited to one (1) eight (8) foot lift.

23. Portions of the area wherein waste was deposited were in excess of eight feet above the contour elevation.

24. The area encompassed by the perimeter border of the landfill and the filled to capacity area of the landfill is of a determinable area, and capable of concise measurement for purposes of determining the area of fill which could be deposited in the perimeter area.

25. On December 5, 1981, a control survey was conducted at the landfill site by Albert B. Savakinos, a registered professional surveyor.

26. After completion of the control survey, Savakinos conducted a topographic survey which was completed in two days, consisting of approximately 480 elevation "shots".

27. The topographic survey conducted by Savakinos in December, 1981 was compared with the original survey done for appellant, and the Savakinos' 1981 survey coincided with the contour lines of the original survey, at the perimeter of the landfill site.

28. Savakinos estimated, by cross-sectioning the contours at various points, that sixty-two thousand (62,000) additional cubic yards of fill could be placed in the area already landfilled as of December, 1981.

29. Savakinos estimated that the acess road, in the landfill area, could accommodate an additional ten thousand (10,000) cubic yards of fill in the landfill.

30. Savakinos' estimates did not take into consideration any settling of the already deposited lifts in the landfill area.

31. The topographic survey conducted by Savakinos did not estimate the actual depth of cover atop the lifts in the landfill area at the time of the survey.

32. The topographic survey conducted by Savakinos was properly conducted and an accurate representation of the topography of the site at the time the survey was conducted.

33. Based upon the topographic survey, Savakinos estimated that the perimeter area of the landfill, which area was not landfilled at the time of the survey, could accommodate approximately twenty-five thousand (25,000) cubic yards of fill.

34. Savakinos did not know of the actual elevation of the ground at the site immediately before the waste was deposited on the ground.

35. The landfill is a renovative/landfill, i.e., one in which the base soil acts as a filter such that contaminants do not seep through to the groundwater.

36. Municipal waste from Middletown Township was hauled to Clymar landfill prior to its closure.

37. Trash from the Ingersoll-Rand plant in Athens, Pa, in the approximate amount of seventy-five (75) tons per month, was hauled to Clymar landfill prior to its closure.

38. As a result of the closing of the Clymar landfill, the waste from Middletown Township, and Ingersoll-Rand will be deposited in landfills which are a greater distance from these points than is Clymar, and the cost to dispose of the waste will be greater than if Clymar were to continue in operation.

39. The waste from Ingersoll-Rand contains residual waste.

40. The financial posture of appellant is such that if the landfill remains closed, appellant will be unable to meet his monthly obligations on two mortgages.

41. If appellant fails to pay the monthly obligations, in the approximate sum of $10,000.00 per month, it is likely that he will lose the landfill and adjacent farm in foreclosure proceedings.

42. Approximately one week to "ten days after the landfill opened up" a trench approximately 100 feet long, 50 feet wide, and 5 feet to 2 1/2 feet high was dug on the site, and waste deposited thereupon, beginning at the lower end of the site (southeast) and moving progressively in a northerly direction up the slope.

43. John Giuton, an adjacent landowner to appellant, observed garbage being dug out of the ground and dumped atop other garbage, as well as garbage being deposited upon "bedrock".

44. On December 23, 1981, a neighbor of appellant, William P. Coleman, observed a flow of manure emanating from a slurrystore on appellant's dairy farm which is separate from and not contiguous to the landfill area and reaching to and flowing into the north branch of the Wyolusing Creek.

45. The site of the manure flow on appellant's farm is not a part of the permitted landfill area, and is operated independently from the landfill operation.

46. The flow of manure across appellant's farmland was caused by one of appellant's farmhands, who does not work in the landfilling operation.

47. The field through which the manure flowed lies astride state road 858, across the road and in a southerly direction approximately one quarter to one-half mile distance from the permitted area.

48. The manure flow from appellant's farm field was not the result of any landfilling operations by appellant.

49. The manure flow into the creek was not intentional on the part of appellant's farmhand.

50. Neither the appellant, nor his son, Robert Wilson, was aware of the actions of the farmhand in causing the flow to commence and to eventually flow into the creek.

51. Appellant's farmhand did not intend that the manure flow would reach the waters of the creek.

52. The field over which the manure flowed is approximately 2,500 feet from the landfill site.

53. A slurrystore is a storage facility, in the form of a steel cylinder in which manure is stored for eventual use as fertilizer.

54. The flow valve on the slurrystore was activated because the slurrystore was rapidly reaching capacity due to the inoperable condition of the appellant's manure spreader.

55. The appellant's manure spreader could not be operated because of the unavailability of leg bolts which had sheared off the rear wheel of the spreader.

56. Appellant had made repeated inquiries to obtain the lug bolts from area suppliers, but did not obtain them until a time approximately two or three weeks after the flow of the manure from the slurrystore.

57. Solid waste was not deposited in any unpermitted areas.

58. As on November 17, 1981, the site operated by appellant as a sanitary landfill, pursuant to DER Permit No. 101019, was filled to capacity, with the exception of the access road and a perimeter area of undetermined size and area.

59. The portion of the landfill site filled to capacity as of November 17, 1981 was not in all respects covered as required by appellant's permit.

60. As to the portion of the landfill site filled to capacity, appellant had not, as of November 17, 1981 submitted to DER a closure/post-closure plan providing for maintenance of the completed portion of the site.

61. As to the portion of the landfill site filled to capacity, appellant had not submitted to DER, as of November 17, 1981, a plan for the identification and elimination or interception of leachate seeps from the landfill site.

62. As of November 17, 1981, no leachate was seeping from the landfill site.

63. As to the portion of the landfill site filled to capacity by November 17, 1981, appellant had not submitted to DER a proposal for groundwater quality assess-

ment and abatement capable of determining and abating and groundwater contamination attributable to the landfill site.

64. As to the portion of the landfill site filled to capacity, appellant was not monitoring the groundwater quality at the landfill site by collecting and analyzing water samples at the existing monitoring points, and was not submitting quarterly and annual reports of water sampling results to DER.

65. As to the portion of the site filled to capacity by Nobember 17, 1981, appellant had not submitted to DER a leachate collection and treatment proposal.

66. As of November 17, 1981, appellant had not submitted a bond to DER.

D I S C U S S I O N

This appeal arises from an order of DER suspending the permit of appellant to operate a landfill, and ordering the cessation of operations at the site located in Middletown Township, Susquehanna County, Pennsylvania.

The order of DER, dated November 17, 1981, specifies three areas wherein appellant had conducted operations at the landfill in violation of the SWMA, to wit:

1. The permitted area was filled to capacity and was at or above final contour.

2. The filled area of the landfill was not properly closed.

3. Certain lifts were in excess of eight (8) feet and placed in unpermitted areas.

Subsequent to the hearings on the above cited order, the intervenors filed a petition requesting relief on the basis that a discharge of slurried manure from appellant's farming operation which resulted in unspecified amounts of the slurried manure to enter waters of the Commonwealth, specifically, the North Branch of the Wyolusing Creek, was a violation of this board's Supersedeas Order, and a violation of the SWMA.

At the hearings, it was conclusively shown that a substantial portion of the permitted area was filled to capacity, and that fact was not seriously contested by appellant. It was also obvious that proper final cover had not been placed on the entire area filled to capacity, but the extent of such was not clearly established. Appellant did not seriously contest the lack of proper final cover on "some" areas of that portion of the site filled to capacity.

Likewise, although there was some testimony that the area filled to capacity was at or above final contour, the exact extent of such area could not be determined from the testimony adduced at trial. At its worst, this deficiency was one of minimal significance in terms of a threat to the community.

As to that portion of DER's order which specified that the permitted site was filled to capacity, the testimony was clear that the entire permitted site was <u>not</u> filled

to capacity. It was admitted that the perimeter area, and the access road in the permitted area, were not filled at all as of the date of DER's order.

The remaining issue, as to the order of November 17, 1981, was that pertaining to the deposit of waste in areas not permitted. A fair reading of the testimony produced at the hearings does not justify a finding that waste was deposited in unpermitted areas.

In summary, the evidence presented at the hearings, and the testimony adduced thereat, clearly show that the DER order of November 17, 1981 was not based on facts necessary to support such order, as regards the issue of capacity and deposition of waste in unpermitted areas.

As to the testimony and evidence regarding the final cover and contour levels, the level of evidence adduced supports appellant's position that such deficiencies were of minimal impact and effect, and do not justify on their own, a suspension of the permit and cessation of operations.

Under the provisions of 25 Pa. Code §21.101(b)(1), DER has the burden of proof in this appeal since it "revoked" the solid waste management permit of appellant,[1] and ordered that the site cease operations and close as of the date of receipt of the order.

In order that DER successfully defend its actions in issuing the order under review, it would be necessary for it to prove, "by a preponderance of the evidence" that its final action can be sustained by the evidence taken by the board. *Warren Sand & Gravel Company, Inc. v. DER*, 20 Pa. Comwlth. Ct. 186, 341 A.2d 556(1975).

In determining that the permitted area was filled to capacity, DER exercised its discretion, and in such instances where DER acts with discretionary authority, the boar may substitute its discretion for that of DER. See *Warren*, supra, citing *East Pennsboro Township Authority v. DER*, 18 Pa. Comwlth. Ct. 58 , 334 A.2d 798(1975), *Rochez Bros.*

1. While the order of DER of November 17, 1981 used the term "suspend", the effect of the order was a revocation of the permit for cause in that the permit was withdrawn and the site ordered closed.

Inc. v. DER, 18 Pa. Comwlth Ct. 137, 334 A. 2d 790, (1975). Since it is without question that the permitted site is not filled to capacity, and since the capacity question was the basis for the other conclusions rendered by DER in its order, i.e., final contours, proper cover and depositing of waste in unpermitted areas, this board can, and will, substitute its discretion for that of DER in this appeal.

The sole remaining issue to be resolved is that allegation that the accidental discharge of slurried manure, in unspecified amounts, into the creek constituted a violation of the Clean Streams Law 35 P.S. §691.101, et seq. and the SWMA, and therefore justified revocation of the board's Supersedeas order, and reinstatement of DER's order.

As to the alleged violation of the Clean Streams Law, supra., standing alone suffice it to say that such a violation is not relevant to this appeal, and will not be considered further by this board.

However, insofar as a violation of the Clean Streams Law is considered to be a violation of the SWMA, we will consider the "manure" incident as relevant to our decision in this appeal.

Intervenors allege that the permittee caused the discharge of the slurried manure into the stream. The evidence adduced at the hearing does not sustain that allegation. Robert Wilson, son of the permittee did not have knowledge of the alleged discharge into the creek until after the incident occurred. Clyde Wilson, the permittee, did not have any knowledge of the discharge until advised of it on the day following the incident, by his son Robert Wilson. Robert Fissler, an employee of the Wilsons, on their farm, was the person responsible for turning on the spigot of the slurrystore and allowing the manure to flow onto the field, from which field an unspecified amount of manure entered the creek.

The only evidence of responsibility for the incident complained of is that of Robert Fissler, who testified that he decided to allow a flow of the manure into the field, but that he did not intend that it would reach the creek. Robert Wilson testified that he specifically told Fissler not to allow the manure to go into the creek.

No evidence was produced to connect Clyde Wilson, the permittee, with the incident. He testified that he was in Scranton that day (of the incident), and returned home late at night, and learned of the incident the next day from his son.

The board finds, in face of such testimony, and without contradicting testimony, that no violation of the SWMA occurred since the permittee (Clyde Wilson) did not cause the discharge of the slurried manure into the creek, and since the discharge was not the result of any landfilling operation.

CONCLUSIONS OF LAW

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

2. The order of DER of November 17, 1981 constitued an abuse of discretion by DER.

3. This board can substitute its discretion for that of DER in this appeal.

4. The manure discharge did not constitute a violation of the SWMA.

O R D E R

AND NOW, this 22nd day of September, 1983, it is hereby ORDERED that:

1. The order of DER of November 17, 1983 is hereby vacated.

2. The appellant, Clyde Wilson, is hereby authorized to accept and deposit waste in the area of the permitted site known as the "Access Road", to a height of eight (8) feet.

3. The appellant, Clyde Wilson, is hereby authorized to accept and deposit waste in the area of the permitted site known as the perimeter area, that is, from the tree line inward for a distance of twenty-five (25) feet, if the said perimeter area has not previously been filled to a height of eight (8) feet.

4. The appellant, Clyde Wilson, is prohibited from depositing trash in any areas other than those specified hereinbefore in paragraphs 2 and 3 of this Order.

5. The appellant, Clyde Wilson, shall place final cover on all closed areas in conformance with applicable statutes and regulations.

6. All fill deposited in the access road and the perimeter area shall be done in conformance with applicable statutes and regulations applicable thereto.

7. No fill shall be deposited upon soils found to be unsuitable for use as renovating subsoils.

8. The permittee, Clyde Wilson, shall comply with all orders of DER pertaining to daily operations, closure of the filled areas, closure of the entire site when filled to capacity, and all aspects of controlling groundwater pollution, including after-closure monitoring and procedures.

9. Nothing in this order shall be construed as relieving the permittee, Clyde Wilson, from compliance with any applicable statutes, rules and regulations concerning operation and closure of landfills in the Commonwealth of Pennsylvania.

10. Clyde Wilson and Robert Wilson shall execute a bond in favor of the Commonwealth binding them personally as partners in Wilson and Wilson to the faithful performance of all of the conditions of this Order and the faithful performance in compliance with the permit issued to them and of the laws of the Commonwealth of Pennsylvania and the rules and regulations of the Department of Environmental Resources, in the sum of $25,000. Upon any violation of this Order, the Commonwealth shall have the immediate right to proceed forthwith before any court of competent jurisdiction to enforce payment of said sum to the Commonwealth. The bond shall be submitted prior to the initiation of any further disposal at the permitted site and

may be obtained from any surety company authorized to do business in the Commonwealth of Pennsylvania or in lieu thereof cash or securities in double the amount of the bond.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: September 22, 1983

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

CARROLL TOWNSHIP AUTHORITY : Docket No. 82-290-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
PETITION FOR SUPERSEDEAS

On October 27, 1982 DER issued an administrative order to the Carroll Township Authority alleging the existance of various identified unpermitted sewer by-pass pipes in the Carroll Township system and the unpermitted discharge from at least some of them of sewage into waters of the Commonwealth.

This order *inter alia* mandated the sealing of the identified by-passes within ten (10) calendar days from receipt thereof and, within weeks of receipt of the Order, the submission of a list of any other by-pass structures in the authority's sewer system.

The authority filed an appeal and a simultaneous petition for supersedeas with the board on November 29, 1982. A hearing was not held on this petition within six days of receipt thereof as is the board's usual practice because appellants' counsel requested that the hearing not be scheduled until January of 1983, DER's counsel, however, insisted that the legal arguments raised by the said petition be promptly addressed and thus counsel argued the merits of the

petition on December 13, 1982.

Appellants' petition raises two legal arguments: a) that DER's order is constitutionally defective since it was issued without prior notice or hearing and b) that the authority's constitutional right to avoid self-incrimination was violated by that section of the order requiring the authority to list unidentified by-passes. Appellants' petition raised no factual issues and appellant who has the burden of proof offered no evidence thus appellant's right to a supersedeas rests solely on the strength of the above arguments.

As a starting point it is noted that pursuant to 25 Pa. Code §21.78 a petition for supersedeas must prove that he will be irreparably harmed if the petition is not granted and, in this case, that the public and the environment will not be harmed by allowing the continued by-pass or raw sewage to the waters of the Commonwealth. Petitioner must also prove that he is likely to succeed on the merits.

Both of appellants' legal arguments go to this final point so, assuming arguendo, that these arguments demonstrate that appellant is likely to prevail upon the merits, petitioner still falls short of the demonstration required to obtain a supersedeas. Petitioner has submitted no evidence upon which this board could find that it will be irreparably harmed and, likewise, petitioner has submitted no evidence that the public health and the environment will not be harmed if DER's order is stayed. Thus, the petition must be denied regardless of the merit of appellants' legal arguments.

This opinion could stop here but in order to save counsel unnecessary effort the board also holds that each of appellants' legal arguments is insufficient.

The contention that notice and a hearing is required before DER issues a sewage order to a municipality has been soundly rejected by Commonwealth Court in *Commonwealth v. Derry Township*, 10 Pa. Commonwealth Ct. 619, 314 A.2d

874 (1973); *DER v. Borough of Carlisle, et al*, 16 Pa. Commonwealth Ct. 341, 330 A.2d 293 (1974).

Likewise, *Carlisle Boro, supra*, stands for the proposition that as against the Commonwealth of which they are the offspring, local municipalities do not possess constitutional rights and thus it undercuts the appellants remaining argument. See also the opinion of Judge MacPhail in *Commonwealth v. Shippensburg Borough*, 708 Crim. Civ. 1976 (Cumberland County) which specifically stands for the proposition that a municipality enjoys no privilege against self-incrimination.

Far from being a special case, the *Shippensburg Borough* opinion is totally consistent with the line of United States and Pennsylvania Supreme Court cases which hold the privilege against self-incrimination being a personal privilege it cannot be invoked by private or public corporations. *U.S. v. White*, 322 U.S. 644, 64 S. Ct. 1248; *Commonwealth v. Col. Investment Corporation*, 457 Pa. 353, 325 A.2d 289 (1974). No contrary authority has been cited by appellants' counsel.

It is therefore unassailable that the authority may here not invoke a privilege against self-incrimination to avoid the affect of DER's order.[1]

ORDER

AND NOW, this 6th day of January, 1983, appellant authority's petition for supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH, Chairman

1. Even if the authority had such a privilege we note that DER has withdrawn all outstanding criminal matters against the authority wherefore it is uncertain that the authority has any factual basis to invoke the privilege.

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
Paul N. Barna, Esquire and Victor K. Lynch, Esquire
DATED: January 6, 1983

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

NICK ZDRALE :

:

Docket No. 82-172-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On July 6, 1982, the appellant filed the above-docketed appeal. On or about July 16, 1982, appellant, through his attorney Dante G. Bertani, filed a petition for supersedeas of the DER order which initiated the appeal. On August 19, 1982, this Board dismissed the aforesaid supersedeas petition, in part because, despite repeated efforts, our staff was unable to contact either the appellant or Mr. Bertani to schedule a hearing on the petition.

On August 19, 1982, we mailed Pre-Hearing Order No. 1 to appellant's counsel, informing him that the appellant was required to file his pre-hearing memorandum on or before November 3, 1982. On November 10, 1982, the appellant not having filed his pre-hearing memorandum, Mr. Bertani was informed by certified mail that sanctions as permitted under our rule 25 Pa. Code § 21.124, including the possibility that the appeal would be dismissed, might be imposed unless the

required pre-hearing memorandum was received on or before November 25, 1982.

On or about November 15, 1982, Mr. Bertani telephoned the Board. According to Mr. Bertani, our November 10, 1982 certified letter to him was Mr. Bertani's first notice that a pre-hearing memorandum would be required; in particular, Mr. Bertani claimed that he never had received a copy of our Pre-Hearing Order No. 1. The Board responded, in this same telephone conversation, that if Mr. Bertani would file an affidavit to the effect that neither he nor his client had received a copy of our Pre-Hearing Order No. 1, the time for filing appellant's pre-hearing memorandum would be extended. In the meantime, Mr. Bertani was informed, the Board would send him another copy of our Pre-Hearing Order No. 1.

The promised copy of Pre-Hearing Order No. 1 was mailed to Mr. Bertani shortly after the just-recounted telephone conversation. Since that time, no affidavit or any other communication has been received from Mr. Bertani or the appellant. The Board now gives Mr. Bertani one last chance to properly prosecute his client's case; heretofore he primarily has wasted this Board's time.

O R D E R

AND NOW, this 7th day of January, 1983, it is ordered that:

1. On or before January 19, 1983, appellant's counsel shall file a sworn affidavit to the effect that neither he, nor to the best of his belief and knowledge his client, had received a copy of our Pre-Hearing Order No. 1 before receiving notice--in our certified letter of November 10, 1982--that a pre-hearing memorandum had been due on November 3, 1982.

2. On or before February 4, 1983, appellant shall file his pre-hearing memorandum in accordance with the requirements of our Pre-Hearing Order No. 1.

3. Failure to comply with either of paragraphs 1 and 2 above, unless justified to and excused by this Board, will be grounds for dismissal of the instant appeal, as permitted under our rules. 25 Pa. Code § 21.124.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

cc: Bureau of Litigation
Howard J. Wein, Esquire (for DER)
Dante G. Bertani, Esquire (for Appellant) CERTIFIED MAIL P312 587752

DATED: January 7, 1983

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

BOROUGH OF TAYLOR : Docket No. 82-179-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
COMMONWEALTH'S MOTION TO DISMISS

On or about July 22, 1982 the Borough of Taylor, Lackawanna County filed an appeal with this board from DER's June 28, 1982 amendment to Solid Waste Management Permit No. 100976. DER has moved this board to dismiss the Borough's appeal for lack of standing and the Borough has answered DER's motion.

Until recently DER's motion would have had a sound legal footing for the Commonwealth Court had held in three separate cases that various Pennsylvania municipalities lacked standing to appeal solid waste disposal permits to this board. However, on December 1, 1982 in *Franklin Township and County of Fayette v. Department of Environmental Resources and Elwin Farms, Inc.*, Slip Opinion No. 81-1-80, the Pennsylvania Supreme Court expressly reversed this line of cases. In sum, the Pennsylvania Supreme Court held that a municipality had a substantial, immediate and direct interest in the establishment and operation of a landfill located within its boundaries.

This board is bound by controlling decisions of the Pennsylvania Supreme Court. Accordingly, the board shall enter the following:

ORDER

AND NOW, this 10th day of January, 1983, the Commonwealth's Motion to Dismiss for lack of standing is denied. The Commonwealth shall answer the Borough's pre-hearing memorandum within 15 days of receipt of this order.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Chairman

DATED: January 10, 1983

cc: Bureau of Litigation
Peter Shelley, Esquire
Lawrence J. Moran, Esquire
Bichler Sanitary Landfill, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

DEL-AWARE UNLIMITED, INC. : Docket No. 82-219-H
: 82-243-H
: 82-229-H
: 82-239-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and NESHAMINY WATER RESOURCES AUTHORITY

OPINION AND ORDER SUR MOTIONS OF NESHAMINY WATER RESOURCES AUTHORITY TO PARTIALLY STRIKE DEL-AWARE UNLIMITED APPEALS AND, IN THE ALTERNATIVE, MOTIONS FOR PARTIAL SUMMARY JUDGMENT

On or about September 2, 1982 ("about" including September 8, 1982) the Commonwealth of Pennsylvania, Department of Environmental Resources (DER) appellee herein, issued to the Neshaminy Water Resources Authority (NWRA), permittee intervenor in each of the above-captioned matters, Dams and Encroachment Permit No. ENC 09-81 covering construction of an intake structure to be located in the Delaware River near the town of Point Pleasant, Plumstead Township, Bucks County. The appellants appealed this DER action in two substantially similar appeals docketed at 82-219-H and 82-243-H.

On or about September 2, 1982 DER certified, pursuant to Section 401 of the Clean Water Act, that the construction of the said water intake structure and the attendant raw pump station at Point Pleasant would not violate the water quality standards established for the Delaware River. The instant appellants

appealed this action of DER in two substantially identical appeals docketed at 82-229-H and 82-239-H.

NWRA has moved this board to partially strike and quash each of the above appeals or in the alternative to grant it summary judgment in each docket. NWRA's first argument (which is identical for each appeal) is that those of appellants' contentions contained in Paragraphs (a), (b), (c), (d), (g), (j), (q), (r), (u), (v), (w), (x), (y), (aa), (bb), (cc), (dd), (ee), (ff), and (gg) of appellants' "Rider to Appeal" are raised in an untimely fashion and, accordingly, are not within the jurisdiction of the EHB because these contentions all relate to the withdrawal of water from *inter alia* the Delaware River at Point Pleasant and thus, these contentions should have been raised when DER issued NWRA a Water Allocation Permit #0978601 in November, 1978.

Appellants, in their Answers to NWRA's motions, apparently do not deny that the above contentions do pertain to the withdrawal of water from the Delaware River or that notice of the allocation permits had been published in the Pennsylvania Bulletin, but they argue that, nevertheless, these issues had to be considered or reconsidered by DER before permitting the construction of the said water intake structure and before issuing the said water quality certification. Appellants also challenge the legal validity of NWRA's Water Allocation Permit #0978601.

As a starting point of the analysis of NWRA's first argument it must be observed that NWRA is really relying upon a res judicata argument rather than a straight untimeliness argument. NWRA has not asserted, let alone demonstrated, that any of the above appeals is tardy. Rather, NWRA would preclude our consideration of these appeals on the basis of appellants' untimeliness in appealing an allegedly related DER action.

Appellants' challenge to the validity of the said Water Allocation Permit demonstrates the difficulty with which a forum is presented when parties seek to

close the courthouse doors on the basis of matters which could have or should have been litigated in prior proceedings; such motions direct the forum's attention away from the matter at hand and towards ever less relevant collateral matters. Perhaps it is for this reason that the Pennsylvania Supreme Court has held that the doctrine of res judicata should be sparingly applied *Schubach v. Silver*, 461 Pa. 366, 336 A.2d 328 (1975).

Commonwealth Court has followed the Pennsylvania Supreme Court's lead by upholding EHB dismissals on the basis of res judicata only where Commonwealth Court found the concurrence of four elements: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons or parties; and (4) identity of the parties for or against whom the claim is made. *Bethlehem Steel Corporation v. DER*, 37 Pa. Commonwealth Ct. 479, 309 A.2d 1383 (1978). For example, in *Bethlehem Steel Corporation, supra*, the court held that Bethlehem's failure to appeal a variance order issued by DER under the Air Pollution Control Act relating to emissions from the draw furnaces of Bethlehem's Steelton Plant did not preclude a much later appeal of DER's refusal to exclude emissions from said furnace from control as being of "minor significance" pursuant to 25 Pa. Code §123.1(a)(9).

In the instant case the prior event which NWRA would use to preclude present review was not even taken under either of the Acts presently at issue. Since Commonwealth Court failed to find an "identity of the thing sued for" in *Bethlehem Steel, supra*, where the same Act and same emissions from the same facility were involved, we surely cannot find such an identity here. NWRA's first argument, therefore must fail because of NWRA's failure to demonstrate the elements necessary to raise res judicata.

NWRA would also have us limit the instant appeals by striking paragraphs (o), (p), and (t) of appellants' "Rider" which, appellants admit, relate to the Bradshaw Reservoir rather than the Point Pleasant intake. Appellants' only re-

sponse to this argument is that the Bradshaw Reservoir and the Point Pleasant intake are both part of an integrated system.

Without prejudice to appellants' right to file a motion to consolidate, we agree with NWRA that it should not, in the context of the above-captioned appeals, have to defend permits (if any) for the Bradshaw Reservoir.

Finally, NWRA would have us strike paragraph (s) of appellants' Rider which, appellants' admit, relates to the NPDES permit issue raised in a companion appeal docketed at EHB Docket No. 82-177-H. Again, it would appear that the NPDES permit in question does not relate directly to the intake of water at Point Pleasant but rather to the discharge of water to other bodies of water. Thus, we again agree with NWRA that this aspect of the case is better handled in the context of EHB Docket No. 82-177-H.

O R D E R

AND NOW, this 17th day of January, 1983, NWRA's motions as entitled above are granted in part and dismissed in part. The contentions raised in paragraphs (o), (p), (s), and (t) of appellants' shall be stricken from consideration by the instant appeal; all other contentions remain in issue. The protective order issued December 1, 1982 is dissolved. Appellants are required to file their pre-hearing memorandum within 30 days from receipt of this order and Pre-Hearing Order No. 1 otherwise stands as issued.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
Louise S. Thompson, Esquire
Robert J. Sugarman, Esquire
Hershel J. Richman, Esquire
William J. Carlin, Esquire

DATED: January 17, 1983

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

STEPHEN LUHRS, et al. : Docket No. 82-231-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and ENERGY RESOURCES, LTD., Permittee

OPINION AND ORDER SUR
APPELLEE-PERMITTEE MOTION TO QUASH APPEAL

On July 27, 1982, the Pennsylvania Department of Environmental Resources (department or DER) issued to appellee-permittee its Permit No. 300882 under the provisions of the Solid Waste Management Act of July 7, 1980, Act 97, authorizing the operation of an oil recycling plant in Southampton Township, Franklin County, Pennsylvania. Notice of the issuance of the permit was published in the Pennsylvania Bulletin on August 14, 1982.

On September 27, 1982, the Environmental Hearing Board (Board) received appellants' notice of appeal. Prior thereto, on September 8, 1982, said notice of appeal was received by the department's Bureau of Litigation, Edward R. Simmons, Regional Solid Waste Manager, and Baumgardner Oil Company, Inc., general partner of appellee, all of whom were served by mail.

On or about October 20, 1982, the appellee-permittee filed a motion to quash said appeal on the basis of untimeliness. Appellants answered said motion and both DER and the appellee-permittee replied to appellants' answer.

These papers establish, and appellants admit, that more than 30 days passed between August 14, 1982, when notice of the permit which appellants would here attack was published in the Pennsylvania Bulletin, and September 27, 1982 when appellants' appeal was docketed with this board. Moreover, no party contests that 25 Pa. Code §25.52(a) of this board's rules applies to the instant situation or that this rule provides that:

> "§ 21.52. Timeliness and perfection.
>
> (a) Except as specifically provided in § 21.53 of this title (relating to appeal *nunc pro tunc*), jurisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of such action or within 30 days after notice of such action has been published in the *Pennsylvania Bulletin* unless a different time is provided by statute, and is perfected in accordance with subsection (b) of this section."

In any event, the above-section has been held to be binding upon this board so that, except for circumstances falling within the *nunc pro tunc* exception, we have no discretion to permit tardy appeals. *Rostosky Coal Company v. DER*, 26 Pa. Commonwealth Ct. 478, 364 A.2d 761 (1976).

The appellants seek to avoid the effect of §21.52(a) by maintaining that their counsel mailed a notice of appeal to this board within the requisite 30-day period and that this mailing constituted filing with the board so as to toll §21.52(a). The uncontested fact that appellants' counsel mailed timely notices to DER and to the permittee-appellee gives some support to appellants' assertion that they mailed a notice of appeal to this board in a timely manner. On the other hand, *Rostosky, supra*, demonstrates that parties sometimes fail to file notices of appeal with this board even when they file them with DER.

In addition, the uncontested affidavit of appellants' counsel stated that "On September 7, 1982 a duly signed notice of appeal was mailed to the Environmental Hearing Board at 221 North Second Street, Third Floor, Harrisburg, Pa. 17101."

It is not clear that this affidavit is sufficient to establish the timely mailing of the appeal as a matter of fact. Without at all questioning the veracity of appellant's counsel, his affidavit does not put to rest the possibility of erroneous memory on his part or, for example, improper addressing or postage of the appeal. Perhaps for these reasons, Commonwealth Court has, upon ocassion, required this board to hold an evidentiary hearing on the issue of timeliness of appeals to this board *Sharon Steel Corporation v. DER*, 28 Pa. Commonwealth Ct. 607, 369 A.2d 906 (1977).

Unfortunately for the appellants, we do not need to make a finding on mailing to determine the matter because mailing a notice of appeal is not equivalent to filing a notice with this board. To be filed with this board an appeal must be received and docketed. This conclusion is supported not only by *Bellefonte Borough v. DER*, 1977 E.H.B. 250 (EHB Docket No. 74-010-D) as cited by appellee-permittee but also by the *Redevelopment Authority of the City of Erie v. Pulakos*, 459 Pa. 157, 267 A.2d 873 (Sup. Ct. of Pa., 1970). In *Pulakos, supra*, the Pennsylvania Supreme Court, in construing an appeal period which was to be tolled upon filing of an appeal with the Supreme Court, discounted the appellants' argument that filing meant placing an appeal in the mail. "Filing" was held by the Supreme Court to require receipt and docketing. We are bound by this determination (see also *Burdett Oxygen Company v. I. R. Wolfe & Sons, Inc.*, 433 Pa. 291, 249 A.2d 299 (1969).

Appellants herein also rely on the presumption that their first appeal, having been mailed on or about September 7, 1982, reached this board prior to September 13, 1982, so that any failure to promptly docket it would be attributable to clerical error on behalf of the board's personnel. As DER points out in its reply such a presumption is rebuttable; *Berkowitz v. Mayflower Sec. Inc.*, 455 Pa. 531, 534; 317 A.2d 584 (1974). The board takes official note that the September 7,

1982 appeal was never received by this board and thus was never docketed. Wherefore the rebuttable presumption of delivery is overcome.

Before concluding this opinion the board is constrained to express its feeling that the present §21.52(a) is perhaps too limiting. We feel that a timely appeal to DER should perhaps suffice as an appeal to this board but this is not what §21.52(a) of our rules provide and even though we did not promulgate the above rule (rather it was promulgated for us by the Environmental Quality Board) we are bound thereby.

O R D E R

AND NOW, this 17th day of January, 1983, appellee-permittee's motion to dismiss is granted and appellants' appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

DENNIS J. HARNISH
Chairman

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

cc: Bureau of Litigation
Michele Straube, Esquire
Kenneth F. Lee, Esquire
Jan G. Sulcove, Esquire

DATED: January 17, 1983

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

OAK TREE COAL COMPANY : Docket No. 82-293-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
PETITION FOR SUPERSEDEAS

DER issued an administrative order on November 15, 1982 which required the appellant within 45 days to supply a certain party, whose water supply had allegedly been affected by appellant's mining, a permanent source of water.

Appellant appealed said order to the board on December 10, 1982 and on the same date petitioned the board for a supersedeas.

DER has moved the board to quash and dismiss appellant's petition and appellant has filed a memorandum of law in response to DER's motion.

DER's motion rests upon its allegation that the appellant's petition is defective on its face for failure to comply with §§21.77 and 21.78 of the board's Rules of Practice and Procedure, 25 Pa. Code §§21.77 and 21.78.

We agree with DER that to comply with our rules a petition for supersedeas must allege facts relevant to each of the requirements for granting a supersedeas delineated in 25 Pa. Code §21.78 *Zdrale v. Commonwealth, DER*, EHB

Docket No. 82-172-G (issued August 19, 1982); *Chemical Waste Management, et al. v. Commonwealth, DER*, EHB Docket Nos. 81-154-H and 81-155-H (issued July 20, 1982).

We also agree that appellant's petition is deficient and thus will be denied without hearing for lack of specificity pursuant to 25 Pa. Code §21.77.

Appellants averrment with regard to its likelihood of succeeding on the merits is a pure legal conclusion entirely devoid of factual support. Likewise, appellant has merely alleged that granting the requested supersedeas would cause no damage to the Foreman residence because it "has been able to function up until this time". On the basis of this statement the board has no way of knowing whether the Foreman's have an adequate temporary supply which could perhaps form the basis for a supersedeas or are simply doing without an adequate water supply.

As to the likelihood of harm to appellant we would not go so far as DER by holding that time, money and energy spent in the absence of a stay do not constitute, irreparable injury since it seems to us that the appellant would not be able to recover these expenditures from the state even appellant succeeding on the merits. On the other hand, we do agree with DER that the above factors standing alone do not justify a supersedeas. Indeed, this proposition is merely a reiteration that a petitioner must satisfy all three of the criteria set forth in §21.78 in order to obtain a supersedeas.

O R D E R

AND NOW, this 17th day of January, 1983, appellant's petition for supersedeas is dismissed, without prejudice.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
Alan S. Miller, Esquire
John B. McCue, Esquire
DATED: January 17, 1983

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

LAWRENCE ROSE, et al. :

:

Docket No. 82-013-H

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
DER'S MOTION FOR SANCTIONS THIRD

On or about December 14, 1981 DER made an assessment of civil penalty against the appellants which assessment was appealed to this board on January 12, 1982. DER propounded interrogatories to the appellants on or about March 4, 1982 and followed these interrogatories with two motions for sanctions on the basis of appellants' failure to answer them. The board ordered appellants to answer said interrogatories and on September 14, 1982 appellants filed answers.

DER is still not satisfied with appellants' answers and it does appear that appellants have failed to provide any answers to Interrogatories 47 through 50 and 54, but rather than seek additional answers, DER seeks instead to shift the burden of proof in this matter to the appellants. We do not agree that the proposed remedy is tailored to the offense.

Moreover, we wonder at how DER can be as sorely prejudiced as it asserts. Surely, it had sound reason to believe that the appellants mined without benefit of license or permit before it issued the appealed assessment.

O R D E R

AND NOW, this 19thday of January, 1983, appellants are required to answer Interrogatories 47 through 50 and 54 and any other presently unanswered interrogatory within 15 days from receipt hereof on pain of dismissal of appellants' appeal.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Chairman

DATED: January 19, 1983

cc: Bureau of Litigation
Stanley R. Geary, Esquire
J. E. Ferens, Jr., Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

DELAWARE UNLIMITED, et al.

Docket No. 82-177-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
NWRA DEMURRER TO DELAWARE UNLIMITED, INC.
NOTICE OF APPEAL

On June 22, 1982, Richard L. Hinkle, Chief of the Permit Section of DER's BWQM Norristown office, issued a letter containing DER's determination that no National Pollutant Discharge Elimination System ("NPDES") Permit would be required for the NWRA's diversion of water from the Delaware River to the North Branch of Neshaminy Creek. Appellants filed a timely appeal of this letter to the board and NWRA has demurred to said appeal arguing that appellants have no standing to appeal from DER's non-action.

NWRA cited no authority in defense of its demurrer and it does not argue that appellants lack standing because they have no interest in the diversion project. Indeed, even under the narrow view of standing taken by the Pennsylvania Commonwealth Court, at least those appellants who own property in or near the Delaware at Point Pleasant would qualify *Western Pennsylvania Conservancy v. DER*, 28 Pa. Cmwlth Ct. 204, 367 A.2d 1147 (1977) and it may be, as appellants argue, that because a NPDES permit (or absence thereof) is at issue appellants enjoy broader standing under the Clean Water Act.

As best the board can discern NWRA's argument though sounding in standing is really that there is no final DER action for this board to review since DER's refusal to issue a NPDES permit was if anything, a non action. The board is aware of its decision to the effect that DER's refusal to revoke a permit was not an adjudication appealable to this board *George Eremic v. DER*, 75-283-C, 1976 249 & 324. In essence, the *Eremic* adjudications were based upon an examination of the legal status quo. Since DER's failure to revoke the permit in *Eremic supra.* merely perpetuated the legal and factual situation in *Eremic, supra.*, the board held that the status quo had not changed.

In the instant matter, however, DER has by its actions, appealed at other docket numbers, changed the status quo by permitting the diversion of water from the Delaware River to Neshaminy Creek. Thus, the instant matter is distinguishable from the *Eremic* situation. Moreover, in *Ermic, supra.* DER could revoke the challenged permit on any given day and could be asked to do so every day, there was therefore in that case a real issue as to the finality of DER's action. Here, if a NPDES permit is not required when the integrated facilities are constructed it will be too late.

In sum, we hold that the instant matter is distinguishable from *Eremic, supra.*, and that DER's action, here, constitutes a final action of DER in which appellants have an immediate, direct and substantial interest.

O R D E R

AND NOW, this 19th day of January, 1983, NWRA's Demurrer is dismissed.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Chairman

DATED: January 19, 1983

cc: Bureau of Litigation
Louise S. Thompson, Esquire
Joanne R. Denworth, Esquire
Hershel J. Richman, Esquire
William J. Carlin, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

EAST ALLEN COAL COMPANY, INC. :

:

Docket No. 82-145-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

In a letter dated May 11, 1982, DER informed Lewis A. Liberto, President, East Allen Coal Company, that East Allen's application for a 1982 Surface Mining Operator's license had been denied, for reasons including inter alia that East Allen previously had failed to comply with the laws and regulations governing surface mining operations.

On June 11, 1982, East Allen, through its counsel Rose, Schmidt, Dixon and Hasley, Pittsburgh, filed an appeal of this license denial with this Board.

In accordance with the Board's regular practice, the Board then issued its Pre-Hearing Order No. 1, which notified East Allen that East Allen must file its pre-hearing memorandum on or before August 30, 1982. At the request of the parties, the appellant was granted an extension of time to November 26, 1982 for filing its pre-hearing memorandum, pending settlement negotiations.

On November 15, 1982, however, Rose, Schmidt, Dixon and Hasley withdrew its appearance in this matter. Thereafter, on December 9, 1982,no pre-hearing memorandum having been received from appellant, nor request for further extension of time, the Board notified appellant that his appeal might be dismissed under the Board's rules, 25 Pa. Code § 21.124, unless his pre-hearing memorandum was filed by December 19, 1982.

This notification, addressed to Mr. Liberto, was returned "addressee unknown"; apparently it had been incorrectly addressed. However, a copy of the same notice, correctly addressed this time, sent certified to Mr. Liberto on December 30, 1982, was received by him on January 3, 1983, as evidenced by the return receipt which came back to the Board.

Nevertheless, as of this date, since January 3, 1983 neither the pre-hearing memorandum nor any other communication has been received from Mr. Liberto or from any representative of his. Indeed our last communication from Mr. Liberto or a representative was his counsel's withdrawal of appearance on November 15, 1982. His pre-hearing memorandum has been overdue, without a request for extension of time, since November 26, 1982. He was warned more than two weeks ago that failure to file his pre-hearing memorandum might result in sanctions, including dismissal of his appeal.

(ORDER on next page)

O R D E R

WHEREFORE, this 19th day of January, 1983, the above-captioned appeal of East Allen's is dismissed for failure to abide by the Board's rules, 25 Pa. Code § 21.124.

ENVIRONMENTAL HEARING BOARD

DENNIS J. HARNISH
Chairman

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

cc: Bureau of Litigation
Donald A. Brown, Esquire
Lewis A. Liberto

DATED: January 19, 1983

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

SPRING-BENNER JOINT AUTHORITY : Docket No. 82-228-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
COMMONWEALTH'S ALTERNATIVE MOTIONS TO DISMISS

Appellant in this matter, the Spring-Benner Joint Authority, was, in 1981, constructing a sewage treatment collection and treatment system in Centre County. This system was being constructed in part with federal funding authorized under the Clean Water Act, 33 U.S.C. §1285(a).

At this time DER was responsible for making determinations concerning the Clean Water Act construction grant for the said system pursuant to an agreement between DER and EPA. Thus, the appellant submitted to DER change order number 3 asking for EPA design approval of cost participation in pavement required to restore the road surface (apparently after laying sewer lines).

DER's response to this change order is contained in a letter of January 9, 1981, a copy of which is attached hereto. In this short letter DER stated that, "[t]he change order is approved for content only and not for EPA cost participation".

On or about September 24, 1982 Spring-Benner Joint Authority filed an appeal at the above-docket from DER's determination of ineligibility of change

order number 3 for EPA cost participation. The authority's appeal alleged that even though it had received the above-described letter on January 11, 1981, "official notice of final denial has not been transmitted to [the] authority".

DER has moved the board to dismiss the authority's appeal on alternative grounds. DER argues that its January 9, 1981 letter embodied DER's final determination on change order number 3 so that the authority's (admitted) failure to appeal this letter for more than 1-1/2 years from receiving the letter violated board rule 21.52(a), 25 Pa. Code §21.52(a) and thus deprived this board of jurisdiction over the authority's appeal 71 P.S. §510-21(a) *Rostosky v. Commonwealth, DER*, 26 Pa. Commonwealth 478, 364 A.2d 761 (1976).

Alternatively, DER argues that if the board finds that the January 9, 1981 letter does not embody DER's final determination, the authority's appeal must be dismissed because the board's jurisdiction is limited to "final actions" or "final determinations" of DER, 71 P.S. §510-21(a) - (c); 25 Pa. Code §21.2(a); 1 Pa. C.S.A. §101, *Commonwealth, DER v. New Enterprise Stone and Lime Company, Inc.*, 25 Pa. Commonwealth Ct. 389, 359 A.2d 845 (1976). The authority and DER have exchanged a variety of answers and replies concerning DER's motion and have supplied the board with briefs.

As a starting point of our analysis we agree with DER that if the January 9, 1981 letter constituted written notice of DER's "final determination" regarding change order number 3, the authority's appeal is untimely. We also agree with DER that the facts a) that this letter does not bear either an appeal paragraph or b) that it does not bear a specific designation that it is a "final action" does not keep it from being a "final determination" *Bethlehem Steel v. DER*, 37 Pa. Commonwealth 479, 390 A.2d 1383 (1978).

A close examination of the January 9, 1981 letter, however, provides a basis for distinguishing this letter from DER actions held to be final in

Bethlehem Steel, supra as well as *Wheeling-Pittsburgh Steel Corporation v. DER*, 27 Pa. Commonwealth Ct. 356, 366 A.2d 613 (1976) and *Commonwealth, DER v. Derry Township, Westmoreland County*, 351 A.2d 606.

At issue in *Bethlehem Steel, supra* was DER's letter denying Bethlehem's application for an exemption from DER's fugitive emissions regulation, 25 Pa. Code §123.1, on the ground that it qualified for the minor significance exception, §123.1(a)(9). Whatever else could be said of this letter, no fair minded person receiving it could be in doubt that DER had made a final determination that Bethlehem's fugitive emissions were not of minor significance. Likewise, the NPDES certification at issue in *Wheeling-Pittsburgh, supra* and the administrative order at issue in *Derry Township, supra* clearly embodied final DER actions. The certification embodied effluent limitations while the order required the planning, designing, financing, and construction of sewage treatment works. No one, other than a lawyer, would argue that DER's "mind" had not been "made up" with regard to the matters addressed in these actions.

By contrast the January 9, 1981 letter is so succinct as to asymptotically approach the vanishing point. Perhaps, as DER argues, the authority's consultants, who worked with DER on a daily basis, knew that this letter constituted a final denial of EPA cost participation, but we hold DER to a higher standard when it seeks to deprive an appellant of his day in court. The question, we believe, is whether the lay persons on the authority, to whom the January 9, 1981 letter is addressed, would recognize it as a final denial of their request for EPA cost participation. Since neither the word "denial" nor any synonym thereof is used in this letter we cannot hold this letter to constitute the type of written notice required to start the operation of §21.52.

On the other hand, since DER argues that it intended the January 9, 1981 letter to be its final determination, we cannot support DER's clever argument that

the January 9, 1981 action was not final. The fact that DER fails to provide proper written notice of a final action does not deprive that action of finality, it merely deprives DER of the use of §21.52(a) as a legal impediment to the authority's day in court.

O R D E R

AND NOW, this 24th day of January, 1983, DER's motion to dismiss is denied and Pre-Hearing Order No. 1 is reinstated with an extension of 30 days from the date hereof within which the appellant must submit its pre-hearing memorandum.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
Michele Straube, Esquire
Richard L. Campbell, Esquire
Christopher C. Conner, Esquire

DATED: January 24, 1983

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
Bureau of Water Quality Management
736 West Fourth Street
Williamsport, Pennsylvania 17701

January 9, 1981

Sewerage
C42-1017
Spring-Benner Joint Authority
Spring Township, Centre County

Mr. Ralph Dobelbower, Chairman
Spring-Benner Joint Authority
R. D. #2, Box 110D
Bellefonte, PA 16823

Dear Mr. Dobelbower:

Enclosed is a copy of the below listed change order. The change order is approved for content only and not for EPA cost participation.

Contract	Change Order No.	Reason for Ineligibility
CBF(1-4)	3	Change in the scope of the project

The change order has been stamped with State approval as required by the Rules and Regulations of the Pennsylvania Department of Environmental Resources.

If you have any questions, please contact me or John Grinder at (717) 327-3678.

Sincerely,

David W. Aldenderfer
Project Manager - Grants Unit

DWA:lm
Enclosures

cc: Joseph Galda, EPA
Richard F. Becker, Army Corps of Engineers
Administrative Services Section

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

TROUT UNLIMITED ALLEGHENY MOUNTAIN CHAPTER : Docket No. 82-166-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and STOUT COAL COMPANY

OPINION AND ORDER SUR
APPELLANT'S MOTION FOR SACTIONS

On or about June 11, 1982 DER issued to Stout Coal Company (Stout) Mine Drainage Permit 17800145 covering a site in Brady Township, Clearfield County. On July 12, 1982, the Allegheny Mountain Chapter of Trout Unlimited (appellant) filed a notice of appeal from this permit with this board. This notice contained a certification, endorsed by appellant's counsel, that a copy thereof had been mailed to Stout. Pursuant to §21.52(g) of our rules of practice, 25 Pa. Code §21.52(g)

> "[t]he service upon the recipient of a permit...,as required by this section, shall subject such recipient to the jurisdiction of the Board as a party appellee."

On July 28, 1982 the board issued Pre-Hearing Order No. 1 (as evidenced in the board's docket book). A copy of this order was sent to "PERMITTEE: Stout Coal Company". Paragraph 3 of said order required "[T]he Commonwealth and other

appellee(s)..." to file answering pre-hearing memorandua within fifteen (15) days after receipt of appellant's pre-hearing memorandum.

Appellant's pre-hearing memorandum was received by the board on October 14, 1982 yet as of November 18, 1982 more than 30 days later, the board had not received a pre-hearing memorandum from either DER or Stout. Thus, in accordance with our standard practice the board issued on November 18, 1982 a notice that "unless there is compliance by November 29, 1982..." with the outstanding pre-hearing order DER and Stout faced the imposition of sanctions. This notice was mailed to permittee's counsel who had entered his appearance on October 29, 1982 return receipt requested and a signed return receipt card demonstrated that it was received by permittee's counsel.

On November 24, 1982 DER's counsel responded to the November 18 notice asking for additional time to comply with the notice and on December 3, 1982 DER submitted its pre-hearing memorandum.

Stout's counsel did not respondto the aforesaid motion on or before November 29, 1982 and thus Stout faced the imposition of sanctions on that date. However, Stout's counsel did send a letter to the board on December 7 in which he asserted that "[I]n reviewing this file, I have not been able to find any Order placing any obligation on the Permittee to file a Pre-Hearing Memorandum" and requested 15 days "from the date of this letter" in which to comply.

Notwithstanding that Mr. Picadio failed to assert that the permittee had not received pre-hearing order no. 1 (which would be the only factor excusing Stout's failure to comply with the said pre-hearing order) as a courtesy to Stout's counsel, the board, on December 14, 1982 reissued pre-hearing order no. 1 which was endorsed with the following phrase: "COMPLIANCE BY PERMITTEE DUE WITHIN 15 DAYS FROM RECEIPT HEREOF."

It is now January 24, 1983--the 15 days in the reissued pre-hearing order has long passed and appellant's counsel has moved this board to apply sanctions to Stout for its failure to comply with the various orders of the board described above.

In his answer to said motion, Stout's counsel explains his failure to comply with the December 14, 1982 by stating that "[c]ounsel for the Permittee has not seen a copy of this Order and it has either not been received or has inadvertently been misplaced or filed.". We certainly have no reason to dispute this assertion of Mr. Picadio and much reason to believe his word. However, even if he, personnally, did not receive the December 14 reissued pre-hearing order there was no assertion that it was not received in his office. We do know that counsel for both the appellant and DER received the December 14 pre-hearing order which lends support to the assertions of the board's staff that a copy was also sent to Mr. Picadio's office. Moreover, issuance of the December 14, 1982 order is evidenced by an entry in the board's official docket book. Setting aside the December 14 order, Stout's unexplained failure to comply with the board's July 28, 1982 order, the failure of Stout's counsel to respond to the board's November 18, 1982 letter (which he admits receiving) by November 29, 1982 as required therein, and finally Stout's counsel's failure to file a pre-hearing memorandum within 15 days of his December 7, 1982 letter as he promised therein, at least cumulatively, provide grounds for imposing sanctions.

We shall not, therefore, accord Stout a fourth "bite at the apple" by granting Stout an additional 15 days within which to file its pre-hearing memorandum. On the other hand, the board cannot agree with appellant that sustaining appellant's appeal is the appropriate sanction, bearing in mind the presumption of

regularity which attaches to permits issued by DER and the fact that the burden of proof in third party appeals from permit issuances is upon the appellant.[1]

O R D E R

AND NOW, this 24th day of January, 1983, appellant's motion for sanctions is granted. Stout is precluded from presenting any evidence in the above-captioned matters. Except for the above preclusion, Stout has all the rights and privileges of a permittee-appellee including the right to cross-examine the witnesses of other parties, to participate in oral argument and to submit briefs.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
Anthony P. Picadio, Esquire
Robert P. Ging, Jr., Esquire

DATED: January 24, 1983

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1. In *East Allen Coal Company, Inc. v. DER*, EHB Docket No. 82-145-G, the board recently dismissed an appeal for failure of appellant to file a pre-hearing memorandum after receiving a letter like the November 18 letter.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

LEBANON VALLEY COUNCIL OF GOVERNMENTS : Docket No. 82-218-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
DER'S MOTION TO DISMISS
AND MOTION FOR STAY

Appellant, the Lebanon Valley Council of Governments, is the local agency authorized to enforce the Pennsylvania Sewage Facilities Act in four Lebanon County townships. Pursuant to the said Act DER is supposed to reimburse one-half of eligible expenses incurred by local agencies in enforcing said Act. Accordingly, prior to July 15, 1982 the appellant submitted to DER its expenses for enforcing the said Act in 1981. On July 15, 1982 DER sent the appellant a check plus a letter explaining why this check was for less than one-half of the expenses reported by the appellant.

On August 2, 1982 appellant's counsel responded to DER's July 15 letter with a written demand for additional reimbursement in the sum of $4,259.05. On August 23, 1982 DER responded to the said demand letter with a more complete explanation of why the additional reimbursement would not be forthcoming. Appellant filed an appeal from the August 23 letter with this board.

DER has moved this board to dismiss the instant appeal. DER argues that the instant appeal is tardy because its July 15, 1982 letter constituted the department's "final action" with regard to reimbursement and the instant appeal was filed more than thirty days after that event.

DER also argues that the August 23 letter is not an "adjudication" and is thus not appealable since it did not change the legal status quo.[1]

Appellant does not challenge the legal authorities upon which DER relies to support both of the above arguments and the board agrees with DER that the regulations and cases cited by DER stand for the propositions for which they were cited. Appellant does disagree, however, that the July 15, 1982 as a matter of fact, constituted a final DER action.

In this regard we agree with the appellant. We note that the July 15, 1982 letter bears no appeal paragraph and contains no other indicia that it is a final action of the department. While these factors standing alone would not obviate the finality of an otherwise final action we believe they must be taken in the context of the action in question. In essence, the appellant's submittal to DER constituted a bill or invoice while the July 15, 1982 check and letter of DER constituted DER's response to the said bill. In the ordinary custom of commerce one would expect DER's response to be followed by a demand letter such as the appellant's counsel sent and, indeed, Pennsylvania law requires such a demand as a condition precedent to successfully maintaining an assumpsit action.

While we do not hold DER to these ordinary customs in administering the various acts within its jurisdiction, we hold that fundamental fairness requires DER to clearly announce when it intends to vary from these customs. An appeal

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1. In actuality DER's arguments are merely 2 ways of stating the same argument. If the July 15 action is "final" both of DER's arguments must succeed; conversely if the July 15 action is not "final" both of DER's arguments must fail.

paragraph such as is routinely contained in other actions which DER considers to be final would certainly suffice as such notice. In the absence of any such notice and in view of commercial custom we do not find DER's motion to dismiss to be well taken.

O R D E R

AND NOW, 24th day of January, 1983, DER's motions for a stay and to dismiss are denied. DER shall comply with Pre-Hearing Order No. 1 within 15 days of receipt of this Order.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
Lynn Wright, Esquire
Joseph M. Hill, Jr., Esquire

DATED: January 24, 1983

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

MAYNARD F. KEMERER :

:

: Docket No. 82-236-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and BENJAMIN COAL COMPANY, Permittee

OPINION AND ORDER

On September 9, 1982, DER granted the permittee, Benjamin Coal Company mine drainage permit No. 17810158 and mining permit No. 100064-17810158-01-0. These permits were issued with restrictions which are immaterial to the concerns of this Opinion and Order.

On October 4, 1982 the appellant, Maynard Kemerer, informed the Board by letter that he was appealing issuance of the aforementioned appeals. The Board, in accordance with its usual practice, took this letter of Mr. Kemerer's to be a timely filing of an appeal under its rules, 25 Pa. Code §21.52(a). However, this filing did not comply with the requirements of 25 Pa. Code §21.51, which prescribes the form and content of the notice of appeal. Therefore the Board, still in accordance with its usual practice, on October 5, 1982 acknowledged Mr. Kemerer's letter of appeal, but also ordered him to furnish the information

needed to fully comply with 25 Pa. Code §21.51 within ten days of his receipt of the Board's order, under the threat that failure to comply with the order might lead to dismissal of his appeal.

On October 14, 1982 the Board received a letter from Mr. Kemerer saying that he had just returned from a trip to Florida to find the Board's October 5, 1982 order. Mr. Kemerer explained that his trip to Florida was necessitated by his father's death and the need to make arrangements for his mother. He therefore asked for an extension of time to comply with our October 5, 1982 order. Under the circumstances described by Mr. Kemerer, the Board would have granted the requested extension, but no extension proved necessary; Mr. Kemerer did file a properly completed Notice of Appeal on October 15, 1982. In this Notice of Appeal Mr. Kemerer certified that he had served a copy of the appeal to the permittee, as is required by 25 Pa. Code §21.51(f)(3).

On October 18, 1982 the Board, once again in accordance with its usual practice, sent Mr. Kemerer the Board's Pre-Hearing Order No. 1, which inter alia ordered appellant to file his pre-hearing memorandum on or before January 3, 1983; Pre-Hearing Order No. 1 is issued when an appellant appears to have complied with all requirements of 25 Pa. Code §§21.51-21.52. On January 3, 1983, however, the permittee, through its counsel, informed the Board by telephone that Benjamin Coal Company never had received a copy of the appeal, despite Mr. Kemerer's certification to the contrary in his aforementioned October 15, 1982 filing. On January 5, 1983, in response to this allegation by the permittee, the Board wrote Mr. Kemerer as follows:

> The permittee, Benjamin Coal Company, has informed the Board that it never has received a copy of your appeal, although in your Notice of Appeal, filed October 15, 1982, you certified that you had mailed a copy to the permittee.

> Will you please send [the permittee's attorney] another copy of the appeal? Will you please send the Board a copy of any documents you have, e.g., a certified mail receipt, showing or tending to show that you indeed did send the permittee a copy of the appeal on or before October 15, 1982?

There was no immediate response by Mr. Kemerer to this January 5, 1983 letter from the Board. Moreover, his pre-hearing memorandum (due January 3, 1983) had not been received by January 5, 1983, nor had there been any request by Mr. Kemerer for an extension of time to file his pre-hearing memorandum. On January 13, however, the Board received a letter dated January 12, 1983 from Wilson Fisher, president of Hess and Fisher Engineers, Inc., requesting an extension of time--to January 17, 1983--for Mr. Kemerer to file his pre-hearing memorandum; Mr. Fisher informed the Board Secretary during a telephone conversation that he was "assisting" Mr. Kemerer in this matter, but did not further explicate his (Mr. Fisher's) role.

On January 17, 1983, the Board wrote Mr. Fisher that we would defer ruling on his request for an extension of time, but would provisionally receive the appellant's pre-hearing memorandum if it actually did get filed on January 17, 1983; in fact the pre-hearing memorandum was not received by the Board until January 18, 1983, although it was dated January 15, 1983. Our January 17, 1983 letter, which was copied to Mr. Kemerer and to the permittee's attorney, also stated that Mr. Fisher's request for an extension of time to file the pre-hearing memorandum could not be granted routinely if the other parties to this appeal objected to the extension; if there were objections, then Mr. Kemerer would have to explain satisfactorily why an extension was necessary, and why it was requested so late--after the January 3, 1983 deadline, which itself was 75 days from the issuance date of our Pre-Hearing Order No. 1 which set the January 3, 1983 deadline.

On January 20, 1983, the permittee's attorney did object to Mr. Fisher's request (presumably made with Mr. Kemerer's approval) for an extension of time to comply with our Pre-Hearing Order No. 1. Consequently Mr. Kemerer will have to defend the request, as discussed at the end of the preceding paragraph. In the meantime, the permittee has raised the further objection that Mr. Kemerer has never perfected his appeal. Our January 17, 1983 letter reminded Mr. Fisher and Mr. Kemerer we had not received any indication of his compliance with our January 5, 1983 request (quoted supra) that he send a copy of the appeal to the permittee's counsel. We pointed out (in the same January 17, 1983 letter) that the Board's Rules and Regulations, notably 25 Pa. Code §21.52, state that an appeal must be perfected before the Board's jurisdiction attaches. In order that the instant appeal be perfected, according to 25 Pa. Code §21.52(b), a copy of the notice of appeal must be served on the permittee.

Apparently as a result of the foregoing representations, Mr. Kemerer on January 17, 1983 did serve a copy of his appeal on the permittee. To be precise, a copy of a letter to this effect, dated January 17, 1983, together with a receipt for certified mail dated January 19, 1983 and addressed to permittee's attorney, now has been received by the Board. The Board has received no evidence that Mr. Kemerer did mail a copy of the notice of appeal on or about October 15, 1982, when he certified he indeed had complied with this requirement for perfecting the appeal.

The Board's rules, 25 Pa. Code §21.51(f)(3) state that service of the notice of appeal on the permittee shall be accomplished within ten days of the filing of the appeal. 25 Pa. Code §21.52(b) states that no appeal shall be deemed to be perfected unless the permittee is served with a notice of appeal "in accordance

with §21.51" (emphasis added). Nevertheless, this Board has ruled in the past that the ten day requirement of 25 Pa. Code §21.51(f)(3) is not a requisite for perfecting the appeal; the only essential requirement for perfection of the appeal is service of the notice of appeal on the permittee. R. Czambel v. DER, Docket No. 80-152-G, Opinion and Order issued December 11, 1980, 1980 EHB 508. On the other hand, we are not inclined to permit an appellant to delay indefinitely its compliance with the requirement that the permittee be served with the notice of appeal. As we explained in Czambel, supra, the Supreme Court of Pennsylvania in analogous cases, notably Hodge v. Me-Bee Co., 429 Pa. 585, 240 A.2d (1968), has made it plain that perfection must be accomplished within a reasonable time after filing the appeal, or else the appeal must be quashed. Without an evidentiary hearing, we are not in a position to decide whether the apparent actual delay in serving Benjamin Coal with the notice of appeal, namely from October 15, 1983 to January 19, 1983, has been unreasonably long. Indeed, the decision whether or not this delay has been unreasonably long rests largely on whether or not Benjamin Coal has been prejudiced by the delay, an issue whose resolution also requires an evidentiary hearing.

O R D E R

WHEREFORE, this 31st day of January , 1983, in accordance with the foregoing Opinion in this matter, it is ordered as follows:

1. Before proceeding to the merits of this appeal, an evidentiary hearing will be scheduled to determine whether this appeal should be dismissed for failure to comply with the Board's rules (see 25 Pa. Code §21.124). The parties will be permitted to present evidence, and to cross examine, on the

following issues:

a. When the notice of appeal first was mailed or otherwise served on the permittee, and when it actually was first received by the permittee.

b. Whether, even before receiving a copy of the notice of appeal, the permittee had become aware that the appellant had appealed DER's action of granting the permittee mining and mining drainage permits.

c. In what ways, if any, the permittee will be prejudiced by allowing the appeal to be perfected on or about January 19, 1983.

d. Why the appellant required an extension of time to file his pre-hearing memorandum, and why his request for an extension of time was filed so late.

2. The date for the Commonwealth and for the permittee to file their pre-hearing memoranda (see paragraph 3 of our Pre-Hearing Order No. 1) is continued indefinitely; after the aforementioned evidentiary hearing, if the Board decides the appeal should not be dismissed for failure to comply with the Board's rules, a new due date for filing the appellees' pre-hearing memoranda will be set.

3. On or before February 14, 1983, the parties shall petition the Board for permission to present evidence not falling under the categories 1a - 1d above, if they feel the need for such additional evidence; the petitions must make clear why such additional evidence is necessary.

4. The Board will schedule the aforementioned evidentiary hearing shortly after February 14, 1983, at which time additional categories of permitted evidence, if any, will be made known to the parties.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY, Member

DATED: January 31, 1983

cc: Bureau of Litigation
Donald A. Brown, Esquire
Maynard F. Kemerer
Carl Belin, Jr., Esquire

EHB—82: 12/79

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

CONCERNED CITIZENS AGAINST SLUDGE :

:

: Docket Nos. 82-220-G
: 82-221-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and CITY OF PHILADELPHIA, Permittee

Feb. 9, 1983

OPINION AND ORDER
SUR PRELIMINARY OBJECTIONS

These matters concern two permits granted to the City of Philadelphia (Philadelphia) by the Department of Environmental Resources (DER) Bureau of Solid Waste Management, allowing Philadelphia to dispose of sewage sludge--from its Northeast and Southwest Water Pollution Control Plants--on two land reclamation sites. Permit No. 602201 pertains to a 72-acre site identified as Arcadia No. 1, in Grant and Montgomery Townships, Indiana County. Permit No. 602124 pertains to a 155-acre site identified as Benjamin Coal Company Mines 11 and 11B in Banks Township, Indiana County.

On September 20, 1982, the Concerned Citizens Against Sludge (Citizens) appealed these permit grants. The appeal of permit No. 602201 was docketed as EHB 82-220-G; the appeal of permit No. 602124 was docketed as EHB 82-221-G. Thereafter preliminary objections, requesting inter alia that these appeals be

dismissed, were filed by Modern Earthline Companies, Inc. (Earthline); Earthline identified itself as a party appellee acting as Philadelphia's agent.

On December 1, 1982, this Board issued an Opinion and Order wherein we refused to rule on Earthline's preliminary objections, because we did not agree Earthline's claimed agency relationship with Philadelphia conferred party-appellee status on Earthline. We further ruled that Philadelphia had been served with copies of the notices of appeal in these matters, as required by 25 Pa. Code § 21.51 (f)(3), and therefore that these appeals have been perfected in accordance with 25 Pa. Code § 21.52(b). Nevertheless, because there was some possibility the notices of appeal had not reached Philadelphia's legal counsel, we ordered the Citizens to re-serve their notices of appeal on the office of Philadelphia's City Solicitor. Philadelphia was ordered to enter its appearance in these matters, and was given the opportunity to take whatever actions were required to protect its rights as the true party appellee in these appeals.

Philadelphia now has entered its appearance, and has filed its own preliminary objections (p.o.'s) to these appeals. In so doing, Philadelphia simply has adopted the p.o.'s primarily filed by Earthline; except for a few altered phrases, necessary to adopt Earthline's p.o.'s as Philadelphia's, the p.o.'s filed by Philadelphia are word-for-word identical to Earthline's. The Citizens already have responded to Earthline's p.o.'s, however, as has DER. Therefore, although the Citizens and DER have not filed responses to the Philadelphia p.o.'s, the Board will assume that the Citizens' and DER's previously filed responses to Earthline's p.o.'s continue to pertain; paragraph 1 of this Board's Order of January 4, 1983 in these matters already has indicated

to the parties that the previously filed responses to Earthline's p.o.'s would be accepted as responses to Philadelphia's p.o.'s.

Philadelphia's p.o.'s are numerous. We shall rule on them seriatim. For the most part, the p.o.'s raised to the two appeals are the same.

I. P.O. that the Board lacks jurisdiction over these appeals.

Philadelphia argues that appellant's failure to comment on the permit applications, which comments were invited in a Notice of Permit Applications appearing at 11 Pa. Bulletin 3531 (October 10, 1981), makes appellant ineligible to file the present appeal. Philadelphia cites Comm. of Pa. Ins. Dept. v. Pa. Coal Mining Assn., 25 Pa. Cmwlth 3, 358 A.2d 745 (1976) in support of this thesis.

This p.o. has no merit, and is dismissed. The Citizens and DER correctly point out that there is no requirement, anywhere in the Board's rules, that comment on a permit application is a necessary prerequisite to appealing the permit grant. See 25 Pa. Code §§ 21.51-.52. As for Pa. Ins. Dept., supra, it pertains to a totally different statutory scheme, and is quite inapposite to the Board's powers, which are governed by provisions of the Administrative Code, § 1921-A, 71 P.S. § 510-21. The Administrative Code states that no action of DER:

> shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board.

This right to appeal to the Board is unqualified; there is no indication whatsoever that an appellant must have availed himself of prior opportunities in the administrative process, such as commenting on a permit application.

II. P.O. that appellant lacks standing.

Philadelphia claims the appellant has not alleged that DER's actions will injure or otherwise adversely affect appellant; therefore, Philadelphia argues,

the appellant lacks standing to prosecute these appeals. DER agrees that to date appellant has failed to allege facts sufficient to confer standing, but does not take a position on the issue whether this failure justifies dismissal of the instant appeals. The appellant points to paragraph 4(f) of its notices of appeal as evidence that adverse effects of the permit grants indeed have been alleged.

Paragraph 4(f) of the appeal docketed as No. 82-220-G reads as follows:

> Grant and Montgomery Townships, the location of permit No. 602201, are both rural communities. Hunting of wild animals, such as deer and game birds, is not only a sport but an economic necessity for supplementing their food supply. Paragraph 10 of permit No. 602201 requires that "Grazing by animals whose products are consumed by humans shall be prevented for at least two (2) months or longer after sewage sludge application." There is no feasible way the City of Philadelphia, or their agents can guarantee that the wild life of the area will not be allowed to graze on the areas where sludge has been applied. Since the wild life is consumed by humans in this area, the permittees cannot possibly abide by paragraph number 10.

The requirements for a citizens group to have standing to appeal have been discussed recently by this Board. Concerned Citizens of Rural Ridge v. DER, EHB Docket No. 82-100-G, Opinion and Order (November 22, 1982). The Citizens association in its own right, or individual members of the association, must have an interest in the subject matter or particular question litigated (in this case the permit grants to Philadelphia) which is "substantial, immediate and direct." William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). The Pennsylvania courts have not, in environmental cases, explicitly ruled that an association has standing to represent its members if some of its members would have standing to sue in their own right, whether or not the association as an association has a "substantial, immediate and direct"

interest in the outcome of the litigation. However, the Board has concluded, in Rural Ridge supra, that the trend of recent non-environmental cases shows the Pennsylvania courts would so rule, given the opportunity. Concerned Taxpayers of Allegheny County v. Commonwealth of Pa. and Grace Sloan, State Treasurer, 33 Pa. Cmwlth. 518, 382 A.2d 490 (1978); Tripp Park Civic Association v. Pennsylvania PUC, 52 Pa. Cmwlth. 296, 415 A.2d 967 (1980); 1000 Grandview Association v. Mt. Washington Associates et al., 290 Pa. Super. 365, 434 A.2d 796 (1981); Fay v. Bohlin and Powell, ___ Pa. Super. ___, 444 A.2d 179 (1982).

Paragraph 4(f), quoted supra, does not allege facts sufficient to confer standing under the criteria described in the previous paragraph, nor are the deficiencies of paragraph 4(f) in this regard remedied by combining paragraph 4(f) with other paragraphs of appellant's notice of appeal in EHB No. 82-220-G. The Citizens have not alleged that individual members of their association would suffer food supply deprivations if permit No. 602201 is upheld. Even if the Citizens had so alleged, it is not wholly clear that such deprivation would provide an interest satisfying the William Penn test; certainly additional facts, tending to establish that the alleged food supply deprivation really provides a "substantial, immediate and direct" interest would have to be alleged. The allegation, in paragraph 4(f) supra, that the permittee "cannot possibly abide by paragraph number 10" of the permit in no way helps to confer standing on the Citizens. The permit has been issued by DER under the authority of Act 97, July 7, 1980, the Solid Waste Management Act (SWMA), 35 P.S.A. §§ 6018.101 et seq. Section 104 of the SWMA, 35 P.S.A. § 6018.104, clearly gives DER the power to administer and enforce the SWMA, including the granting of permits and the prosecution of violators. Nowhere in the SWMA is there any indication that the Pennsylvania legislature intended

that citizens groups like the appellant were to act as "private attorneys general," looking over DER's shoulders as DER administered the SWMA.

The preceding paragraph pertains to the appeal docketed as No. 82-220-G. Although the Citizens association pointed to paragraph 4(f) as evidence of its standing to prosecute appeal No. 82-221-G, in actuality notice of appeal No. 82-221-G contains no paragraph 4(f). Indeed paragraph 4 of 82-221-G in its entirety reads as follows.

> 4. This appeal is based upon the following:
>
> a) The application for permit filed by the City of Philadelphia was incomplete and did not conform to the statute known as the Solid Waste Management Act.
>
> b) The variance between the initial application and the subsequent material supplied by applicant on July 12, 1982 was so great, in respect to the data given for the content of the sludge, that the DER should not have approved the application.
>
> c) Various requirements of the permit, as issued, have not been complied with by the City of Philadelphia, namely the various water monitoring requirements and the storage of sludge.
>
> d) Other grounds as they may become apparent through discovery.

These paragraphs 4(a) - 4(d) do not even come close to a justification of the Citizens' standing to prosecute appeal No. 82-221-G, for reasons which have been discussed in connection with 82-220-G. The catch-all paragraph 4(d), which also is paragraph 4(g) [mislabeled in the original as 4(f)] of appeal 82-220-G, provides no independent basis for standing. An appeal which on its face lacks standing is not made acceptable by the hope that standing will become manifest after discovery. This Board will not permit an appeal to be the excuse for a pure fishing expedition.

Nevertheless, despite the aforementioned deficiencies of the Citizens' appeals as filed, we shall not at this time dismiss the Citizens' appeals for lack of standing. If the Citizens deserve to have their appeals heard by this Board, we do not wish to deprive them of this opportunity because their pleadings have been inartful. It is possible the Citizens could plead facts sufficient to overcome Philadelphia's p.o. that the Citizens lack standing. Therefore we will give the Citizens another chance to allege facts warranting standing, by appropriate amendment of their notices of appeal. In this connection we stress we are aware that when the Citizens filed their appeal they--like any appellant--may not have been in possession of all facts supportive of standing, many of which could be learned through discovery only. But some threshold allegations of facts necessary to support standing must be made when an appeal is filed; the appeal cannot be an excuse for a pure fishing expedition, as we have said. Moreover, the date of this Opinion and Order is well past the 60 day period (after these appeals were filed) within which the Board expects discovery to be vigorously pursued. 25 Pa. Code §21.111(a). Consequently a request by the Citizens to defer filing the amended notices of appeal called for supra, on grounds of lack of time to complete discovery, will not be granted by the Board.

The Citizens may, if they so wish, accompany the aforementioned amendments with a memorandum of law in support of their standing. The other parties will have the same opportunity to file memoranda of law in support of their views on the standing issue. We will rule on the Citizens' standing shortly after the Citizens' amended appeals are received.

III. P.O. that the appeals are moot.

Philadelphia asserts that the appeals are moot because on or before the date on which Earthline received appellant's notices of appeal, Earthline already had very largely reclaimed the permitted sites. DER disagrees the appeals are moot, but offers no reason for its opinion. The Citizens seem prepared to accept Philadelphia's logic in this regard, but challenge the correctness of Philadelphia's assertions that reclamation has proceeded as rapidly as Philadelphia asserts.

This p.o. is wholly without merit, and is dismissed. As stated supra, 710 P.S. § 510-21 provides that actions of DER are not final until there has been an opportunity to appeal the action to this Board. The appeals in this matter are timely; if Philadelphia chose to implement the permits before their validity was ruled on by this Board, Philadelphia did so at its own risk. If the permits were unlawfully issued, they were not made lawful by Philadelphia's hasty implementation of the permit provisions. Assuming for the moment purely arguendo that the permits are overturned, Philadelphia's assertions that reclamation already is far advanced may become relevant in defenses by Philadelphia to enforcement actions by DER against Philadelphia arising out of Philadelphia's operations of the sites, but these assertions are wholly out of place in the present appeals, whose sole function is to determine whether DER abused its discretion in granting the permits.

IV. P.O. that the appeals are unverified.

Philadelphia moves to strike the appeals because they contain factual allegations, yet are unverified. According to Philadelphia, verification is "required by Rule 1024 of the Pennsylvania Rules of Civil Procedure which is made applicable to these proceedings by 25 Pa. Code § 21.64(b)."

Proceedings before the Board are governed by 1 Pa. Code Chapters 31-35, as modified by the Board's own rules, 25 Pa. Code Chapter 21. The content of the notice of appeal is set forth in 25 Pa. Code § 21.51; as the Citizens correctly observe, this section of the Board's rules nowhere specifies that the notice of appeal must be verified. Indeed, 1 Pa. Code § 33.12 states:

> Except as otherwise required by statute, it shall not be necessary to verify under oath any pleading, submittal or other document filed with an agency.

There is no "other" statutory requirement that notices of appeal to this Board be verified. As for 25 Pa. Code §21.64(b), it merely states:

> The form of pleadings, including where applicable the requirement for verification, shall be as specified in the Pennsylvania Rules of Civil Procedure.

This statement does not "require" that a notice of appeal be verified; verification may be "inapplicable." 25 Pa. Code § 21.51 and 1 Pa. Code § 33.12 have made the requirement for verification "inapplicable" to a notice of appeal to this Board.

This p.o. is rejected.

V. P.O. that the notice of appeal does not conform to Pa. R.C.P. No. 2152.

Philadelphia moves to strike the appeals because they have not been brought in the name of any members of the Citizens association, as trustees ad litem, as required by the Pennsylvania Rules of Civil Procedure, Pa. R.C.P. No. 2152.

Our discussion concerning the preceding P.O. IV is pertinent to this P.O. V, but our conclusion now differs. The language of 25 Pa. Code § 21.51 does not mention "trustee ad litem," any more than it mentions "verification." On the other hand, we now do not have, anywhere in 1 Pa. Code chapters 31-35,

a provision--analogous to 1 Pa. Code § 33.12--specifically rejecting the requirement that an association prosecute an appeal in the name of a trustee ad litem. Furthermore there is no analogue--in 25 Pa. Code § 21.64(b)--of the qualifying phrase "including where applicable the requirement for verification," which we read as supporting our thesis that a notice of appeal need not be verified. In 1 Pa. Code § 31.3, a "pleading" is defined as:

> Any application, complaint, petition, answer, protest, reply or similar document filed in an adjudicatory hearing.

This definition includes the notice of appeal.

It is reasonable, therefore, to read 25 Pa. Code § 21.64(b), even taken together with 25 Pa. Code § 21.51, as requiring that the form of the notice of appeal be consistent with the requirements of Pa. R.C.P. No. 2152. This conclusion is reinforced by consideration of the reasons for requiring Pa. R.C.P. No. 2152 in civil court litigation; these same reasons seem equally relevant to the instant appeals. In particular, Pa. R.C.P. No. 2155 makes the trustee ad litem liable for costs which may be taxed against a plaintiff unincorporated association. Although we presently have no expectation of assessing costs against the Citizens, nevertheless we think it is reasonable that the Citizens be represented by a responsible individual, acting as trustee ad litem, against whom such costs could be levied if necessary. The Board's authority to assess costs derives in part through 25 Pa. Code § 21.124, which permits the Board to assess such sanctions as are permitted in similar situations by the Pennsylvania Rules of Civil Procedure; Pa. R.C.P. No. 4019, which describes permissible sanctions in discovery disputes, permits the assessment of costs and other financial penalties against an offending party in a number of situations.

This p.o. of Philadelphia's is meritorious, therefore, insofar as it has pointed out a deficiency of the instant notices of appeal which requires correction. However, we will not strike the appeals solely for their initial failure to comply with Pa. R.C.P. No. 2152. The Citizens, as ordered below, will have to amend their appeals so that these appeals are brought in the name of a member or members of the Citizens association, as trustees ad litem.

VI. P.O. in the nature of a demurrer.

Philadelphia asks us to dismiss various portions of these notices of appeal on the grounds that the Citizens have failed "to state any factual or legal objections which constitute a basis for appeal of the Department's action in issuing the subject permit." The Citizens have responded unhelpfully to this p.o., to the effect that the p.o. "is a conclusion of law and does not require an answer."

In our view this p.o. of Philadelphia's has considerable merit. Although the Citizens have made forthright objections to the permits, the legal bases for concluding that DER has abused its discretion, even granting that the Citizens could prove all the facts they allege, have not been set forth by the Citizens. For example, how does the previously discussed allegation in paragraph 4(f) of appeal No. 82-221-G, that Philadelphia "cannot possibly abide by paragraph number 10" of the permit, imply DER should not have granted permit No. 602201? This allegation more reasonably seems to imply that Philadelphia has been granted an unfairly restrictive permit, and that Philadelphia, not the Citizens, should be appealing. Similar even more obvious criticisms pertain to the previously quoted paragraphs 4(a) - 4(c) of appeal No. 82-221-G.

Nevertheless, we shall not sustain this p.o. in the nature of a demurrer. As explained previously, the Board does not wish to deprive the Citizens of their opportunity to be heard merely because of inartful pleading. Furthermore, relying in part on the authority of 25 Pa. Code § 21.51(e), the Board customarily has been very unwilling to judge an appellant's case meritless until he has been able to complete his discovery, granted his notice of appeal makes a threshold showing of standing and of a possible legal basis for appealing. The Board's view in this regard is manifested by our standard Pre-Hearing Order No. 1, which was issued routinely in both these appeals. Paragraph 4 of Pre-Hearing Order No. 1 states that a party, including the appellant

> may be deemed to have abandoned all contentions of law or fact not set forth in its pre-hearing memorandum.

There is no proviso that contentions not previously made in the notice of appeal will be deemed abandoned.

Therefore this p.o. is dismissed. Philadelphia (and DER) will retain the right to move for judgment on the pleadings, or for summary judgment, after receipt of the Citizens pre-hearing memoranda in these appeals.

VII Other P.O.'s, in essence asking for more specific and more pertinently pleaded notices of appeal.

For reasons which have been explained in connection with earlier p.o.'s, we find these p.o.'s of Philadelphia's meritorious, but reject them nevertheless. At this late date, many months after the notices of appeal have been filed, and when the Citizens' pre-hearing memorandum should be filed in less than thirty days, it seems pointless--and merely would produce additional delay--to ask the Citizens to file more specifically and more artfully pleaded notices of appeal. The Citizens have been alerted, by our foregoing discussion, that their previous

pleadings have been deficient and that they will be held to the legal and factual contentions set forth in their pre-hearing memoranda in these appeals. Specific deficiencies of the notices of appeal, which the pre-hearing memoranda should rectify, have been described above. The Citizens' attention also is called to the specific deficiencies listed in various paragraphs of Philadelphia's p.o.'s; although we largely have rejected these p.o.'s, we believe many of them have merits (as we have indicated) which the Citizens seriously should consider.

In dismissing these p.o.'s VII of Philadelphia's, we recognize the aforementioned deficiencies of the Citizens' notices of appeal may have caused Philadelphia--and DER, which joined Philadelphia in moving for more specific notices of appeal--genuine difficulty in preparing their cases. Our Pre-Hearing Order No. 1 requires that Philadelphia and DER file their pre-hearing memoranda only fifteen (15) days after receipt of the Citizens' pre-hearing memoranda. Our leniency in granting the Citizens so much time to formulate precisely their objections to the permits--from September 20, 1982 when the notices of appeal were filed, to March 10, 1983 when the Citizens' pre-hearing memoranda now are due, after several continuances--should not be allowed to prejudice Philadelphia and DER. Therefore, we shall rule favorably on any reasonable requests by Philadelphia or DER for extensions of the time to file their pre-hearing memoranda, should they feel they have been prejudicially surprised by the anticipatedly more specific (than in the notices of appeal) contentions of fact and law in the Citizens' pre-hearing memoranda.

An Order, consistent with the foregoing Opinion, follows.

O R D E R

AND NOW, this 9th day of February, 1983, it is ordered that:

1. Except for the preliminary objections to the Citizens' standing to appeal, the preliminary objections filed by Philadelphia in the two above-captioned appeals are dismissed.

2. On or before February 28, 1983 the Citizens shall amend their two notices of appeal as follows:

a. Allegations which could confer standing shall be pleaded.

b. The appeals shall be brought in the name of a member or members of the Citizens association, as trustees ad litem (see Pa. R.C.P. No. 2152).

3. The Citizens, and the other parties, may file memoranda of law in support of their positions on the standing issue on or before February 28, 1983, but need not do so.

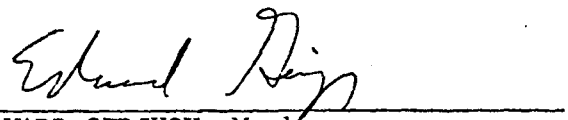
4. The Board will rule on Philadelphia's preliminary objections to standing shortly after February 28, 1983.

5. Lack of time to complete discovery will not, of itself, be grounds for the Board to extend the February 28, 1983 filing date called for in paragraph 2 supra.

6. The Board will rule favorably on reasonable requests by Philadelphia or DER for extensions of time to file their pre-hearing memoranda, presently due fifteen (15) days after the Citizens' pre-hearing memoranda are filed.

7. All parties are reminded of the possible sanctions described in paragraph 4 of our Pre-Hearing Order No. 1 in these appeals.

ENVIRONMENTAL HEARING BOARD



EDWARD GERJUOY, Member

DATED: February 9, 1983

cc: Howard Wein, Esquire
Cheré Winnek-Shawer, Esquire
Frank M. Thomas, Jr., Esquire
Marguerite R. Goodman, Esquire
Benjamin G. Stonelake, Jr., Esquire
Bureau of Litigation

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BETHLEHEM MINES CORPORATION :

:

: Docket No. 82-067-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and UNITED MINE WORKERS OF AMERICA,
Permittee

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

Bethlehem Mines Corporation (Bethlehem) operates Mine No. 60 (the mine), an underground bituminous mine located in Washington County, Pennsylvania. Normally, vehicular traffic within this mine is controlled by a dispatcher. For some time, however, Bethlehem had not been employing a dispatcher on non-producing coal shifts, or on other shifts, e.g., weekend shifts, wherein, in Bethlehem's judgment, the traffic was insufficiently heavy to require a dispatcher. But on March 23, 1981, DER ordered Bethlehem to assign a dispatcher to "be in attendance, on non-producing coal shifts, working shifts, weekends, where there are more than one track mounted vehicle operating in the mine at any given time." The asserted authority for the order was Section 270(d) of the Pennsylvania Bituminous Coal Mining Act (the Act), 52 P.S. § 701-270(d). This section reads:

> A system of signals, methods or devices shall be used to provide protection for trips, locomotives, and other equipment, coming onto tracks used by other equipment. Where a dispatcher is employed to control trips, traffic under his jurisdiction shall move only at his direction.

On March 27, 1981, Bethlehem requested that DER's Commissioner of Deep Mine Safety appoint a commission pursuant to Section 123 of the Act, "to make further examination into the matter in dispute" (the language of Section 123, 52 P.S. § 701-123). The commission was duly appointed and, on January 28, 1982, affirmed DER's original order. The commission report stated:

> It is the recommendation of this Commission that the order issued by District Mine Inspector Robert E. Fulton, dated March 23, 1981, that a dispatcher be on duty on idle days shall be held in strict compliance.

Bethlehem then timely appealed the DER order to this Board, on the grounds inter alia that DER's action is contrary to law, is outside the scope of the Act, and is not authorized by any valid rules, regulations and/or statutes of the Commonwealth of Pennsylvania. These grounds have been incorporated by Bethlehem into the motion for summary judgment which is the subject of this Opinion and Order. The Board's ruling on this motion, which herewith is dismissed, is based on the parties' pre-hearing memoranda, on their memoranda of law concerning the summary judgment motion, and on oral argument heard February 1, 1983. Factual assertions from these sources have been embodied in this Opinion only when, as with the history of this appeal recounted supra, the Board has been certain the asserted facts are disputed by none of the parties. The Board member writing this Opinion has benefited from a view of the mine in the company of all the parties, conducted February 4, 1983; this view included a tour of the mine's haulage tunnels on a track-mounted vehicle, during a non-producing shift with traffic controlled by a dispatcher. The term "parties" includes the United Mine Workers of America (UMW), who on September 15, 1982 was granted permission to intervene in this appeal.

Bethlehem argues that Section 270(d), quoted supra, does not require use of a dispatcher, though it delineates the powers a dispatcher has when one is employed; under Section 270(d), therefore, there is no authority to order Bethlehem to employ a dispatcher (Bethlehem further argues). Bethlehem also denies that other sections of the Act relied on by DER (see infra) authorize DER to require use of a dispatcher. According to Bethlehem, the Act at most permits DER to order Bethlehem to correct an unsafe condition in the mine (in this case the system Bethlehem is using to control traffic); the Act does not, Bethlehem asserts, permit DER to choose the means (in this case, use of a dispatcher) to correct the allegedly unsafe condition. Consequently Bethlehem asks for summary judgment as a matter of law--really a judgment on the pleadings because, in Bethlehem's view, there are no outstanding facts requiring proof; in fact, Bethlehem's motion for summary judgment was accompanied by no affidavits, and Bethlehem has continued to insist that the issue resides solely in the construction to be given Section 270(d).

Originally DER appears to have taken the view that if Bethlehem used a dispatcher to control traffic on coal-producing shifts, then under Section 270(d) a dispatcher would be required on all shifts. This was the content of a memorandum dated October 24, 1972, from William Oberdorfer, the Director Bureau of Legal Services to Walter J. Vicinelli, Director Bureau of Deep Mine Safety. Mr. Oberdorfer wrote:

> Bearing in mind that one of the fundamental purposes of the Act is to protect the health and promote the safety of all persons employed in and about the mines, it is my opinion that, under Section 270(d), where a dispatcher is employed to control trips during the normal five working days in a mine, the dispatcher is also required to direct traffic (two or more trips on a given track system where there is the possibility of collision) in that mine on the sixth day.

Mr. Oberdorfer's view is referred to in the aforementioned January 28, 1982 commission report. However, DER's memorandum of law and contentions during oral argument indicate that DER no longer is relying on, nor even accepts, Mr. Oberdorfer's construction of Section 270(d). On December 23, 1980, Dennis Strain, Assistant Attorney General Bureau of Legal Services, in a letter to his superior, Douglas Blazey, Chief Counsel DER, rejected application (to the instant dispute) of Oberdorfer's construction of Section 270(d). Mr. Strain wrote:

> This concerns a controversy at the Bethlehem Somerset No. 60 Mine, over the employment of dispatchers on idle shifts. Based upon my review of this matter, it is my opinion that Section 270(d) of the Pennsylvania Bituminous Coal Mine Act requires the use of a dispatcher, only if necessary to protect traffic using a common track. . .
>
> There are more factors to consider, consequently, than was contemplated in the 1972 interpretation. Rather than applying a single rule for mines which use dispatchers, the traffic system of each mine should be evaluated in light of the conditions which exist there. If an inspector decides that a dispatcher is required at a particular mine, he will have to justify the conditions which support that decision.

In essence, this December 23, 1980 legal opinion is the basis of DER's Memorandum of Law in opposition to Bethlehem's summary judgment. Mr. Strain happens to be the attorney representing DER in the instant appeal; he argues that Sections 121 and 123 of the Act authorize DER's mine inspector to evaluate the mine's traffic system "in light of the conditions which exist there," and to order a dispatcher if--in the inspector's judgment--safety so requires. Section 123, 52 P.S. § 701-123, authorizes the mine inspector "to exercise sound discretion in the performance of his duties." Section 121, 52 P.S. § 701-121, states:

> In case any mine or portion of a mine is, in the judgment of the mine inspector, in so dangerous a condition, from any cause, as to

> jeopardize life and health, he shall at once notify the secretary, who shall immediately appoint a commission to accompany promptly the said mine inspector to the mine wherein said dangerous condition is alleged to exist. The commission shall make a full investigation, and if they shall agree that there is immediate danger they shall direct the superintendent of the mine, in writing, to remove forthwith said dangerous condition.

The Board is bound by neither Mr. Oberdorfer's nor Mr. Strain's construction of Section 270(d). Nor need we rule on the Oberdorfer construction, because DER is not relying on it in the instant appeal. However, to lay the matter to rest, we will state that under any recognized principles of statutory construction, e.g., the Statutory Construction Act, 1 Pa. C.S.A. §§ 1501ff, esp. § 1921, we are unable to reach Mr. Oberdorfer's construction of Section 270(d). The plain language of Section 270(d), in our view, is that a dispatcher need not be part of an acceptable "system of signals, methods or devices. . . used to provide protection. . .", but that at any time when a dispatcher is being employed as part of the system, traffic shall move only at the dispatcher's direction; in particular, as we interpret 270(d), use of a dispatcher on some shifts carries no implication a dispatcher is needed on other shifts.

On the other hand, we find Mr. Strain's construction of Section 270(d) very reasonable, especially when--as Mr. Strain urges--Section 270(d) is read in conjunction with Sections 121 and 123, bearing in mind the title of the Act, 52 P.S. § 701-101:

> An Act relating to bituminous coal mines, . . . providing for the health and safety of persons employed in and about the bituminous coal mines of Pennsylvania.

In particular, we rule that the function of Section 270(d), in the statutory scheme, is to mandate a "system of signals, methods or devices" which will ensure safe transport when equipment "is coming out onto tracks used by other equipment." W

further rule that Sections 121 and 123 together give the inspector the authority, in the exercise of sound discretion, to decide that Bethlehem's system of signals, methods or devices is unsafe without a dispatcher.

It is true that Section 121 only authorizes the mine inspector to notify the secretary of the dangerous condition the inspector discovered; only after the inspector's conclusions have been affirmed by a commission is the secretary authorized to order the mine superintendent "to remove forthwith said dangerous condition." In the instant appeal, the order was issued by the mine inspector before the commission called for by Section 121 had been appointed. However, Bethlehem immediately asked for a commission under the authority of Section 123, and this commission did affirm the inspector's original March 23, 1981 order. Under the procedural aspect of the instant appeal, therefore, any deviation between the procedure called for in Section 121 and the actual sequence of events in the instant appeal is inconsequential; Bethlehem's rights have been fully protected.

There remains, however, the issue raised by Bethlehem, that even if DER is empowered to decide Bethlehem's present traffic control system is unsafe, DER is not empowered to prescribe use of a dispatcher to make it safe. Although Bethlehem argues ably in favor of this very limiting (on DER) construction of the Act, we find DER's position on this issue more persuasive. Despite Bethlehem's oral arguments that the Supreme Court's recent holding in DER v. Butler County Mushroom Farm, Slip Opinion (Pa., December 23, 1982) can be distinguished from the instant appeal, we believe Mushroom Farm is applicable to this appeal, and indeed is dispositive of this remaining issue of Bethlehem's. Although the Mushroom Farm case involved the Pennsylvania General Safety Law, 43 P.S. §25-1 et seq., the thrust of the Supreme Court's opinion easily is broad enough to encompass DER orders under the Bituminous Coal Mining Act.

In Mushroom Farm, the Commonwealth Court had ruled that under the General Safety Law, DER could not issue administrative compliance orders. The Supreme Court overturned this ruling, saying in effect that unless the General Safety Law clearly manifested a legislative intention to forbid such compliance orders, the Legislature must have expected that DER's enforcement powers under the General Safety Law would include the power to issue compliance orders. The Mushroom Farm Court found no intention to forbid administrative compliance orders in the General Safety Law, averring such an intention would have been unusual. In particular, the Court wrote:

> The result of the Commonwealth Court's holding is to restrict the DER to seeking judicial enforcement under the Act [the General Safety Law] and to deprive it of the adjudicatory power which is a customary and vital tool in the functional operations of present day administrative agencies. . . While such a result is contrary to the normal practice of our General Assembly in creating administrative agencies of this nature, ... , this uniqueness must, nevertheless, be accepted if it in fact represents the true legislative intention. . . The title to the Act [the General Safety Law] unequivocally demonstrates a legislative concern for the safety of employees in this employment environment and also reflects an intent to confer upon the Department. . . the power to monitor such operations with a view to the safety of these employees. . .
>
> Moreover, the issuance of an order is not limited to the correction of a violation but also may be employed as a means to establish a standard of conduct in furtherance of the purposes of the Act. Whereas the delegated legislative aspect of the agency's power is generally used to establish standards of conduct, the agency also may utilize, in particular instances, the adjudicative aspect of the agency's power for further standards of conduct needed to meet specialized problems.

In the instant appeal, Bethlehem is not challenging the power of DER to issue an administrative compliance order, but is insisting that the order must be limited to the requirement that Bethlehem correct an allegedly unsafe

DER also has the burden of showing that its proposed cure for the unsafe operation namely the assignment of a dispatcher "to be in attendance, on. . . shifts, . . . , where there are more than one track mounted vehicle operating in the mine at any given time," will provide safe operation. These are heavy burdens on DER. If DER can meet them, it will have shown inter alia that Bethlehem had been operating unsafely and that a readily attainable cure to the unsafe operation was available but had not been used by Bethlehem.

Under the circumstances of these burdens DER already faces, it is unreasonable to ask DER--as Bethlehem would ask--to confine its role to evaluation of Bethlehem's proposed cures for the unsafe operation, perhaps having to reject a dozen Bethlehem proposals. Moreover, assuming arguendo DER has met its aforementioned burdens, is DER then supposed to permit Bethlehem--which had been operating unsafely as DER showed--to continue to operate possibly unsafely while DER evaluates one after another of Bethlehem's newly proposed cures? Would it be fair to the workers in the mine, represented in this appeal by the Intervenor, to make them work under possibly unsafe conditions until Bethlehem comes up with a mode of operation DER agrees is safe, when DER already has shown that its proposed remedy--in this case use of a dispatcher--will provide safe operation?

We do not believe these outcomes, following from Bethlehem's view of what the Act empowers DER to order, are reasonable or could have been what the Legislature intended. If Bethlehem feels it has other (than use of a dispatcher) means of providing safe operation, it can propose those means as an affirmative defense during the hearing on the merits of this appeal, or can appeal at a later time from DER's refusal to permit Bethlehem to make use of those other means. In either of these events, Bethlehem will have the burden of showing that

DER's refusal to accept such means of traffic control as a substitute for a dispatcher is an abuse of DER's discretion. It is our opinion that imposing this burden on Bethlehem is fair and lawful, and consistent with the precepts of Mushroom Farm when, as we are assuming arguendo, DER will have maintained its burdens of showing Bethlehem had been operating unsafely but could operate safely with a dispatcher.

O R D E R

WHEREFORE, this 16th day of February, 1983, Bethlehem's Motion for Summary Judgment in the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY, Member

DATED: February 16, 1983

cc: Bureau of Litigation
Dennis Strain, Esquire
R. Henry Moore, Esquire
Robert S. Whitehill, Esquire

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WILLOWBROOK MINING COMPANY :

:

Docket No. 82-137-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR DER's MOTION FOR SANCTIONS

Willowbrook has appealed DER's denial of a variance for Willowbrook to mine coal within 300 feet of certain dwellings. Willowbrook has served Interrogatories on DER and received answers to them. On September 1, 1982, DER, in its turn, has served its First Set of Interrogatories and its First Requests for Admissions, on Willowbrook. Answers to these discovery requests were filed by Willowbrook on or about October 14, 1982. These answers included various objections, including "General Objections" to the entire Set of Interrogatories and Requests for Admissions. On November 3, 1982, DER responded with a Motion for Sanctions, requesting that the Board:

(1) Order Willowbrook to correct the alleged deficiencies in its Answers to DER's Interrogatories and Requests for Admissions, these alleged deficiencies having been described in paragraphs 15-24 of DER's Motion.

(2) Strike Willowbrook's aforesaid "General Objections", together with any language, in Willowbrook's answers, suggesting that these answers are "subject to Appellant's General Objections."

The Board, consistent with its usual practice and with 1 Pa. Code §35.179, on November 10, 1982 advised Willowbrook that its answer to DER's aforesaid Motion for Sanctions must be filed on or before November 24, 1982. In the meantime, Willowbrook's counsel informed the Board that he would reply to the Motion on or before November 22, 1982. Nevertheless, Willowbrook did not file a reply to the Motion. Instead, Stephen C. Braverman, Willowbrook's counsel, met with Alan S. Miller, DER's counsel, and apparently reached an amiable resolution of their discovery controversy. In particular, on November 24, 1982, Mr. Braverman wrote Mr. Miller--with a copy to the Board--a summary of the supplemental responses (in addition to those already filed) Willowbrook expected to make to DER's outstanding discovery requests. Mr. Miller for his part wrote the Board on November 24, 1982 that receipt of the aforementioned supplemental responses "would obviate the need for a ruling on the Department's Motion for Sanctions."

At the parties' joint request, therefore, the Board suspended action on DER's Motion for Sanctions, pending the filing of Willowbrook's supplemental responses. On January 14, 1983, nothing having been heard from the parties, the Board asked Mr. Miller to report on the status of his discovery requests. On January 19, 1983, Mr. Miller replied that he had not yet received the promised supplemental responses; Mr. Miller indicated that he was writing Mr. Braverman setting a deadline of January 31, 1983 for receipt of those responses. On February 4, 1983, Mr. Miller advised the Board that Mr. Braverman had neither

filed the supplemental responses nor otherwise contacted Mr. Miller concerning this matter; Mr. Miller therefore renewed his request that the Board act on his November 3, 1982 Motion for Sanctions. Although this letter was copied to Mr. Braverman, as of this date the Board has not received a response from Mr. Braverman to Mr. Miller's renewal of his Motion, nor have the supplemental responses been filed.

If the facts are as described above, and we have no reason to believe differently, DER unquestionably is entitled to have sanctions imposed on Willowbrook. However, we shall not grant all the sanctions requested in DER's original Motion. Mr. Miller's letter of November 24, 1982 to the Board clearly indicated that the supplemental responses promised by Mr. Braverman would meet DER's discovery needs. Therefore, rather than attempt to decide whether DER's allegations of deficiencies in Willowbrook's answers were justified, we simply order Willowbrook to file forthwith the supplemental responses described in Mr. Braverman's letter of November 24, 1982 to Mr. Miller.

Under the Board's rules, 25 Pa. Code §21.124, Willowbrook's failure to comply with this Order may subject Willowbrook to sanctions described in Rule 4019 of the Pennsylvania Rules of Civil Procedure. On the other hand, under Rule 4019(g)(1) imposition of financial penalties for failure to comply with the Board's present Order would not be lawful unless Willowbrook has been given the opportunity for a hearing to show cause why the present Order shall not issue. Consequently, the present Order also gives Willowbrook this opportunity.

* * * * * *

O R D E R

WHEREFORE, this 22nd day of February, 1983, it is ordered that:

1. On or before March 1, 1983, Willowbrook--if it feels its failure to have filed the supplemental responses promised November 24, 1982 can be justified--shall request a hearing whereat it can justify said failure.

2. Unless Willowbrook timely requests the aforesaid hearing, Willowbrook--on or before March 4, 1983--shall file all supplemental responses it agreed to file in Mr. Braverman's letter of November 24, 1982 to Mr. Miller.

3. If Willowbrook, having failed to request the hearing described in paragraph 1 above, does not comply with paragraph 2 above, it will be deemed to have waived the opportunity for a hearing referred to in Rule 4019(g)(1) of the Pennsylvania Rules of Civil Procedure.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY, Member

cc: Bureau of Litigation
Ward T. Kelsey, Esquire — Certified Mail No. 587 765
Alan S. Miller, Esquire — " " " 587 765
Stephen C. Braverman, Esquire — " " " 587 766

DATED: February 22, 1983

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MAGNUM MINERALS :

:

Docket No. 82-230-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTIONS FOR SANCTIONS AND FOR PROTECTIVE ORDER

On September 3, 1982, DER denied Appellant's application for a mine drainage permit. On September 27, 1982, Magnum filed a timely appeal of this permit denial. Thereafter, on November 26, 1982, DER served its First Set of Interrogatories, 49 in number, on Magnum. On December 3, 1982, Magnum filed objections to the bulk of these Interrogatories, accompanied by a Motion for Protective Order freeing Magnum from the burden of answering any of the Interrogatories. Nevertheless, Magnum--after some discussion with DER--did file answers to DER's Interrogatories on January 12, 1983, without waiting for the Board to rule on its objections or its Motion for a Protective Order. DER, finding these answers unsatisfactory, now has filed a Motion for Sanctions, requesting that Magnum be ordered to answer various Interrogatories more fully.

Simultaneously, DER--on January 26, 1983--filed its response to Magnum's December 3, 1982 Motion for a Protective Order. Magnum, on February 11, 1983, has filed its Answer to DER's Motion for Sanctions; included in this Answer is a paragraph designated "New Matter" by Magnum, requesting the Board "to dismiss the Motion for Sanctions and to grant the Appeal."

We proceed to rule on these outstanding discovery disputes, beginning with Magnum's Motion for Protective Order. DER quite correctly argues that Magnum's Motion for Protective Order, and the objections accompanying that Motion, have been waived (more accurately, mooted) by Magnum's January 12, 1983 filing of its Answers to the previously objected-to Interrogatories. In its answers, Magnum did not renew its objections to DER's Interrogatories; indeed, Magnum's Answer to DER's Motion for Sanctions largely argues that Magnum has furnished satisfactory answers to DER's Interrogatories, at which answers DER now is "nit-picking." Therefore we dismiss as moot Magnum's Motion for Protective Order and accompanying objections to DER's Interrogatories, and henceforth will concentrate on DER's Motion for Sanctions.

DER's Motion for Sanctions offers specific complaints about Magnum's answers to a number of DER's Interrogatories. Magnum's response to DER's Motion gives specific reasons why DER's complaints are unreasonable and do not merit sanctions. Consequently we cannot avoid an equally specific examination of the objected-to individual Interrogatories and their Answers.

Interrogatory 4

DER claims that Magnum's Answers to Interrogatories 4(b), 4(c) and 4(d) are insufficient. Magnum argues to the contrary. The relevant portions of Interrogatory 4 are:

> 4. Referring to the statement contained in Paragraph 3(b) of Appellant's Notice of Appeal that "the action taken was arbitrary and capricious and not in accord with the law and/or rules and regulations and/or facts," please provide:...
>
> b. A DESCRIPTION of the specific acts and provisions of such acts you contend were not adhered to by the Department.
>
> c. A DESCRIPTION of the specific "rules and regulations" you contend were not adhered to by the Department.
>
> d. A DESCRIPTION of "facts" which you contend existed and were not considered or adhered to by the Department.

After answering part (a) of Interrogatory 4, Magnum wrote, presumably in answer to each of portions 4(b), 4(c) and 4(d), the following (quoted in full):

> This is a legal conclusion and no Answer is required. However, all of the other answers to these Interrogatories substantiate the fact that this property can be mined without pollution and thus the Department was wrong to deny the application.

Magnum's answers to Interrogatories 4(b), 4(c) and 4(d) are not responsive. DER is not asking Magnum to draw a legal conclusion. DER is asking Magnum for the statutes, rules and regulations and "facts" on which Magnum is basing its contention that DER's action was "not in accord with the law and/or rules and regulations and/or facts." As such, DER is asking for information which clearly "is relevant to the subject matter involved in the present action," i.e., which falls under the scope of discovery permitted by Pa. Rules of Civil Procedure Rule 4003.1, which is applicable to the instant appeal by virtue of the Board's own rules and regulations 25 Pa. Code §21.111(c). In fact, much of the information demanded in these Interrogatories already was required of Magnum in our Pre-Hearing Order No. 1 (paragraphs 2A and 2B). Magnum has not contended that

the answers to Interrogatories 4(b), 4(c) and 4(d) necessarily involve non-discoverable information of the sort described in Pa. R.C.P. 4003.3 or 4011. Certainly Magnum has not claimed that the information requested is privileged. Magnum's objections that the information requested by DER is not discoverable because the information "is already in possession of the inquirer," or because it is being asked to "prepare and furnish information" are without merit. Indeed [Goodrich-Amram 2d §4003.1:25]

> "The present Rules contain no provision mentioning the knowledge of the inquirer as limiting discovery... None of the decisions under the original Rules is now authoritative... Knowledge of the facts is no longer an automatic barrier to discovery.

Magnum is ordered to furnish new answers to Interrogatories 4(b), 4(c) and 4(d), correcting the deficiencies (described in paragraphs 8 and 9 of DER's Motion for Sanctions) in Magnum's original answers to these Interrogatories.

Interrogatory 5

This Interrogatory reads:

> 5. Please list the location of any and all surface mines within a one (1) mile radius of the proposed Magnum operation where the Middle Kittanning coal seam has been mined without causing post-mining pollution.

Magnum's complete answer is: "Within knowledge of Department." Its response to DER's Motion for Sanctions reiterates: "Appellant is not required to answer Interrogatories where the answers are already within the knowledge of the adverse party."

We already have explained that Magnum's "Within knowledge of Department" is an insufficient reason for not answering this Interrogatory fully. On the other hand, we find the information requested to be of very doubtful relevance

to this appeal. Neither Magnum's appeal nor its pre-hearing memorandum claim Magnum will prove the Middle Kittanning seam has been mined within one mile of the proposed Magnum operation "without causing post-mining pollution." Nonetheless, the rules intend that discovery be liberally allowed and that the limitations on discovery be narrowly construed [see Goodrich-Amram 2d, §4001:3]. Therefore, we order Magnum to answer Interrogatory 5, within Magnum's present immediately-at-hand knowledge, with no implication that Magnum is to search out the facts, in its own files or elsewhere, concerning the post-mining pollution caused by past mining of the Middle Kittanning coal seam within one (1) mile of the proposed Magnum operation. We believe this ruling is consistent with the intent of the Pennsylvania Rules of Civil Procedure without imposing an undue burden on Magnum.

Interrogatory 27

The problem with this Interrogatory may be no more than hasty draftsmanship. Magnum says DER is "nit-picking." We shall settle this point by ruling that Magnum's answer to Interrogatory 27(b): "None with the same characteristics pertaining to mining methods" is intended to mean: "No mine sites...[which] exhibited the same characteristics as indicated in the overburden analysis submitted by Magnum with its permit application where a post-mining discharge did occur." If Magnum's answer was not so intended to mean, then Magnum must furnish a new totally unambiguous answer to Interrogatory 27(b).

Interrogatories 31 and 32

Interrogatory 31 reads:

> 31. Please list and provide the location(s) of any and all streams, creeks and tributaries located within a one (1) mile radius of the proposed Magnum operation which would be in any way affected during or after surface mining.

Magnum's answer was:

> No degradation is expected in any stream or tributary during or after mining.

DER now claims that Magnum's answer is unresponsive, because Magnum has addressed "degradation" only, and ignored other ways of "affecting" the watercourses in the vicinity of the proposed mining operation. Magnum insists that the term "affected" in the Interrogatory could only mean "degradation," so that--argues Magnum--it has answered the Interrogatory.

The dictionary definitions do not make the words "affected" and "degraded" synonyms. If other means of "affecting" the watercourses than "degrading" them are relevant to this appeal, DER would be entitled to ask for and get the requested information about "affected" watercourses, unless DER's request is outside the allowed scope of discovery for reasons not yet discussed. As it happens, this Interrogatory does appear to be outside the allowed scope of discovery. In particular, Interrogatory 31, as written, violates the limitations on the scope of discovery embodied in Pa. R.C.P. Rule 4011(b) and/or (e). The problem stems from the phrase "in any way affected" employed in the Interrogatory. There are no limits on the phrase "in any way." Magnum is being asked to examine any effects of the mining operation on any watercourses in the vicinity, no matter how irrelevant or how insignificant these effects are. For example, a watercourse whose temperature would be changed by 0.001°C would be "affected" under this Interrogatory.

Therefore, we will not require Magnum to enlarge upon its answer to Interrogatory 31. If DER feels it must have more information about the effects of Magnum's mining operation on nearby watercourses, it will have to frame Interrogatories which list specific watercourse effects DER regards as relevant,

and then ask Magnum whether such effects will occur. Petitions by DER to submit such Interrogatories will require leave of the Board. 25 Pa. Code §21.111(a).

As for Interrogatory 32, we agree with Magnum that its answer to Interrogatory 32 was consistent with the answer Magnum gave to Interrogatory 31. Again, if DER requires more specific information about the effects on water quality in the vicinity of the proposed mining operation, it will have to frame more specific Interrogatories.

Interrogatory 38

Interrogatory 38 reads:

> 38. Please state at what depth below the lowest coal seam and below drainage the major aquifer can be located and state in detail what effects the proposed Magnum surface mining operation would have on that aquifer.

Magnum's answer, in full, was: "Cannot be answered as worded."

In its response to DER's Motion for Sanctions, Magnum wrote:

> This Interrogatory cannot be scientifically answered. The use of the word "can" is improper. Furthermore, Appellant does not know what is meant by "major acquifer" [Magnum's spelling]. Is Appellant to define that phrase?

It is true that this Interrogatory could have been more felicitously worded, and that as a result its meaning is somewhat ambiguous. It also is true that the term "major aquifer" is not defined anywhere in DER's First Set of Interrogatories. On the other hand, Magnum's answer, "Cannot be answered as worded," is unsatisfactory by the standards of Pa. R.C.P. 4006(a)(2). The "reasons for the objection" called for by Pa. R.C.P. 4006(a)(2) should be specific and should set forth in detail the matters to which exception is taken (see Goodrich-Amram 2d, §4066(a):3). Magnum's objection fails to explain why

the Interrogatory "cannot be answered as worded"; lacking such explanation, the Board does not agree the Interrogatory cannot be answered, though we do agree differing interpretations of the Interrogatory may call for differing answers. When Magnum filed its original (December 5, 1982) objections to DER's Interrogatories, it did not complain Interrogatory 38 could not be answered; rather, Magnum then complained Interrogatory 38 was objectionable as one of a group of Interrogatories whose

> answers are either already known to DER, or readily apparent and discoverable from public records of documents, or are already in possession of DER, or would require Appellant to perform an independent investigation.

The terms "major" and "aquifer" have established dictionary-defined meanings; Magnum should have no difficulty in deciding on a reasonable interpretation of the phrase "major aquifer." The phrase "can be located" in Interrogatory 38 seems intended to mean "is likely to be found"; at any rate, we instruct Magnum to so construe the Interrogatory's phrase "can be located." Magnum is ordered to answer Interrogatory 38 with "major aquifer" and "can be located" interpreted as we have just described.

Interrogatory 46

Interrogatory 46 asks Magnum to identify each of its expected expert witnesses in this matter, and for each such witness to state:

> a. his or her area of expertise, experience, professional societies, publications, authored or co-authored, date of publication, journal, if any, and a summary of its contents;
>
> b. the subject matter on which the expert is expected to testify, as provided in Pa. R.C.P. 4003.5(a)(1)(a);

> c. the substance of the facts and opinions to which he or she is expected to testify and a summary of the grounds for each opinion, as provided in Pa. R.C.P. 4003.5(a)(1)(b).

In response to this Interrogatory, Magnum listed four expert witnesses: Matthew H. Kenealy, Todd Giddings, James Strange and Chris Moravec. DER complains that Magnum provided neither the substance of the facts and opinions to which each of these experts is expected to testify nor a summary of the grounds for each opinion. DER further complains that, except for Matthew Kenealy, DER failed to provide the qualifications and area of expertise of its expert witnesses. Magnum insists that it fully has answered the Interrogatory.

Omitting the furnished qualifications and area of expertise, etc., of Matthew Kenealy, which DER accepts as a satisfactory answer to Interrogatory 46(a) for Mr. Kenealy, Magnum's answer to Interrogatory 46, in full, is:

> Matthew H. Kenealy, III, ... will testify to everything contained in the original mine drainage Application and the overburden analysis and the conclusions to be drawn therefrom.
>
> Todd Giddings. (Qualifications known to Department). Conclusions to be drawn from the Application and the overburden analysis.
>
> James Strange--Mining Manager. Will testify as to proposed method of mining and specialized handling.
>
> Chris Moravec--Mining Engineer. Will testify as to method of mining and specialized handling.

Parts (b) and (c) of Interrogatory 46 track the language of Pa. R.C.P. Rules 4003.5(a)(1)(a) and 4003.5(a)(1)(b). Magnum's answer to Interrogatory 46 does not indicate which portions of its answer correspond to portions (a), (b) or (c) of Interrogatory 46. We will rule that Magnum's answer has furnished a satisfactory answer to Interrogatory 46 (b), for each of the expert witnesses

listed. We also rule, however, that Magnum has failed to answer Interrogatory 46(c) for any of its expert witnesses. A statement as to the subject matter of expert testimony, such as Todd Giddings' "Conclusions to be drawn from the Application and the overburden analysis," does not convey "the substance of the facts and opinions to which the expert is expected to testify," nor does such a statement provide "a summary of the grounds for each opinion." That the answer to Interrogatory 46(c) should be more than a statement of the subject matter of expected testimony is implied by the fact that the drafters of the discovery rules wrote two individual Rules 4003.5(a)(1)(a) and 4003.5(a)(1)(b). In addition, the scope of the answer the drafters expected to an interrogatory such as 46(c) may be gathered from the last sentence of Rule 4003.5(a)(1)(b), which states:

> The party answering the interrogatories may file as his answer a report of the expert or have the interrogatories answered by his expert. The answer or separate report shall be signed by the expert.

Therefore, Magnum is ordered to furnish a full answer to Interrogatory 46(c) for each of its expert witnesses, consistent with the foregoing discussion. The requirement that the answers be attested to by the experts themselves (see the quote immediately supra) shall not be overlooked. As for Interrogatory 46(a), it is obvious on its face that Magnum's answer to Interrogatory 46 provided none of the information requested in Interrogatory 46(a), for Todd Giddings, James Strange or Chris Moravec. Magnum is ordered to provide a resume and publications list for each of these three witnesses, if such resumes and publication lists already are available in Magnum's or the witnesses' files. If not already available, the witness shall provide a brief summary of his professional experience and his publications, or in the alternative shall furnish a reference to a readily

available Biographical Directory, e.g., Who's Who, where such summaries can be found. The answer that DER already has the information will not suffice unless Magnum can point specifically to files in which the desired information in the form desired is located. Magnum need not furnish a list of publications where no list already exists. Whether or not Magnum furnishes a publication list, Magnum need not prepare a summary of any of the publications of any of its expert witnesses; such summaries are not called for in the text of Rule 4003.5, and--because their relevance is far from apparent and their preparation would be burdensome--are outside the scope of discovery allowed by Pa. R.C.P. Rule 4003.1.

Interrogatory 47

Magnum and DER also are disputing the sufficiency of Magnum's answer to Interrogatory 47. This Interrogatory reads:

> 47. Please IDENTIFY each person who supplied any information for the Answers to, or participated in answering, any Interrogatory contained herein, and list each Interrogatory for which that person supplied information.

Magnum's answer was: "James Strange; Chris Moravec." Evidently Magnum has not furnished the information requested. However, we shall not require Magnum to identify, for each Interrogatory, each person "who supplied any information for the Answers to, or participated in answering" that Interrogatory. Again DER is requesting information of very dubious relevance, well outside the scope of discovery. DER, with its use of the unlimited terms "any" and "participated in", is asking Magnum to keep records of casual and/or de minimis contacts made during preparation of its Answers to each of the Interrogatories. DER legitimately may need the names of specific persons possessing specific types of information, but these names then should be asked for directly, in carefully delineated Interrogatories

not indirectly via an unlimited Interrogatory like 47.

DER is entitled to ask for the identities of all those persons who contributed significantly to the preparation of Magnum's Answers to DER's First Set of Interrogatories, without a breakdown of their contributions by Interrogatory. We shall assume that the names James Strange and Chris Moravec encompass all such persons; if not, Magnum is ordered to supplement its answer to Interrogatory 47 so as to make its list of such contributors complete. We note that merely furnishing names, without further information, is not "identification" sufficient to satisfy the requirements of, e.g., the identification of expert witnesses called for in Pa. R.C.P. Rule 4003.5(a)(1)(a). On the other hand, we do not agree that Magnum is required to furnish all the information called for under Definition 5, IDENTIFY, of DER's First Set of Interrogatories. A person, expected witness or not, is "identified" when sufficient information is provided for the propounder of the Interrogatories (in this case DER) to seek the person out, to ascertain the person's reputation, and to gain an initial understanding of his or her relationship to the instant appeal. There is no need to burden the recipient of the Interrogatory with the task of furnishing the huge amount of additional information DER is requesting under its definition of IDENTIFY, most of which information well may be quite irrelevant to the appeal. If information of this sort is relevant for any identified person, it can be discovered specifically, via appropriate specifically directed later Interrogatories, or via deposition.

We trust that Magnum's to-be-furnished answers, to Interrogatory 47 and to other Interrogatories discussed above, will be consistent with the precepts of the immediately preceding paragraph. We add that our Order makes our procedure in this discovery dispute consistent with the requirements of Pa. R.C.P. Rule 4019(g)(1 which is applicable to this appeal through 25 Pa. Code §§21.111 and 21.124.

O R D E R

WHEREFORE, this 28th day of February, 1983, it is ordered that:

1. On or before March 14, 1983, MAGNUM shall furnish answers to those Interrogatories for which, consistent with the foregoing Opinion, additional answers are required.

2. On or before March 10, 1983, either party may request the opportunity for oral argument designed to induce the Board to modify this Opinion and Order.

3. If no such timely request for oral argument is received, the parties will be deemed to have waived the opportunity for a hearing called for in Pa. R.C.P. Rule 4019(g)(1).

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY, Member

cc: Bureau of Litigation
Ward T. Kelsey, Esquire
Alan S. Miller, Esquire
Leo M. Stepanian, Esquire

DATED: February 28, 1983

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

SOBERDASH COAL COMPANY :

:

Docket No. 83-030-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION FOR LEAVE TO APPEAL NUNC PRO TUNC

On January 31, 1983 this Board received an appeal from Soberdash Coal Company (Soberdash), objecting to an order dated December 16, 1982, from DER to Soberdash, received by Soberdash on December 20, 1982. This appeal, which on its face was untimely under our rules, 25 Pa. Code §21.52(a), was accompanied by a petition for leave to appeal nunc pro tunc, as permitted under 25 Pa. Code §21.53.

The standards for allowance of an appeal nunc pro tunc have been enunciated by the Commonwealth Court. Rostosky v. DER, 26 Pa. Cmwlth 478, 364 A.2d 761 (1976). As we have stated recently in East Side Landfill Authority v. DER, EHB No. 81-209-M, Opinion and Order (February 8, 1982)

> To allow an appeal nunc pro tunc, the allowance must be based on extraordinary conditions and must involve fraud or some

> breakdown in the court's operation through... default of its officers, whereby the party has been impaired...[T]he mere neglect of counsel cannot justify the granting of an appeal nunc pro tunc.

We held similarly in Sharon Steel Corporation v. DER, 1978 EHB 205.

Soberdash's stated reason for requesting leave to file its appeal nunc pro tunc is that after reviewing DER's December 16, 1982 order it first believed it was in compliance, and only later--after the 30 day appeal period had elapsed did it come "into possession of information which causes Petitioner to believe that compliance with the terms and provisions of the said Order [of DER] may be impractical or impossible." This reason falls far short of the Rostosky requirements for allowing an appeal nunc pro tunc. The petition for leave to appeal nunc pro tunc is therefore rejected.

It follows, again under the authority of Rostosky, that we cannot take jurisdiction of Soberdash's appeal, as we often have ruled in instances of untimely appeals. See, e.g., Stephen Luhrs v. DER and Energy Resources, Ltd., EHB No. 82-231-H, Opinion and Order (January 17, 1983).

O R D E R

WHEREFORE, this 1st day of March , 1983, Soberdash's petition for leave to file an appeal nunc pro tunc is rejected, and Soberdash's above-docketed

appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Dennis Jay Harnish

DENNIS J. HARNISH, Chairman

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, Member

Edward Gerjuoy

EDWARD GERJUOY, Member

cc: Bureau of Litigation
Joel R. Burcat, Esquire
Robert M. Keim, Esquire

DATED: March 1, 1983

COMMONWEALTH OF PENNSYLVANIA

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HARRISBURG, PENNSYLVANIA 17101
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GEORGE AND BARBARA CAPWELL :

:

Docket No. 83-019-M

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

By letter dated December 15, 1982, the Bureau of Dams and Waterway Management of the Department of Environmental Resources (DER) advised the appellants George and Barbara Capwell that appellants' application for a permit to construct and maintain a solid-fill stationary dock along Quaker Lane in Silver Lake Township, Susquehanna County, Pennsylvania, had been denied by the Department, the notice was sent to appellants by certified mail and received by appellants on December 17, 1982.

The notice of appeal filed by appellants was received and docketed by this Board on January 18, 1983.

Under the provisions of 25 Pa. Code, Section 21.52(a) notices of appeals must be filed with this Board within thirty (30) days "after the party appellant has received written notice "of the final action taken by DER.

The last day for filing in this matter was January 17, 1983, and therefore this appeal was not timely filed.

Where an appeal is not filed within thirty (30) days from the date of receipt of notice of final action by DER, this Board has no jurisdiction to act upon the merits of the appeal. *Joseph Rostosky Coal Company v. DER*, 26 Pa. Cmwlth. Ct. 478, 364, A.2d. 761 (1976).

Accordingly, this appeal must be dismissed.

O R D E R

AND NOW, this 4th day of March, 1983, upon motion of DER, and upon consideration of the record herein which reveals that the instant appeal was filed after thirty (30) days from the date of receipt of the notice of final action by DER, the appeal of George and Barbara Capwell, at EHB Docket No. 83-019-M be and is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

Dennis Jay Harnish

DENNIS J. HARNISH
Chairman

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: March 4, 1983

cc: Bureau of Litigation
Louis A. Naugle, Esquire
George and Barbara Capwell

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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ENNIS J. HARNISH, CHAIRMAN
ANTHONY J. MAZULLO, JR., MEMBER
EDWARD GERJUOY, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

REV. AND MRS. DONALD LINTELMAN	)	
	)	
v.	)	
	)	Docket No. 82-295-G
COMMONWEALTH OF PENNSYLVANIA	)	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	)	
and J. L. HIGBEE SANITATION SERVICE, Permittee	)	
JEFFREY HIGBEE d/b/a HIGBEE SANITATION SERVICE	)	
	)	
v.	)	Docket No. 82-298-G
	)	
COMMONWEALTH OF PENNSYLVANIA	)	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	)	
COOLSPRING TOWNSHIP	)	
	)	
v.	)	
	)	Docket No. 82-299-G
COMMONWEALTH OF PENNSYLVANIA	)	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	)	
and JEFFREY HIGBEE, Permittee	)	

OPINION AND ORDER SUR
MOTIONS TO CONSOLIDATE AND TO QUASH

On or about September 1, 1981, Mr. and Mrs. Donald Lintelman et al. (Lintelman), appellants in the above-docketed appeal No. 82-295-G, filed a timely appeal of DER's action in issuing solid waste facility permit No. 601886 to Jeffrey Higbee (Higbee). That appeal was docketed at EHB 81-151-H, later changed to 81-151-G. Permit No. 601886 authorized the agricultural utilization--on property in Coolspring Township, Mercer County--of residential septic tank wastes collected by

Higbee. Issuance of permit No. 601886 also was timely appealed by Coolspring Township (Coolspring) in the appeal EHB 81-134-H, later changed to 81-134-G; Coolspring also is the appellant in the above-captioned appeal 82-299-G.

Extensive hearings have been held by the Board on the appeals 81-134-G and 81-151-G, which were consolidated. These hearings recently have been completed but all briefs have not yet been submitted. The appeals 81-134-G and 81-151-G therefore have not yet been adjudicated; in particular, the Board has not yet determined whether--as Lintelman and Coolspring urge--DER's grant of permit No. 601886 to Higbee was an abuse of discretion. In the meantime, on June 30, 1982 DER and Higbee entered into a Consent Order and Agreement wherein DER and Higbee agreed, inter alia, on the following findings of fact:

a. Between about May 1980 and May 1982, on about 50 separate occasions, Higbee disposed of septic tank wastes in an abandoned strip mine located in Jackson Township, Mercer County, on property owned by Charles Higbee, Jeffrey Higbee's father.

b. Higbee carried out the 50 disposals described in paragraph a above despite notice from DER that such disposal was unlawful.

DER and Higbee further agreed that:

c. For the aforementioned unlawful disposals, Higbee shall pay a civil penalty of $1,650 to the Commonwealth's Solid Waste Abatement Fund.

d. DER's Bureau of Solid Waste Management will review the Consent Order and Agreement for the purpose of deciding whether DER should "revoke, suspend or modify" the existing solid waste permit No. 601886.

e. Higbee waives all rights to appeal the Consent Order to the Environmental Hearing Board.

On November 19, 1982, the Bureau of Solid Waste Management wrote Higbee

that--pursuant to the promised review (see paragraph d supra)--Higbee's permit No. 601886 was suspended for the period from receipt of the November 19, 1982 letter to March 15, 1983. This suspension of his permit has been appealed by Higbee, in the above-captioned appeal 82-298-G. Higbee's main reasons for appealing are (quoting from his Notice of Appeal):

> The fine and other provisions of the consent order were sufficient deterrent from any such future action and the suspension of a totally different permit is unnecessary, overburdensome, and defeats the purposes of the Act.

On the other hand, Lintelman and Coolspring, in their respective appeals 82-295-G and 82-299-G, are appealing the permit suspension mainly on the basis that the penalties imposed by DER have been impermissibly weak; in particular--these appellants aver--DER should have revoked, not merely suspended, Higbee's permit No. 601886. These appellants also allege that:

(1) DER failed to give due consideration to the significance of allegedly perjured testimony offered by Higbee in the aforesaid hearings on appeals 81-134-G and 81-151-G.

(2) DER's mere suspension of Higbee's permit, along with other DER actions, manifests bias in favor of Higbee in this matter, stemming from a rather vaguely delineated DER "conflict of interest."

On January 6, 1983, DER moved to consolidate the appeals 82-295-G, 82-298-G and 82-299-G. On January 12, 1983, Higbee moved to quash the appeals 82-295-G and 82-299-G, mainly on the grounds that neither Lintelman nor Coolspring has standing to appeal DER's suspension of Higbee's permit "for actions taken elsewhere by the permittee" (quoting Higbee) which do not affect Lintelman or Coolspring. It is these Motions which are the subject of this Opinion and Order. Unfortunately, to make our

rulings on their Motions understandable, we have been forced to review supra the extensive history of Higbee's permit No. 601886.

Lintelman and Coolspring, though given the opportunity, have not opposed DER's Motion for Consolidation. The three above-captioned appeals all involve the same question of law, namely whether--taking into account all relevant circumstances, which are the same for the three appeals--DER's suspension of Higbee's permit was too hard on Higbee, or too soft, or just right, an issue which may not have been seriously examined since 1831.[1] Therefore, consistent with 25 Pa. Code §21.80(a), the three above-captioned appeals will be consolidated henceforth, under the common caption

LINTELMAN et al.	)	
	)	Docket Nos. 82-295-G
v.	)	82-298-G
	)	82-299-G
COMMONWEALTH OF PENNSYLVANIA	)	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	)	

The appellants Lintelman, Higbee and Coolspring will retain their individual rights as parties, if only because Higbee's interests clearly are diverse from those of Coolspring and Lintelman. However, the Board reserves the right to limit the testimony, including the number of witnesses, in any eventual consolidated hearings on the merits of these three appeals, in the interest of avoiding unnecessary costs or delay. See 25 Pa. Code §21.90(a), as well as 1 Pa. Code §§35.45 and 35.127.

Higbee's Motions to Quash 82-295-G and 82-299-G have been opposed by Lintelman and Coolspring respectively. They contend that their participation in the hearings on the earlier appeals 81-134-G and 81-151-G gives them standing to pursue the instant appeals. No authority is cited for this contention, which clearly is

---

1. Goldilocks and the Three Bears, first brought to print in 1831. See Opie, "The Classic Fairy Tales" (Oxford University Press 1974), pp. 199-200.

incorrect. To demonstrate standing to appeal under controlling precedent [see William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975) and its progeny], an appellant must demonstrate an interest in the subject matter or particular question litigated which is "substantial, immediate and direct." The DER action complained-of in the instant appeals, namely suspension of Higbee's permit, is not identical with the DER action complained-of in the earlier appeals 81-134-G and 81-151-G, namely the original permit grant. Thus a "substantial, immediate and direct" interest in the original permit grant of itself cannot convey standing to appeal the permit suspension.

Lintelman and Coolspring offer numerous other contentions in support of their standing to pursue the instant appeals. For the most part these contentions are wholly without merit, and do not warrant detailed rejection here. However, Lintelman does allege that not preventing Higbee from exercising his permit will adversely affect Lintelman and other immediately adjacent property owners; this allegation is sufficient to confer standing on Lintelman. Coolspring has managed to make similar allegations, and therefore also has standing to appeal. Franklin Township v. DER, 452 A.2d 718 (Pa. 1982). Higbee's Motions to Quash the appeals 82-295-G and 82-299-G are dismissed.

Before closing, a few further remarks about these appeals are in order. Higbee has not appealed his fine; indeed, he agreed not to do so (see paragraph e supra). Higbee has not petitioned for a supersedeas to stay DER's suspension of his permit. Therefore, the Board cannot give Higbee his requested relief--namely lifting the suspension--without an adjudication that DER's action in suspending the permit was an abuse of discretion. Higbee made no request that we offer him an accelerated hearing on the merits and consequent adjudication. Thus Higbee's

appeal 82-298-G has been handled routinely by the Board. In particular, our routine issuance on December 23, 1982 of Pre-Hearing Order No. 1 to the parties required Higbee to file his pre-hearing memorandum by March 8, 1983, only seven days before his permit suspension automatically ends. Higbee made no objection to this order, and as of this date has not yet filed his pre-hearing memorandum. Consequently, we cannot expect DER's pre-hearing memorandum, which is due 15 days after receipt of Higbee's pre-hearing memorandum, will be filed before March 15, 1983. Evidently, an adjudication of this appeal by the Board before Higbee's permit suspension ends on March 15, 1983 is utterly unlikely. A motion to dismiss the appeal 82-298-G on grounds of mootness seems appropriate and would be welcomed.

As for the appeals 82-295-G and 82-299-G, their ability to resist an allegation of lack of standing carries little or no implication that these appeals have merit. If the Board's adjudications in 81-134-G and 81-151-G, which should be written soon, should conclude that DER abused its discretion originally, by granting the permit, then these appeals also will become moot; in any event, we will not, under the guise of the above-captioned appeals, retry the appeals 81-134-G and 81-151-G. The new appeals 82-295-G and 82-299-G are worth hearing and can have merit only if:

1. DER did not abuse its discretion in granting the original permit.

2. Although DER did not abuse its discretion in granting the original permit, newly developed evidence (such as the Consent Order and Agreement) implies it now would be an abuse of discretion for DER to allow Higbee (not just anybody, but Higbee specifically) to exploit his permit after March 15, 1983.

3. Operation of the permit by Higbee (not just anybody) threatens injury to Lintelman and Coolspring sufficient to confer standing under the William Penn standard.

Paragraphs 2 and 3 above emphasize that operation by Higbee (not just anybody) must be addressed, because if operation of the permit by anybody (not Higbee explicitly) now would be an abuse of discretion, then granting the original permit must have been an abuse of discretion, an inference contradictory to our starting assumption 1.

Proving the averments 2 and 3 above under the constraint that DER did not abuse its discretion in granting the original permit will be difficult. There is absolutely no indication, in Lintelman's or Coolspring's pleadings, that these appellants can muster the required proofs. As of this writing, appellants' pre-hearing memoranda, subject to our standard Pre-Hearing Order No. 1, are just about due in each of the appeals 82-295-G and 82-299-G. Unless their pre-hearing memoranda very greatly improve on their Notices of Appeal, motions (essentially motions for judgment on the pleadings) to dismiss the appeals 82-295-G and 82-299-G well might be appropriate.

O R D E R

AND NOW, this 4th day of March, 1983, it is ordered that:

1. DER's Motion to Consolidate these appeals is granted; henceforth this consolidated set of appeals will be captioned as described in the body of the accompanying Opinion.

2. The appellants Lintelman, Higbee and Coolspring will retain their individual rights as parties; however, the Board reserves the right to limit the

testimony, in any eventual consolidated hearings on the merits of these three appeals, in the interest of avoiding unnecessary costs or delay.

3. Higbee's Motions to Quash the appeals 82-295-G and 82-299-G are dismissed.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY, Member

DATED: March 4, 1983

cc: Bureau of Litigation
Howard J. Wein, Esquire
Keith E. Bell, Esquire
Anna Belle Jones, Esquire
William G. McConnell, Esquire

COMMONWEALTH OF PENNSYLVANIA

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ALLEGHENY COUNTY SANITARY AUTHORITY : Docket No. 82-269-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
APPELLANT'S MOTION TO STAY PROCEEDINGS

On or about October 27, 1982 the Allegheny County Sanitary Authority (Alcosan or appellant) filed an appeal from DER's determination to exclude Alcosan's proposed sludge disposal project from the 1983 Project Priority List. Alcosan followed its appeal to this board by filing a civil action (No. 82-2534) with the United States District Court for the Western District of Pennsylvania which action raised nearly identical issues as the instant appeal and sought to enjoin DER's award of sewage facility construction grants to any Pennsylvania municipality.

Alcosan has not filed a pre-hearing memorandum in the instant appeal as required by Pre-Hearing Order No. 1, but has filed a Motion to Stay Proceedings in the instant matter pending further action by the said U.S. District Court. In support of its motion Alcosan has alleged and DER does not deny, that hearings were held by the U.S. District on December 14, 15 and 16, 1982 on Alcosan's motion for preliminary injunction, that, on December 20, 1982, at the direction

of the U.S. District Court, Alcosan notified all 900 municipalities and authorities on DER's municipal sewage discharge inventory of its federal suit and of their right to intervene in said proceedings and, further, that as of January 14, 1983 some 14 municipalities had availed themselves of this opportunity and, finally, that briefs have been filed in the federal case by EPA, DER and Alcosan and the matter is presently under consideration by the Court.

DER opposes Alcosan's motion for a stay and both it and Alcosan have briefed this issue to the board. Alcosan, relying upon the concurring opinion of Board Member Cohen in *Latrobe Municipal Authority, et al. v. DER*, EHB Docket No. 75-211-C emphasizes the advantages of utilizing the federal forum and problems in this board exercising its jurisdiction over a dispute which would certainly affect entities not party to the instant appeal.

DER's impressive brief raises a plethora of arguments. First, DER argues that Alcosan should be bound by its own selection of the board as its initial forum. Next, DER asserts that no EHB regulation authorizes an indefinite stay of proceedings and, finally, DER contends that Alcosan's request is contrary to long-standing principles of law.

Without necessarily adopting Alcosan's reasoning or the authority the adjudication issued in *Latrobe, supra* which addressed a construction grants program before it was substantially "decentralized", we do recognize the practical advantages of continuing the instant action pending the U.S. District Court's decision in the related action.

As to DER's arguments, we are not impressed with the "choice of forum" argument because Alcosan had no choice but to file the instant appeal even if it wanted to pursue its federal remedies. Moreover, to the extent that this or the other legal principles have any merits they should be addressed to the U.S. District; they are reasons for it to abstain from exercising jurisdiction rather than reasons for this board to expedite the instant matter.

As to DER's second argument it is emphasized that the Order below is a continuance specifically authorized by 25 Pa. Code §21.17(b), rather than an indefinite stay and thus is well within the board's authority as recognized by DER on page 3 of its brief.

Finally, contrary to DER's last argument, the present procedure will result in an expeditious resolution of this controversy. If Alcosan prevails in the U.S. District Court its relief will be more expeditious than anything it could obtain from the board at this time noting the lack of pre-hearing development of the instant action. If Alcosan does not prevail, DER is not inconvenienced by a stay of these proceedings and Alcosan is estopped to complain about any prejudice to it. Furthermore, the procedure DER contests here was followed in *Del-Aware Unlimited, Inc., et al. v. Roger M. Baldwin, et al.*, Civil No. 82-5115 (E.D. Pa.) and its EHB campanion *Del-Aware Unlimited, Inc. v. DER and NWRA*, EHB Docket No. 82-219-H; and in that matter DER did not contest the procedure.

O R D E R

AND NOW, this 4th day of March, 1983, in consideration of appellant's motion to stay proceedings and the arguments for and against this motion the same is granted in part. Appellant shall comply with Pre-Hearing Order No. 1 on or before May 2, 1983 or within 15 days from being denied preliminary relief by the U.S. District Court in the matter cited above whichever is earlier.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Chairman

DATED: March 4, 1983

cc: Bureau of Litigation
Robert W. Adler, Esquire
Richard D. Speigelman, Esquire

COMMONWEALTH OF PENNSYLVANIA

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CONSOLIDATION COAL COMPANY : Docket No. 82-265-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
J & D MINING, INC.

OPINION AND ORDER SUR
PERMITTEE'S PETITION TO QUASH APPEAL

This case arise from the granting by the Department of Environmental Resources of a coal mine drainage permit (permit no. 5682301) to J & D Mining, Inc. The permit allows J & D Mining to mine the Upper Kittanning coal seam overlying the workings of the Laurel Mine. The Laurel Mine is owned by National Mines Corporation and is operated by Consolidation Coal Company (Consol) pursuant to a management agreement between National Mines and Consol. All employees working in the Laurel Mine are employees of Consol. All equipment used in the Laurel Mine is the property of National Mines.

The Upper Kittanning coal seam lies between seventy and one hundred feet above the coal seam (Lower Kittanning) being mined by Consol in the Laurel Mine. Consol is concerned that flooding of the workings of the J & D Mine would endanger employees of Consol working in the Laurel Mine.

The permittee-intervenor, J & D Mining, Inc. (J & D) has petitioned the board to quash Consol's appeal as untimely. Consol has answered this petition

as has DER. There is no essential dispute among the parties concerning the applicable facts. It is agreed that Consol was contacted by DER via a June 21, 1982 letter which solicited Consol's comments concerning J & D's proposed mining. Consol's comments as contained in a July 13, 1982 letter, took the form of suggested special conditions to be added to J & D's permit.

On August 3, 1982 Mr. William Parsons, a DER official, wrote to Consol informing Consol that the suggested special conditions would not be added to J & D's permit. This letter included a standard appeal paragraph notifying Consol that it had 30 days within which to appeal from "[t]his action" of DER. However, DER did not issue the permit in question to J & D until September 8, 1982.

DER copied Consol with the September 8, 1982 cover letter accompanying the said permit but did not send Consol a copy of said permit. An official notice that the permit had been issued appeared in the September 25, 1982 Pennsylvania Bulletin. Consol filed the instant appeal on October 25, 1982.

J & D argues that Consol should have appealed from the August 3, 1982 letter or at least the September 8, 1982 permit issuance and that its failure to do so within 30 days of either of the said events constitutes a violation of §21.52 of this board's Rules of Practice and Procedure, 25 Pa. Code §21.52, which deprives us of jurisdiction.

As a starting point the board acknowledges that it only has jurisdiction over timely appeals, *Rostosky v. Commonwealth, DER*, 26 Pa. Commonwealth Ct. 478, 364 A.2d 761 (1976). To discern what constitutes a timely appeal we must refer to §21.52(a) which provides that:

> "(a) Except as specifically provided in §21.53 of this title (relating to appeal *nunc pro tunc*), jurisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of such action or within 30 days after notice of such action has been published in the *Pennsylvania Bulletin* unless a different time is provided by statute, and is perfected in accordance with subsection (b) of this section."

The most pertinent part of this section is the part which initiates the 30 days appeal period, i.e., that the appellant "...has received written notice of such action or within 30 days after notice of such action has been published in the Pennsylvania Bulletin..."

The disjunctive "or" is used in this phrase which, pursuant to the rules of Statutory Construction, 1 Pa. C.S.A. §1903, we shall construe as indicating its standard useage, i.e., as joining alternatives. Thus, under §21.52(a) the 30 day period begins to run from either the publication in the Pennsylvania Bulletin or the receipt of written notice whichever is earlier. We must therefore consider whether either the August 3, 1982 or the September 8, 1982 letter constitutes written notice under §21.52(a).

As to the August 3, 1982 letter we note that DER has repudiated the appeal paragraph contained therein and now maintains that this letter was not appealable. We agree. This letter did not consitute a final action by DER concerning the J & D permit; the issuance of that permit on September 8, 1982 was the final (and thus appealable) action, *Sunbeam Coal Corporation v. Commonwealth, DER*, 8 Pa. Commonwealth Ct. 622, 304 A.2d 169 (1973).

Finally, we do not believe that the cover letter dated September 8, 1982 was notice to Consol of anything other than the issuance of a permit to J & D Mining. If DER had sent the permit to Consol, it's employees could quickly have perceived that the permit was not limited with Consol's suggested conditions.

However, in the absence of the permit Consol could have believed that DER had changed its institutional mind about the suggested conditions.

Indeed, the board's general experience with DER's permitting procedures includes numerous instances where DER issued a controversial permit only after adding additional special conditions.

Thus, we believe that §21.52(a) began to run against Consol only when notice of issuance of J & D's permit appeared in the September 25, 1982 Pennsylvania Bulletin and no party has even asserted, let alone demonstrated, that Consol failed to make a timely appeal as measured from the publication date.

O R D E R

AND NOW, this 9th day of March, 1983, J & D's motion to quash Consol's appeal is denied and the permittee and DER are directed to comply with Pre-Hearing Order No. 1 within 15 days from their receipt of this order.

ENVIRONMENTAL HEARING BOARD

DENNIS J. HARNISH
Chairman

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: March 9, 1983

cc: Bureau of Litigation
Joel R. Burcat, Esquire
Daniel E. Rogers, Esquire
John J. Dirienzo, Jr., Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

BOROUGH OF TAYLOR : Docket No. 82-179-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and BICHLER SANITARY LANDFILL, Permittee

OPINION AND ORDER

AND NOW, this 10th day of March, 1983, it appearing from the papers filed of record in the above-captioned matter that: a) on or about June 28, 1982 DER issued an amendment to Solid Waste Management Permit No. 100976 to Charles Bichler authorizing the acceptance of waste in the Bichler Sanitary Landfill, and

b) On or about July 16, 1982 the Borough of Taylor, Lackawanna County, filed an appeal from the issuance of said permit, and

c) On or about August 16, 1982 this board issued Pre-Hearing Order No. 1 requiring the Borough to file a pre-hearing memo on or before November 1, 1982 and requiring DER and the Bichler Sanitary Landfill, permittee, to file responsive pre-hearing memoranda within 15 days of receipt of appellant's memorandum, and

d) On or about November 1, 1982 the Borough submitted its pre-hearing memorandum, and

e) On or about January 10, 1983, in response to a motion to dismiss filed by DER and answered by the Borough, this board issued an Opinion and Order denying DER's motion to dismiss and requiring it to answer the Borough's pre-hearing memorandum within 15 days, and

f) On January 18, 1983, by letter of its counsel, DER advised the permittee that it would not be filing a pre-hearing memorandum and that the burden of defending the permit would fall upon permittee, and

g) The permittee has never sought, let alone obtained, an extension of time to file an answer to the Borough's pre-hearing memorandum, and

h) The permittee did not file a status report in response to the board's letter of January 27, 1983, and

i) DER's response to said status report letter reiterated its position that the permittee had to defend the said permit, and

j) On or about February 10, 1983, the board issued an order requiring the permittee to file a pre-hearing memorandum by February 22, 1983 or face sanctions including a default adjudication, and a return receipt card signed by Leona Bichler indicated that this order was received at the permittee's address on February 11, 1983, and

k). The permittee has not filed a pre-hearing memorandum but instead the board received a letter on February 22, 1983 from Thomas P. Kennedy, Esquire which stated *inter alia* that Mr. Kennedy would not be entering an appearance on behalf of the permittee, and that the permittee would not "prosecute" this appeal and has "no further interest in the matter":

The appeal of the Borough of Taylor is granted and Permit No. 100976 is revoked.

ENVIRONMENTAL HEARING BOARD

BY: DENNIS J. HARNISH
Chairman

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: March 10, 1983

cc: Bureau of Litigation
Peter Shelley, Esquire
Charles Bichler
Lawrence J. Moran, Esquire

EHB-44: Rev. 1/ 3

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 North Second Street
Third Floor
Harrisburg, Pennsylvania 17101
(717) 787-3483

BOROUGH OF TAYLOR

v. DOCKET NO. 82-179-H

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and BICHLER SANITARY LANDFILL, Permittee

CLARIFICATION OF ORDER

On March 10, 1983 the board issued an order in the above-captioned matter. The intent of that order was to revoke the amendment to Solid Waste Management Permit 100976 which was the action appealed at the instant caption, however, the said order apparently, has been construed as revoking the Solid Waste Management Permit itself.

The purpose of this CLARIFICATION is to emphasize that the board has revoked only the amendment to Solid Waste Management Permit 100976 not the said permit itself.

ENVIRONMENTAL HEARING BOARD

DENNIS J. HARNISH
Chairman

cc: Bureau of Litigation
508 Executive House
101 South Second Street
Harrisburg, PA 17120

For the Commonwealth of Pennsylvania,
Department of Environmental Resources:

Peter Shelley, Esquire

For the Appellant/Respondent/Defendant:

Lawrence J. Moran, Esquire

Permittee:
Charles Bichler

DATED: March 15, 1983
vp

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

BI-A-ROBI SYSTEMS, INC. :

:

Docket No. 82-235-M

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On October 1, 1982, BI-A-ROBI SYSTEMS, INC. (appellant) filed a notice of appeal with this Board. In that notice of appeal, and in subsequent filings, appellant appealed from "the action of the Department of Environmental Resources in deleting appellant from the list of approved manufacturers of aerobic sewage treatment facilities in the Commonwealth of Pennsylvania".

The Department of Environmental Resources (DER) filed a motion to dismiss the appeal alleging, inter alia, that DER had not taken an "action" which was appealable to the Board, and that an attack upon a departmental regulation is outside the scope of review of the Board.

Appellant argues, in its brief in opposition to the motion to dismiss that DER's removal of appellant's name from the list of approved manufacturers was an "adjudication" and such "action" is reviewable by this Board. Appellant also contends that the Board has jurisdiction "over a challenge to the (pertinent) regulation".

This Board has the authority to grant motions for summary judgment, an

area encompassing motions to dismiss, only if there is no genuine issue as to a material fact. *Doraville Enterprises v. Commonwealth of Pa., DER*, 1980 EHB 489, 492, citing *Summerhill Borough v. DER*, 34 Pa. Cmwlth. Ct. 574, 383 A.2d 1320 (1978).

The material facts in this appeal are not genuinely in issue. The record reveals that appellant submitted his aerobic treatment tanks for certification by the Nation Sanitation Foundation (NSF) as being in conformity with NSF Standard No. 40.

After testing by NSF, appellant was advised on or about June 1, 1981, that the tanks had not successfully "passed the "Vacation" phase of the final stress test conducted by NSF.

NSF Standard No. 40 was originally promulgated and dated November 13, 1970, but was revised in November, 1978.

The regulation in question, and relied upon by DER in its motion to dismiss is 25 Pa. Code §73.41 (a), which reads, in pertinent part, as follows:

> (a) Aerobic sewage treatment tanks shall not be approved unless the tank has been found by the Department of Environmental Resources to be in conformance with the NSF Standard No. 40, dated November 13, 1970." (emphasis supplied).

As a result of NSF's position, that appellant's tanks had not successfully completed the testing under Standard No. 40, as revised November, 1978, DER merely forwarded NSF's certification list to all local sewage enforcement officers. The certification list did not contain appellant's name as the manufacturer of a certified aerobic sewage treatment system.

The Board's review of the respective positions of the parties involved, as represented by the notice of appeal, the motion to dismiss and the briefs in support of and in oppisition to the motion reveals that the salient issue has not been addressed in any meaningful manner.

The above-cited regulation, 25 Pa. Code §73.41 requires that DER find that the tanks are manufactured in conformance with NSF Standard No. 40, dated

November 13, 1970. Therefore, two tests are required:

1. A finding by DER,

2. Conformance of the tank with NSF Standard No. 40 dated November 13, 1970.

As to the first test, DER, in its briefs, admits that it "merely performed the ministerial function of transmitting...list of aerobic treatment systems with current NSF seals." "The DER transmittal involved no decision, determination or judgment...." The preceeding quotes are DER's justification for the position that DER has not exercised any final action, as is required by statute for appeals to lie before this Board.

By its own admission, DER has not acted in accord with the regulation defining its duties and obligations relating to standards for aerobic sewage treatment systems.

Further, DER accepted the findings of NSF as to conformity with Standard No. 40, despite the fact that NSF used a revised Standard No. 40 in November, 1978. DER's authority to determine standards in this area is limited by the express terms of 25 Pa. Code §73.41(a) to "conformance with the NSF Standard No. 40, dated November 13, 1970." (emphasis supplied). There is no authority under that regulation for DER to apply a later standard.

Since DER was required, by regulation, to make a finding that the tanks were manufactured in conformance with NSF Standard No. 40 dated November 13, 1970, and since, by admission DER has failed to act in accordance with 25 Pa. Code §74.41 (a), we find that it has acted arbitrarily and capriciously in this matter, as a matter of law.

However, since the facts regarding the soundness of appellant's aerobic sewage treatment system have not yet been developed in the present stage of the proceedings, we cannot state as a matter of law that appellants' system conforms to the 1970 NSF standards. DER must determine this upon demand.

O R D E R

AND NOW, this 11th day of March, 1983, DER's motion to dismiss is denied, and the appeal of BI-A-ROBI SYSTEMS, INC., at EHB Docket No. 82-235-M is hereby remanded to DER for action consistent with the findings of this opinion.

ENVIRONMENTAL HEARING BOARD

Dennis Jay Harnish

DENNIS J. HARNISH
Chairman

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: March 11, 1983

cc: Bureau of Litigation
George E. Clark, Jr., Esquire
Robert W. Adler, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
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ALLEGHENY COUNTY SANITARY AUTHORITY : Docket No. 82-269-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADDENDUM TO OPINION AND ORDER
SUR APPELLANT'S MOTION TO STAY PROCEEDINGS

Following the issuance of the opinion and order sur appellant's motion to stay proceedings in the instant matter, which opinion was based upon the pendancy of a related request for preliminary relief in the United States District for the Western District of Pennsylvania, it has come to the board's attention (by means of papers filed in *Borough of Littlestown v. Commonwealth of Pennsylvania, DER*, EHB Docket No. 82-277-H) that on February 17, 1983 the said U.S. District Court dismissed all state defendants from the federal suit.

According to the March 4, 1983 order of this board, appellant is required to comply with Pre-Hearing Order No. 1 "within 15 days from being denied preliminary relief by the U.S. District Court". Considering the fact that the federal suit is still proceeding as to EPA but has been dismissed as to DER the board's order may be considered to have been rendered ambiguous by subsequent events. Thus, in order to avoid this possiblity it is ordered that appellant

shall comply with Pre-Hearing Order No. 1 within 15 days from the date of this order.

ENVIRONMENTAL HEARING BOARD

DENNIS J. HARNISH
Chairman

DATED: March 14, 1983

cc: Bureau of Litigation
Robert W. Adler, Esquire
Richard D. Spiegelman, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

MAYNARD C. GRAHAM and MARIAN C. GRAHAM :

:

Docket No. 83-016-M

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On January 8, 1981, the Bureau of Mining and Reclamation of the Department of Environmental Resources (DER) sent a notice to Maynard Graham, a partner in Graham Brothers Coal Company, by certified mail ordering Graham Brothers Coal Company to close all mining activities, except for backfilling and restoration activities on mine drainage permits 4475SM13 and 44755M16, and on mining permits 1314-1 and 1314-3, 3A, the notice was received by Graham on January 9, 1981.

On April 21, 1981 DER sent a notice to Maynard Graham, partner as aforesaid, by certified mail advising Graham that performance and collateral bonds provided by the company for the above three mining permits were declared forfeited. Graham received this notice on April 22, 1981.

By notice dated September 10, 1981, DER returned to Graham its mining permit application no. 1314-4477SM13-01-1 by certified mail. This notice was received by Graham on September 12, 1981.

A single notice of appeal of the above three (3) final actions of DER was filed by Graham with this Board on January 17, 1983.

Under the provisions of 25 Pa. Code Section 21.52(a) appeals must be filed within thirty (30) days "after the party appellant has received written notice" of the action taken by DER. The instant appeal was filed more than thirty (30) days after the three (3) separate notices of final actions by DER were received by the appellants herein.

Where an appeal is not filed within thirty (30) days from receipt of notice of final action by DER, this Board has no jurisdiction to act upon the merits of the appeal. *Joseph Rostosky Coal Company v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 75-257-C (issued January 9, 1976), aff'd 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

Accordingly, this appeal must be dismissed.

O R D E R

AND NOW, this 14th day of March, 1983, upon motion of DER, and upon consideration of the record which discloses that the appeal of Maynard C. Graham and Marian C. Graham was filed more than thirty (30) days from the date of receipt of notice of DER's final action, the appeal of Maynard C. Graham and Marian C. Graham at EHB Docket No. 83-016-M be and hereby is dismissed.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Chairman

DATED: March 14 , 1983

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
Alan MacLeod, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
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COMMONWEALTH OF PENNSYLVANIA :
PENNSYLVANIA GAME COMMISSION :

Docket No. 82-284-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and GANZER SAND & GRAVEL, INC., Permittee

OPINION AND ORDER
SUR REQUEST FOR INSPECTION

On November 1, 1982, DER issued a permit for construction and operation of a 40 acre residual waste landfill to the permittee, Ganzer Sand and Gravel ("Ganzer"). On November 22, 1982, the Commonwealth of Pennsylvania Game Commission ("Commission") appealed issuance of this permit, alleging inter alia that operation of the permit would allow acid and other contaminating material "to leach into the important wetlands immediately adjacent to the permitted site."

On December 8, 1982, the Commission filed a Request for Inspection of the site, whose alleged purpose was "to aid Appellant in the preparation of the trial of this case." This Request for Inspection, which was objected to by Ganzer, is the subject of this Opinion and Order. Our ruling follows a Commission Motion for an Order to Permit Inspection and Entry, as well as a Ganzer Motion for a

Protective Order. The Motion for a Protective Order included a request that the Board hear oral argument on the inspection issue before ruling on Appellant's Motion for an Order to Permit Inspection; this request was granted. The hearing, which was concerned solely with the instant discovery dispute, was held March 8, 1983. All parties were represented at this hearing, including the Hammermill Paper Co. ("Hammermill"), who by this time had been granted permission to intervene in this appeal.

The Commission asks to inspect:

a. The existing gravel pit which is to be the site of the landfill operation.

b. The soil that has been stockpiled on the east and west elevations of the gravel pit.

c. The adjacent 15.8 acre field from which final cover soil for the landfill will be excavated.

d. The soil borrow area from which renovating soil will be taken.

The Commission requests permission to enter and inspect the above described sites for the purpose of taking the following tests:

(1) Drill with core drilling equipment a total of approximately eight core borings to a depth of twenty feet.

(2) Approximately three of the core borings, after being drilled, to be converted into water observation wells.

(3) Excavate with a backhoe a number of test pits in the proposed landfill area.

(4) Obtain representative soil samples from the necessary test pits.

Ganzer objects to the aforementioned inspections and tests on the following main grounds:

(i) The tests would cause unreasonable annoyance, embarrassment, oppression, burden or expense to Ganzer, in violation of Rule 4011 of the Pennsylvania Rules of Civil Procedure [applicable to this matter by 25 Pa. Code §21.111(d) and (e)], because:

(A) The desired test results already have been or will be made available to DER, from whom the Commission can obtain those results.

(B) Ganzer's engineers, geologists, etc., will have to be present during the Commission's tests, forcing Ganzer to incur considerable (yet unnecessary since the tests are unnecessary) expense.

(ii) The desired inspection and tests are irrelevant to the appeal.

(iii) The desired inspection and tests will even further delay implementation of the permit, which was only granted long after application; such delay will greatly prejudice Ganzer and Hammermill, who--unable to wait--may have to seek another site.

The Commission's inspection and entry requests listed supra, and Ganzer's objections thereto, are too site-specific and detailed to be treated purely in the abstract; some "facts" germane to this controversy will have to be subsumed. The aforementioned oral argument was not an evidentiary hearing, however, so that the record to date in this matter is composed solely of allegations, without established facts. On the other hand, the oral argument indicated that many of the parties' allegations are not in dispute; these undisputed allegations form the "factual" basis for the rulings herein. We herewith permit any party to preserve, for ultimate appeal of our final adjudication in this matter, the contention that the rulings herein rest on an incorrect factual base.

With these introductory remarks out of the way, let us turn to Ganzer's objections (i)-(iii) supra. Objection (iii) can be dealt with summarily. At the parties', including Ganzer's, own request [stipulation filed by the parties on February 23, 1983], the Board has extended the time for initiating discovery without leave of the Board to May 1, 1983. 25 Pa. Code § 21.111(a). This extension was requested largely because Ganzer wishes to take additional discovery after it receives answers to previously filed interrogatories. No good reason has been advanced for believing the Commission's requested inspections and tests cannot be initiated on or before May 1, 1983, even after taking the time for reformulation required by the present Order (see infra); the requested inspections and tests should be completed in about three weeks. Therefore we reject Ganzer's objection (iii) supra; the presently disputed inspection and tests will not delay resolution of this matter any more than will the undisputed discovery Ganzer itself expects to initiate.

We also reject Ganzer's objection (i)(A). The test results which "already have been or will be made available to DER" mainly were and will be obtained by Ganzer's own consultant. The Commission certainly is entitled to rely on its own engineers and consultants for test results, rather than on the results furnished by Ganzer, a party adverse to the Commission in this appeal.

Deferring consideration of Ganzer's objection (i)(B) [see infra], we turn to Ganzer's objection (ii). This objection questions the relevancy of the Commission's proposed tests. Relevance "to the subject matter involved" is a basic requirement for permissible discovery. Pa. R.C.P. Rule 4003.1 Although the Commission need not rely on Ganzer's test results, it is not entitled to ask for its own tests unless those tests fall within the scope of discovery.

Relevance "to the subject matter involved" permits wider discovery than does "relevance to the issues" [see Goodrich-Amram 2d §4003.1:6], and is to be "broadly and liberally interpreted" as well [see Goodrich-Amram 2d §4003.1:7]. Moreover, although the law admittedly is not wholly clear, where there are pleadings (i.e., where there is a detailed notice of appeal, as in the present instance), it appears that the burden is on the objector--here Ganzer--to establish the desired discovery is not relevant to the subject matter involved, once the proponent of the discovery--here the Commission--has satisfied the court that irrelevancy of the proposed discovery is not obvious. Goodrich-Amram 2d §4003.1:8.

The Commission maintains the requested tests are required because its own examination of the test results furnished DER suggests those results are erroneous; in particular, the Commission questions the soil permeabilities reported to DER by Ganzer, and believes the correct soil permeabilities are much larger than reported. A larger soil permeability, the Commission claims, could cause contaminating fluids to reach the wetlands the Commission is charged to protect.

We rule that these allegations by the Commission suffice to meet its threshold burden of demonstrating that discovery of soil permeabilities at the site by the Commission is relevant to the subject matter of this appeal. It is not clear, however, nor was counsel for the Commission able to make it clear, that all the requested inspections and tests bear on soil permeabilities; we are particularly doubtful about the relevance of the desired water observation wells (test (2) listed supra). Granted the Commission can meet its threshold burden of showing its projected tests bear on soil permeabilities, however, it then

becomes Ganzer's burden to show that some or all of the requested inspections and tests actually are irrelevant despite the Commission's having met its threshold burden. Ganzer has not made this required showing; thus far its allegations in this regard have been purely conclusory, e.g.:

> In addition, since the landfill permit is not dependent upon existing soil conditions at the site, but is based upon the construction of a site which meets the requirements of the rules and regulations of the Pennsylvania Department of Environmental Resources, inspection of the areas listed [by the Commission, see paragraphs a-d supra] is simply irrelevant to the present appeal. Response of Ganzer to the Commission's Request For Inspection.

We now return to Ganzer's objection (i)(B). Under Pa. R.C.P. 4011(b), Ganzer may not be subjected to "unreasonable annoyance, embarrassment, oppression, burden or expense." As Goodrich-Amram 2d §4011(b):1 makes plain, the key word here is "unreasonable"; the mere imposition of some burden and expense, unless unreasonable, is not ground to forbid discovery or inspection.

There is reason to believe the Commission's proposed tests may transcend the allowed limits of discovery under Rule 4011(b). The Commission's original Request for Inspection stated that the time for performing the desired inspection "would extend for a period of approximately 30 days." During oral argument, the Commission's attorney indicated that it would be difficult to complete the inspection in less than 20 days. This is a long period of intrusion on Ganzer's property, which should not be permitted without good reason. Yet the Commission's counsel admitted that its engineer had proposed the inspection and tests without ever visiting the site, if only to see whether test pits and water observation wells of the sort the Commission proposed to dig were not already on the site.

Furthermore, although the Commission argued otherwise, Ganzer is entitled to have trained monitors present at all times and at all locations the

Commission's personnel are conducting their discovery on the site [see, for instance, the citations in Goodrich-Amram 2d, §§4009(a):10 and 4009(a):11]. In view of the scope of the inspection and testing the Commission proposes to undertake, lasting twenty days or longer, Ganzer quite reasonably maintains its monitoring of the Commission's discovery will subject Ganzer to considerable expense. This expense will be unreasonable if the Commission is proposing unnecessary inspection and testing; it is difficult for the Commission to make a credible argument that all its proposed tests are necessary when it has not even visited the site before setting forth its proposed inspection and testing program.

Our Order in this matter is consistent with the foregoing and with our provisional ruling at the conclusion of oral argument. Briefly, we will permit the Commission inspection and testing bearing on soil permeabilities at the site, unless Ganzer can convince us--without recourse to a hearing on the merits, which we will not undertake at this stage of the proceedings--that the proposed inspection and tests actually are irrelevant because, e.g., soil permeability tests are irrelevant. At this time, we will not permit the Commission to engage in discovery which does not bear on soil permeability at the site. If it turns out that the Commission's values for the soil permeabilities agree with those reported by Ganzer, the basis for the Commission's discovery request collapses; to permit further discovery by the Commission in such circumstances, especially discovery as burdensome as proposed, would unwisely countenance an unjustified fishing expedition, objectionable because the Commission would be "fishing with a net rather than a hook" [see Goodrich-Amram 2d §4011(b):2]. If the soil permeabilities measured by the Commission prove to be larger than Ganzer

reported, all parties then will be able to decide more sensibly how well-founded is the Commission's complaint, and how deficient the data furnished DER may have been. In any event, we are not going to permit the Commission to conduct extensive inspection and testing on Ganzer's property without some minimal assurance that the objectives of the Commission's projected digging, e.g. wells, are not already on the site.

O R D E R

AND NOW, this 15th day of March, 1983, it is ordered that:

1. On or before April 1, 1983, the Commission's engineer shall schedule a view of the site which is the subject of this appeal, to determine whether the desired information--concerning soil permeabilities at and near the site--can be obtained with a less intrusive inspection and testing program than originally proposed.

2. The Commission's engineer (and assistants as required by him) shall be admitted to the site on the day scheduled by the Commission's engineer, provided that Ganzer and the other parties to this appeal receive at least one week's notice of the date of the scheduled view.

3. The other parties to this appeal also shall be admitted to the site on the day scheduled for the Commission's engineer's view, and--along with Ganzer's representatives--may accompany the Commission's engineer on his view.

4. Provided one week's notice has been given (see paragraph 2), the date scheduled by the Commission for the view need not be approved by the other parties, including Ganzer; however, the parties are encouraged to set a mutually agreeable time consistent with the requirements of paragraphs 5 and 7-10 infra.

5. On or before April 8, 1983, the Commission shall file a revised Request for Inspection, listing the tests the Commission--having viewed the site--now wishes to perform. The Commission may list all the tests it previously proposed, although hopefully it now will have decided it can make do with fewer tests; the Commission shall not list any "new" test not requested in its original Request for Inspection.

6. Said revised Request, for each test listed, shall be accompanied by a brief statement explaining:

a. How the test will elucidate relevant soil permeabilities.

b. Why pits, wells, etc. already on the site will not suffice, so that new digging is necessary.

7. On or before April 1, 1983 Ganzer and the other parties may file brief statements explaining why, in these parties' opinion, various inspections and tests originally requested by the Commission are irrelevant to the subject matter of these proceedings, recognizing that this Board must rule on this discovery dispute without the benefit of a full hearing on the merits.

8. The Commission's revised Request for Inspection, due April 8, 1983 (see paragraph 5), may include very brief rebuttals of the statements filed by the parties on April 1, 1983 (see paragraph 7).

9. The Board will rule on this matter on or before April 15, 1983, deciding at that time precisely which tests requested by the Commission will be allowed.

10. The Commission and Ganzer forthwith shall schedule mutually convenient dates, starting no later than May 1, 1983, when the Commission's engineers will be permitted to enter upon Ganzer's land to perform the

inspection and tests, if any, permitted by the Board (see paragraph 9); the Commission and Ganzer shall attempt to set these dates at times convenient for the other parties, but the convenience of Ganzer and the Commission shall be paramount in this regard.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY, Member

DATED: March 15, 1983

cc: Bureau of Litigation
Howard J. Wein, Esquire
Paul F. Burroughs, Esquire
Stuart M. Bliwas, Esquire
William J. Kelly, Esquire
Daniel Brocki, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

UNITED MINE WORKERS OF AMERICA : Docket No. 82-217-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and FRANK ONDASH, et al., Licensees

OPINION AND ORDER SUR
INTERVENORS' MOTION TO DISMISS

On July 19, 1982 DER reissued Blaster's licenses to Messers Frank Ondash, Paschal Belculfine, Arthur Ognibene and Douglas Schmidt (licensees). By an undated letter which was postmarked Harrisburg, September 18, 1982, Charles A. Nork, a DER official notified Mr. Ronald Zera, Esquire, counsel for the United Mine Workers of America (UMW) that said reissuances had occurred.

On September 20, 1982 UMW appealed DER's reissuance of said blasters licenses to licensees.

Licensees have intervened in this matter and have filed a motion to dismiss UMW's appeal. Licensees' motion rests upon three separate grounds. First, licensees moved this board to quash and dismiss UMW's appeal because the pre-hearing memo it filed (allegedly) failed to comply with this board's pre-hearing order. The board agrees that UMW's pre-hearing memo is rather skimpy being but a single page in length. Nevertheless, this pre-hearing memo (which

is not a pleading but rather a convenience to the board and other parties), along with the UMW's Notice of Appeal, does raise the issue of compliance with 25 Pa. Code §210.1(e) and, in general, the level of licensees' training and experience to handle, or shoot explosives.

Licensees can, of course, supplement their knowledge of UMW's case through the use of discovery. Thus, the sanction requested (dismissal of UMW's appeal) would seem to be excessive in the circumstances.

The second ground asserted by licensees for dismissing UMW's appeal is lack of EHB jurisdiction due to an allegedly untimely filing by the UMW. The action here appealed took place on July 19, 1982 and UMW's appeal not being filed until September 20, 1982 would not be timely if the July 19 date was the effective date. However, in order to activate the 30-day appeal period in 25 Pa. Code §21.52(a) DER must provide the would-be appellant with written notice or publish notice in the Pennsylvania Bulletin. From the facts of record in this file UMW filed an appeal within a week of obtaining written notice from DER that it had reissued licensees' licenses.

The licensees' third and final ground for dismissal is that the UMW is an unincorporated association and as such must be represented by its officers before the EHB. While licensees cite Rule 2152 of the Pennsylvania Rules of Civil Procedure, they cite no legal authority applicable to practice before this board to support its third and final ground for dismissal. Unincorporated associations have been parties to EHB proceedings and have been represented by counsel in these proceedings for at least eight years so EHB custom if nothing else runs against the licensees' third argument.

ORDER

AND NOW, this 18th day of March, 1983, licensees' motion to dismiss is denied.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Chairman

DATED: March 18, 1983

cc: Bureau of Litigation
Dennis W. Strain, Esquire
F. Regan Nerone, Esquire
Ronald J. Zera, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

LECHENE COAL COMPANY, INC. and LEO LECHENE, PRESIDENT : Docket No. 82-226-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On or about January 31, 1983 the above-captioned matter was scheduled for hearing. The hearing was to take place on March 22 and March 23, 1983. On March 18, 1983 a telephone conference call was held among Allan E. MacLeod, Esquire, counsel for the instant appellant, Joel R. Burcat, Esquire, counsel for DER and the undersigned.

During this conference Mr. MacLeod represented to the undersigned that he was unprepared to represent the appellant in the instant matter because he had been unable to contact any representatives of the appellant company.

Mr. Burcat suggested that appellant's failure to provide its counsel with any assistance in litigating the instant matter was grounds for the board to impose the sanction of dismissing the instant appeal. The board agrees with DER's position but in the interest of assuring fairness and to accommodate Mr. MacLeod's desires the following order gives the appellant one last opportunity to defend itself.

ORDER

AND NOW, this 24th day of March, 1983, the appellant is granted until April 15, 1983 to file a formal verified petition showing cause why its appeal should not be dismissed for failure to prosecute. If the board does not receive such a petition by the date specified, the appeal shall be considered dismissed without further order of the board.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Chairman

DATED: March 24, 1983

cc: Bureau of Litigation
Joel R. Burcat, Esquire
Allan E. MacLeod, Esquire
Lechene Coal Company, Inc.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

TROUT UNLIMITED, ALLEGHENY MOUNTAIN CHAPTER : Docket No. 82-166-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and STOUT COAL COMPANY, INC., Permittee

OPINION AND ORDER SUR MOTIONS
FOR RECONSIDERATION AND FOR
RECONSIDERATION BY THE BOARD EN BANC

On January 24, 1983 the undersigned issued an Order in response to appellant's Motion for Sanctions against the intervenor, Stout Coal Company, Inc. which Order sanctioned the intervenor by reason of its failure to comply with at least two pre-hearing orders of the board. A procedural history of the matter and the rationale for said order appeared in an attached opinion which opinion is incorporated by reference herein.

On February 1, 1983 counsel for intervenor filed a Motion for Reconsideration. This motion was placed before Board Member Edward Gerjuoy since the case had been assigned to him subsequent to January 24, 1983.

Mr. Gerjuoy declined to rule upon said motion and recommended that intervenor's counsel file a Motion for Reconsideration by the Board En Banc. On March 2, 1983 the intervenor filed a Motion for Reconsideration by the Board

En Banc of said order. Due to scheduling difficulties hearings by the board en banc are rarely held in any matter and would not seem appropriate for an issue such as this which has little or no programmatic impact. Nevertheless, intervenor's motions (neither of which has been answered in a timely manner by either the appellant or DER) raised certain legal and factual issues which Mr. Gerjuoy has asked the undersigned, as author of the sanctioning order, to address.

The board is not persuaded that the due process clause of the United States Constitution precludes the imposition of sanctions without a prior hearing. This board has frequently granted motions for summary judgment and motions to dismiss without hearings and this practice has been explicitedly blessed by Commonwealth Court. If a case can be dismissed without hearing the lesser sanction imposed in the instant matter would plainly not violate the due process clause.

The undersigned is, however, persuaded by the affidavit of intervenor's counsel that 1) counsel was unaware of the issuance of pre-hearing order no. 1 to Stout Coal Company and 2) his office did not receive the reissued pre-hearing order no. 1 (which was shown on its face as being sent to Stout Coal Company).[1]

Given this uncontested affidavit the undersigned agrees that the imposition of any sanctions upon Stout for its failure to comply with said pre-hearing orders was ill advised. In conclusion I feel compelled to state that the sanctions order was certainly not meant to denigrate either the character or competence of intervenor's counsel (which qualities are held by me in high esteem).

---

1. Intervenor's Motion for Reconsideration En Banc further alleges that Randy Stout, President of Stout Coal Company denied receipt of either pre-hearing order. Since this hearsay statement is not supported by Mr. Stout's affidavit it has little weight.

A sincere apology is offered for any inconvenience or annoynance my sanction order has caused Mr. Picadio.

ORDER

AND NOW, this 24th day of March, 1983, the sanction order of January 24, 1983 is cancelled.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Chairman

DATED: March 24, 1983

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
Robert P. Ging, Jr., Esquire
Anthony P. Picadio, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

B.B.S. COAL COMPANY :

:

Docket No. 82-276-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

This appeal was filed and perfected on November 10, 1982. On November 15, 1982, in accordance with our usual practice, Pre-Hearing Order No. 1 was issued, requiring the appellant to file his pre-hearing memorandum on or before January 31, 1983. On February 22, 1983, no pre-hearing memorandum having been received, the Board sent Appellant a certified letter, return receipt requested, advising Appellant that unless its pre-hearing memorandum was filed by March 7, 1983, the Board might apply sanctions under its Rule 21.124, including dismissal of the appeal. The receipt showing that the Board's February 22, 1983 letter had been received was returned to the Board dated February 23, 1983. As of this date Appellant's pre-hearing memorandum has not been filed.

Previously, moreover, on January 28, 1983 DER had filed a Motion for Judgment on the Pleadings in this matter. On February 2, 1983 the Board wrote

Appellant, by ordinary mail, informing Appellant that its response to the aforesaid Motion for Judgment on the Pleadings must be filed on or before February 21, 1983. As of this date Appellant has made no response to DER's Motion for Judgment on the Pleadings.

Under the circumstances, we would be justified in dismissing this appeal by granting DER's motion. However, we prefer to dismiss under 25 Pa. Code §21.124, for "failure to abide by a Board order," as we warned we might do in our February 22, 1983 letter. By so ruling, dismissal of this action carries no implications whatsoever about the merits of DER's motion, even though we recognize that in accordance with 25 Pa. Code §21.64(d) we are entitled to treat as admitted all relevant facts stated in DER's motion.

ORDER

WHEREFORE, this 25th day of March 1983, the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Dennis Jay Harnish

DENNIS J. HARNISH, Chairman

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR., Member

Edward Gerjuoy

EDWARD GERJUOY, Member

DATED: March 25, 1983

cc: Bureau of Litigation
Joel R. Burcat, Esquire
Phillip Brown

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

WESTERN HICKORY COAL COMPANY :

:

Docket No. 82-141-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION FOR ARGUMENT BEFORE THE BOARD EN BANC

The hearing on the merits of this appeal was held on December 14, 1982. At the termination of the hearing, a briefing schedule was set up. By March 7, 1983, all permitted briefs had been filed. On March 14, 1983, Appellant filed a Motion for Argument Before the Board En Banc, alleging that there are issues of first impression in this appeal, whose outcome will have an effect upon the statewide coal industry. The Motion, these allegations, and oral argument before a single Board member as well as before the Board en banc are opposed by DER.

DER points out that the Board's rules and regulations, 25 Pa. Code §21.92, require that motions for oral argument be filed within five days after hearing and prior to adjudication. Appellant's motion has been filed prior to adjudication, but much later than five days after hearing. On this basis we deny the motion.

However, we believe that our broad powers permit us to order oral argument on our own motion. Therefore, though the motion was filed late, we would have granted it had we agreed with Appellant's allegations about the importance of this appeal. But we are inclined to go along with DER's view that this appeal, though not inconsequential, is not more important than many before us.

Finally we note that the Board's rules provide for oral argument en banc only on rehearing or reconsideration. 25 Pa. Code §21.122. Again, we believe we may ask for oral argument en banc whenever we deem it necessary to do so. However, Section 21.122 reflects the fact that the Board, already overworked, could not function if it were to take the time to hold hearings en banc in any but very exceptional circumstances.

O R D E R

WHEREFORE, this 25th day of March 1983, it is ordered that:

1. Appellant's motion to hold oral argument before the Board en banc is rejected.

2. The Board reserves the right to ask for oral argument on its own motion, before the undersigned or before the Board en banc, if further perusal of the parties' briefs should convince the Board such oral argument would be useful.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY, Member

DATED: March 25, 1983

cc: Bureau of Litigation
Stanley R. Geary, Esquire
Bruno A. Muscatello, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA GAME COMMISSION :
:
Docket No. 82-284-G
:
v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and GANZER SAND & GRAVEL, INC., Permittee

OPINION AND ORDER SUR
PETITION TO AMEND GROUNDS FOR APPEAL

On November 1, 1982, DER issued Solid Waste Permit No. 300795 for construction of a 40-acre residual waste landfill to the permittee, Ganzer Sand & Gravel ("Ganzer"). On November 22, 1982 the Commonwealth of Pennsylvania Game Commission ("Commission") timely appealed issuance of this permit, alleging inter alia that operation of the permit would allow acid and other contaminating material "to leach into the important wetlands immediately adjacent to the permitted site."

On March 1, 1983, the Commission petitioned for leave to amend its grounds for appeal in this matter, alleging that during the course of discovery the Commission had learned the following facts:

1. On April 15, 1982, the Erie County Health Department ("Erie"), pursuant to Section 504 of the Solid Waste Management Act of 1980,

35 P.S. §6018.504 ("SWMA"), objected to issuance of the aforementioned permit because Erie thought the design would allow leachate "breakout" near the north end or east side of the subject fill.

2. On September 1, 1982, Erie withdrew its objection to issuance of Permit No. 300795 provided the permit would include a condition:

> ...that the applicant will provide proper control and disposal of any leachate that may develop.

3. The aforesaid condition was not included in Permit No. 300795 as actually issued.

4. DER did not publish in the Pennsylvania Bulletin its justification for overriding Erie's recommendation of September 1, 1982, although such publication is required by Section 504 of the SWMA.

Based on these allegations, the Commission wishes to amend its grounds for appeal to include the additional grounds that DER has violated Section 504 of the SWMA. The other parties have objected to such amendment, arguing:

a. The Commission does not have standing to raise the issue of alleged noncompliance with Section 504 of the SWMA.

b. The amendment is untimely; March 1, 1983, when the petition to amend was filed, is more than 30 days past the deadline for filing a Notice of Appeal under the Board's rules. 25 Pa. Code §21.52(a).

The Board agrees with each of these objections. The Commission is not an entity whose recommendations on a solid waste permit must be taken into account by DER under Section 504 of the SWMA. The Commission has made no claims that DER's alleged violation of Section 504 of the SWMA has injured the Commission in any way sufficient to confer standing under Pennsylvania law. See

Concerned Citizens of Rural Ridge v. DER, EHB Docket No. 82-100-G, Opinion and Order issued November 22, 1982 and Concerned Citizens Against Sludge v. DER and City of Philadelphia, Permittee, EHB Docket Nos. 82-220-G and 82-221-G, Opinion and Order issued February 9, 1983. To paraphrase this February 9, 1983 Opinion and Order (see pp. 5 and 6), nowhere in the SWMA is there any indication that the Pennsylvania legislature intended that the Commission would act as a private or Commonwealth attorney general, looking over DER's shoulders as DER administered the SWMA.

Therefore the Commission lacks standing to raise the issue of alleged noncompliance with Section 504 of the SWMA. In addition, the amendment--insofar as it attempts to introduce an entirely new ground for appeal--does appear to be untimely, although the record does not show precisely when the filing period permitted under 25 Pa. Code §21.52(a) expired.[1]

Despite the preceding, however, we shall not bar the Commission from presenting evidence concerning the possible need for a permit condition of the sort Erie requested (see allegation 2 listed above) provided the requirements of our Pre-Hearing Order No. 1 are met. One of the Commission's objections to the permit, stated in its original Notice of Appeal, is:

> The permit would allow acid and other contaminating material to leach into the important wetlands immediately adjacent to the permitted site.

The need for "proper control and disposal of any leachate that may develop" is well within the boundaries of subjects the Commission would be permitted to address, once it had filed a Notice of Appeal containing the objection just quoted. As we have explained in Township of Indiana et al. v. DER, Docket Nos.

---

1. According to Section 21.52(a) the appeal must be filed with the Board within 30 days after the party appellant has received written notice of the DER action appealed from. By November 22, 1982, when the Commission filed its appeal, notice of the permit issuance somehow must have reached the Commission.

82-099-G and 82-100-G, Opinion and Order issued September 15, 1982:

> [T]his Board customarily permits appellants to offer arguments and testimony concerning objections (to DER's complained-of action) which have not been listed in the original Notice of Appeal, provided proper notice of such arguments and testimony has been given in appellant's pre-hearing memorandum... This Board practice is consistent with the letter and intent of 25 Pa. Code §21.51(e) which recognizes that in appeals to this Board--which so often involve highly technical issues--the appellant frequently cannot be expected to fully articulate the grounds for his appeal until he has had the opportunity for discovery.

ORDER

AND NOW, this 29th day of March 1983, it is ordered that:

1. The Commission's Petition to Amend its Grounds for Appeal in this matter is rejected.

2. Assuming there is compliance with the requirements of our Pre-Hearing Order No. 1, the Commission will be permitted to present evidence concerning the possible need for a permit condition "to provide proper control and disposal of any leachate that may develop" during operation of the landfill which is the subject of this appeal.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY, Member

DATED: March 29, 1983

cc: Bureau of Litigation
Howard J. Wein, Esquire
Paul F. Burroughs, Esquire
Stuart M. Bliwas, Esquire
William J. Kelly, Esquire
Daniel Brocki, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

TWILIGHT INDUSTRIES :

:

Docket No. 81-167-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER RE
OVERDUE STATUS REPORTS

On December 9, 1982 this matter was continued until February 4, 1983; on or before that date the parties were to file a report concerning the status of their settlement negotiations.

As of this date, neither party has filed the requested status report. The Board has no wish to force the parties to a hearing on the merits if they genuinely are engaged in settlement negotiations. But in the absence of regular status reports, the Board has no way of deciding whether a hearing on the merits should be scheduled. Furthermore, the Board is in no mood to spend its time reminding the parties that status reports are due.

O R D E R

WHEREFORE, this 30th day of March, 1983, it is ordered that:

1. This matter is continued to March 30, 1984, one year from now.

2. At that time, if nothing further has been heard from the parties, this appeal will be marked discontinued without prejudice on grounds of inactivity; no further notice of possible discontinuance on grounds of inactivity will be sent to the parties.

3. Either party wishing to terminate its settlement negotiations, and to proceed to a hearing on the merits, has the responsibility of so informing the Board.

4. The Board no longer requires, nor desires, status reports from the parties.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: March 30, 1983

cc: Bureau of Litigation
Henry McC. Ingram, Esquire
Donald A. Brown, Esq.
Fred S. Shaulis, C.E.O., PBS Coals, Inc.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
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BETHLEHEM MINES CORPORATION :

:

: Docket No. 82-067-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and UNITED MINE WORKERS OF AMERICA, Intervenor

OPINION AND ORDER SUR
REOPENING OF PROCEEDINGS

The procedural history to February 1983, of this appeal filed by Bethlehem on February 26, 1982, has been summarized in an Opinion and Order Sur Motion For Summary Judgment at the above docket number, issued February 16, 1983; therefore this procedural history will not be repeated here, except as required for the purposes of the instant Opinion and Order.

On February 9, 1983, after two full days of hearings on this matter, Bethlehem and DER announced at the opening of a third hearing day that they expected to be able to reach a settlement satisfactory to the two of them, but that they did not expect Intervenor United Mine Workers of America ("UMW") to join them in the settlement. Nevertheless, Bethlehem and DER asked the Board member conducting the hearing to suspend the hearings pending settlement negotiations between Bethlehem and DER.

UMW strongly opposed suspension of the hearings for the aforesaid purpose, arguing that no settlement which excluded UMW could be valid. However, the hearing examiner did suspend the hearings pending settlement negotiations between Bethlehem and DER. The hearing examiner grounded his ruling on 25 Pa. Code §21.120, which reads:

> 21.120. Termination of proceedings.
>
> (a) In all cases where a proceeding is sought to be terminated by the parties as a result of a settlement agreement, the terms of such settlement shall be submitted to the Board for approval and the major substantive provision thereof shall simultaneously be published in the Pennsylvania Bulletin. Such settlement, unless the terms of the settlement itself provide otherwise, shall be effective immediately upon approval by the Board subject to reopening if an objection is filed as set forth below, and upheld by the Board. Any aggrieved party objecting to the proposed settlement may, within 20 days after publication, appeal to the Board in accordance with these rules and request a hearing on its objections.
>
> (b) ...The Environmental Hearing Board is empowered to approve this settlement which becomes final if no objection is timely made.

According to the hearing examiner, this Section 21.120 of the Board's rules, giving UMW the right to appeal any proposed settlement between DER and Bethlehem, sufficiently protects UMW's rights in this matter. Under the circumstances, in the hearing examiner's view, it would be unfair--to DER, Bethlehem and the Board--to refuse Bethlehem and DER the opportunity to come up with what even UMW might agree is a fair settlement, thereby sparing all the parties and the Board many time-wasteful days of hearings.

On March 23, 1983 DER and Bethlehem filed their proposed settlement with the Board, in the form of a Consent Order and Agreement. A Notice of Termination of Proceedings, for publication in the Pennsylvania Bulletin in

satisfaction of the notice requirements imposed by 25 Pa. Code §21.120, accompanied the proposed settlement; this Notice has been forwarded to the Pennsylvania Bulletin for publication. In the meantime, UMW has filed a Petition to Disapprove the Proposed Settlement, and also has filed an accompanying Motion to Quash the Aforementioned Notice of Termination of Proceedings. We now will rule on this Petition and accompanying Motion, taking advantage of the various memoranda of law the parties have filed in support of their respective positions on the merits and legal effect of the proposed settlement.

We deny UMW's Motion to Quash the Notice of Termination. The Board stands by its previous ruling that it is lawful, and no violation of UMW's rights, for DER and Bethlehem to seek a settlement between themselves of their differences in this matter. Granted the correctness of that earlier ruling, publication of the Notice is required by 25 Pa. Code §21.120(a).

The Board also rejects UMW's Petition to Disapprove the Proposed Settlement, insofar as this Petition maintains the Board had no right to suspend hearings before UMW could present its case, pending settlement negotiations between DER and Bethlehem. However, this Petition of UMW's also raises substantive objections to terms of the proposed settlement, e.g , "to the excessive number of vehicles which would be operating" and to "the absence of any consideration of the number of vehicles from Mine No. 51 which would regularly be on Mine No. 60 haulage." We regret that UMW did not find the proposed settlement unobjectionable, but UMW certainly is entitled to bring such objections to the Board's attention before the Board decides whether or not to approve the proposed settlement.

Therefore, in the interests of expediting resolution of the remaining issues in this case, we shall regard UMW's aforesaid Petition to Disapprove the Proposed Settlement as an appeal of the proposed settlement under the authority of 25 Pa. Code §21.120. The new appeal will be consolidated with the instant appeal, under the same caption and docket number. The record already made in the instant appeal, including all evidence presented at the two days of hearings February 7-8, 1983, will be made part of the record on UMW's appeal of the proposed settlement. Hearings, giving UMW the opportunity to present its case against the proposed settlement, will be scheduled in the near future. In this new appeal, the burden of proof and the burden of proceeding will be upon UMW. 25 Pa. Code §21.101(c)(4).

Because all the parties filed pre-hearing memoranda before hearings were held on Bethlehem's February 26, 1982 appeal which initiated this controversy, because the parties have had the benefit of numerous exchanges of views on the need for a dispatcher in the mine on all shifts (the key issue in the controversy, see our February 16, 1983 Opinion and Order at this docket number), and because the testimony UMW wishes to present is clearly stated on pp. 6-8 of UMW's Memorandum of Law in Support of Petition to Disapprove Settlement (filed March 21, 1983), we shall not require pre-hearing memoranda from the parties, again in the interests of expediting resolution of the remaining issues in this case. At the to-be-scheduled hearings, UMW will be limited to presenting the testimony just described; each of the other parties will be limited to presenting evidence which is germane to the issues UMW raises but which is not purely repetitive of evidence that party already has presented (at the February 7-8, 1983 hearings).

Our Order (see below) embodies the rulings stated supra, but does give each party the opportunity to protest those rulings it deems prejudicial to its abilities to properly present its case at the forthcoming hearings.

O R D E R

WHEREFORE, this 31st day of March 1983, it is ordered that:

1. UMW's Motion to Quash the Notice of Termination of Proceedings is rejected.

2. UMW's Petition to Disapprove the Proposed Settlement is rejected as such.

3. However, UMW's Petition to Disapprove the Proposed Settlement is accepted by the Board as an appeal, under the authority of 25 Pa. Code §21.120, of the proposed settlement filed by DER and Bethlehem.

4. This new appeal will be consolidated with the above-captioned matter, under the identical caption.

5. The record already made in the above-captioned matter, including all evidence presented at the two days of hearings February 7-8, 1983, will be made part of the record in UMW's appeal of the proposed settlement.

6. Hearings on UMW's appeal of the proposed settlement will be scheduled in the near future.

7. In this new appeal, the burden of proof and the burden of proceeding will be on UMW.

8. Pre-hearing memoranda for these forthcoming hearings will not be required.

9. At the forthcoming hearings, UMW will be limited to presenting the testimony described in pp. 6-8 of UMW's Memorandum of Law in Support of Petition to Disapprove Settlement (filed March 21, 1983), unless UMW does file a pre-hearing memorandum as permitted by paragraph 11 infra.

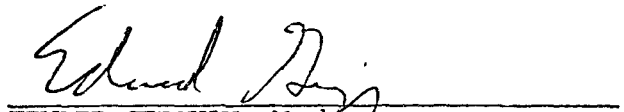
10. At the forthcoming hearings each of the other parties will be limited to presenting evidence which is germane to the issues UMW raises but which is not purely repetitive of evidence that party already has presented (at the February 7-8, 1983 hearings).

11. On or before April 11, 1983, UMW may, if it wishes, file a pre-hearing memorandum describing any additional evidence--beyond that already permitted, see paragraph 9 supra--UMW seeks to present at the forthcoming hearings.

12. On or before April 11, 1983, either or both of the other parties may petition the Board for permission to present evidence beyond the limitation stated in paragraph 10 supra; such petitions must be specifically pleaded.

13. Notwithstanding any of the preceding paragraphs in this Order, the Board reserves its usual rights, under the Board's rules, e.g., 25 Pa. Code §21.90, to control the forthcoming hearings.

ENVIRONMENTAL HEARING BOARD



EDWARD GERJUOY, Member

DATED: March 31, 1983

cc: Bureau of Litigation
Dennis W. Strain, Esquire
R. Henry Moore, Esquire
Robert S. Whitehill, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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ELZIE E. LAVERY :

:

: Docket No. 82-158-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER RE
FAILURE TO WITHDRAW APPEAL

On July 2, 1982, Elzie E. Lavery ("Lavery") filed this appeal of DER's letter to Lavery, dated June 1, 1982, forfeiting a surety bond in the amount of $5,700 because Lavery allegedly had failed to correct violations on his surface mine operation.

On July 7, 1982, the Board, pursuant to its usual practice, sent Lavery Pre-Hearing Order No. 1, advising Lavery that he must file his pre-hearing memorandum on or before September 20, 1982. On September 28, 1982, no pre-hearing memorandum having been received, the Board wrote Lavery's counsel by certified mail that the pre-hearing memorandum was overdue, and that Lavery's failure to file its pre-hearing memorandum by October 8, 1982 would risk default of Lavery's appeal under the Board's rules. 25 Pa. Code §21.124.

On October 6, 1982 the Board received a letter from Mr. Lavery's counsel, written in response to the Board's September 28, 1982 letter. Mr. Lavery's

counsel claimed that neither he nor his client were aware that this appeal was before this Board, or that a pre-hearing memorandum had been due on September 20, 1982. On October 13, 1982 the Board replied to Lavery's counsel. The Board agreed to give Lavery a further extension of time to file his pre-hearing memorandum, provided Mr. Lavery and his attorney filed a sworn affidavit that they never had received our Pre-Hearing Order No. 1. Such an affidavit, dated October 15, 1982, was filed with the Board on October 20, 1982.

In the meantime, on October 14, 1982, the Board received a letter from DER's counsel, advising the Board that settlement of this appeal was being negotiated and, on behalf of both DER and Lavery, asking for a 60-day continuance pending settlement negotiations. On October 22, 1982 the Board more than granted this request; Lavery was given until January 14, 1983 to file his pre-hearing memorandum, and the parties were asked to report to the Board on or before January 5, 1983 concerning the status of their settlement negotiations.

On January 4, 1983 DER's counsel filed the requested status report. She stated that a settlement document had been prepared and was being reviewed, and asked for another continuance until January 19, 1983. On January 11, 1983 the Board granted this request, but extended the continuance until January 24, 1983; on or before that date Lavery--whose task it was to prosecute his appeal but who had not been heard from since filing his affidavit on October 20, 1982--was to file a report on the status of the settlement negotiations.

Nothing further was heard from the parties until February 28, 1983. On that date the Board received a letter from DER's counsel stating that a settlement of this appeal finally had been reached. The letter said, "I expect that Mr. Lavery will be advising the EHB that he will be withdrawing his appeal."

However, no such advice has been received from Lavery or his counsel. No continuance past January 24, 1983 ever has been requested or granted; since January 24, 1983 Lavery has been in default on the pre-hearing memorandum whose previous default had been forgiven on the basis that he had not received our Pre-Hearing Order No. 1. The Board has not received a copy of the settlement for approval, as seemingly is required by 25 Pa. Code §21.120(a), nor are we aware that Section 21.120's requirements for publishing the substantive provisions of the settlement in the Pennsylvania Bulletin have been met.

Under the circumstances, the Board is somewhat at a loss how to proceed. The facts we have recounted surely justify our dismissal of Lavery's appeal for failure to obey the Board's rules. 25 Pa. Code §21.124. On the other hand, it is apparent that some settlement of this appeal, to the mutual satisfaction of Lavery and DER, has been reached. We hesitate to take an action which will unfairly prejudice Lavery's rights in this settlement. However, not having seen the settlement, we must assume that it does fall under 25 Pa. Code §21.120, and therefore that the settlement is not binding upon this Board until Section 21.120 is complied with; if this assumption (and our inference therefrom) is correct, then our dismissal of Lavery's appeal might be the only resolution of this controversy the Board would be willing to enforce.

Therefore, we will not dismiss Lavery's appeal at this time. However, we have no intention of continuing to spend our time reminding the parties that filings of one sort or another are due. Consequently, we are continuing this matter for a year, during which time at least one of the parties will have to take the appropriate steps to get this appeal off our roster; if nothing is done in a year, we will withdraw the appeal without prejudice on our own motion, on grounds

of inactivity. We stress our belief that in not dismissing Lavery's appeal with prejudice, for failure to obey the Board's rules, we are being more than generous to Lavery. Although DER has been somewhat inattentive to the time deadlines we have set, the primary source of the Board's difficulties and wastage of time during the course of this appeal has been Lavery's almost complete disregard of our deadlines and of our rules.

O R D E R

WHEREFORE, this 1st day of April, 1983, it is ordered that:

1. This matter is continued to April 2, 1984, one year from now.

2. At that time, if nothing further has been heard from the parties, this appeal will be marked discontinued without prejudice on grounds of inactivity; no further notice of possible discontinuance on grounds of inactivity will be sent to the parties.

3. It is the parties' responsibility to ensure that termination of this appeal because a settlement agreement has been reached is carried out in accordance with applicable rules and regulations. 25 Pa. Code §21.120.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY, Member

DATED: April 1, 1983

cc: Bureau of Litigation
Diana J. Stares, Esquire
Arthur P. Tonozzi, Esquire

COMMONWEALTH OF PENNSYLVANIA
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EDWARD GERJUOY, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, Plaintiff	)	
v.	)	Docket No. 82-058-CP-G
PENNTECH PAPERS, INC., Defendant	)	
PENNTECH PAPERS, INC.	)	
v.	)	Docket No. 82-085-G
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	)	

OPINION AND ORDER RE
OVERDUE STATUS REPORTS

On February 19, 1982, DER filed a complaint for civil penalties against Penntech Papers, Inc. ("Penntech"), under Docket No. 82-058-CP-G. On March 16, 1982 Penntech filed the independent but related appeal docketed at No. 82-085-G.

Thereafter numerous continuances were granted by the Board in both these appeals, for the purpose--so the parties averred--of permitting settlement negotiations. In particular, such continuances were granted, in one or both of these matters, on September 20, 1982, on October 28, 1982 and on November 17, 1982. On November 16, 1982 DER's counsel informed the Board that settlement negotiations had been unsuccessful, and that DER therefore wished to bring No. 82-058-CP-G to trial. Accordingly,

on November 24, 1982, the Board ordered the parties to complete discovery and other necessary preliminaries to trial on or before January 3, 1983.

On November 26, 1982, however, the Board received a letter from Penntech dated November 23, 1982, informing the Board that settlement negotiations again were being actively pursued. This November 23, 1982 assessment of the situation was affirmed by Penntech in a letter dated December 3, 1982, and by DER in a letter dated December 10, 1982. Therefore, at the parties' request, on December 15, 1982 the Board granted a new continuance until January 23, 1983. On or before January 23, 1983, if the settlement negotiations still were under way, Penntech was to file a report on their status. The parties were asked to promptly inform the Board when the settlement agreement was signed, or when negotiations broke down.

On January 27, 1983 DER's attorney informed the Board by telephone that negotiations were continuing, and that the Board "should hear in a couple of weeks." On February 28, 1983, DER's attorney again informed the Board by telephone that negotiations were continuing, but that he "was going to write very soon." Nothing has been heard from Penntech since its aforementioned December 3, 1982 letter.

The Board certainly has no wish to force the parties to a hearing on the merits of either of these cases if genuine settlement negotiations are continuing. On the other hand, the Board is in no mood to spend its time reminding the parties that status reports are due. The Board already has expended a great deal of time in bringing these cases to their present inconclusive state.

O R D E R

WHEREFORE, this 1st day of April, 1983, it is ordered that:

1. This matter is continued to April 2, 1984, one year from now.

2. At that time, if nothing further has been heard from the parties, the complaint at 82-058-CP-G and the appeal at 82-085-G will be marked discontinued without prejudice on grounds of inactivity; no further notice of possible discontinuance on grounds of inactivity will be sent to the parties.

3. Either party wishing to terminate its settlement negotiations, and to proceed to a hearing on the merits of either or both of these matters, has the responsibility of so informing the Board.

4. The Board no longer requires, nor desires, status reports from the parties.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: April 1, 1983

cc: Bureau of Litigation
Michael E. Arch, Esquire
John J. Kerr, Jr., Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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OLD HOME MANOR :

W. C. LEASURE :

Docket Nos. 82-006-G
82-007-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
PETITIONS FOR SUPERSEDEAS

W. C. Leasure ("Leasure") is president of Old Home Manor, Inc. ("OHM"), a Texas corporation registered to do business in the Commonwealth of Pennsylvania. OHM is the permittee of a number of mine drainage permits and mining permits issued by DER.

On December 23, 1981, DER issued an Order to Leasure and OHM, requiring the performance of various measures allegedly necessary to correct conditions existing on the sites of 16 mining operations; these measures included, e.g., revegetating and the submission of performance bonds.

On January 7, 1982, OHM and Leasure filed independent (though obviously related) appeals from DER's Order, accompanied by petitions for supersedeas. On January 18, 1982, Leasure filed a motion to vacate DER's Order insofar as it applied to Leasure. The alleged grounds for this motion to vacate largely

overlapped the alleged grounds for supersedeas alleged in Leasure's petition.

On April 12, 1982, after receiving memoranda of law from the parties, this Board rejected Leasure's motion to vacate DER's Order of December 23, 1981 (insofar as it was directed against Leasure), although the Board conceded that many of Leasure's arguments had merit; the Board stated that it might be willing to grant Leasure's motion at a later date, should DER, during the course of the hearings on the merits of Leasure's appeal, fail to make various showings needed to counter Leasure's motion to vacate.

Hearings on these supersedeas petitions began on April 13, 1982. On June 3, 1982, the tenth day of these hearings on the supersedeas petitions, it became apparent that the hearings were degenerating into full hearings on the merits, and as such were not serving the intended function of supersedeas hearings. On June 4, 1982, therefore, at a conference with the Board, the parties agreed to close their presentation of evidence on the supersedeas petitions. The parties further agreed to let the Board decide these supersedeas petitions on the basis of the evidence already submitted and the parties' briefs. A detailed stipulation to this effect, limiting the issues and the evidence which would be pertinent to the Board's ruling on the supersedeas petitions, was filed by the parties on July 12, 1982. In pertinent part, this stipulation reads as follows:

> 4...[N]o decision by the Board shall be rendered deciding whether:
>
> a. environmental harm is occurring or will occur if a supersedeas issues;
>
> b. there is an environmental necessity for complying with the actions required of Appellants under DER's appealed from Order.
>
> c. the time periods for completing the specific actions required in the Department's Order...are reasonable.
>
> 5...[B]ecause the issues to be decided have been denominated legal issues,..., the Board shall not deny either of Appellants' supersedeas petitions because

> Appellants have not yet introduced evidence of the elements set forth in 25 Pa. Code §21.78.
>
> 6...[T]he parties' briefs...will concentrate primarily on the legal issues which...can be determinative of one or both of the supersedeas petitions when the issues described above are disregarded and not made a subject for decision by the Board.

On July 12, 1982 the Board embodied this stipulation of the parties in an Order setting up a briefing schedule for filing briefs on the supersedeas petitions. The briefs now having been filed after many continuances, we herewith proceed to rule on these supersedeas petitions. The bases for our rulings will be as the parties have stipulated and we have ordered on July 12, 1982, namely the likelihood of the petitioner prevailing on the "determinative" (i.e., dispositive) legal issues. Because the issues in the two petitions are not identical, although they do largely overlap, we shall examine the petitions separately, starting with OHM's.

I. Old Home Manor's Petition

A. Whether the 1980 Version of SMCRA Governs.

The December 23, 1981 Order issued by DER included the finding:

> G. Leasure and OHM have committed violations of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq., the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq., the Rules and Regulations of the EQB, and the terms and conditions of the above-referenced mine drainage and mining permits.

Apparently because of this language, OHM declares that OHM is being subjected to a retroactive (and therefore unlawful) application of the 1980 version of the

Surface Mining Conservation and Reclamation Act (SMCRA), in that when the permits were issued the 1980 amendments to the SMCRA had not yet been enacted.

We have several comments about the merits of this argument of OHM's, which we reject as a basis for granting supersedeas. Before proceeding to the merits of the argument, however, we note that OHM's original petition for supersedeas did not allege this retroactivity argument as a reason for seeking supersedeas. Petitions for supersedeas are supposed to be pleaded with particularity. 25 Pa. Code §21.77. It was not the Board's expectation in encouraging the parties to reach the aforementioned stipulation, that wholly new legal theories, not previously advanced for or against granting supersedeas, would be argued by the parties. It is true that the parties' stipulation includes, as an agreed issue to be briefed: "f. The statutes and regulations controlling this matter." But this bald reference to "the statutes and regulations controlling this matter" hardly suggests that retroactivity is to be the governing principle in deciding which statute applies.

However, we need not and do not rely on the preceding paragraph's rather technical procedural reason for rejecting OHM's thesis under present discussion. Let us proceed to the merits of OHM's thesis. Then we find OHM's position to be illogical. According to the language quoted above from the December 23, 1981 Order, the alleged SMCRA violations were only a portion of the violations charged. Whether or not the SMCRA in its 1980 version had been violated, violations of "the Clean Streams Law,...the Rules and Regulations of the EQB, and the terms and conditions of the above-referenced mine drainage and mining permits" surely could justify DER's Order. Similarly, it is quite possible that DER's Order would be justified even if we granted OHM's thesis that the 1972 version of the SMCRA should govern. For example, the Order's numerous findings that OHM and

Leasure "have failed to adequately revegetate" and "have failed to backfill to approximately original contour" well might be justifiable under versions of the SMCRA in force even prior to 1966. See 52 P.S. §§1396.10 and 1396.11, repealed November 30, 1971, P.L. 554.

Even setting aside this logical insufficiency, the Board disagrees with the legal premises of OHM's retroactivity thesis. OHM rests its argument that the older version of the SMCRA should apply on American Casualty Company of Reading v. DER, 441 A.2d 1383 (Pa. Cmwlth 1982). However, as DER correctly points out, American Casualty is concerned with the scope of the obligation undertaken by a mine operator's surety, which scope--according to the court--had to be based on the language of the surety's bonds; American Casualty is not concerned with the scope of the obligations which the 1980 and/or the 1972 versions of SMCRA imposed on the mine operator. Thus American Casualty is inapposite to OHM's thesis. Moreover, from Commonwealth v. Barnes and Tucker, 455 Pa. 392, 319 A.2d 871 (1974), it appears inescapable that it is lawful for a statute to require present (after enactment of the statute) remedial measures for environmental damage having its genesis in actions taken prior to enactment of the statute. As the Barnes and Tucker court asserted:

> Even if liability for the discharge of mine drainage was made abatable for the first time under any theory by the 1970 amendments, a recognition of the Commonwealth's claim based thereon would not require that we place a retrospective construction in those amendments. Rather, we would be applying that section to a condition which existed on the date when the amendments covering discharges from abandoned mines became effective, even though such condition resulted from events which occurred prior to their effective date.

For the above reasons of merit, especially our view of Barnes and Tucker's implications, OHM's argument that the 1980 version of the SMCRA should govern has been rejected as a basis for granting OHM a supersedeas. A similar (to OHM's) argument has been advanced previously, and has been similarly rejected by the Board. J. Nevin White Lumber Co. v. DER, 1978 EHB 97 (Docket No. 77-210-W, issued June 9, 1978).

B. Whether, for Some Sites, DER is Estopped from Ordering Reclamation.

OHM claims testimony on the record supports the finding that in December, 1979 J. Anthony Ercole, Director of DER's Bureau of Surface Mining, gave OHM certain assurances concerning some of the sites whose reclamation was ordered by DER in its appealed-from December 23, 1981 Order. In particular, OHM claims that in 1979 Mr. Ercole told OHM sites in the "Wilpen" area need not be reclaimed until DER had acted on an application by OHM to mine limestone in the area. Apparently OHM submitted its application to DER on April 9, 1981, well before the December 23, 1981 Order, but the application to mine limestone was not denied until March 26, 1982, after the December 25, 1981 Order requiring reclamation of the Wilpen area had been issued. OHM argues that Mr. Ercole had the authority to give OHM the aforesaid assurances, and that OHM justifiably relied on these assurances to its detriment. Therefore, OHM concludes, the doctrine of estoppel in pais precluded DER, on December 23, 1981, from ordering OHM to reclaim the mining sites in the Wilpen area. DER rejects this conclusion, of course.

We also reject it. In the first place, we are not convinced the record supports the finding that Mr. Ercole gave the above-described assurances to OHM. Nowhere in his testimony does Mr. Ercole concede that he gave OHM the assurances

they allege. OHM offers the following quotation from Mr. Ercole's testimony (Tr. 903-904):

> Q. Do you remember what the discussion was?
>
> A. ...Mr. Leasure talked about mining some limestone on that site, and again, we told them to submit the proposal for converting it over, or to mine the limestone.
>
> Q. Was there any commitment as to what the Department would do once it had received these proposals?
>
> A. We would review them from that standpoint of changing the operation over and make whatever adjustments had to be made in bonding as we normally do, and I assume, depending on what the application for the non-coal mining, the limestone removal would have covered, then we would have asked for reclamation for the rest of the site.

However, OHM did not quote the language used by Mr. Ercole immediately following the above quotation. He went on to say (Tr. 904):

> But without seeing the proposal, you know, you couldn't make any decision. You know, just as a matter of fact, there has to be a technical review. Even if I were qualified from a technical standpoint, you can't do that from looking at the site. You have to see the data, the information that comes in on the application.
>
> Q. So it was a matter of course then that you are not going to approve such proposals yourself without having first gone through the permit review process?
>
> A. That's true.

This testimony from Mr. Ercole, and similar testimony elsewhere in the record, does not imply that Mr. Ercole gave the aforementioned assurances. If anything, Mr. Ercole is saying that he would not give assurances until he saw actual proposals, although this inference from his language hardly is clear. Thus, given Mr. Ercole's actual language, OHM's claim of assurances rests almost solely on Leasure's own testimony about his meeting with Mr. Ercole, and about

the significance of Petitioner's Exhibit No. 1, a document unsigned by Ercole but which OHM introduced into evidence as having markings purporting to show (in the light of Leasure's testimony) what areas were to be reclaimed. In view of the importance, well understood by OHM at the time, of the alleged agreement to OHM's plans for the Wilpen area, it is very difficult to understand why OHM did not take pains to memorialize unequivocally the terms of any such agreement.

In sum, even if we grant arguendo that on December 23, 1981 the doctrine of estoppel in pais could have estopped DER from ordering OHM to reclaim the Wilpen area, the evidence on the record is insufficient to bear OHM's burden of establishing the factual underpinnings on which estoppel in pais would rest. Specifically, OHM did not meet its burden of showing there was a definite and unqualified agreement with Mr. Ercole, on whose terms OHM justifiably could rely, permitting OHM to delay reclaiming mining sites in the Wilpen area until DER had acted on OHM's application to mine those sites for limestone, even though OHM's application for this purpose was not to be submitted until April 9, 1981, almost a year and a half after Mr. Ercole's meeting with Leasure.

Moreover, for estoppel in pais to apply in the instant dispute, OHM's reliance on Mr. Ercole's alleged assurances must have caused OHM to change its position to its detriment.

> Elements or essentials of estoppel include change of position of parties so that party against whom estoppel is invoked has received a profit or benefit, or party invoking estoppel has changed its position to its detriment.

Black's Law Dictionary, 5th Edition (West 1979), p. 494. See also Ohio Farmer's Insurance Co. v. DER, EHB Docket No. 80-041-G (Adjudication issued August 25, 1981), affirmed by the Commonwealth Court at No. 2326 C.D. 1981 (January 31, 1983).

OHM has not met its burden of showing that, in reliance on Mr. Ercole's assurances, it changed its position relative to the Wilpen area mining sites, to OHM's detriment. All OHM has to say on this subject in its brief is:

> Directly as a result of Mr. Ercole's assurances to OHM, OHM refrained from revegetating the area (Tr. 271), refrained from backfilling the area (Tr. 270), and refrained from maintaining backfilling equipment on the site (Tr. 272). OHM now finds itself subject to the costly litigation of an Order directing it to perform those acts which it was assured would not have to be performed until final action was taken on its application for a limestone permit and is now engaged in the costly process of appeal. It is clear, therefore, that OHM has relied to its detriment on the assurances made by Mr. Ercole.

The suggestion that OHM's failure to revegetate, backfill or maintain backfill equipment on the site was a change of OHM's position to its detriment, because OHM later chose to bear the costs of appealing a DER Order to take precisely these actions, is ingenious but laughable. The Board chooses not to be laughed at, and so rejects this argument of OHM's. OHM might have argued that its expenses for preparing the limestone mining permit application would not have been incurred but for Mr. Ercole's assurances; no such argument was made by OHM however. That Mr. Ercole's alleged assurances largely were irrelevant to OHM's decided-upon course of action in the Wilpen area is strongly suggested by the fact that OHM acquired its limestone mining rights in the area as long ago as 1974-75, long before the alleged December 1979 assurances by Mr. Ercole (see Petitioner's Exhibits 32, 34 and 36).

In view of the foregoing we need not and do not rule whether an agreement between Mr. Ercole and OHM, clearly entered into and definite in its terms, on which OHM justifiably changed its position to its detriment, could have estopped DER's December 23, 1981 Order to OHM to reclaim the Wilpen area.

There are a number of other (than the Wilpen) mining sites for which, according to OHM, DER on December 23, 1981 also was estopped from ordering backfilling, revegetation, etc. OHM's arguments in favor of such estoppel, though somewhat different in factual detail from OHM's arguments for the Wilpen area, rest on substantially the same flawed grounds that have led us to reject OHM's estoppel in pais thesis for the Wilpen site. In particular, for these other sites OHM again fails to meet its burden of showing there was an agreement with DER, or some other act by DER, on which OHM justifiably relied. And OHM again largely fails to show that for these other sites OHM, in this justified reliance, changed its position to its detriment. Here we have used the qualifier "largely" advisedly--on some of these other sites OHM did change its position somewhat, and somewhat to its detriment. For example, in an area of mining sites 615-6 and 615-6(a) where OHM hoped to locate a deep mine, OHM did the preparatory work of facing up the front of the highwall and installing power lines (Tr. 64). However, even if such actions taken by OHM were sufficiently to its detriment to warrant estoppel of DER in favor of OHM for this proposed deep mining area in 615-6 and 615-6(a), the other necessary component for establishing estoppel, namely the existence of an agreement or other action by DER on which OHM justifiably could rely, remains unproved.

Therefore, for reasons now requiring no further elaboration, OHM's claim of estoppel in pais against DER is rejected for all sites forming the subject of the instant appeal.

C. Whether, for Some Sites, Proposed for Future Mining, DER Abused Its Discretion in Ordering Reclamation.

OHM argues that DER abused its discretion in ordering OHM to backfill

and otherwise reclaim certain areas where DER allegedly knew OHM was proposing future mining. We feel this argument of OHM's might have merit for several of the areas falling under the argument's rubric; DER may have abused its discretion in ordering reclamation of those areas. However, the question before us is not whether DER ultimately will be found to have abused its discretion, but rather whether at this stage in the proceedings, under the terms of the July 12, 1982 stipulation the parties agreed to (quoted supra), OHM deserves a supersedeas of DER's December 23, 1981 Order.

The Board's rules governing the circumstances affecting grant or denial of supersedeas, 25 Pa. Code §21.78, read:

> (a) The circumstances under which a supersedeas shall be granted, as well as the criteria for the grant or denial of a supersedeas, are matters of substantive common law. As a general matter, the Board will interpret said substantive common law as requiring consideration of the following factors:
>
> (1) irreparable harm to the petitioner;
> (2) the likelihood of the petitioner's prevailing on the merits; and
> (3) the likelihood of injury to the public.
>
> (b) A supersedeas shall not issue in cases where nuisance or significant (more than de minimis) pollution or hazard to health or safety either exists or is threatened during the period when the supersedeas would be in effect.

Therefore we take the terms of the aforesaid stipulation, especially its paragraph 5, to mean the parties agreed the Board should grant the requested supersedeas if DER's order for OHM to reclaim the areas OHM was reserving for future mining clearly was an abuse of discretion, even though OHM may not have shown that granting the supersedeas will not threaten significant (more than de minimis) injury to the public.

We are not convinced that the Board--though it did approve the stipulation--has the power to ignore its own rules and regulations as blatantly as we just have described; it is contrary to the clear intent of its rules for the Board to issue a supersedeas which threatens significant pollution or hazard to health or safety. This conflict between the stipulation and our rules does not arise in the present case, however, because deciding whether or not DER's action under present consideration was an abuse of discretion requires decisions about the likelihood of environmental harm should the disputed areas be permitted to remain unreclaimed; for the purposes of this Opinion and Order these latter decisions are forbidden to the Board by the terms of the stipulation itself, notably paragraph 4a.

In particular, it is evident that although it is wasteful and expensive, constituting irreparable harm, for OHM to be forced to reclaim land it soon will be tearing up again during its proposed mining, nevertheless it would not be an abuse of discretion for DER to require the reclamation if failure to reclaim would cause significant environmental harm. Obviously the likelihood of environmental harm associated with failure to reclaim does depend on how long the reclaimed land would remain undisturbed; it would be an abuse of discretion for DER to order expensive revegetation which definitely was scheduled to be uprooted the week after planting. But we do not have egregious facts of this sort in the present dispute. Under the facts before us concerning the Wilpen area for instance, where OHM waited almost a year and a half to submit its application to mine for limestone, and where the limestone mining permit application has been denied since March 26, 1982, we cannot conclude the December 23, 1981 Order's requirements as to the Wilpen area mining

sites constituted an abuse of discretion, sufficient to warrant supersedeas under the terms of the stipulation. Similar considerations pertain to other areas where OHM is proposing future mining, e.g., the proposed deep mining area on sites 615-6 and 615-6(a) discussed supra.

For the foregoing reasons we reject OHM's request for a supersedeas of DER's Order insofar as it requires reclamation of areas OHM has reserved for future mining. This ruling is unaffected by OHM's seemingly unqualified argument that it is entitled to a supersedeas of the reclamation order in any area where there remains a possibility of approval of OHM's mining permit application, even if this possibility of approval rests solely on timely appeals of previous permit denials. However, OHM cites no authority for this contention, which would have the effect of making a permit application for new mining in an area become an automatic supersedeas of earlier orders to reclaim the area, and which—in apparent violation of 71 P.S. §510-21(d)--would cause the supersedeas to be maintained automatically by the mere appeal to the EHB of DER's permit denial.

D. Whether DER's Order to Backfill Special Reclamation Project 445 to Approximate Original Contour Was an Abuse of Discretion.

DER's Order required OHM to backfill to approximate original contour ("AOC") the area encompassed by its Special Reclamation Project 445 ("SRP 445"). OHM argues that the original permit application for SRP 445 proposed a terrace type backfill rather than AOC backfilling; moreover, OHM claims, the permit DER issued to OHM for SRP 445 did not vary from the permit application's proposed terrace backfill. Therefore, OHM seemingly concludes (we have had some difficulty ferreting this conclusion out of the morass of arguments in OHM's brief), ordering OHM to backfill the area encompassed by SRP 445 to AOC was an abuse of discretion.

DER's brief does not speak to this contention of OHM's. However, our examination of the record supports OHM's version of the facts. Commonwealth Exhibit 3, dated June 9, 1977, grants DER approval to OHM for SRP 445. The DER letter approving OHM's SRP 445 operation makes reference to a letter from OHM to DER, dated December 29, 1976. In pertinent part this December 29, 1976 letter reads (Petitioner's Exhibit 10):

> The following is a resume of our proposed plans to reclaim this area:...
>
> 3. In our backfilling operations of the reclaimed area, we will construct the necessary terraces so as to provide a reclaimed area that can be planted with vegetation and put to fruitful use.

The permit nowhere contravenes this resume of OHM's reclamation plans, nor does the permit ever specifically call for backfilling to AOC. Although the SMCRA normally calls for AOC backfilling, see 52. P.S. §1396.3 "Contouring", the SMCRA does permit terracing under appropriate circumstances, 52. P.S. §1396.4(2)E.(i). Correspondingly, the newest pertinent surface mining regulations permit deviations from AOC under appropriate circumstances. 25 Pa. Code §§87.142-3.

There is nothing in the present record to suggest the full hearing on the merits of this matter will show that permitting OHM to backfill to terraces rather than to AOC will significantly, or even insignificantly, threaten pollution or hazard to health or safety. Therefore, even though OHM has not met the burdens prescribed by 25 Pa. Code §21.78, we believe it is within our powers, and consistent with the aforementioned stipulation, to grant OHM a supersedeas on the grounds just discussed--that for DER to require AOC in SRP 445, when the permit itself acknowledges OHM's intent to backfill to terraces, was an abuse of discretion. We grant OHM a very limited supersedeas however; the December 23, 1981 Order is

stayed only insofar as it requires backfilling to AOC. Backfilling to terraces, sufficient to meet reasonable standards for such contouring, still must be completed within the time schedule for backfilling set forth in the December 23, 1981 Order.

E. Whether DER's Order Was in Violation of Due Process, Notice, Etc. Requirements

OHM has dredged up a potpourri of substantive and/or procedural violations by DER warranting (OHM claims) a supersedeas of DER's December 23, 1981 Order for some or all of the sites which are the subject of the instant appeal. OHM's arguments in this regard appear to be:

(1) Forcing OHM to backfill its proposed mining sites, before OHM's appeals from denials of permits to operate these sites have been fully heard, constitutes deprivation of property without due process of law.

(2) DER is precluded from enforcing revegetation requirements which have not been published as regulations, see the Commonwealth Documents Law, 45 Pa. C.S.A. §501 et seq., or 1 Pa. Code pp. F-1 to F-43, esp. §702, pp. F-19 and F-20.

(3) DER is precluded from enforcing revegetation requirements because there are no administrative standards for what is to be deemed "adequate" vegetative cover.

(4) The December 23, 1981 Order is invalid because notices of violation on which the Order rests never were issued.

All these arguments for supersedeas hopelessly lack merit. Re (1) above, OHM has given no authority for the novel proposition that an otherwise lawful order to reclaim an area, in exercise of the Commonwealth's powers to protect its citizens' health and environment, is made unlawful by OHM's mere appeal of DER's

denial of a permit for OHM operations on that area; again an appeal would become an automatic supersedeas, in violation of 71 P.S. §510-21(d). This argument of OHM's also fails for reasons related to those discussed under Section IA of this Opinion and Order. Whatever may be OHM's plans for an area, and whatever previous OHM permit applications are being processed by DER, the Commonwealth--through DER--has the power and the duty to order measures DER deems necessary at the time to protect the health and environment of the Commonwealth.

Re (2) above, this Board has ruled in the past that failure to publish a requirement as a regulation does not make the requirement unenforceable. Regulations which are properly adopted and promulgated by DER are accorded a presumption of validity. Allegheny Sanitary Authority v. DER, EHB Docket No. 78-053-H (March 10, 1982), Cambria Coal Co. v. DER, EHB Docket No. 82-071-H (March 11, 1983). Where there are no applicable regulations, DER still is empowered to make reasonable decisions on a case-by-case basis. DER v. Butler County Mushroom Farm, 454 A.2d 1 (Pa. 1982), but the decisions will not be accorded a presumption of validity. Allegheny, supra, Cambria, supra. In other words, DER's attempts to enforce its revegetation requirements on OHM become actions for which the Board can substitute its own discretion, but these revegetation requirements of DER's are not per se unenforceable. Warren Sand and Gravel v. DER, 20 Pa. Cmwlth 186, 341 A.2d 556 (1975).

The argument (3) above pretty much also is countered by the preceding paragraph. Perhaps DER does not have a reasonable basis for deciding what is "adequate" vegetative cover, but certainly OHM has not yet made such a showing in this appeal. We cannot believe that OHM's counsel expects us to grant a

supersedeas on the presently purely speculative possibility that a hearing on the merits will show DER's revegetative requirements, as applied to OHM in the disputed December 23, 1981 Order, were an unreasonable abuse of DER's discretion.

Re (4), although OHM quotes from Mr. Ercole's testimony as evidence that DER has a policy of sending out notices of violation, no authority is given for the proposition that DER cannot issue OHM an order to correct violations unless notices of those violations previously had been given to OHM. Even if this dubious proposition were to be accepted, for no site has OHM sustained its burden of showing there was no actual notice to OHM that violations were occurring; OHM easily could have had such notice although DER did not take the trouble to send OHM a formal notice of violation. Mr. Ercole testified (Tr 947) that prior to 1978 a notice of violation only was sent out at the request of the inspector; this fact hardly implies that before 1978 operators typically were unaware when they were in violation unless the inspector troubled to request that a notice of violation be mailed. We certainly will not sustain the contention that a notice of violation is required where the violation is uncontested by OHM and was obvious to OHM before December 23, 1981. On a number of sites, e.g., where OHM wanted to mine limestone, OHM is relying on an estoppel defense but is not contesting the fact or obviousness of the violations DER is alleging on those sites. On many sites DER does not agree that notices of violation were not sent to OHM. All in all, OHM has failed to make the factual or legal case warranting supersedeas for lack of notice, for any of the sites which are the subject of this appeal.

Consequently the Board refuses to grant supersedeas on the basis of any of the arguments (1)-(4) listed above.

II. Leasure's Petition

Leasure's petition for supersedeas covers all the grounds already discussed in connection with OHM's petition. On those grounds, our rulings vis-a-vis Leasure are identical with our rulings concerning OHM's petition.

However, Leasure advances a number of arguments to the effect that DER cannot exercise jurisdiction over him and could not direct its December 23, 1981 Order to him. Therefore, Leasure asks that, on these special grounds, the Order be stayed against him even though not against OHM. These special grounds now will be examined.

A. Whether There Is Personal Jurisdiction over Leasure.

This issue was thoroughly briefed by the parties after Leasure, on January 18, 1982, filed his motion to vacate DER's Order insofar as it was directed at Leasure. On April 12, 1982, before hearings on these supersedeas petitions commenced on April 13, 1982, this Board issued an Opinion and Order, at Docket No. 82-007-G, Sur Leasure's Motion to Vacate DER's Order. There we ruled that DER's factual allegations in its Order sufficed to satisfy the minimum contacts constitutionally required for exercise of personal jurisdiction over Leasure, under several sections of Pennsylvania's long-arm statute, 42 Pa. C.S.A. §5322. However this ruling was in the context of OHM's motion to vacate the Order, wherein we were required to suppose that DER's factual allegations were true. Now we must decide whether, in light of the evidence already presented, it is likely that Leasure (who has the burden in this supersedeas petition) could show traditional notions of fair play and substantial justice would be offended by requiring him to resist DER's December 23, 1981 Order in a Pennsyl-

vania forum, namely the Environmental Hearing Board. See our Opinion and Order of April 12, 1981 supra.

In this regard we remark first that Leasure--who was one of the first witnesses at the hearings which began on April 13, 1982--obviously has entered a general appearance in this appeal, an eventuality we could not predict on April 12, 1982 when we issued our previous Opinion and Order in this matter. Leasure's testimony, his counsel's brief and oral arguments, etc., have been directed to the merits of the Commonwealth's Order, not merely to whether there was jurisdiction in personam over Leasure. Therefore, by well established judicial principles, Leasure's objections to being forced to appear personally before the Board in this matter may be considered waived. Goodrich-Amram 2d, §2080:12

We prefer not to let this issue rest at this point, however, because Leasure may feel he was led into a general appearance by our April 12, 1982 Opinion and Order, wherein we wrote:

> Rule 1028(c) of the Rules of Civil Procedure authorizes the court "to take evidence by depositions or otherwise" when the preliminary objections raise factual issues. We shall not specifically order depositions on the issue of jurisdiction in the instant action, but we do expect the parties to present evidence on this issue, and will not make our ruling on the issue of personal jurisdiction final until the relevant factual issues can be resolved.

The evidence already developed at these hearings shows the following: Leasure frequently has met personally with DER representatives at various Commonwealth locations; the alleged assurances by Mr. Ercole, on which Leasure and OHM base their estoppel claims for supersedeas, were given at one such meeting. Mr. Leasure apparently is personally very familiar with the sites

which are the subject of DER's Order (see, e.g., Tr. 27, 38, 57), because he has walked up and down them. Mr. Leasure also obviously spends a good deal of time in Pennsylvania merely in his capacity as president of OHM, which operates in Pennsylvania only (Tr. 348). There is a house in Pennsylvania, on a farm owned by Leasure until 1977 and then sold to Ag Services (a parent corporation of OHM), in which Leasure regularly stays when he is in Pennsylvania on OHM business (Tr. 356). Although Leasure presently owns no property in Pennsylvania, before February 15, 1977 he did own a number of properties on which were and are located many of the mining sites which are the subject of this appeal; Mr. Leasure owned the aforesaid properties during the period of time the corresponding mining sites were supposed to be operated by or (if operations were completed) were supposed to be reclaimed by OHM. See the Supplemental Affidavit of W. C. Leasure, filed March 29, 1982 in Docket No. 82-007-G, which was made part of the record in this matter (Tr. 360).

In our view, the evidence just described shows sufficient personal contacts between Leasure and the Commonwealth that forcing him to appear in a Pennsylvania forum does not offend traditional notions of fair play and substantial justice. Therefore, whether or not Leasure is deemed to have put in a general appearance waiving objections to in personam jurisdiction, we reject his petition for supersedeas, insofar as it was grounded on the contention that we had no right to exercise personal jurisdiction over Leasure. We stress that in so ruling we are offering no opinion as to whether or not Leasure's activities as OHM's president merit piercing the corporate veil between Leasure and OHM. Both parties appear confused on this point: the issue now before us is not whether Leasure used his control over OHM as a vehicle to further his own personal

interests and thereby acquired some of OHM's liabilities, but rather whether Leasure's activities--as the president of OHM and in other capacities--warrant the exercise of jurisdiction over him by Pennsylvania, a state wherein he does not reside.

B. Whether Irregularities in Service Prevented Jurisdiction From Attaching.

This issue was thoroughly aired in our Opinion and Order of April 12, 1982, wherein we ruled against Leasure's contentions in this regard. Leasure has made no new arguments and produced no pertinent data not available before April 12, 1982. The key questions are whether or not Leasure actually received notice, and--if he did--whether or not the notice gave him adequate opportunity to prepare his case. Leasure did receive actual notice, though the service was irregular; he had adequate opportunity to prepare his case. Supersedeas on these grounds is rejected.

However, we take this opportunity to correct a section of our April 12, 1982 Opinion and Order concerning the applicability of 1 Pa. Code §33.31. On April 12, 1982 we wrote that 1 Pa. Code §33.31 prescribed the form of service of DER's December 23, 1981 Order. Indeed, we brusquely rejected Leasure's counsel's contention that 25 Pa. Code §1.5 had excluded 1 Pa. Code §33.31 from the rules and regulations applicable to proceedings before the Department. We declared that an "agency order" was not a proceeding, and therefore that 25 Pa. Code §1.5, which applies to "proceedings before the Department", does not prevent 1 Pa. Code §33.31 from prescribing the rules for service of agency orders.

In ruling as described in the preceding paragraph we were incorrect, and in dealing brusquely with Leasure's counsel we were unjustly rude; the undersigned apologizes for both these sins. Since writing our April 12, 1982

Opinion and Order we have become aware that the comments by the Environmental Quality Board (EQB) explaining their promulgation of 25 Pa. Code §1.5 explicitly declare 25 Pa. Code §1.5 is intended to apply to service of agency orders. 9 Pa. Bulletin 3633 (November 3, 1979). We are bound by the EQB's intentions in this matter.

The preceding paragraph corrects--and in legal effect replaces--any contrary assertions in our April 12, 1982 Opinion and Order, notably on pp. 5 and 19-20 of that Opinion and Order. This correction of our previous holding in no way modifies the conclusion--in our April 12, 1982 Opinion and Order and in the present Opinion and Order--that the irregularities in serving the December 23, 1981 Order on Leasure did not prevent jurisdiction form attaching.

C. Whether DER Has the Authority To Direct Its Order To Leasure as an Individual.

This issue also was thoroughly aired in our April 12, 1982 Opinion and Order. There we concluded that--aside possibly from those mining sites on property formerly owned by Leasure--the Order could not be directed to Leasure personally unless DER established a duty on Leasure's part to carry out the various remedial measures called for in the Order.

DER's Order did "find" that OHM and Leasure had committed various violations of the relevant statutes and regulations. However, none of the mining permits and mine drainage permits to which the Order refers were issued to Leasure. Nor did DER, in its December 23, 1981 Order, make any findings of fact pointing to specific actions by Leasure in violation of his duties as an officer of OHM. Instead, in all its arguments preceding the Board's April 12, 1982 Opinion and Order, DER insisted that Leasure's position as the president of OHM automatically and per se subjected him to liability for OHM's actions. For

example, DER's January 29, 1982 Answer to Leasure's Motion to Vacate states:

> 9. Both the Clean Streams Law and the Surface Mining Conservation and Reclamation Act impose liability upon officers of corporations...
>
> 10. Because the appellant is the president of Old Home Manor, Inc., the Department's Order requiring him to correct these violations is consistent with the liability imposed by both statutes.
>
> 11. Due process allows a corporate officer to be held liable for any act of the corporation which is within the officer's power to prevent.

These arguments of Leasure's were dealt with in our April 12, 1982 Opinion and Order, which we here affirm in this regard. As we tried to explain on April 12, 1982, the fact that under appropriate circumstances Leasure might be liable for OHM's failures to obey the law does not imply that Leasure necessarily can be held liable whenever OHM has violated the law. For so sweeping a liability, it generally is necessary to pierce the corporate veil, to say in effect that in this case OHM and Leasure are one and the same entity.

Now, more than a year after issuing its December 23, 1981 Order to Leasure, and well after our April 12, 1982 Opinion and Order was filed, DER--in its Brief in Opposition to Supersedeas filed January 24, 1983--finally has come round to arguing that the December 23, 1981 Order to Leasure was lawful because the corporate veil between Leasure and OHM deserves to be pierced. In particular, DER argues that Leasure has used OHM as a vehicle for furthering his own personal interests. DER (in its January 24, 1983 Brief) also argues that Leasure did participate personally in the unlawful conduct alleged in the Order, but examination of DER's arguments on this point indicates they are no more than a rephrasing of the thesis that the corporate veil should be pierced. As Leasure

rightfully contends, DER--while alleging Leasure's personal participation in unlawful activities--merely recites OHM's alleged deficiencies of conduct and then asserts Leasure is equally responsible.

Turning to the issue of piercing the corporate veil, there is some merit in DER's contention that Leasure has used OHM as a vehicle for furthering his own personal interests. Nevertheless, we shall uphold Leasure on this facet of his supersedeas petition, and do grant a supersedeas of DER's December 23, 1981 Order insofar as it is directed at Leasure, except for those sites which are located on properties owned by Leasure before February 15, 1977 (Supplemental Affidavit of W. C. Leasure, supra). A DER Order to an individual is a very serious matter, carrying the potential of various severe penalties if the Order is not forthwith obeyed. We do not believe a DER Order should be issued to an individual, in this case Leasure, without a clear understanding by DER of DER's legal authority for subjecting the individual to the Order.

More particularly, we rule Leasure has met his burden (for the purposes of his supersedeas petition) of showing that the Board probably will decide it was an abuse of discretion for DER to issue the December 23, 1981 Order to Leasure under the authority DER was claiming until relatively recently. We recognize that if and when this appeal of Leasure's actually reaches a hearing on the merits, our hearing will be de novo, and may involve evidence and arguments arrived at by DER after December 23, 1981, Township of Salford v. DER, Docket No. 76-135-C, 1978 EHB 62 (May 3, 1978); our limitations on the evidence and legal theories we are willing to entertain at such a hearing are limited primarily by the consideration that newly introduced evidence and legal theories avoid surprise and prejudice to other parties, i.e., avoid inconsistency with

our Pre-Hearing Order No. 1. Melvin D. Reiner v. DER, Docket No. 81-133-G (July 28, 1982). It remains possible, therefore, that at a hearing on the merits DER will convince us the Order should be enforceable directly against Leasure, at least as of the date of said hearing and perhaps as of December 2, 1981. But, with the arguments and evidence presently on the record in this matter, we are unlikely to permit enforcement of DER's Order to Leasure as of its date of issuance, December 23, 1981, now that it has become abundantly clear that as of December 23, 1981, and considerably thereafter, DER was unable to offer any lawful justification for subjecting Leasure to the Order.

We specifically have excluded, from the supersedeas supra, those sites which are located on properties owned by Leasure before February 15, 1977. Terms of the December 12, 1981 Order pertaining to such sites are not stayed by the instant Opinion and Order. For these just-described sites we are not granting a supersedeas because for them we do not agree Leasure has met his burden--under the supersedeas rules and the July 12, 1982 stipulation quoted supra--of showing that as a matter of law Leasure, though a former landowner, could not be required to take the remedial measures called for by the Order on the properties he had owned. Leasure's attempts to explain away Ryan v. DER, 30 Pa. Cmw'th 180, 373 A.2d 475 (1977), are not convincing; Leasure's argument that the Clean Streams Law, 35 P.S. §691.316, does not authorize an Order against Leasure as a former landowner because DER has not found a danger of pollution from a condition on the sites is sophistry. In various places, e.g., paragraph 1.N(2), the Order specifically states that the ordered action is needed to prevent degradation of the waters of the Commonwealth, in this case "to prevent any further deposition of silt and ground materials to Mardis Run";

moreover, finding H of the Order states unequivocally: "The Department finds that on the above-referenced mining sites conditions exist which cause a danger of pollution."

O R D E R

WHEREFORE, this 11th day of April 1983, it is ordered that:

1. OHM's Petition for Supersedeas is rejected, except for its request that the Order be stayed as to Special Reclamation Project 445; for SRP 445, the Order for backfilling to approximate original contour is stayed, but the Order must be complied with for backfilling to terraces at least, within the time schedules set forth in the Order.

2. Leasure's Petition for Supersedeas is granted, except for those terms of the Order pertaining to mining sites located on properties owned by Leasure before February 15, 1977, and listed in his Supplemental Affidavit in Docket No. 82-007-G, filed March 29, 1982.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY, Member

DATED: April 11, 1983

cc: Bureau of Litigation
Diana J. Stares, Esquire (Certified Mail No. 587974)
Dennis Strain, Esquire (" " " ")
Gregg Rosen, Esquire (" " " 587973)

COMMONWEALTH OF PENNSYLVANIA

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COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA GAME COMMISSION :

:

Docket No. 82-284-G
:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and GANZER SAND & GRAVEL, INC., Permittee
and HAMMERMILL PAPER COMPANY, INC., Intervenor

OPINION AND ORDER
SUR REVISED REQUEST FOR INSPECTION

On March 15, 1983 this Board issued an Opinion and Order Sur the Commission's Request for Inspection. The events leading up to our March 15, 1983 Opinion were described in that Opinion and need not be repeated here. The present Opinion and Order stems from paragraphs 5 - 8 of our March 15, 1983 Order, wherein the parties were asked to state, more clearly than heretofore, why the Commission's requested tests were or were not relevant to this appeal, "recognizing that this Board must rule on this discovery dispute without the benefit of a full hearing on the merits." In response to our March 15, 1983 Order, Ganzer and Hammermill, on April 1, 1983, have filed separate memoranda explaining their objections to the Commission's proposed tests. The Commission, on April 8, 1983, has filed a Revised Request for Inspection, now based on a visit to the site by its engineer. This Revised Request largely duplicates the Commission's previous request, but also does provide much of the previously lacking motivation for the Commission's requests.

Ganzer and Hammermill now have stated clearly their objections to the claimed relevance of the Commission's projected tests. Mainly they argue that the soil permeabilities the Commission seeks to measure are irrelevant to the proposed landfill design because their proposed design does not use a liner and therefore does not require any particular permeability standards. These parties also argue that attempts to measure the permeabilities of soils in areas surrounding the 40-acre gravel pit (which is to be the site of the landfill operation) will be futile because the permeabilities so measured will not characterize these soils after the soils have been disturbed. Furthermore, assert Ganzer and Hammermill, the core borings the Commission proposes will encounter the water table and therefore cannot possibly yield meaningful permeability results. Ganzer and Hammermill also contend that the Commission's proposed water observation wells have absolutely nothing to do with soil permeabilities.

The Commission claims that the permeabilities it seeks to measure will be relevant, even to the liner-free landfill design Ganzer proposes. In particular, The Commission states that its engineer believes:

> the permeability contrast between the flyash daily cover as compacted in the landfill, and the gravelly silt loam soil used as an intermediate cover, suggests potential sidewall breakout of leachate, which could have the potentional (sic) to adversally (double sic) affect the environment.

The Commission insists its permeability measurements will be meaningful even if the water table is encountered. The Commission also argues that the test results it seeks will bear on the stability of the landfill, in that improper subbase soils could make the landfill unstable.

Although the civil court case law precedents (see Goodrich-Amram 2d, §4003.1:7) are not precisely analogous to actions before this Board, in the

instant discovery dispute it would be illogical to give the Commission the burden of establishing the relevancy of its inspection requests. As Goodrich-Amram 2d states (pp. 66-67): "If there is any conceivable basis of relevancy, the discovery should be permitted." Therefore, in the instant discovery dispute, it is Ganzer's burden to show that the Commission's requested tests are not "relevant to the subject matter involved in the pending action" (language of Pa. R.C.P. Rule 4003.1). In the light of the Commission's answers to Ganzer's arguments against the proposed tests, Ganzer has not met this burden, although it is conceivable that Ganzer's objections ultimately will prove to be well-founded. As we stated in our March 15, 1983 Order, we must rule on the Commission's request now, without the benefit of a full hearing on the merits. Similarly, although the Commission's proposed tests, expected to take twenty days to complete, undoubtedly will be burdensome to Ganzer, we do not find that Ganzer has met its burden of showing the Commission's proposed tests "would cause unreasonable annoyance, embarrassment, oppression, burden or expense" (language of Pa. R.C.P. Rule 4011).

Consequently we shall allow all inspections and tests requested in the Commission's Revised Request for Inspection, with the exception of the proposed conversion of several core borings into water observation wells. The Commission's reasons for requesting water observation wells, as stated in its Revised Request for Inspection, are:

> This is relevant since the existing water oberservation (sic) wells, as shown on Engineering Drawing 2200182, indicates only one water observation well in the northwestern portion of the proposed landfill. In this same drawing, which is the water table contour map, indicates that the general flow of water is in a northwestern direction which would

> indicate insufficient water well monitoring of potential leachate that Appellant believes will enter the water table. In addition, Appellant's important wetlands are located in the direction in which the groundwater is flowing. Consequently, Appellant believes that these water wells are relevant and not unduly burdensome to Ganzer.

The above quote indicates that the Commission is not seeking these water observation wells in the reasonable expectation that the water wells will "lead to the discovery of admissible evidence" (language of Pa. R.C.P. Rule 4003.1). The Commission apparently believes that Ganzer's design for the landfill does not include adequate monitoring of potential leachate. The Commission's belief may be well-founded, but the construction of permanent water wells at this time, before the landfill can be producing leachate, is not going to yield any evidence the landfill is improperly designed.

It is possible that the hearing on the merits of this appeal will show that the landfill indeed is inadequately monitored, in which event the permit may have to be amended to provide for additional monitoring points. On this basis, Ganzer may wish to pay heed to the Commission's remark that converting the Commission's core borings into water observation wells is a simple task, involving merely placing a pipe in the existing boring. Permitting the Commission to construct the wells at this time, while the Commission has its equipment on the site, may save Ganzer the expense of having to construct its own monitoring wells at a later date. However, this is a matter for Ganzer and the Commission to settle between themselves. At this time, we will not order Ganzer to allow construction of the water wells, nor--if Ganzer decides to let the Commission construct them--will we order Ganzer to allow the Commission to inspect the completed wells.

O R D E R

WHEREFORE, this 15th day of April, 1983, it is ordered that:

1. The Commission's requests for inspection and tests, described in its Revised Request For Inspection filed April 8, 1983, are granted, excepting the proposed conversion of several core borings into water wells.

2. Paragraph 10 of our March 15, 1983 Order in this matter is reaffirmed; however, the inspection and tests may begin after May 1, 1983 if all the parties are willing to postpone initiation of the inspection to a later date.

3. The inspection and tests shall be completed, and all the Commission's equipment shall be removed from Ganzer's land, on or before the 20th day after the inspection and tests commence; extension of this time limit will be permitted only on good cause shown, such as interference by weather.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: April 15, 1983

cc: Bureau of Litigation
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DEL-AWARE UNLIMITED, INC., et al. : Docket No. 82-177-H
: 82-219-H
: 82-243-H
: 82-229-H
v. : 82-239-H

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and NESHAMINY WATER RESOURCES AUTHORITY and
PHILADELPHIA ELECTRIC COMPANY

OPINION AND ORDER SUR NESHAMINY WATER RESOURCES AUTHORITY'S MOTIONS FOR RECONSIDERATION; MOTION AND SECOND MOTION FOR DEMURRER AND/OR PARTIAL SUMMARY JUDGMENT

A. BACKGROUND OF THE VARIOUS APPEALS

(1) Appeals of the Department of Environmental Resources issuance of a Dams and Encroachments Permit to Neshaminy Water Resources Authority - Docket Nos. 82-219-H and 82-243-H

On September 20, 1982, Del-Aware Unlimited, Inc. and James Greenwood (appellants) filed a notice of appeal with the Environmental Hearing Board (board). The notice of appeal challenged the Department of Environmental Resources (DER or department) issuance to the Neshaminy Water Resources Authority (NWRA) Dams and Encroachments Permit No. ENC 09-81. This appeal was assigned Docket No. 82-219-M.

A second notice of appeal was filed by appellants on October 5, 1982 which, but for the addition of four named appellants, was substantially similar,

if not identical, to the appeal docketed No. 82-219-M. This second appeal was assigned Docket No. 82-243-M.

(2) Appeals of the Department of Environmental Resources Certification under Section 401 of the Clean Water Act; Docket Nos. 82-229-H and 82-239-H

On September 24, 1982, appellants filed a notice of appeal with the board challenging the department's certification, issued under Section 401 of the Clean Water Act, that the construction of the NWRA Water Pumping Station at Point Pleasant would not violate the state water quality criteria for the Delaware River. This appeal was assigned Docket No. 82-229-H.

A second notice of appeal naming four additional appellants was filed with the board on October 5, 1982. This second appeal, assigned Docket No. 82-239-H, was substantially similar, if not identical, to Docket No. 82-229-H.

(3) Appeal of the Department of Environmental Resources determination that a National Pollutant Discharge Elimination System Permit under the Clean Water Act was not required for the operation of the Point Pleasant Diversion Project; Docket No. 82-177-H

On July 19, 1982, appellants filed a notice of appeal with the board from the department's determination that a National Pollution Discharge Elimination System Permit would not be required for the operation of the Point Pleasant Facility. This appeal was assigned Docket No. 82-177-H.

NWRA's Petition to Intervene was granted by the board on September 15, 1982. On November 10, 1982, NWRA filed (at Docket No. 82-177-H) a Preliminary Motion in the form of a Demurrer with the board which was answered by the appellants. On November 10, 1982 NWRA filed a Motion to Partially Strike and Quash the appeals at Dockets 82-219-H and 82-443-H, 82-229-H and 82-239-H.

On January 17, 1983, the board issued an Opinion and Order granting NWRA's motions at 82-219-H, et al in part and denying same in part. On January 19, 1983, the board issued an Opinion and Order denying NWRA's Motion for a Demurrer at

82-177-H. All the above matters have now been consolidated at joint 82-177-H and 82-219-H.

At the pre-hearing conference held in this matter on February 2, 1983, NWRA orally sought reconsideration of the aforesaid motions. NWRA argued that the board had misapprehended the legal basis of its motions (which motions had not been accompanied by briefs). In order to grant NWRA every procedural courtesy, the board, in its pre-hearing conference order of February 10, 1983, permitted NWRA to file a written motion for reconsideration of the aforesaid motion and briefs "in support thereof". Appellants construed this phrase to permit NWRA to file only a motion for reconsideration and a brief in support of this motion. Thus, the appellants responded only to this motion. However, NWRA construed the board order of February 10, 1983 as permitting briefs in support of its original motions and therefore, NWRA filed substantive briefs in support of its Demurrer and Motion to Strike and Quash as well as a Memorandum of Law in Support of a Second Motion for Demurrer and/or Partial Summary Judgment.

On March 29, 1983 the board granted appellants a week to respond to NWRA's barrage of motions and briefs and on April 1, 1983 the appellants' filed two responsive briefs.

I. First Motion at EHB 82-219-H

NWRA's initial motion at EHB 82-219-H was based upon the theory that certain contentions raised by appellants were not within the jurisdiction of the board because these contentions had been raised after the allowable appeal period.

NWRA asserts in support of this motion, and appellants do not deny, that in 1978 DER issued Water Allocation Permit No. 0978601 to NWRA pursuant to the Act of June 24, 1939, P.L. 842 (Act. No. 365) which permit granted NWRA leave to acquire and use for public water supply purposes *inter alia* 49,800,000 gpd from the Delaware River at a diversion point near Point Pleasant which diversion is also

the underlying subject matter of the instant appeals.

No appeal was timely filed from said permit. Thus, argues NWRA, the appellants may not now collaterally attack the DER decisions encompassed by the said water allocation permit. NWRA bases a similar argument upon ths subsequent DRBC Section 3.8 (allocation) approval of NWRA's proposal withdrawals.

We can dismiss the NWRA argument based upon the DRBC Section 3.8 allocation rather summarily. No DER decision was involved in the DRBC allocation. NWRA's brief attempts to transmute a DRBC decision into a DER decision by explicating (accurately, we believe) the unique nature of the DRBC.

We do recognize that the DRBC, as a creature of the federal government and each signatory state, has overall responsibility for the management and control of the Delaware River Basin's water resources and to this end we acknowledge that the DRBC compact provides *inter alia* that no water related project or facility can be constructed in the basin unless it has been first included in the DRBC's comprehensive plan. However, we agree with appellants that this language merely gives DRBC a veto over water related projects; their inclusion in the comprehensive plan does not mandate the construction of these projects nor does it obviate any functions, powers and duties of the signatory states. Indeed, §1.5 of the Compact expressly preserves these functions, 32 P.S. §815.101, Section 1.5.

As to the 1978 DER Water Allocation Permit, we agree that NWRA's brief is on the right track when it analyzes the Water Rights Act of 1939, 32 P.S. §§631, *et seq.* in order to determine what findings DER made in issuing that permit. Administrative agencies may not act outside the scope of their legislative authority, *Delaware Community College v. Fox*, 20 Pa. Cmwlth. Ct. 335 (1975); *Elias v. EHB*, 10 Pa. Cmwlth. Ct. 489, 312 A.2d 486 (1973) and thus only if the Water Rights Act required the type of environmental assessment DER conducted in regard to the instant appeals would its prior allocation decision bar the said appeals. We further agree

with NWRA that the Preamble and §7 of the Water Rights Act bear the closest scrutiny.

The Water Rights Act's Preamble evidences the scope of said Act as follows:

> "Whereas, An adequate and safe supply of water for the public is a matter of primary concern affecting the life, health and comfort of the people of this Commonwealth; and
>
> Whereas, The increase of the population makes it necessary that the available supply of water be conserved, controlled and used equitably for the best interests of all concerned; and
>
> Whereas, The use of water for the supply of water to the public is the most essential of all public service, vital to life itself; and
>
> Whereas, The public interest requires that public water supplies be developed not only for present needs but also for developing needs for a reasonable time in the future from and after any original appropriation or acquisition of a source of supply; and
>
> Whereas, The public interest requires that sources of water supply appropriated or acquired but not used or not reasonably necessary for future needs should be available for appropriation or acquisition by others requiring such sources."

See, "Historical Note" to 32 P.S. §631.

To accomplish the purpose and expressed intent of the legislature, Section 7 of the Act, 32 P.S. §637, vests in the Department of Environmental Resources (successor to the Water and Power Resources Board) the authority and duty to perform an overall investigation and evaluation of the proposed allocation. 32 P.S. §637. Approval of a requested allocation may only be given where it is determined that the proposed new source or additional supply:

> "(1) Will not conflict with the rights to such water or water rights held.
>
> (2) Water and water rights proposed are reasonably necessary for the present purposes and future needs of the public water supply agency making the application.

(3) Taking of said water or exercise of water rights will not interfere with navigation.

(4) Taking of said water or exercise of water rights will not jeopardize public safety.

(5) Taking of said water rights will not cause substantial injury to the Commonwealth.

(6) Issuance of the Water Allocation Permit is in the public interest."

Although, as stated above, we agree that NWRA's brief looked at the pertinent sections of the Water Rights Act, we do not agree that this brief drew the correct conclusions from its analysis thereof.

Nowhere does the Preamble discuss any environmental impacts of a proposed water allocation. Rather, this 1939 Act, which obviously predates the growth of widespread environmental awareness among the citizens of this Commonwealth and their elected officials, is clearly directed towards the development of public water supplies in such a manner as to meet all reasonable present needs without jeopardizing future needs.

It is not surprising therefore that Section 7 of the Act, 32 P.S. §637, which lists the items for DER consideration when reviewing an application is devoid of any mention of environmental impacts. To be sure, Section 7 contains the typical catchall phrase that DER should consider "the public interest" before issuing an allocation permit and arguably this broad term and/or the requirement to avoid substantial injury to the Commonwealth would authorize a consideration of environmental factors. However, this argument is not supported by the mandatory portion of Section 7 of the Act.

The mandatory portion of §7 states that:

"...if the Board finds that the proposed new source or additional supply will not conflict with the rights to such water or to water rights held by any other public water supply agency which are reasonably necessary for its present purposes or future needs, and that the water or the water rights proposed to be acquired are reasonably necessary for the present purposes and future needs

> of the public water supply agency making application, that the taking of said water or the exercise of said water rights will not interfere with navigation, jeopardize public safety, or cause substantial injury to the Commonwealth, then, and in that case, the Board shall approve the application and shall issue a permit therefor."
> (emphasis added)

This language clearly dispells the notion that DER is authorized by this Act to deny a water allocation permit for any environmental insult short of one which would "cause substantial injury to the Commonwealth". Of course, DER may have additional duties imposed upon it by the Environmental Rights Amendment, Article I, §27 of the Pennsylvania Constitution (which was adopted some 30 years after the Water Rights Act) but it is noteworthy that this Amendment is not so much as mentioned in DER's "Report on the Application of Neshaminy Water Resources Authority for Water Allocation from Pine Run, North Branch Neshaminy Creek and Delaware River" dated November 1, 1978, (which is attached as Exhibit B to NWRA's brief and which, apparently, incorporates DER's administrative record for the said water allocation permit). It is true that some environmental impacts of the proposed project are discussed in a summary fashion, under the "will not cause substantial injury to the Commonwealth" section of the report but the report nowhere addresses any of the three tests of compliance with the Environmental Rights Amendment set forth in *Payne v. Kassab*.

In view of the above, we do not find that the Water Rights Act per se permitted DER to or that DER did undertake an extensive environmental assessment prior to issuing the said water allocation permit.

Furthermore, *Borough of Collegeville v. Philadelphia Suburban Water Company*, 377 Pa. 636, 105 A.2d 722 (1954) which discusses the effect of a state water allocation under the Water Rights Act does not, as NWRA asserts, demonstrate the finality of that action vis á vis a subsequent administrative action taken pursuant to different legislative authority. In *Collegeville, supra*, private plantiffs brought an equity action to enjoin Philadelphia Suburban Water Company

from diverting water from Perkiomen Creek. The Supreme Court in *Collegeville, supra*, affirmed the decision of the lower court which sustained the defendant water company's preliminary objections and dismissed plaintiffs complaint. This decision, as is stated therein, merely applies the long established rules that the jurisdiction of a court of equity may not be invoked where there is an adequate remedy at law, and that statutory remedies must be exhausted before there is resort to equitable jurisdiction.[1] The *Collegeville* decision did not address the issue of the impact of a water allocation permit in a subsequent administrative action. (Note, the courts have often drawn a distinction between issues which may be reached in administrative review and those which may be attacked at equity. *Fox, supra.*

NWRA's reliance upon *Toro Development Company v. DER*, 56 Pa. Cmwlth. Ct. 471, 425 A.2d 1163 (1983) is also misplaced. *Toro, supra* was merely the latest in a series of cases in which the Commonwealth Court recognized the interconnection between the Pennsylvania Clean Streams Law, 35 P.S. §§691.1 *et seq.* and the Pennsylvania Sewage Facilities Act, 35 P.S. §§750.1 *et seq.* (See *Carroll Township v. DER*, 48 Pa. Cmwlth. Ct. 590, 409 A.2d 1378 (1980), *Kidder Township v. DER*, 41 Pa. Cmwlth. Ct. 376, 399 A.2d 799, (1979)) In these cases and others, Commonwealth Court has recognized that when the Clean Strams Law provides that DER, before taking action thereunder, shall consider, *inter alia* "water quality management and pollution control in the watershed as a whole" and "the feasibility of combined or joint treatment facilities" (Section 5 Clean Streams Law 35 P.S. §691.5) these considerations shall be taken by sewage facilities plans prepared pursuant to Section 5 of the Pennsylvania Sewage Factilities Act, 35 P.S. §750.5.

NWRA which has the burden of supporting its motions, has demonstrated no such close connection between the Water Rights Act and the Acts under which the presently appealed action are taken. Also, it is important to note that DER

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1. In *Collegeville, supra*, no appeal had been timely taken from issuance of the water allocation permit.

in this case has not argued that its 1978 water allocation approval precluded or diminished the need for an independant environmental review of the Point Pleasant diversion prior to taking the actions upon appeal herein. To the contrary, DER's comprehensive Environmental Assessment prepared in 1982 at least implicitedly acknowedges DER's duty in this regard. The legal interpretation of the administrative agencies impowered to enforce all of the above Acts must be given more weight than those of private parties like NWRA.

II. Second Motion at 82-219-H

In its second Motion to Strike, NWRA shifted its focus from prior DER actions to prior actions allegedly involving Del-Aware Unlimited, Inc. before other forums. Having been rebuffed by the board's January 17, 1983 Opinion on its res judicata theory; NWRA in its second motion, relies upon collateral estoppel which does not require "the identity of the thing sued for" lack of which proved factual to NWRA's res judicata theory.

Collateral estoppel does require, however, that the issue consideration of which would be barred in a subsequent action was finally adjudicated by a court of competent jurisdiction in an earlier matter. *Pilgrim Ford Products Company v. Filler Products, Inc.*, 143 A.2d 48 (48). Thus, we agree with appellants, that portion of NWRA's second motion based upon *Del-Aware Unlimited, Inc. v. Baldwin* must be discounted since no final adjudication has been rendered in *Baldwin*.[2] To the extent that the interlocutory decision in *Baldwin* has pertinence here, we believe that the federal court's dismissal of DER as a party to the federal action supports appellants' argument that its concerns are properly placed before this board.

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2. Del-Aware's motion for preliminary injunction of the Army Corps of Engineers was denied by the U.S. District Court for the Eastern District of Pennsylvania in Baldwin.

We also agree with appellants that any findings rendered in the proceeding before the NRC *Application of Philadelphia Electric Company*, NRC No. 52-532 should not raise the bar of collateral estoppel in this case. We are strongly supportive of the proposition quoted in appellants' brief that states that "a court should approach gingerly a claim that one agency has conclusively determined an issue later analyzed from another perspective by an agency with a different substantive jurisdiction, *FTC v. Texas*, 555 F.2d 862 (D.C. Cir.), cert. den. 431 U.S. 974, (1977). While NWRA and PeCo undoubtedly feel that having run the guantlet before the NRC and DRBC and Army Corps on the same project they should not have to replow the same ground in the instant proceedings. The board does sympathize with the position of these parties but their concern is essentially a political one far outside the scope of our jurisdiction. The Congress of the United States and the General Assembly of the Commonwealth of Pennsylvania have chosen to create a number of agencies and to charge these agencies with varying degrees of overlapping jurisdiction over the Point Pleasant project. This being that case, each agency must discharge the duties assigned to it and if this results in a succession of administrative hearings that is apparently the price we the federal and state governments have been willing to pay to ensure a thorough review of projects.

The board has offered the suggestion that the records in the NRC and other proceedings could be incorporated in these proceedings in order to avoid unnecessary duplication of testimony but to date the parties have not been able to agree on admission of such testimony.

The final support of its second motion, the DRBC approval of 1981 and the affirmation by the U.S. District Court for the Eastern District of Pennsylvania of the DRBC approval in *Delaware Emergency Group v. Housler*, 536 F. Supp. 26 (ED Pa. 1981) aff'd., 681 F.2d 805 (3rd Cir. 1982), are subject to the same above argument,

an administrative proceeding, including judicial review, of one administrative agency must be approached gingerly as collaterlly estopping another agency which may be charged with considerably different responsibilities.

In sum, as to NWRA's second motion to quash or limit the issues raised in appellants' rider to its notice of appeal we hold that these issues have yet to be finally litigated before a forum having jurisdiction equivalent to that of this board and thus NWRA's collateral estoppel theory is not well taken.

III. Demurrer at 82-177-H

Docket 82-177-H involves appellants' appeal from DER's refusal to require a National Pollutant Discharge Elimination System (NPDES) Permit under §402 of the Clean Water Act; 33 U.S.C. §1342 for diversion of Delaware River water into the North Branch of Neshaminy Creek. NWRA demurrers to this appeal asserting that this board has no jurisdiction to consider any of appellants' claims which arise under the federal Clean Water Act or the regulations of the administrator of EPA. NWRA argues that since NPDES permits are issued pursuant to the federal Clean Water Act the procedures of that act must be followed by those seeking redress of their grievances. NWRA argues that pursuant to §505, 33 U.S.C. §1365 of the Clean Water Act U.S. District Courts are granted original and exclusive jurisdiction of suits against the administrator of EPA where there is an alleged failure of the administrator to perform mandatory actions. Assuming, arguendo, that §505 does provide exclusive jurisdiction for challenging EPA actions, Section 505 also makes it clear this section does not authorize suits against non-willing state parties. (The Eleventh Amendment to the United States Constitution would quite probably have invalidated an attempt to place the states under federal court authority.)

Thus, NWRA is relegated to arguing that appellants' appeal from DER's refusal to issue a NPDES permit is, in essence, an appeal from an action of the

administrator of EPA because DER runs the NPDES permit program in Pennsylvania as an agent of EPA. DER does act in certain respects as EPA's agent in administering the NPDES permit program but no more so than in administering the construction grants program or in certifying NPDES permits to EPA prior to delegation. The board has held in the context of construction grants and certification issues that to the extent that DER has duties and performs actions under the federal Clean Water Act this board has jurisdiction to review these actions. The board has also entertained appeals from NPDES permits issued by DER.

The jurisdictional grant of this board is mercifully succinct and clear. Section 1921-A of the Administrative Code, 71 P.S. §510-21A states as follows:

> "(a) The Environmental Hearing Board shall have the power and its duties shall be to hold hearings and issue adjudications under the provisions of the act of June 4, 1945 (P.L. 1388), known as the "Administrative Agency Law," on any order, permit, license or decision of the Department of Environmental Resources."

This section clearly requires us to exercise jurisdiction over any action or decision of DER and it is the jurisdiction of this board, not of the federal or state judiciary, which is questioned by NWRA's Demurrer. Again, we cannot agree with NWRA's legal argument in this regard.

O R D E R

AND NOW, this 18th day of April, 1983, NWRA's Motion for Reconsideration having been granted and based upon said reconsideration NWRA's Demurrer and First and Second Motions to Quash or Limit Issues or for Partial Summary Judgment are denied.

ENVIRONMENTAL HEARING BOARD

Dennis Jay Harnish

DENNIS J. HARNISH
Chairman

DATED: April 18, 1983

cc: Bureau of Litigation
Louise S. Thompson, Esquire
Robert J. Sugarman, Esquire
Hershel J. Richman, Esquire
William J. Carlin, Esquire
Eugene J. Bradley, Esquire
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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
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JOHN N. WILSON :

:

: Docket No. 83-002-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On January 5, 1983, Mr. Wilson appealed a DER order, dated December 10, 1982, directing Wilson to reclaim a site on which Wilson allegedly had been conducting surface mining operations.

Thereafter Wilson failed to complete Interrogatories filed by DER, and failed to file his pre-hearing memorandum as required by the Board's Pre-Hearing Order No. 1 to the parties. A threat, mailed to Wilson's counsel, that sanctions might be imposed upon Wilson for the aforementioned failures elicited the response--from Wilson's counsel--that he had been informed Wilson no longer wished his counsel to proceed with the appeal.

This information caused the Board to write Mr. Wilson directly, on March 28, 1983, by certified mail, which he received. This March 28, 1983 letter, included with this Opinion and Order as Exhibit A, also warned Wilson of possible sanctions,

including dismissal, if he did not file his pre-hearing memorandum by April 8, 1983, and did not answer DER's Interrogatories by April 15, 1983. As of this date, the Board has received no response to our March 28, 1983 letter. In the meantime, on April 19, 1983, DER has filed a Motion for Sanctions, asking the Board to dismiss his appeal.

We will dismiss the appeal, but not because of DER's Motion, to which Wilson has not had time to respond. Wilson, through warnings directly to him as well as to his counsel, has had ample opportunity to meet the requirements of the Board's rules, or at the very least to explain why he has not met the Board's deadlines. The Board's rules, 25 Pa. Code §21.124 authorize dismissal for failure to abide by the Board's rules and orders. This failure has been flagrant in the instant appeal.

O R D E R

WHEREFORE, this 4th day of May, 1983, it is ordered that the above-docketed appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Dennis Jay Harnish
DENNIS J. HARNISH, Chairman

Anthony J. Mazullo, Jr.
ANTHONY J. MAZULLO, JR., Member

Edward Gerjuoy
EDWARD GERJUOY, Member

DATED: May 4, 1983

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
John N. Wilson
Al Lander, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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CONCERNED CITIZENS AGAINST SLUDGE
by Charles Small, Jr.,
Trustee ad Litem :

: Docket Nos. 82-220-G
: 82-221-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and CITY OF PHILADELPHIA, Permittee

OPINION AND ORDER
SUR MOTION TO VACATE PREVIOUS
ORDER SUR PRELIMINARY OBJECTIONS

May 4, 1983

These matters concern two permits granted to the City of Philadelphia ("Philadelphia") by the Department of Environmental Resources ("DER") Bureau of Solid Waste Management, allowing Philadelphia to dispose of sewage sludge (termed "mine mix" by Philadelphia)--from its Northeast and Southwest Water Pollution Control Plants--on two land reclamation sites. Permit No. 602201 pertains to a 72-acre site identified as Arcadia No. 1, in Grant and Montgomery Townships, Indiana County. Permit No. 602124 pertains to a 155-acre site identified as Benjamin Coal Company Mines 11 and 11B in Banks Township, Indiana County.

On September 20, 1982, the Concerned Citizens Against Sludge ("Citizens") appealed these permit grants. The appeal of permit No. 602201 was docketed as EHB 82-220-G; the appeal of permit No. 602124 was docketed as EHB 82-221-G.

Thereafter preliminary objections, requesting inter alia that these appeals be dismissed, were filed by Philadelphia. The Board has ruled on these preliminary objections, in an Opinion and Order dated February 9, 1983.

On March 10, 1983, Philadelphia filed a Motion to Vacate our February 9, 1983 Opinion and Order, accompanied by a supporting memorandum of law. We now rule on this Motion to Vacate, which argues that the aforesaid appeals are moot and that the Citizens lack standing to pursue these appeals. Philadelphia's memorandum of law (footnote 1) remarks that Philadelphia reserves the right to address, at later stages of these proceedings, other issues--than mootness and standing--discussed in our February 9, 1983 Opinion and Order; for what it's worth, we permit Philadelphia this reservation.

Before proceeding any further, however, we note that our rules, 25 Pa. Code chapter 21, do not provide for Motions to Vacate our interlocutory rulings, such as our February 9, 1983 Opinion and Order. The Board does not claim to be infallible, but our energies are limited--we simply cannot rehash every non-final order issued by the Board. Similarly, even if the Motion to Vacate is regarded as a Motion for Reconsideration, our rules provide for reconsideration of final decisions only. 25 Pa. Code §21.122. Nevertheless, we have reconsidered our February 9, 1983 rulings in the light of Philadelphia's Motion.

I. Mootness

On February 9, 1983 we dismissed as meritless Philadelphia's argument that these appeals are moot because on or before the date (September 20, 1982) on which the Citizens filed the appeals, the permitted sites very largely

already had been reclaimed. Philadelphia now has filed affidavits supporting its allegations that "all mine mix application and seeding" have been completed on the entire Arcadia site (permit No. 602201) and on "area 1" (98 acres) of the Benjamin site (permit No. 602124). Philadelphia continues to insist that the appeals therefore are moot with respect to the entire Arcadia site and "area 1" of the Benjamin site; apparently Philadelphia now concedes that the Citizens' appeal 82-221-G is not moot with respect to areas 2 and 3 of the Benjamin site.

However, we continue to hold that neither of the above-captioned appeals has been made moot in any part by the affidavit-supported facts recounted immediately above. Philadelphia argues vigorously that moot questions are not justiciable; we agree. Philadelphia further argues that a question is moot if relief cannot be granted; we agree again. But Philadelphia is unable to explain why this Board cannot grant the desired relief in these appeals. The Citizens ask us to declare that DER abused its discretion in granting these permits. We are able to so declare, and if we did so rule the permits would become unlawful, and would have been unlawful from their date of issuance.

Philadelphia goes on to argue (in effect) that the appeals are moot because--even if we correctly ruled DER abused its discretion in granting the permits--the courts cannot remedy the existing sludge applications, which have been incorporated into the soil and seeded, with vegetation already beginning to grow. But this argument palpably is incorrect. Whether at this late date it would be wise, or just, to require Philadelphia to remove the already-applied sludge are issues which are wholly distinct from the issue of mootness, and which need not be decided now. However, it certainly would be within a court's power

to order removal of the already-applied sludge if it could be shown that DER, by inattention to its own regulations, had approved sludge applications which--if not removed--surely were going to pollute the waters of the Commonwealth for a very long time.

Philadelphia contends that 71 P.S. §510-21(d), by mandating that an appeal of a DER action does not act as an automatic supersedeas, implies that any party who receives a validly issued permit may rely on it. We do not see that 71 P.S. §510-21(d) carries any such implication, but accept the principle that the recipient of a validly issued permit may rely on it. Unfortunately for Philadelphia, its reliance on this principle begs the question; our rulings on these appeals are supposed to decide whether or not the permits appealed-from really were validly issued. Philadelphia argues that a final decision on a permit appeal may take years, and that under such circumstances it is illogical for a permittee to be at risk for implementing the permit without waiting for a final ruling on its validity. Perhaps so, but if we adopt Philadelphia's viewpoint then surely under the same circumstances it is at least equally illogical for the Legislature even to bother making provision for appeals in 71 P.S. §510-21, because with a "good" lawyer a permittee can delay a final decision on the permit's validity until well after the permittee had completed whatever sludge applications, construction, mining, etc., the permit called for, thereby--on Philadelphia's reasoning--mooting any third-party appeal of a permit grant.

II. Standing

On February 9, 1983 we ruled, following our earlier holding in Concerned Citizens of Rural Ridge v. DER, EHB Docket No. 82-100-G, Opinion and Order (November 22, 1982), that the Citizens can have standing to represent their members in

the instant appeals. However, to demonstrate standing for the Citizens, facts must be alleged which would confer standing on individual members of the Citizens association, had they appealed in their individual names.

Philadelphia seemingly does not dispute the standing ruling we have just summarized. Therefore Philadelphia's Motion to Vacate was inapposite insofar as our February 9, 1983 discussion of the Citizens' standing is concerned. Actually, Philadelphia, though not disagreeing with our legal approach to standing, is arguing that the Citizens have not alleged facts sufficient to confer standing, as the Citizens were ordered to do on February 9, 1983. There is some merit to this argument of Philadelphia's, which would have been very appropriate in a renewed motion to dismiss for lack of standing, now that the Citizens' responses to our February 9, 1983 Order have been received.

Therefore, insofar as it deals with standing, we treat Philadelphia's Motion to Vacate as a renewed motion to dismiss for lack of standing. We now rule on this motion; because the facts alleged in support of standing are different in the two appeals, the appeals 82-220-G and 82-221-G must be examined separately.

II. A. Permit No. 602201. Docket No. 82-220-G

The deficiencies in the Citizens' Notice of Appeal at this docket number, particularly with regard to standing, have been discussed in our February 9, 1983 Opinion, and need not be repeated here. In response to our February 9, 1983 Order, the Citizens have filed an Amended Appeal which, in pertinent part, reads as follows:

> 7. Just south of this site is Little Mahoning Creek.
>
> 8. The area upon which sludge has been applied is less than one hundred (100) feet from Little Mahoning Creek.

9. Many of the citizens of the area, including Charles Small, Jr., James Buffone, and Larry Bergreen, all of whom are members of Concerned Citizens Against Sludge, have in the past and to this date fish in Little Mahoning Creek.

10. Water run off from the sludge area will cause irreparable harm to the fish in Little Mahoning Creek, and consequently will also cause harm to Charles Small, Jr., James Buffone, and Larry Bergreen.

11. James Buffone is a member of the Association of Concerned Citizens Against Sludge. He is unemployed and in order to supplement his food supply he must hunt small game, deer and game birds. The permit was issued on August 23, 1982, and within a matter of days the sludge was being applied. Hunting season is open in Pennsylvania on or about October 15. The permit states grazing by animals whose products are consumed by humans shall be prevented for at least two (2) months or longer after sewage sludge application. To prevent hunting on or around the sludge application areas would cause irreparable harm to the above named citizens.

Philadelphia argues that the allegations just quoted, even when taken together with the allegations in the original Notice of Appeal, are insufficient to confer standing. To be precise, Philadelphia argues that the aforesaid allegations would not confer standing to appeal on individual members of the Citizens (such as Charles Small, Jr., James Buffone and Larry Bergreen named in the Amended Appeal), under the William Penn test that the interest in the question litigated--in this case the grant of Permit No. 602201 to Philadelphia--must be "substantial, immediate and direct." William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975).

We agree with Philadelphia. The alleged deterioration of hunting and fishing in the vicinity of the site, even if true, is not--in our opinion--an injury to individual Citizens of the "substantial, immediate and direct" type contemplated by the William Penn court. As Philadelphia contends, the Citizens

continue to allege injuries which are common to all Pennsylvania residents; such injuries do not merit standing. The Citizens, though given the opportunity to do so in our February 9, 1983 Opinion, have not filed any memorandum of law which might have changed the conclusions we have stated in the last two sentences. Moreover, in our view these conclusions pertain also to James Buffone despite the allegation that Mr. Buffone must hunt small game, deer and birds to augment his food supply. The Citizens have not alleged, and we doubt they could prove, that the operation of the site will cause any substantial, immediate and direct degradation of Mr. Buffone's food supply. Wherever Mr. Buffone has been hunting, he has been risking the possibility that the wild game he has been killing had been feeding on waste disposal or otherwise unhealthful sites; we do not believe Mr. Buffone can show operation of the disputed site will significantly increase the risk to his health caused by his reliance on wild game as food.

In the immediately preceding sentence we more nearly have been ruling on the merits of the Citizens' claims than on whether their alleged facts can confer standing. However, we wanted to make it clear that in rejecting standing we are not taking refuge in the Citizens' unartful pleadings, about which the Citizens already have been warned, in our February 9, 1983 Opinion. Because we do not believe they could furnish the proof, the Citizens' failure to plead the allegation that operation of the site will substantially, immediately and directly degrade Mr. Buffone's food supply is inconsequential.

II. B. Permit No. 602124. Docket No. 82-221-G

The Citizens' Amended Appeal at this docket number states:

> 7. William Kraynak and George Kraynak are both named property owners in Paragraph 3 in the Permit Application submitted by the City of Philadelphia to Appellee, Department of Environmental Resources.

8. Paragraph 3b of the above mentioned Permit Application states site acquisition will be by lease for one (1) year.

9. No lease has ever been signed, nor entered into, by any of the named property owners.

10. William Kraynak is a member of Concerned Citizens Against Sludge.

11. Sludge has been deposited on the property of William Kraynak without his permission.

These allegations clearly do suffice to allege a "substantial, immediate and direct injury satisfying the William Penn test. Therefore, Philadelphia's Motion to Vacate, or to dismiss for lack of standing, is rejected for the appeal at Docket No. 82-221-G. However, we remind the Citizens that they must prove their allegations of standing, just as they must prove whatever facts are needed to sustain their appeal on the merits. In our February 9, 1983 Opinion we rejected Philadelphia's preliminary objection in the nature of a demurrer (though we conceded the preliminary objection had considerable merit) on the grounds that the Citizens had not yet had the opportunity to file their pre-hearing memoranda in these appeals, wherein the facts they intended to prove presumably would be more carefully delineated than in the Citizens' Notices of Appeal.

The Citizens now have filed their pre-hearing memoranda in these appeals; more precisely, they have filed a single pre-hearing memorandum which apparently is intended to satisfy the requirements of our Pre-Hearing Order No. 1 for both the above-captioned appeals (which have not been consolidated). Paragraph 2A of our Pre-Hearing Order No. 1 reads:

> 2. The appellant shall file...a pre-hearing memorandum which shall contain the following:
>
> A. Statement of facts each party intends to prove.

Here, in its entirety, is the Citizens' pre-hearing memorandum's response to the above requirement:

A. Statement of Facts:

1. Concerned Citizens Against Sludge shall prove that the Department of Environmental Resources did not comply with its own regulations in connection with permit number 602201 in that the application identified as number 602201 was filed by the City of Baltimore, but issued to the City of Philadelphia.

2. The Department of Environmental Resources failed to comply with its own permit requirements in that the Department of Environmental Resources made no provisions to insure grazing animals were not allowed to graze on the sludge sites pursuant to permit mandate.

3. The Department of Environmental Resources did not sufficiently investigate Modern-Earthline to insure compliance with the Solid Waste Management Act 97 § 503(d).

The Board supposes it is possible the Citizens are content with this statement of the facts the Citizens feel it necessary to prove. But the Citizens are reminded that paragraph 4 of our Pre-Hearing Order No. 1 reads:

4. A party may be deemed to have abandoned all contentions of law or fact not set forth in its pre-hearing memorandum.

O R D E R

WHEREFORE, this 4th day of May, 1983 it is ordered that:

1. Philadelphia's motion to dismiss the above-captioned appeals for mootness is rejected; these appeals are not moot in any part.

2. Philadelphia's motion to dismiss the appeal at Docket No. 82-220-G for lack of standing is granted.

3. Philadelphia's motion to dismiss the appeal at Docket No. 82-221-G for lack of standing is rejected.

4. The Citizens are reminded that a party may be deemed to have abandoned all contentions of law or fact not set forth in its pre-hearing memorandum.

ENVIRONMENTAL HEARING BOARD

Dennis Jay Harnish

DENNIS J. HARNISH, Chairman

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, Member

Edward Gerjuoy

EDWARD GERJUOY, Member

DATED: May 4, 1983

cc: Bureau of Litigation
Howard Wein, Esquire
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Martha Gale, Esquire
Marguerite Goodman, Esquire
Benjamin G. Stonelake, Jr., Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

CAMBRIA COAL COMPANY :

:

: Docket No. 82-071-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
PETITION FOR RECONSIDERATION

On March 11, 1981, the Board entered its final adjudication in this matter. We sustained Cambria Coal Company's (Cambria's) appeal, and remanded the matter to DER with the instruction that DER issue Cambria its previously refused amendment to Mining Permit No. 101206-4274SM-0-1; conditions of the amended permit were to be consistent with our adjudication.

On March 30, 1983, DER filed a timely (under 25 Pa. Code §21.122) petition for reconsideration and reargument, en banc. We herewith deny this petition, for reasons explained infra.

Our rule 21.122(a) states that reargument (and attendant reconsideration) "will be taken only for compelling and persuasive reasons, and will generally be limited to instances where:"

> (1) The decision rests on a legal ground not considered by any party to the proceeding and that

> the parties in good faith should have had an opportunity to brief such question.
>
> (2) The crucial facts set forth in the application are not as stated in the decision and are such as would justify a reversal of the decision. In such a case reconsideration would only be granted if the evidence sought to be offered by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing.

The contentions in DER's Petition may be summarized as follows:

(a) The Board decided that DER's "no double permitting" policy was arbitrary and capricious as applied to Cambria, although DER never had the opportunity to fully brief this legal issue.

(b) The Board decided that Cambria and not Lechene Coal Company (Lechene) had the rights to mine coal in the property under dispute, although the Board has no authority to determine title to real property, and although DER had no opportunity to fully brief the issues of who had the coal mining rights and the Board's power to rule on those rights.

(c) The Board's decision that the "no double permitting" policy was arbitrary and capricious rested on alleged facts--concerning DER's past double permitting practices--which were not in the record.

(d) In relying on DER's alleged past double permitting practices, the Board overlooked facts in the record concerning Lechene's reclamation problems at the site, which facts justified DER's adherence to its no double permitting policy for the disputed 18 acres which are the subject of the instant appeal.

(e) The Board's decision rested on legal grounds, concerning the effects on Lechene's bonding responsibilities if Cambria were to be granted its permit, which are unsound and which DER did not have the opportunity to fully brief.

Concerning these five [(a) - (e)] contentions of DER's, we have reached the following conclusions:

(a) DER had the opportunity to fully brief this legal issue, and did so brief. Section V of DER's brief is headed:

> V. DER POLICY PROHIBITING OVERLAPPING MINING PERMITS SHOULD BE SUSTAINED IN THIS CASE EVEN THOUGH THE POLICY HAS NOT BEEN PROMULGATED AS A REGULATION.

This heading speaks for itself as a rebuttal to DER's contention (a). This section of DER's brief concludes with the quotation, from the Board's recent adjudication in Chemclene Corporation v. DER, Docket No. 80-168-M (September 21, 1982):

> The bond assessment program, admitted by DER to be unpublished, and not a regulation, is therefore not accorded a presumption of validity, and this Board may substitute its discretion for that of DER when considering the bond assessment program.

DER's contention (a) is rejected.

(b) Cambria's post-hearing brief, filed on or about twenty days before DER's brief was filed, proposes inter alia the following Findings of Fact:

> 16. At no time did Cambria grant Lechene any right to mine the coal it owned under the 53 acre tract of land.
>
> 17. Lechene had applied to the Department and had been granted a Mining Permit and a Mine Drainage Permit on 18 acres of the 53 acre tract even though Lechene did not have the surface or coal mining rights thereto.

These proposed Findings of Cambria's, of which DER had notice, refute DER's contention that it did not have the opportunity to fully brief the issue of who had the coal mining rights in the disputed 18 acres.

As for DER's contention that it did not have the opportunity to fully brief the issue of the Board's power to make rulings bearing on title, the record shows that the hearing examiner put DER on notice that this issue might come up.

In ruling that Appellant's Exhibit No. 15--identified as "a report from Olympia Title Company...the surface and mineral title report covering the Powell and Bosar property [the property in dispute]" (N.T. p. 64)--would be admitted into evidence, the hearing examiner said (N.T. pp. 65-66):

> I am going to admit it over objection for several reasons.
>
> First of all, on the basis of that Donald Cooper opinion where a title of research was submitted and I believe the ruling in that case was that even if the board doesn't have authority, it doesn't make determinations with regard to who owns what piece of property to the extent that the Department makes such determinations in undertaking its actions, the board must of necessity have the jurisdiction to review the department's determination.
>
> I don't know at this point to what extent the Department's determination rests on title in this case or not, but...I think the title abstract and the chain of title are necessary for me to understand where Appellant's 1 and 2 fit into the picture.

The objection to which the hearing examiner referred in the above quote from the transcript was by DER's counsel, who said (N.T. p. 65): "I object... on the grounds that the board is not empowered to make decisions about legal title." The opinion to which the hearing examiner referred was Donald D. Cooper and Kathleen Cooper v. DER, Docket No. 81-032-G (Adjudication on Reconsideration, September 20, 1982). In Cooper we arrived at the Conclusion of Law:

> 4. Although the Board does not have the power to adjudicate property rights disputes, the Board has the power and the duty to form well-founded opinions concerning the ownership of...property which is the subject of the instant appeal, when such opinions are needed to discharge the Board's obligations under 71 P.S. §510-21.

The hearing examiner's statement at the hearing, quoted supra, and the actual adjudication in the instant appeal, are consistent with Cooper, of which DER had notice. Nowhere in the adjudication whose reconsideration now is petitioned

did we do more than reach a "well-founded opinion" about the mining rights to the disputed acreage; certainly we did not adjudicate any disputed property rights. At the hearing DER's counsel put on record his objection that "the board is not empowered to make decisions about legal title." Therefore, DER's contention (b) is rejected.

(c) In the petitioned-from adjudication (p. 8) the Board wrote:

> Fourthly, DER did not contest Cambria's evidence that Cambria had received mining permits from DER in five instances since 1981 where the areas in question were already permitted to and bonded by other mining companies. Mr. Moore had no explanation for DER's failure to consistently follow this policy except that these variances did not occur within his mining district. While, as stated above, these factors are not determinative, they do affect the weight we give the reasons DER proffers to support its policy.

DER argues that it did "contest" the Cambria evidence referred to in the immediately preceding quotation. However, the language of paragraph 14 of DER's petition indicates that DER believes its objections (at the hearing) to the admission of Cambria's evidence on double permitting were equivalent to contesting the evidence. We do not give so broad an interpretation to the Board's use of the verb "contest" in the above quote; but in any event, whether or not DER is offering the correct interpretation of "contest" is irrelevant. Once evidence of double permitting had been admitted, the Board was entitled to rely on such evidence, which DER could "contest" only by introducing contradictory evidence.

More to the point is DER's contention that in fact Cambria's examples of double permits never were admitted into evidence. Here DER is correct. DER also contends that it has answered Interrogatories concerning these five alleged examples of double permitting, and that four of the five were not instances of double permitting at all; the fifth example, DER admits, was an instance of

double permitting, but represented a policy error which had been corrected before the letter giving rise to the instant appeal had been issued. Cambria's Answer to DER's Petition for Reconsideration does not contest these just-stated contentions of DER's.

Consequently it appears that our adjudication--notably our Finding of Fact 23 which states "DER has ignored this policy [against double permitting] on at least 5 occasions since 1981 by issuing permits to and accepting bonds from Cambria at other sites"--has rested on alleged facts not in the record. Nevertheless, we will not grant reconsideration on the basis of this error of ours. Leaving aside the question of whether evidence concerning the true nature of Cambria's alleged double permitting examples could have been introduced by DER at the hearing, we observe that Rule 21.122(a)(2) strongly disfavors reconsideration unless: "The crucial facts...are not as stated in the decision and are such as would justify a reversal of the decision." (emphasis added). As we stated in the above quotation from p. 8 of our adjudication, our finding that there had been five instances of double permitting was not determinative. Abandoning this finding would not have changed our decision to sustain the appeal, as is obvious from a reading of the entire adjudication. The adjudication consists largely of a series of counterexamples to DER's rigid insistence that it must forbid double permitting of the disputed 18 acres in order to avoid various administrative and enforcement problems. Our finding that there already had been five instances of double permitting supported our disbelief that DER had to refuse Cambria's permit application, but certainly was not necessary to such disbelief; and indeed, our retraction of our finding that there were five previous double permits has not suspended said disbelief.

(d) DER contends that in relying on the alleged existence of five previously double permitted sites, the Board overlooked facts in the record concerning outstanding reclamation problems at the Lechene site. As we have explained under (c) supra, in reaching our decision to sustain Cambria's appeal we did not and do not "rely" on the existence of five previously permitted sites. Moreover, our adjudication in this matter did not "overlook" the facts in the record concerning outstanding reclamation problems at the Lechene site; we were aware of these problems, but did not draw the inference from them that DER urged, namely that the existence of these reclamation problems justified application of DER's "no double permitting policy" to the disputed 18 acres.

In illustration of the immediately preceding assertion, our Findings of Fact 19 and 20 state that as of September 22, 1982 Lechene had not completed reclamation on the 18 acre area, including regrading soil piles and spreading top soil. On p. 9 of our March 11, 1983 adjudication we state:

> Even if it were to be assumed, for the sake of argument, that Lechene would not complete reclamation of the 18 acre parcel, one cannot see why the Commonwealth and the environment would not be better served by issuing Cambria a mining permit and requiring it to post new bonds (which would issue at a higher rate than the Lechene bonds).

On pp. 9 - 10 of our opinion we suggest that DER could rid itself of its concerns--about being unable to enforce Lechene's bonds after issuing Cambria a permit--merely by forfeiting Lechene's bond before accepting Cambria's bond. We added, on p. 10: "The record discloses abundant support for such a forfeiture."

In sum, DER may not be satisfied with the inferences we have drawn from the record, but their contention (d) misreads the thrust of our opinion, and herewith is rejected as grounds for reconsideration.

(e) Despite DER's contention to the contrary, DER did have ample opportunity to brief the issue of the effect on Lechene's bonding responsibilities from issuance of the Cambria permit, including the possible release of surety for Lechene's bonds. In section IV, p. 8 of DER's post-hearing brief, there is a long paragraph on the problems overlapping permits would pose for DER enforcement actions against mine operators. The paragraph begins: "Overlapping mining permits would confuse liability for environmental damage." On p. 10 of its post-hearing brief, DER argues:

> Furthermore, the issuance of an overlapping permit might be deemed to automatically discharge the surety because the issuance of the overlapping permit might be deemed to be a material alteration of the surety bond.

Several other arguments in support of DER's contention that double permitting will cause bond forfeiture problems for DER may be found on pp. 10 - 11 of DER's post-hearing brief.

Therefore DER has no basis for its contention that it has not had the opportunity to fully brief the effects on Lechene's bonding responsibilities stemming from issuance of Cambria's permit. Furthermore, we do not agree with DER's additional contention that the Board's own analysis of these effects--on Lechene's bonding responsibilities stemming from issuance of Cambria's permit--was unsound. But even if DER were correct in this last contention, such a contention, though it might provide grounds for reversing us on appeal, does not provide grounds for reconsideration under Rule 21.122(a), quoted above.

O R D E R

WHEREFORE, this 4th day of May, 1983, it is ordered that DER's Petition for Reconsideration of our March 11, 1983 adjudication is rejected; our March 11, 1983 adjudication is affirmed.

ENVIRONMENTAL HEARING BOARD

Dennis Jay Harnish

DENNIS J. HARNISH, Chairman

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, Member

Edward Gerjuoy

EDWARD GERJUOY, Member

DATED: May 4, 1983

cc: Bureau of Litigation
Donald A. Brown, Esquire
Leo M. Stepanian, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

MULTICHEM CORPORATION :

:

Docket No. 83-047-M

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
MOTION TO DISMISS

By certified letter return receipt requested dated November 23, 1982 the application of appellant, Multichem Corporation, for a hazardous waste transporter's license was denied by Gary R. Galida, Chief, Division of Hazardous Waste Management, Department of Environmental Resources of the Commonwealth of Pennsylvania (DER).

The return receipt for said letter is dated November 26, 1983, and was received by appellant, although appellant in its notice of appeal admits receipt of the letter as of November 24, 1982.

The notice of appeal was received and filed in the offices of the Environmental Hearing Board (Board) on March 11, 1983.

This board has jurisdication to hear and decide appeals from final action of DER, and the letter of November 23, 1982 to appellant from DER is a final action of DER which is appealable to this board. (Citations omitted).

However, any appeal, in order to be perfected so as to preserve the rights of the appealing party must be timely filed. In the instant appeal, the notice of appeal

was required to be filed with the board within thirty (30) days of receipt of notice of DER's final action (letter of Galida), pursuant to the provisions of 25 Pa. Code §21.52.

Giving the appellant the benefit of the discrepancy between the date shown on the return receipt, November 26, 1982, and appellant's acknowledged date of receipt of the letter, November 24, 1982, the last date for filing of the notice of appeal would have been December 26, 1982.

This board, and the Courts of this Commonwealth have consistently held that the board lacks jurisdiction to hear an appeal which has not been filed within the statutory time period following receipt of notice of final action of DER. *Joseph Rostosky v. DER*, 26 Pa. Cmwlth. Ct. 478, 364 A.2d 761 (1976); *George and Barbara Capwell v. DER*, EHB Docket No. 83-019-M (Opinion and Order dtd. March 4, 1983).

In light of such controlling precedent, the board holds that the appeal of Multichem Corporation was not timely filed and must be dismissed for lack of jurisdiction.

O R D E R

AND NOW, this 5th day of May , 1983, the appeal of Multichem Corporation is dismissed for lack of jurisdiction due to untimely filing.

ENVIRONMENTAL HEARING BOARD

Dennis Jay Harnish

DENNIS J. HARNISH, Chairman

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR., Member

DATED: May 5, 1983

Edward Gerjuoy

EDWARD GERJUOY, Member

cc: Bureau of Litigation
Louis A. Naugle, Esquire
Michael Guarnieri, President

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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OLD HOME MANOR, INC. :

and :

W. C. LEASURE : Docket Nos. 82-006-G
82-007-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION FOR RECONSIDERATION

On April 11, 1983, this Board issued an Opinion and Order granting in part, and denying in part, petitions for supersedeas in the above-captioned appeals, filed by Old Home Manor (OHM) and W. C. Leasure (Leasure) respectively. These appellants, on May 2, 1983, now have filed a Petition for Reconsideration "pursuant to 25 Pa. Code §21.122." We herewith rule on this May 2, 1983 Petition.

We begin by noting that by its language, and by its location in the Board's Rules and Regulations, 25 Pa. Code §21.122 clearly is intended to apply only when there has been a final adjudication by the Board. Although the Board's general powers to conduct its proceedings undoubtedly permit the Board to reconsider any of its rulings at any time before final adjudication, nevertheless except under extraordinary circumstances the Board cannot be expected to expend its already overtaxed resources on reconsideration of interlocutory decisions.

Furthermore, even assuming 25 Pa. Code §21.122 were routinely applicable to the instant petition, the petition should comply with the requirements of 25 Pa. Code §21.122. Our Rule 21.122(a) states that reargument (and attendant reconsideration) "will be taken only for compelling and persuasive reasons, and will generally be limited to instances where:"

> (1) The decision rests on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief such question.
>
> (2) The crucial facts set forth in the application are not as stated in the decision and are such as would justify a reversal of the decision. In such a case reconsideration would only be granted if the evidence sought to be offered by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing.

The Petition for Reconsideration has not complied with either of these two just-quoted requirements, as we now will document.

I. Jurisdiction Over Leasure

A. Leasure contends that the Board erred in holding that Leasure, by having entered a general appearance, may be deemed to have waived his objections to the Board's exercise of in personam jurisdiction over him. Leasure so contends at length, although our April 11, 1983 Opinion unmistakably states in connection with this waiver ruling:

> We prefer not to let this issue rest at this point, however, because Leasure may feel he was led into a general appearance by our April 12, 1982 Opinion and Order.

Our April 11, 1983 Opinion then proceeded to analyze the issue of in personam jurisdiction over Leasure on its merits; we concluded:

> In our view, the evidence just described shows sufficient personal contacts between Leasure and the Commonwealth that forcing him to appear in a Pennsylvania forum does not offend traditional notions of fair play and substantial justice. Therefore, whether or not Leasure is deemed to have put in a general appearance waiving objections to in personam jurisdiction, we reject his petition for supersedeas, insofar as it was grounded on the contention that we had no right to exercise personal jurisdiction over Leasure.

Evidently, in making the contention under present discussion, Leasure's counsel has ignored our clear statement that our assumption of in personam jurisdiction over Leasure did not "rest" on the waiver issue Leasure so assiduously argues. Under 25 Pa. Code §21.122(a)(1), quoted above, only those legal grounds on which our decision "rests" are proper subjects for reconsideration. Therefore, we need not--and do not--address here the merits of Leasure's contention that there was no waiver of his objections to the Board's assumption of in personam jurisdiction over him.

B. Leasure contends that "The Evidence Is Insufficient To Show Minimal Contacts Sufficient For Jurisdiction To Attach As To Leasure." However, Leasure's arguments in this regard are no more than an assertion that the Board erred in its holding, with supporting arguments rehashed from its brief filed before we issued our April 11, 1983 Opinion. Leasure does not try--and does not manage--to show that either of the requirements of Rule 21.122(a) are met.

II. DER's Powers Over Leasure Under The CSL

Leasure contends that the Board in excluding certain properties from the supersedeas granted to Leasure, "erred in relying upon the Clean Streams Law (CSL)." In so arguing, Leasure further asserts that "the Board has apparently

misapprehended the import of Ryan v. Comm. DER." Leasure makes these contentions in his Petition for Reconsideration although our April 11, 1983 Opinion states:

> We specifically have excluded, from the supersedeas supra, those sites which are located on properties owned by Leasure before February 15, 1977. Terms of the December 12, 1981 Order pertaining to such sites are not stayed by the instant Opinion and Order. For these just-described sites we are not granting a supersedeas because for them we do not agree Leasure has met his burden--under the supersedeas rules and the July 12, 1982 stipulation quoted supra--of showing that as a matter of law Leasure, though a former landowner, could not be required to take the remedial measures called for by the Order on the properties he had owned. Leasure's attempts to explain away Ryan v. DER are unconvincing.

In other words, Leasure merely is arguing that the Board's April 11, 1983 rulings were erroneous, as they well may have been--we do not claim infallibility. But Leasure so argues without any reference to the Board's supersedeas rules, 25 Pa. Code §§21.76 - 21.78, or to the July 12, 1982 stipulation which (see our April 11, 1983 Opinion) played a crucial role in our rulings. Nor does it seem to matter to Leasure's counsel that our April 11, 1983 Opinion obviously had examined, and rejected, the very same arguments he now is reiterating in his Petition for Reconsideration.

III. Whether OHM Should Have More Time For Backfilling To Terraces

On one of the sites which form the subject of the present dispute, the site of Special Reclamation Project (SRP) No. 445, OHM asked for a supersedeas of DER's December 23, 1981 Order that this site be backfilled to approximately original contour (AOC). OHM claimed that the permit OHM received called for backfilling to terraces, not to AOC. The Board felt that OHM had sustained its burden on this point, and therefore granted the requested supersedeas. However,

the Board required that OHM complete its terraced backfilling within the December 23, 1981 Order's original schedule for backfilling to AOC.

OHM now complains that it cannot meet this time schedule, which calls for backfilling completion by August 15, 1983 and for revegetation by September 15, 1983. OHM therefore asks the Board to reconsider its April 11, 1983 Opinion, and to order now that OHM may have approximately one year and eight months (from the present date) to complete terracing of SRP 445.

As is his wont, OHM's counsel nowhere explains how this request falls under the purview of 25 Pa. Code §21.122, on which he is relying (as discussed supra). Furthermore, the Board finds OHM's request for an extension of time of approximately 20 months to complete backfilling of SRP 445 especially inappropriate because of the following language in OHM's Brief in Support of Supersedeas, filed October 12, 1982. Discussing this very site, SRP 445, the brief stated [p. 43]:

> Leasure further testified that he expected to have the area terraced by the deadline imposed by DER's Order... OHM submits that this Board should (1) issue a supersedeas to prevent the Department from successfully alleging a violation of law; and (2) rule that OHM must complete the area by September, 1983, since both the Department and OHM agree that it is a reasonable completion date.

O R D E R

WHEREFORE, this 10th day of May, 1983, the Petition for Reconsideration of our April 11, 1982 Opinion and Order in the above-captioned appeals is denied.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY, Member

DATED: May 10, 1983

cc: Bureau of Litigation
Diana J. Stares, Esquire
Dennis W. Strain, Esquire
Gregg M. Rosen, Esquire
Michael Calderone, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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(717) 787-3483

JAMES CAINE :

:

Docket No. 82-095-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On March 8, 1982, DER refused James Caine's application for a public eating and drinking (E & D) license, on the grounds that sewage from his proposed restaurant would be unlawfully discharged into the waters of the Commonwealth. Caine timely appealed this refusal on April 2, 1982.

Thereafter, the parties engaged in extensive negotiations which (according to DER) have culminated in the following agreement between the parties:

1. Caine was to amend his previous E & D application, to the effect that he now will use a holding tank as the means to provide for sewage disposal.

2. DER would approve the amended application.

Indeed DER asserts that on March 10, 1983, DER did issue an E & D license to Mr. Caine for operation of his restaurant.

As of this date, Caine has taken no steps to withdraw his appeal, although it appears that no dispute remains between Caine and DER. However, on April 26, 1983, DER has filed a Motion to Dismiss the above-captioned appeal on grounds of mootness. This Motion was accompanied by a sworn Affidavit, by DER Sanitarian Supervisor Wayne H. Billings, affirming that Caine had been issued the aforesaid E & D license. Caine has not disputed the Motion or the Affidavit.

Under the circumstances, we see no reason to disbelieve DER's account of the facts in this matter, which account clearly implies the appeal now is moot.

O R D E R

WHEREFORE, this 13th day of May, 1983, the above-captioned appeal is dismissed on grounds of mootness.

ENVIRONMENTAL HEARING BOARD

DENNIS J. HARNISH, Chairman

ANTHONY J. MAZULLO, JR., Member

EDWARD GERJUOY, Member

DATED: May 13, 1983

cc: Bureau of Litigation
Lynn Wright, Esquire
Gerald C. Grimaud, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
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JEFFREY HIGBEE d/b/a
HIGBEE SANITATION SERVICE :

:

Docket No. 82-298-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

The facts in this appeal, which on March 4, 1983 was consolidated with the appeals at Docket Nos. 82-295-G and 82-299-G, have been summarized in our Opinion in this matter dated March 4, 1983. In that Opinion we remarked that a motion to dismiss this appeal on grounds of mootness seemed appropriate.

On April 11, 1983, DER filed a Motion to Dismiss this appeal on grounds of mootness. On April 22, 1983, Counsel for Higbee was advised that this Motion had been received, and was ordered to respond, should she wish to do so, on or before May 3, 1983.

As of this date, Higbee has not responded to DER's Motion to Dismiss. The reasons for granting the Motion are legally compelling, as fully explained in our March 4, 1983 Order.

O R D E R

WHEREFORE, this 13th day of May, 1983, it is ordered that:

1. The above-captioned Appeal is dismissed on grounds of mootness.

2. The above-captioned Appeal is removed from the March 4, 1983 consolidation of Docket Nos. 82-295-G, 82-298-G, 82-299-G.

3. The caption for the remaining consolidated Appeals at Docket Nos. 82-295-G and 82-299-G henceforth will read:

LINTELMAN et al.	)	
v.	)	Docket Nos. 82-295-G
COMMONWEALTH OF PENNSYLVANIA	)	82-299-G
DEPARTMENT OF ENVIRONMENTAL RESOURCES)		

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH, Chairman

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR., Member

Edward Gerjuoy

EDWARD GERJUOY, Member

DATED: May 13, 1983

cc: Bureau of Litigation
Keith E. Bell, Esquire
Anna Belle Jones, Esquire
William G. McConnell, Esquire
Howard Wein, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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HARRISBURG, PENNSYLVANIA 17101
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LINTELMAN et al. :

:

Docket Nos. 82-295-G
: 82-299-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
MOTION TO DISMISS AND REQUEST FOR ORAL ARGUMENT

The facts in these consolidated appeals as of March 4, 1983 have been summarized in an Opinion and Order of that date, at the above Docket Numbers. On April 11, 1983, DER filed a motion to dismiss these appeals on various grounds, including mootness and lack of merit. In the alternative, DER asks that these appeals be continued until the Board has ruled on the underlying appeals at Docket Numbers 81-134-G and 81-151-G, which--with all post-hearing briefs in--now are awaiting adjudication. Both Coolspring Township and Lintelman oppose this motion of DER's for much the same reasons. However, Coolspring Township agrees with DER's request that the above-captioned appeals be continued until the appeals at 81-134-G and 81-151-G are adjudicated. Lintelman does not speak to this request that the appeals be continued, but does ask that the Board offer the parties the opportunity for oral argument on DER's motion to dismiss.

Although DER's motion to dismiss has much merit, the counter-arguments of Lintelman and Coolspring Township are not wholly unmeritorious. Therefore, in view of the fact that sustaining the 81-134-G and 81-151-G appeals unquestionably would make the above-captioned appeals moot, and in view of the further fact that an Order of the Common Pleas Court of Mercer County, Pennsylvania presently enjoins the permittee from operating the permit which is the subject of these present appeals, the Board sees no reason to rule on the motion to dismiss at this time. Rather, we shall adopt DER's recommendation, concurred with by Coolspring Township, that this matter be continued until after the adjudication at Docket Nos. 81-134-G and 81-151-G is issued.

For similar reasons, Lintelman's request for oral argument on DER's motion to dismiss is deferred until 81-134-G and 81-151-G are adjudicated. In this connection we note that the Board's Rules, 25 Pa. Code Chapter 21, do not provide for oral argument on motions before the Board. 25 Pa. Code §21.92 is restricted to oral argument after formal hearings on the merits have been completed. However, under general rules of administrative practice and procedure, the Board presumably has the authority to accede to a request for oral argument. 1 Pa. Code §35.204.

O R D E R

WHEREFORE, this 18th day of May, 1983, it is ordered that:

1. The above-captioned appeals are continued until the underlying appeals at Docket Nos. 81-134-G and 81-151-G are adjudicated.

2. If need be, after the aforesaid adjudication at Nos. 81-134-G and 81-151-G is entered, an appropriate order will be issued concerning DER's Motion to Dismiss these appeals and Lintelman's request for oral argument on this motion.

3. In the meantime, rulings on the aforesaid Motion to Dismiss and request for oral argument are deferred indefinitely.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY, Member

DATED: May 18, 1983

cc: Bureau of Litigation
Howard J. Wein, Esquire
Keith E. Bell, Esquire
William G. McConnell, Esquire
Anna Belle Jones, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

NESHAMINNEY ENTERPRISES INTERNATIONAL :
and COCHRAN & KELLER COAL COMPANY, INC. :

: Docket No. 82-289-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
MOTION TO DISMISS

On October 26 and October 29, 1982, DER issued two orders directing Appellants to cease surface mining operations on acreage under Mine Drainage Permit 3574SM7 and Mining Permit 1525-1(A-2). On November 26, 1982, a telegram skeleton notice of appeal of these orders was received by the Board (see 25 Pa. Code §21.52(c). The appeal finally was perfected on December 14, 1982, and on December 15, 1982 Appellants--in accordance with our usual custom--were mailed our Pre-Hearing Order No. 1, requiring Appellants to file their pre-hearing memorandum on or before February 28, 1983.

On March 15, 1983, no pre-hearing memorandum having been received from Appellants, the Board notified Appellants' counsel by certified mail that unless their pre-hearing memorandum was filed on or before March 25, 1983, the Board might apply sanctions, including dismissal of the appeal, in accordance

with the Board's rules, 25 Pa. Code §21.124. On March 25, 1983, the Board received Appellants' counsel's response to the Board's March 15, 1983 letter. Appellants' counsel, citing "certain differences" which had arisen between himself and Appellants, petitioned the Board to allow him to withdraw as counsel for Appellants. Appellants' counsel stated that he had made his intention known to Appellants; Appellants' counsel also filed a pre-hearing memorandum, whose substantive portions merely incorporated verbatim the factual and legal allegations which previously had been set forth in the Notice of Appeal.

On March 30, 1983 the Board wrote Appellants, informing them that their counsel had petitioned for leave to withdraw, and asking that objections to said petition be filed with the Board by April 7, 1983. On April 12, 1983, no objection having been received, the Board permitted Appellants' counsel to withdraw. On April 21, 1983 the Board scheduled a pre-hearing conference on this matter for May 18, 1983, and so informed Appellants, who had not named new counsel.

On May 18, 1983, DER appeared for the scheduled pre-hearing conference, but Appellants did not. Appellants did not notify the Board of their inability to attend the scheduled May 18, 1983 pre-hearing conference, nor did they ask for an alternate time. Indeed, nothing has been heard from Appellants or their counsel since December 14, 1982, other than the March 25, 1983 response of Appellants' counsel to the Board's March 15, 1983 letter. In the meantime, DER, on May 13, 1983, has filed a Motion to Dismiss this matter because of Appellants' alleged failure to pursue their appeal. This Motion recapitulated the aforementioned history of this matter, and pointed out that Appellants have not yet filed any response to DER's First Set of Interrogatories to Appellants, which

first were served on Appellants on February 2, 1983. Appellants have not filed any response to DER's Motion to Dismiss.

In view of the circumstances which have been described, we see no reason to refuse DER's Motion, which herewith is granted for failure to prosecute the instant appeal, in a fashion amounting to flagrant disregard of the Board's orders. 25 Pa. Code §21.124.

O R D E R

AND NOW, this 25th day of May , 1983, for reasons stated in the foregoing Opinion, the above-captioned appeal is dismissed, with prejudice.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: May 25, 1983

cc: Bureau of Litigation
Alan S. Miller, Esquire
Neshaminney Enterprises, International
Robert O. Lampl, Esquire
(Attorney for Cochran & Keller Coal Company, Inc.)

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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HARRISBURG, PENNSYLVANIA 17101
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ELZIE E. LAVERY :

:

Docket No. 82-158-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On April 1, 1983 this Board issued an Opinion and Order in the above-captioned matter. That Opinion and Order reviewed the history of this appeal to April 1, 1983 (which history will not be repeated here) and warned that we would withdraw the appeal on our own motion if no action was taken by the parties on this matter during the year April 1, 1983 to April 1, 1984.

On April 15, 1983, counsel for the Appellant wrote that a consent order in settlement of this matter had been agreed to. Thereafter, counsel for DER has sent us a copy of the Consent Order and Agreement between DER and Elzie Lavery, dated January 25, 1983. One of the clauses in this Consent Order and Agreement states:

> 6. Within fifteen (15) days of the execution of this Consent Order and Agreement, Lavery shall file a letter with the Environmental Hearing Board, in a form acceptable to the Department, withdrawing with prejudice the Appeal from the bond forfeiture, which docketed at 82-158-G.

No such letter from Lavery has been received by this Board, nor has Counsel for Lavery, in his April 15, 1983 letter, specifically requested withdrawal of the instant appeal. However, in view of the history of this matter summarized in our April 1, 1983 Opinion, and in view of the above-quoted paragraph 6 of the Consent Order and Agreement, we now see no need to keep this matter on our docket any longer.

O R D E R

WHEREFORE, this 25th day of May, 1983, the above-captioned appeal is dismissed with prejudice.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.

Edward Gerjuoy

EDWARD GERJUOY

DATED: May 25, 1983

cc. Bureau of Litigation
Diana Stares, Esquire
Arthur P. Tonozzi, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

DEL-AWARE UNLIMITED, INC., et al. : Docket No. 82-177-H
: 82-219-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and NESHAMINY WATER RESOURCES AUTHORITY and
PHILADELPHIA ELECTRIC COMPANY

OPINION AND ORDER SUR MOTION TO
REOPEN THE RECORD AND/OR FOR REBUTTAL

The last day of hearing in the above-captioned matter was May 17, 1983. The record was closed on that date subject to motions to reopen, if any. On May 31, 1983 appellant filed a Motion to Reopen the Record and/or For Rebuttal. The motion has been answered and opposed by intervenors PECO and NWRA.

Among the reasons set forth in said motion to justify the reopening of the record, the most persuasive is the allegation that on May 17, 1983 the voters of Bucks County by referendum, disapproved Bucks County's continued participation in the Point Pleasant project. The impact of this referendum and subsequent actions taken by the Bucks County Commissioners is by no means clear to the board.

The board does understand, however, that NWRA is an entity formed to plan, design, obtain all necessary permits and approvals for and construct the

public water supply portion of the Point Pleasant project; the project proposed to be operated as a joint venture of Bucks and Montgomery Counties. The board also understands that DER balanced the benefits of the public water supply portion of the project, along with the PECO portion of the project, against the environmental impacts of the project in performing its duties under Article I, Section 27 of the Pennsylvania Constitution and 25 Pa. Code Chapter 105 of its regulations. If Bucks County's withdrawal imperils completion of all or part of the water supply portion of the project it would seem that DER would have to take another hard look at this balance.

Besides the above considerations, the board is also concerned that a removal for legal reasons may be required in Docket 82-177-H which pertains to DER's determination not to require PECO to file an application for a NPDES permit for discharging Delaware River water into the East Branch of Perkiomen Creek. A similar remand may be required regarding discharge of Delaware River water into the North Branch of the Neshaminy Creek as well.[1] The board appreciates that there may be a legal distinction between the action DER took with regard to the East Branch and its failure to act with regard to the North Branch.

While the above considerations may ultimately persuade the board to reopen the record, it cannot be too strongly emphasized that the board is reluctant to reopen the record absent the strongest showing of the need to do so. Therefore it is the purpose of the following order to set up a briefing schedule on the remand issues as well as on the implications of the actions of Bucks County on the continued viability of at least the water portion of the Point Pleasant project.

---

1. Of course, if a portion of the matter were remanded to DER, there would probably be no extra delay to the project due to reopening the record.

O R D E R

AND NOW, this 27th day of June, 1983, it is ordered that:

1. On or before July 11, 1983, the appellant shall file with the board a brief addressing:

a) the legal issues raised in its appeal at 82-177-H

b) assuming arguendo, that an NPDES permit is required before the Delaware River water can be discharged into the North Branch of the Neshaminy did DER ~~cut~~ as in violation of law or in an arbitrary and capricious fashion in failing to require such a permit before (or contemporaneous with) the permits approved in the actions under appeal

c) the legal and factual implications of the Bucks County actions on the continued viability of the water supply portion of the Bucks County project; and

d) legal authority supporting any other ground for reopening the record, adding to the record or permitting rebuttal as requested by its motion. (This section should include a discussion of the use of PUC testimony against DER and NWRA which entites were presumably not parties before the PUC)

2. All other parties shall file briefs with the board responding to appellants' brief within 15 days from their recipt thereof.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

cc: Bureau of Litigation
Louise Thompson, Esquire
Robert J. Sugarman, Esquire
Hershel R. Richman, Esquire
William J. Carlin, Esquire
Eugene J. Bradley, Esquire
Bernard Chanin, Esquire
Troy B. Conner, Jr., Esquire
James M. Neill, Esquire

DATED: June 27, 1983

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

HOWARD FUGITT and
JAMES E. GATTEN :

:

Docket No. 83-029-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and TYHONAS COAL COMPANY, Permittee

OPINION AND ORDER
SUR MOTION TO DISMISS

On January 10, 1983, DER issued Mine Drainage Permit No. 63820104 and Mining Permit 100538-63820104-01-0 to the Tyhonas Coal Company ("Tyhonas"). The appellants were notified of this action by letter, also dated January 10, 1983. The appellants then filed a timely notice of appeal of these permits. Appellants asked the Board to take the following actions:

(a) To revoke the permits issued to Tyhonas.

(b) To investigate violations by DER of its own rules and regulations.

(c) To investigate DER's conflict of interest and ethical violations in this matter.

To support their requests for these Board actions, the appellants listed numerous allegations of violations and other irregularities by Tyhonas and DER. Many of these allegations were wholly without merit. Appellants' allegations

possibly worth mentioning here included:

> 1. Tyhonas had not complied with advertising requirements (e.g., 25 Pa. Code §86.34) that are intended to give the public full opportunity to protest applications for surface mining permits.
>
> 2. DER and Tyhonas employees held a "clandestine" conference before the onset of a public hearing on the Tyhonas permit application.
>
> 3. Bethlehem Township ("Township") and DER wrongfully granted Tyhonas a variance to mine within 100 feet of public roads.

On March 16, 1983 the appellants, acting pro se, filed their pre-hearing memorandum as required by our Pre-Hearing Order No. 1. In this pre-hearing memorandum the appellants reiterated the allegations made in their Notice of Appeal. The appellants also wrote:

> We are ordinary citizens, designated as spokespersons for sixteen (16) families in the Pigeon Creek Valley. We represent the citizens of Pennsylvania, accusing a few Department employees of wrong-doing. We see the need for an attorney to guide us in legal protocol. We believe the Commonwealth should provide us with an attorney for this Hearing. We have been given notice that two (2) attorneys will appear on behalf of the Department. In all fairness, in a spirit of true democracy, we request one of these attorneys come over to our side, to guide us in legal procedure, to assume the role of prosecutor.

The Board responded to this request on March 23, 1983. We informed the appellants that we had no power to order DER or any other Commonwealth agency to furnish them an attorney, but in the strongest terms urged the appellants to secure their own attorney. Nevertheless the appellants have not secured an attorney, and are continuing to prosecute their appeal pro se.

On April 1, 1983 DER filed its pre-hearing memorandum. This pre-hearing memorandum was followed by a DER Motion to Quash, as beyond this Board's jurisdiction,

any complaint that Bethlehem had wrongfully issued a road variance. Appellants responded to DER's Motion on April 18, 1983; the response was not to the point, and mainly manifested appellants' need of an attorney.

On April 20, 1983, Tyhonas filed its pre-hearing memorandum, accompanied by a motion to dismiss the entire appeal on the grounds that the appellants had not demonstrated standing. The DER and Tyhonas outstanding motions, and other matters relevant to the hearing on the merits of this appeal, were discussed at a pre-hearing conference on April 22, 1983, attended by all the parties. At that conference the Board reiterated its advice that appellants obtain counsel. The Board also explained to the appellants that their previously filed documents indeed had left questionable their standing to appeal. However, because the Board's policy is to give an appellant every opportunity to demonstrate standing (see, e.g., our Opinions and Orders of September 15 and October 12, 1982, in Concerned Citizens of Rural Ridge, Docket No. 82-100-G), especially when the appellants are citizens appearing pro se, we permitted the appellants to file an amended notice of appeal, designed to demonstrate their standing.

The appellants filed their amended notice of appeal on May 6, 1983. Their amended notice of appeal reiterated their previous allegations, and added numerous new allegations, many of which again were wholly without merit. The new allegations possibly worth mentioning include:

> 4. Appellants are interested parties within the meaning of the Surface Mining Conservation and Reclamation Act ("SMCRA") and the Clean Streams Law ("CSL").
>
> 5. Tyhonas has a history of non-compliance with DER Rules and Regulations.
>
> 6. The Tyhonas mine is adjacent to the South Branch of Pigeon Creek, which supplies the Cokebury Reservoir with water for a municipal water supply.

7. The erosion and sedimentation ("E & S") controls proposed in the permit are incapable of meeting effluent standards and will cause pollution of the South Branch of Pigeon Creek.

8. Under Article I Section 27 of the Pennsylvania Constitution, any pollution of the South Branch of Pigeon Creek constitutes an injury to the appellants.

9. The conduct of the mining operation in close proximity to the appellants deprives the appellants of the rights guaranteed to them under Article I Section 27.

DER and Tyhonas have responded to appellants' amended notice of appeal by renewing their previously filed motions. Most recently, on June 20, 1983, appellants have filed a "Final Pleading", signed by themselves and some 18 other "residents of Pigeon Creek Valley". This Final Pleading alleges:

10. Because Tyhonas cannot be expected to properly reclaim its surface mining site, the appellants expect to suffer emotional trauma from the consequent scenic harm to Pigeon Valley, whose vistas are much admired by travelers.

We have recounted the foregoing detailed and somewhat tortuous history largely to ensure that all parties, but especially the appellants, will understand the content and basis of the Order which follows. We grant DER's motion; this Board's jurisdiction is confined to reviewing actions of DER, not of Townships. 71 P.S. §510-21. We agree that the appellants have not alleged facts sufficient to confer standing, as is their burden. Nevertheless, at this time we will not grant Tyhonas' motion to dismiss, because we believe appellants' failure to demonstrate standing may be ascribable to their legal inexperience instead of to their actual lack of injury. Some of their allegations 1 - 10 supra could confer standing with the addition of routine heretofore unpleaded allegations, such as where appellants reside relative to the proposed mining site. As we have previously

stated, if these citizens deserve to have their appeals heard by this Board, we do not wish to deprive them of this opportunity because their pleadings have been inartful. Concerned Citizens Against Sludge v. DER, Docket No. 82-220-G (Opinion and Order, February 9, 1983).

On the other hand, we will not extend indefinitely the appellants' opportunities to demonstrate standing. Moreover, as the foregoing history of this matter clearly indicates, rulings which will exclude immaterial and unmeritorious issues from this appeal are long overdue. Therefore, we also rule as follows.

A. Appellants will be given one last chance to allege facts sufficient to confer standing (see our Order accompanying this Opinion). These new facts must tend to flesh out the allegations 1 - 10 listed above; at this late date we will not permit appellants to raise any inherently new issues. The appellants are advised that to gain standing under Pennsylvania law they must be able to demonstrate their interest in the permit grant to Tyhonas is "substantial, immediate and direct." William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). In the instant appeal, this phrase from William Penn roughly implies the appellants must demonstrate that Tyhonas' operations under the permit are likely (which means more probably than wildly speculatively) to adversely affect their persons or properties or environment in a substantial, immediate and direct fashion. Appellants may wish to refer to William Penn, as well as to the Rural Ridge and Sludge Opinions and Orders we have cited; copies of our Opinions and Orders are obtainable from the Board. Appellants should note that:

> (i) The allegation 4 above, that the appellants are interested persons under the SMCRA and the CSL, is purely conclusory and--without additional facts--does not confer standing.

(ii) The appellants have not alleged the locations of their residences and activities, relative to the mine or to the South Branch of Pigeon Creek.

(iii) There has been no allegation that the appellants' water supply comes from the Cokeburg Reservoir.

(iv) Injuries to persons other than the appellants will not confer standing on the appellants.

(v) Appellants' allegation 10, concerning the emotional trauma they expect to suffer, is too speculative and insubstantial to confer standing under the William Penn test.

In connection with note (iv) immediately above, we remark that on April 22, 1983, at the pre-hearing conference, we told the appellants that if they could allege injuries to other citizens in their group sufficient to confer standing on such citizens, we would consider the possibility of permitting our present appellants to represent the interests of those other citizens in these appeals. The appellants' amended notice of appeal did not take advantage of this opportunity, which was objected to by Tyhonas. We no longer will admit allegations of injuries to other citizens; the time is past for embarking on such issues, whose entry into the instant appeal comes very close to allowing those other citizens to become parties although the statutory period for appeals by them has lapsed. 25 Pa. Code §21.52.

B. In the event the appellants do file allegations sufficient to confer standing, and if a hearing on the merits subsequently is held, the parties' presentations at that hearing will be limited to evidence bearing on:

(i) The appellants' allegations of standing.

(ii) Whether or not DER's grant of a variance to Tyhonas to mine within 100 feet of a public road was an abuse of discretion under 25 Pa. Code §§86.37(a)(5)(iv) and 86.102(8)(ii).

(iii) Whether or not Tyhonas' history of non-compliance with DER rules and regulations made the permit grant an abuse of DER's discretion under Pa. Code §§86.36(c) and 86.37(a)(8).

(iv) Whether or not the permit's provisions relating to E & S controls comply with applicable statutes and regulations.

(v) Assuming the E & S statutes and regulations have been complied with, whether or not these statutes and regulations will fail to protect the environment under the circumstances of Tyhonas' proposed mining operation.

(vi) Whether or not there has been a violation of Article I Section 27 of the Pennsylvania Constitution under the test of Payne v. Kassab, 11 Pa. Cmwlth. 14, 312 A.2d 86 (1973), affirmed 468 Pa. 226, 361 A.2d 263 (1976).

Evidence bearing on issues other than those listed as B(i) - B(vi) immediately above henceforth will be regarded as irrelevant to this appeal. Any issues which appellants have raised, other than those just listed, are rejected as without merit. This last ruling of ours needs no explanation, except perhaps as it applies to the appellants' allegation 1 above, concerning compliance with advertising requirements. Appellants have given no reason to believe they have facts which could show failure to comply with, e.g., 25 Pa. Code §86.34 (assuming arguendo there was such failure) injured or prejudiced them in any way. Campbell v. DER, 39 Pa. Cmwlth. 624, 396 A.2d 870 (1979). Such facts, if appellants have them, should be included in the amended pre-hearing memorandum called for in the accompanying Order (see below); if the facts warrant, we will modify the above list B(i) - B(vi) to include evidence bearing on the advertising requirements compliance issue.

We add that the Board reserves the right to further limit the parties' presentations at the hearing on the merits of this appeal [i.e., we reserve the right to exclude evidence bearing on the issues B(i) - B(vi)], after the Board has been able to review the appellants' amended pre-hearing memorandum. The appellants must recognize that they have not been granted the power to act as "private attorneys general", looking over DER's shoulders as DER administers the

SMCRA and the CSL. Sludge supra. Nor has this Board been given the power to oversee all the internal functionings of DER. Our powers are clearly stated in, and limited by, 71 P.S. §510-21. Our task is to decide whether, in granting the permit appealed from, DER abused its discretion or arbitrarily exercised its duties or functions. R. Czambel, Sr. v. DER, EHB Docket No. 80-152-G, 1981 EHB 88; Ohio Farmers Insurance Co. v. DER, Docket No. 80-041-G, 1981 EHB 384, affirmed 457 A.2d 1004 (Pa. Cmwlth. 1983). Requests to "investigate" or discipline DER personnel should be addressed to the Governor's office, or to the legislature perhaps, but certainly not to this Board.

O R D E R

WHEREFORE, this 1st day of July, 1983, it is ordered that:

1. On or before July 27, 1983, the appellants shall file an amended pre-hearing memorandum, consistent with the requirements of our Pre-Hearing Order No. 1, and following the good example of DER's pre-hearing memorandum filed April 1, 1983.

2. In addition to the information required by our Pre-Hearing Order No. 1, this amended pre-hearing memorandum shall list separately those factual allegations on which appellants are relying to demonstrate their standing to appeal.

3. Appellants are reminded of paragraph 4 in our Pre-Hearing Order No. 1; no other amendments to appellants' pre-hearing memorandum will be accepted without good cause shown.

4. If they so desire, Tyhonas and DER may amend their pre-hearing memoranda no later than 15 days after receipt of appellants' amended pre-hearing memorandum.

5. Tyhonas' and DER's pre-hearing memoranda may be accompanied by brief arguments concerning the legal sufficiency of any newly pleaded (in appellants' amended pre-hearing memorandum) allegations concerning appellants' standing.

6. DER's Motion to Quash, filed April 8, 1983, is granted.

7. Action on Tyhonas' motion to dismiss for lack of standing is deferred until receipt of the amended pre-hearing memoranda called for in the preceding paragraphs of this Order.

8. The proceedings at a hearing on the merits of this appeal, if held, will be limited as explained in the accompanying Opinion.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY, Member

DATED: July 1, 1983

cc: Bureau of Litigation
Diana J. Stares, Esquire
Alan S. Miller, Esquire
Howard Fugitt
James E. Gatten
Wesley T. Long, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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(717) 787-3483

DONNELLEY PRINTING COMPANY :

:

Docket No. 83-048-M

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
MOTION TO DISMISS AND STAY PROCEEDINGS

By notice dated February 10, 1983, and entitled "Notice of Violation", the Department of Environmental Resources (DER), through Arthur L. Dalla Piazza, a solid waste specialist operating out of the Harrisburg regional offices of DER, informed Donnelley Printing Company (appellant) that a violation of DER regulations, specifically 25 Pa. Code §75.267(b) and 265(z) had occurred at appellants facility at 216 Greenfield Road, Lancaster, Pennsylvania.

The notice was received by appellant on February 14, 1983, and an appeal was timely filed with the Board on March 15, 1983, together with a Petition for Supersedeas.

On April 20, 1983, DER filed a Motion to Dismiss the appeal and a Motion to Dismiss Petition for Supersedeas together with a Motion to Stay Proceedings. On May 31, 1983, appellant filed answers to the DER's motions to dismiss.

At issue at this time is the question of whether or not the document sent by DER to appellant of February 10, 1983 is such that it constitutes a final and appealable action of DER over which this Board may exercise jurisdiction.

Under the provisions of 25 Pa. Code §21.2(a)(1), an action is defined as:

> "Any order, decree, decision, determination or ruling by the Department (DER) affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person...."

25 Pa. Code 21.2(a)(1).

DER argues that pursuant to 25 Pa. Code 21.2(a)(1), and the cases decided by this Board, and the Commonwealth Court, a notice of violation is not such a final and appealable action as would visit jurisdiction in this Board.

Appellant argues that the notice of violation was a final action of DER in that it advised appellant it had violated the Solid Waste Management Act, 35 P.S. §6018.101, et seq. (SWMA), and the rules and regulations promulgated thereunder, 25 Pa. Code §75.

It is admitted that appellant was served with a document advising that statutes and regulations had been violated. However, such action by DER has been held to be unappealable, since no adjudication has been made by the transmission of a notice of violation, *Sunbeam Coal Corporation v. Department of Environmental Resources*, 8 Pa. Cmwlth Ct. 623, 304 A.2d 169(1973). *Perry Brothers Coal Company v. DER*, EHB Docket No. 82-122-H (Opinion 10-13-82).

Appellant cites us to *Sunbeam, supra*, as well as to *DER v. New Enterprise Stone and Lime Co., Inc.*, 25 Pa. Cmwlth Ct. 389, 359 A.2d 845(1976), and several other Commonwealth Court decisions[1] in support of his position. In these cites, appellant rightfully analyzes the Court's interpretation of what constitutes an appealable action. In its brief, appellant contends:

> "The common theory tying together the holdings in these cases is that for an action to constitute an appealable action, The Department's (DER) decision must be final, not preliminary, and the action must direct compliance with an act and impose liability or obligation."

Appellant's Brief In Support of Answer to Motion to Dismiss, p.7.

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1. See *Standard Line v. Refractories Company v. DER*, 2 Pa. Cmwlth Ct. 434, 279 A.2d 383(1971), *Bethlehem Steel Corporation v. DER*, 37 Pa. Cmwlth Ct. 479, 390 A.2d (1978), *Gateway Coal Company v. DER*, 41 Pa. Cmwlth Ct. 442, 399 A.2d 802(1979).

Appellant's synthesis of the decisions is entirely correct and accepted by this Board. The difficulty arises when the same synthesis is applied to the document over which this appeal was brought.

The document is labeled "NOTICE OF VIOLATION". After noting in the body thereof that the appellant is being advised that it has violated "SWMA", the notice then "recommends" three courses of action to appellant, and therein is the key to the resolution of this action.

Appellant was not finally ordered to do anything by DER. No sanctions were imposed in the document. Appellant was not required to do anything as a result of the notice. No obligation was imposed upon appellant as a result of the alleged "violation" of SWMA. DER did not "direct compliance" with anything and "impose liability or obligation" upon appellant herein. No final "decision" has been rendered by DER.

As the Commonwealth Court stated in *DER v. New Enterprise Stone & Lime Co., Inc.*,

> "...(A)dministrative agency laws generally refer to the term 'decision'. as including a determination which can be classified as quasi-judicial in nature and which affects rights or duties."

25 Pa. Commonwealth Ct. at 393 (1976).

Despite the admitted fact that appellant was notified that it had violated the SWMA, and regulations promulgated thereunder, the notice did not direct compliance with anything, and, most importantly, the notice did not impose liability or obligation upon appellant.

We therefore hold that the notice of violation was not a final and appealable action by DER, and, accordingly, this Board lacks jurisdiction in this appeal.

O R D E R

AND NOW, this 12th day of July , 1983, upon consideration of the notice of appeal filed in this appeal, and DER's Motion to Dismiss, and appellant's answer thereto, and for the reasons set forth in the foregoing Opinion, DER's Motion to Dismiss is granted and appellant's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: July 12, 1983

cc: Michele Straube, Esquire
James A. Humphreys, III

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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(717) 787-3483

ALLEGHENY COUNTY SANITARY AUTHORITY :

:

: Docket No. 82-269-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION TO LIMIT ISSUES

The above-captioned matter involves the appeal by the Allegheny County Sanitary Authority ("Alcosan") from DER's decision to exclude Alcosan's proposed sludge disposal project from the 1983 Project Priority List. Some of the history of this appeal already has been reviewed by this Board in our Opinions and Orders of March 4 and March 14, 1983. The pertinent (to the instant Opinion and Order) history of this appeal since March 14, 1983 is as follows.

On March 29, 1983, Alcosan filed its pre-hearing memorandum. This memorandum listed many wide-ranging factual allegations Alcosan expected to prove in support of its appeal; correspondingly, Alcosan advanced a large number of wide-ranging legal contentions. On April 19, 1983, DER--without filing its already due pre-hearing memorandum--moved to limit the issues in the appeal; DER argued that a large portion of Alcosan's pre-hearing memorandum was outside the

scope of this appeal. Thereafter DER did file its pre-hearing memorandum, and the parties filed briefs in support of their respective positions on DER's Motion to Limit the Issues. At the request of the Board, the parties also have briefed the issue of the significance--for the instant appeal--of the April 19, 1983 Opinion and Order issued by the Honorable Hubert I. Teitelbaum in Civil Action No. 82-2534, U. S. District Court (W.D., Pa.).

In essence Alcosan contends that its exclusion from the 1983 priority list was an abuse of DER's discretion for some or all of the following reasons:

> 1. DER incorrectly computed Alcosan's project priority score.
>
> 2. DER excluded Alcosan from the 1983 list of fundable projects although Alcosan met the criteria for fundability.
>
> 3. Alcosan had been incorrectly excluded from the 1982 list of fundable projects, which list was a primary basis for constructing the 1983 list.
>
> 4. Various other municipal sludge disposal projects, notably Philadelphia's, had been wrongly included in the 1982 and 1983 priority lists, thereby adversely affecting Alcosan's chances of getting on those lists.
>
> 5. Alcosan's failure to be placed on the 1983 project priority list can be traced to DER's delays --as far back as 1976, and especially in 1981--in processing various Alcosan applications pertinent to the proposed sludge disposal project which is the subject of the instant appeal.
>
> 6. DER failed to comply with various federal and Commonwealth statutory and regulatory provisions, especially provisions requiring public notice of DER actions pertinent to DER's project priority lists.

DER maintains that the bulk of the issues raised by Alcosan's contentions 1 - 6 supra are outside the scope of the instant appeal. In particular, DER asks that the following issues be excluded from the instant appeal:

a. All issues involving the sewage treatment projects of the City of Philadelphia, including the decision to "segment" these projects;

b. All issues involving priority lists other than the FY 1983 list; and

c. Issues involving the number of priority points assigned to Alcosan's sludge disposal project.

DER's professed reason for excluding issues categorized under a - c supra is "lack of jurisdiction." However, DER's actual arguments in support of such exclusion include the claims that some or all of the above issues a - c:

(i) are irrelevant;

(ii) involve an untimely collateral attack on DER actions which now must be considered final and unappealable;

(iii) are not judiciable in the instant appeal because their adjudication would affect the rights of non-parties, notably Philadelphia.

(iv) are barred on grounds of res judicata or collateral estoppel, because they were adjudicated in Judge Teitelbaum's aforesaid April 19, 1983 Opinion and Order.

Alcosan rejects these claims (i) - (iv), as one would expect.

We begin our analysis with an examination of DER's claim (i) supra. Alcosan filed a timely appeal from DER's letter of September 24, 1982 to Alcosan. This letter first stated, "your priority rating has not changed from 70 points," and then went on to say, "your project cannot be included on the 1983 priority list for construction grants funding." Therefore the issues relevant to this appeal are those involving the factual and legal basis for DER's decision not to include Alcosan's proposed sludge disposal project on the 1983 priority list. Evidently the details of DER's 70 priority points calculation are part of the basis just mentioned.

On the criterion just stated, we find that each of Alcosan's contentions 1 - 6 supra is relevant. At first sight, the contention that Philadelphia and other municipalities were wrongly included on the 1982 list seems irrelevant to Alcosan's exclusion from the 1983 list, but Alcosan insists that its exclusion from the 1983 list is directly traceable to its exclusion from the 1982 list; at this stage of these proceedings we cannot state that the evidence will not support such traceability.

However, DER's claims (ii) - (iv) summarized supra can justify exclusion (from the subject matter of the instant appeal) of issues which are logically relevant. In particular, we agree with the following implication of DER's claim (ii): The validity of now final DER actions (those which under 71 P.S. §510-21(c) and 25 Pa. Code §21.52(a) are no longer appealable) cannot be litigated under the rubric of the instant appeal. On the other hand, where Alcosan can show that DER's decision not to include Alcosan on the 1983 priority list relied on previously taken, now unappealably final actions (e.g., actions taken in 1982), the reasonableness of those earlier actions legitimately can be argued in the instant appeal; for DER, in preparing its 1983 list, to have relied on demonstrably unreasonable actions taken in prior years could be an abuse of DER's discretion. We strongly doubt that a DER action which becomes final because it was not appealed, simultaneously becomes conclusively reasonable for the purposes of later actions relying thereon; possibly the original unappealed-from action becomes presumptively reasonable. At this juncture we are not ruling on the reasonableness of DER's reliance on now final past actions for the purpose of present decision making.

The logic of DER's arguments in favor of its claim (iii) supra is not pellucid. In places DER argues, on the authority of Latrobe Municipal Authority

v. DER, 1975 EHB 422, that this Board lacks jurisdiction to re-examine DER determinations for non-Alcosan projects (e.g., the priority points ratings for Philadelphia's projects) without permitting municipalities affected by such re-examinations to participate in the instant appeal. According to DER, the Board must refrain from exercising jurisdiction because permitting such broad participation in the instant appeal would be impractical, and would cause much instability in the administration of the Pennsylvania federal construction grants program. Elsewhere DER maintains, on the authority of Upper Moreland Township v. DER, 1978 EHB 104, that the Board lacks jurisdiction because DER's preparation of a priority list omitting Alcosan's project was not an appealable DER action. Alcosan argues that Moreland supra is inapposite, and that Charleston Township Municipal Authority v. DER, 29 Pa. Cmwlth. 127, 370 A.2d 758 (1977), decided after Latrobe supra, clearly gives the Board jurisdiction to hear Alcosan's challenge to its omission from the 1983 priority list.

We agree with Alcosan that Charleston supra gives the Board jurisdiction to hear this appeal. See also Abington Township v. DER, 1980 EHB 238, Bethlehem Township Municipal Authority v. DER, 1981 EHB 22. In fact, we agree with Alcosan that Charleston, along with Abington and Bethlehem, have superseded the language in Latrobe suggesting that the Board cannot entertain this challenge to the 1983 priority list

> without a colorable showing that the State's implementing regulations are invalid under State or federal law or that the State has flagrantly misapplied its own regulations.

No such "colorable showing" is required in order that the Board have jurisdiction over the subject matter of this appeal.

On the other hand, the ruling immediately above really does not address the concerns which led the Board to employ the just-quoted language from Latrobe,

and which led Board Member Joseph L. Cohen, in a concurring opinion in Latrobe, to use the even stronger language:

> In my opinion, we lack jurisdiction to hear any appeals of this nature for the reason that we have jurisdiction neither over EPA nor those municipalities who have been awarded a sufficient number of priority points to enable them to be eligible for Federal funding. Since we have no jurisdiction over EPA, we can make no binding decision regarding its responsibilities in matters of this sort. Our lack of jurisdiction over the other municipalities who have been determined to be eligible for grants would not enable us to make a determination with regard to the entire list submitted to EPA. Inasmuch as there is a finite sum of money available, it follows that were we to determine in favor of any appellant, we would be adversely affecting other municipalities without their being a part to the proceedings. Such a result could not be justified under any circumstances.

Nor do DER or Alcosan squarely address these concerns. In particular, DER--though arguing that its claim (iii) above implies the Board should exclude issues involving Philadelphia sewage treatment projects (see the issues a in the list a - c supra)--seemingly does not realize that its claim (iii) may be pertinent to essentially all the issues in this appeal. Certainly the Board, even on the fragmentary record presently before us, gravely doubts that we can grant Alcosan the relief it seeks--namely an order to DER to place Alcosan's sludge disposal project on the 1983 priority list--without affecting the rights of entities (e.g., Philadelphia) whose projects already are on the 1983 list.

Our concerns in this regard are not assuaged by Alcosan's argument that Philadelphia "undoubtedly has had ample notice of this proceeding," and could have sought to intervene. The record does not show what notice Philadelphia has received, and Philadelphia is by no means the only entity which might be affected adversely by an order to place Alcosan's project on the priority list. Under

traditional views of the inadvisability of proceeding in the absence of indispensable parties [see Goodrich Amram 2d, §2232(c):1], this Board should not issue such an order without full assurance that possibly adversely affected entities have had full opportunity to protect their rights.

DER's claim (iv)—that Judge Teitelbaum's April 19, 1983 Opinion and Order has precluded our adjudication of issues in the instant appeal—has little merit. Judge Teitelbaum was considering a request for a preliminary injunction. His denial of the preliminary injunction largely was based on his finding that "Alcosan has not demonstrated that it has a reasonable probability of succeeding" in its contentions. In other words, Judge Teitelbaum frankly was basing his rulings on a preliminary and incomplete record (as typically is the situation for records made in preliminary injunction hearings). Judge Teitelbaum's rulings on the merits of Alcosan's contentions were no more than provisional. Therefore, even ignoring the fact that the issues before Judge Teitelbaum were not unquestionably precisely those before the Board in the instant appeal, we cannot permit Judge Teitelbaum's denial of preliminary injunctive relief to have res judicata or collateral estoppel effect in this appeal. Del-Aware Unlimited, Inc. v. DER, EHB Docket No. 82-177-H (Opinion and Order, April 18, 1983).

To summarize, the issues Alcosan raises in its pre-hearing memorandum are relevant to its appeal. For various possible reasons, many of these issues, especially those involving now unappealably final DER actions, eventually may prove to be outside the scope of this appeal, but such reasons remain to be established. Although the Board has jurisdiction over the subject matter of this appeal, we should not assert our jurisdiction unless we can do so without adversely affecting entities which have not had full opportunity to protect their rights.

An Order, consistent with the foregoing considerations, follows.

O R D E R

WHEREFORE, this 22nd day of July, 1983, it is ordered that:

1. On or before August 12, 1983, DER shall file a supplemental pre-hearing memorandum, consistent with the foregoing Opinion and the following paragraphs of this Order.

2. Issues relevant to this appeal are those involving the factual and legal basis for DER's decision not to include Alcosan's proposed sludge disposal project in the 1983 priority list.

3. The issues raised in Alcosan's pre-hearing memorandum meet this definition of relevance to the instant appeal.

4. The validity of now final no longer appealable DER actions cannot be litigated under the rubric of the instant appeal.

5. Unless Alcosan can show that DER's decision not to include Alcosan on the 1983 priority list relied on some previously taken, now unappealably final action, the lack of reasonableness of that earlier action will be outside the scope of the instant appeal.

6. At a later date, the parties will be asked to brief the question of whether or not DER's reliance on an unappealed-from now final earlier action is either presumptively or conclusively reasonable.

7. DER's pre-hearing memorandum may ignore issues DER believes will be excluded from this appeal under paragraph 5 supra; however, DER is reminded of paragraph 4 of our Pre-Hearing Order No. 1.

8. The parties are advised that unless and until the Board becomes convinced it should do otherwise, the Board intends to fashion a decree in this appeal which will not affect the rights of entities already certified for federal

funding on the 1983 project priority list; hopefully this decree nevertheless will serve as useful precedent for deciding, if need be, whether DER's exclusion of Alcosan from the 1984 list of fundable projects would be an abuse of discretion.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: July 22, 1983

cc: Bureau of Litigation
Robert W. Adler, Esquire
John L. Heaton, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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PENNSYLVANIA MINES CORPORATION :

:

Docket No. 80-164-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

This appeal first was filed on September 30, 1980. It was assigned originally to Board Member Thomas M. Burke, was reassigned to Board Chairman Paul E. Waters when Mr. Burke resigned from the Board, was re-reassigned to Board Member Dennis J. Harnish when Mr. Waters completed his term, and now has been re-re-reassigned to Board Member Edward Gerjuoy upon Mr. Harnish's resignation form the Board.

Originally the parties were ordered to file their pre-hearing memoranda by November 3, 1980. Starting November 13, 1980, numerous extensions of the pre-hearing memoranda due date, pending settlement negotiations, were requested and granted. On July 10, 1981 the parties furnished a joint status report stating

> Settlement papers are being circulated among counsel, and it is expected that signed documents will be filed with the Board in the near future.

Thereafter, for a very long time nothing was heard from either party. Finally, on February 4, 1983, Mr. Harnish wrote appellant's counsel asking whether appellant wished to withdraw the appeal, and giving appellant until February 22, 1983 to respond. Appellant's counsel responded on February 20, 1983, requesting another 60-day extension to complete settlement negotiations. Appellant's counsel wrote:

> If upon expiration of such 60-day period the matter has not been resolved, Appellant would be prepared to file its pre-hearing memorandum promptly and otherwise proceed with the appeal.

The February 20, 1983 request for a 60-day extension was granted. On April 29, 1983, another 60-day extension was requested; the Board, noting that the previous 60-day extension had been insufficient, granted a continuation until July 15, 1983 to permit settlement negotiations between the parties. It now is over a week past that date; no word has been received from the parties and the pre-hearing memoranda remain unfiled.

We believe the above facts would justify dismissal of the appeal for failure to obey the Board's rules. 25 Pa. Code §21.124. However, DER shares the responsibility for the parties' delays in meeting their deadlines; dismissal of the appeal is a severe sanction, and is directed against the appellant only. Moreover, the Board itself was derelict in permitting this matter to drag on so long without assurance--especially during the interval July 10, 1981 to February 4, 1983--that serious settlement negotiations really were under way.

The Board greatly prefers that parties settle their disputes without a Board hearing and adjudication. However, the Board has the responsibility of managing appeals so that they can be resolved fairly, with due regard for the public interest--whether by adjudication or by settlement. 25 Pa. Code §21.120.

Such resolution through an adjudication by us becomes unlikely for an appeal received almost three years ago, wherein the parties have not yet even filed their pre-hearing memoranda setting forth the factual and legal bases of their respective positions (see our Pre-Hearing Order No. 1). Furthermore, as the parties must know, the Board lacks the resources--and finds it undignified--to continually remind the parties they have not met filing dates.

An Order, consistent with these considerations, follows.

O R D E R

WHEREFORE, this 25th day of July, 1983, it is ordered that:

1. This matter is continued until October 24, 1983.

2. On or before October 24, 1983, appellant shall file his pre-hearing memorandum; no further extensions of time for filing appellant's pre-hearing memorandum will be granted without very good cause shown.

3. Appellant's unexcused failure to file his pre-hearing memorandum by October 24, 1983 will be grounds for dismissal of this appeal.

4. On or before November 8, 1983, or 15 days after appellant files his pre-hearing memorandum, whichever is sooner, DER shall file its pre-hearing memorandum; no further extensions of time for filing DER's pre-hearing memorandum will be granted without very good cause shown.

5. DER's unexcused failure to file its pre-hearing memorandum by the due date specified in paragraph 4 supra will be grounds for defaulting DER's case and sustaining this appeal.

6. Unless either party objects, once the pre-hearing memoranda are received the Board will grant the parties an indefinite continuance pending settlement negotiations.

7. "Very good cause shown" in paragraphs 2 and 4 supra includes the filing of a settlement agreement in accordance with 25 Pa. Code §21.120.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY, Member

DATED: July 25, 1983

cc: Bureau of Litigation
Dennis W. Strain, Esquire
Henry Ingram, Esquire

On or about July 27, 1983 the Board received a letter from the Appellants, dated July 25, 1983. This letter reiterated some of the Appellants' previously stated arguments in favor of their cause, but did not list any new factual allegations on which the Appellants' standing might have been based. Indeed, this letter made no pretense of being the amended pre-hearing memorandum called for in our July 1, 1983 Order. On the contrary, the letter stated:

> We appreciate the patient explanations given in your magnificent document, dated July 1, 1983. Again we see the need of a personal attorney to explain and clarify.
>
> We do understand the Board's decision to grant DER's Motion to Quash.

The Board took no immediate action after receipt of this letter from the Appellants, to be certain that the Appellants were not going to file the amended pre-hearing memorandum required by our July 1, 1983 Order. As of this date, however, no such pre-hearing memorandum has been filed. The aforesaid July 25, 1983 letter is the last communication from Appellants to the Board.

Therefore, we see no basis for continuing to refuse Tyhonas' motion to dismiss for lack of standing. That motion now is granted and the appeal now is formally dismissed. We stress that the appeal has been dismissed solely on the merits of the record before us, and not on the purely procedural grounds that the Appellants have failed to meet a Board-imposed deadline. The Pennsylvania Supreme Court recently has rejected the summary dismissal of a law suit for failure to file a court-ordered brief, saying such summary dismissal was inconsistent with the standard of fairness embodied in Rule 126 of the Pennsylvania Rules of Civil Procedure. De Angelis v. Newman, 460 A.2d 730 (Pa. 1983). We believe our rulings in this appeal, including our present dismissal of the appeal, have been more than fair to the Appellants, as well as thoroughly consistent with the precepts of

Rule 126 and its analogue for administrative agency proceedings, 1 Pa. Code §31.2. This Board previously has noted the relevance of Rule 126 and 1 Pa. Code §31.2 to our holdings. W. C. Leasure v. DER, EHB Docket No. 82-007-G (Opinion and Order, April 12, 1982).

O R D E R

WHEREFORE, this 15th day of August, 1983, the above-captioned appeal is dismissed, with prejudice.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR., Member

EDWARD GERJUOY, Member

DATED: August 15, 1983

cc: Bureau of Litigation
Diana J. Stares, Esquire
Alan S. Miller, Esquire
Howard Fugitt
James E. Gatten
Wesley T. Long, Esquire

COMMONWEALTH OF PENNSYLVANIA

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CONCERNED CITIZENS AGAINST SLUDGE
by Charles Small, Jr., Trustee ad Litum :

: Docket No. 82-221-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and CITY OF PHILADELPHIA, Permittee

OPINION AND ORDER
SUR MOTION TO DISMISS

This matter concerns a permit granted to the City of Philadelphia ("Philadelphia") by the Department of Environmental Resources ("DER") Bureau of Solid Waste Management, allowing Philadelphia to dispose of sewage sludge on a 155-acre site identified as Benjamin Coal Company Mines 11 and 11B in Banks Towhship, Indiana County. Issuance of this permit, No. 602124, has been appealed by the Concerned Citizens Against Sludge ("Citizens").

The history of this appeal already has been thoroughly reviewed in two Opinions and Orders of this Board, dated February 9, 1983 and May 4, 1983. We shall not repeat this previously reviewed history here, except when necessary to clarify the text of the present Opinion.

On May 4, 1983, we rejected Philadelphia's motion to dismiss the above-captioned appeal for lack of standing. We declared that allegations contained

in the Citizens' Amended Notice of Appeal, filed March 7, 1983, were sufficient to gain standing under the William Penn "substantial, immediate and direct" injury test. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). These allegations were:

> 7. William Kraynak and George Kraynak are both named property owners in Paragraph 3 in the Permit Application submitted by the City of Philadelphia to Appellee, Department of Environmental Resources.
>
> 8. Paragraph 3b of the above mentioned Permit Application states site acquisition will be by lease for one (1) year.
>
> 9. No lease has ever been signed, nor entered into, by any of the named property owners.
>
> 10. William Kraynak is a member of Concerned Citizens Against Sludge.
>
> 11. Sludge has been deposited on the property of William Kraynak without his permission.

The foregoing are the only allegations, in the Citizens' original or amended notices of appeal, which conceivably could confer standing.

On May 4, 1983 we also pointed out that to actually confer standing the foregoing allegations would have to be proved, not merely alleged. We explained that the Citizens' pre-hearing memorandum filed April 18, 1983 (which under our Pre-Hearing Order No. 1 was supposed to list the facts the Citizens intended to prove) was woefully deficient as to proof of standing. This deficiency was remedied to some extent during a pre-hearing conference held May 26, 1983, at which time the Citizens distributed an Amended "Pre-Trial" Memorandum. On June 15, 1983 we issued an Order, consistent with agreements arrived at during the aforesaid pre-hearing conference, giving the Citizens one last opportunity to amend their pre-hearing memorandum. This "final" amended pre-hearing memorandum was filed by the Citizens on June 27, 1983.

The May 26, 1983 and June 27, 1983 amended pre-hearing memoranda did list--as part of what the Citizens intended to prove--some facts relevant to standing. These facts were:

> 5. DER nor the City of Pittsburgh, nor any agents of the City of Philadelphia received written permission for the dumping of sludge from any of the named property owners, nor was any lease entered into between DER, City of Philadelphia or any agent of the City of Philadelphia and any of the property owners listed in the permit application.
>
> 14. Benjamin Coal Company did not have a valid Lease Agreement with the Krynaks, listed property owners on the permit application, at the time the permit was issued.

Philadelphia now has renewed its Motion to Dismiss this appeal for lack of standing. Philadelphia's renewed Motion relies on admissions by the Citizens, obtained in response to Requests for Admissions under the Pa. Rules of Civil Procedure Rule 4014. In particular, Philadelphia served the following requests for admissions on the Citizens:

> 4. William Krynak did grant permission for Modern Earthline to apply sludge to that portion of the permit area which is owned by him on the condition that Modern Earthline have his property surveyed without charge to him.
>
> 5. Modern Earthline did arrange to have this property surveyed at no expense to Mr. Krynak.
>
> 6. The subject property was surveyed free of charge for Mr. Krynak.
>
> 7. Modern Earthline Companies did have permission from Mr. Kraynak to apply sludge to that portion of the Benjamin site which is owned by him.

On June 30, 1983, the Citizens responded as follows to the above Requests for Admissions:

> 4. Admitted. It is admitted that William Kraynak did grant permission for Modern Earthline to apply sludge to that portion of the permit area which is owned by him on the condition that Modern Earthline have his property surveyed without charge to him.

5. Admitted. It is admitted that Modern Earthline did arrange to have the property surveyed at no expense to Mr. William Kraynak.

6. Admitted. It is admitted that the subject property was surveyed free of charge for Mr. William Kraynak.

7. Admitted. It is admitted that Modern Earthline Companies did have permission from Mr. William Kraynak to apply sludge to that portion of the Benjamin site which is owned by him.

These admissions on June 30, 1983 seem disconcertingly at variance with paragraphs 5 and 14 (quoted supra) from the Citizens' amended pre-hearing memorandum filed with the Board only three days earlier. Citizens' counsel will be expected to explain this apparent variance.

On the basis of the foregoing admissions, we rule that the allegation 11 quoted supra from the Citizens' Amended Notice of Appeal--to the effect that William Kraynak had been injured by deposition of sludge on his property without his approval--is not provable. Correspondingly, we rule that the Citizens' standing in this appeal cannot be based on alleged injury to William Kraynak. If the Citizens feel these rulings are based upon a misunderstanding of the implications of their admissions, they may request reconsideration of these rulings, while explaining what they believe their admissions actually imply.

Nevertheless, we still must reject Philadelphia's Motion to Dismiss. The Citizens appear to be alleging that other members of their association, e.g., George Kraynak, also have been injured by the deposition of sludge on their properties; this allegation, if provable, continues to confer standing. Here the word "appear" has been used advisedly. The Citizens' pleadings remain as inartful, and therefore as obscure, as ever (see our February 9, 1983 and May 4, 1983 Opinions in this matter); for example, the Citizens have not yet offered a complete list of the property owners allegedly injured by the sludge deposition. However, we remain

unwilling to deprive the Citizens of a deserved opportunity to be heard because of inartful pleading.

We stress that our refusal to dismiss at this stage of the proceedings rests largely on the fact that the supplemental form C allegedly (according to Philadelphia) signed by all property owners does not specifically mention sludge application, and therefore does not immediately imply that the property owners gave permission for sludge application when they authorized entry upon their properties for purposes of reclamation. We also stress that Philadelphia is mistaken in its seeming belief that the standing issue is conclusively resolved in Philadelphia's favor by the fact that the regulations do not require written landowner consent to sludge application; an issue to be decided is whether, despite the extant regulatory scheme, DER's grant of the permit without insisting on landowners' permission for sludge application (assuming arguendo that such permission was not granted) was an abuse of discretion under the facts of this appeal. See our recent discussion of the Board's jurisdiction to entertain challenges to regulations, in Coolspring Township v. DER, EHB Docket No. 81-134-G (Adjudication, August 4, 1983), which also involved a third party appeal of a permit for land disposal of sludge.

On the other hand, we cannot indefinitely delay final resolution of this appeal while the Citizens slowly converge to a pre-hearing memorandum which fully describes their best case. The Citizens will be held to the contentions of law and fact they have set forth in their already filed pre-hearing memorandum and amendments thereto. Under paragraph 4 of our Pre-Hearing Order No. 1, other contentions of law and fact which may be offered by the Citizens will be deemed waived, as the Citizens were warned in our May 4, 1983 Opinion and Order.

Furthermore, on the basis of the aforementioned Citizens' pre-hearing memorandum and amendments thereto, the Citizens' presentation at a hearing on the

merits, when scheduled, will be limited to evidence bearing on the following "issues of relevance to this appeal."

> a. Whether there are property owners, who are members of the Concerned Citizens of Rural Ridge, on whose properties sludge deposited without the owners' permission has occurred or is threatened.
>
> b. Whether environmental harm to the Citizens is threatened by any provable DER failures to abide by the statutes and/or regulations governing this permit.
>
> c. Whether environmental harm to the Citizens is threatened even though DER abided by the applicable statutes and regulations.

The issue of the Citizens' standing is the major unresolved issue falling under a above. The Citizens' evidence under a will be the subject of a preliminary hearing on the standing question, before evidence on issues b and c is heard. The Citizens are ordered (see below) to file a second "final" amended pre-hearing memorandum listing:

> (i) The names of those property owners (other than William Kraynak) who are members of the Citizens' association and on whose properties sludge allegedly has been or is threatened to be deposited without permission.
>
> (ii) The facts the Citizens intend to prove in connection with the claims under (i) above, stated in a form consistent with the requirements of our Pre-Hearing Order No. 1.
>
> (iii) The names of any witnesses, not already named under (i) and (ii) above, who are expected to testify on the standing issue a listed supra.

When and if evidence on the "issues of relevance" b and c is heard, it will be limited to contentions set forth in the Citizens' already-filed pre-hearing memorandum and amendments thereto, as already explained. We emphasize that, consistent with other considerations in Coolspring, supra, we shall not permit the introduction of evidence which has no bearing on the real merits of the appeal, namely

whether operation of the permit has produced or threatens harm to the Citizens. For example, we will not permit evidence on the following allegations from the Citizens' June 27, 1983 amended pre-hearing memorandum:

> 8. Under the heading, Hydrogeology Comments, Paragraph 1, in the above mentioned June 16, 1982 letter, DER requested additional information concerning rock outcrops, etc. The map submitted by Modern Earthline, the agent of the City of Philadelphia did not reflect the required information.
>
> 9. Under the heading Hydrogeology Comments, Paragraph 2, in the above mentioned June 16, 1982 letter, DER requested additional information concerning ground water flow direction and additional hydrogeolgie (sic) information which was not given by Modern Earthline, the agent of the City of Philadelphia.

Whether or not DER ever received the additional information allegedly requested in DER's June 16, 1982 letter is irrelevant to the Citizens' burden in this appeal. The Citizens' burden is to show, on the basis of the record made in these proceedings --which because our hearings are de novo can include presently available information as well as information only available to DER at the time it granted the permit-- that granting the permit constituted an abuse of discretion.

An Order consistent with the above considerations, and with the need for expeditious disposition of pending discovery requests, follows.

O R D E R

WHEREFORE, this 19th day of August, 1983, it is Ordered that:

1. Philadelphia's motion to dismiss the above-captioned appeal for lack of standing is rejected.

2. The Citizens' claimed standing to prosecute this appeal cannot be based upon alleged injury to William Kraynak.

3. On or before August 26, 1983, the Citizens shall file a second "final" amended pre-hearing memorandum listing:

(i) The names of those property owners (other than William Kraynak) who are members of the Citizens' association and on whose properties sludge allegedly has been or is threatened to be deposited without permission.

(ii) The facts the Citizens intend to prove in connection with the claims under (i) above, stated in a form consistent with the requirements of our Pre-Hearing Order No. 1.

(iii) The names of any witnesses, not already named under (i) and (ii) above, who are expected to testify on the issue of whether there are property owners who are members of the Citizens' association on whose properties sludge deposition without permission has occurred or is threatened.

4. When and if a hearing on the merits of this appeal is scheduled, the Citizens' presentation will be limited to evidence bearing on the issue stated in paragraph 3(iii), together with evidence bearing on:

(i) Whether environmental harm to the Citizens is threatened by any provable DER failures to abide by the applicable statutes and regulations.

(ii) Whether environmental harm to the Citizens is threatened even though DER abided by the applicable statutes and regulations.

5. Paragraph 4 above is supplemented by the further restriction that the Citizens will be held to the contentions of law and fact they have set forth in their already filed pre-hearing memorandum and amendments thereto; the second "final" amended pre-hearing memorandum called for in paragraph 3 above will give the Citizens a needed opportunity to clarify their previous filings, but is not intended to open the door to new previously unmentioned contentions.

6. The aforementioned second "final" amended pre-hearing memorandum due August 26, 1983 shall include an explanation of the variance, discussed in the accompanying Opinion, between the Citizens' amended pre-hearing memorandum filed June 27, 1983 and the Citizens' admissions filed June 30, 1983.

7. For the time being, Philadelphia's depositions shall be limited to those Citizens' witnesses who are expected to testify on the issue of whether there are property owners who are members of the Citizens' association on whose properties sludge deposition without permission has occurred or is threatened.

8. For the sole purpose of enabling Philadelphia to complete its discovery on the issue stated in paragraph 7 above:

(i) The time for Philadelphia to take depositions on this issue is extended to September 15, 1983, recognizing that the Citizens' response to paragraph 3 above is not due until August 26, 1983.

(ii) Subpoenas, if necessary for these depositions, will be furnished on request

(iii) If Philadelphia prefers to complete its discovery on this issue via means other than depositions, such as requests for admissions, it may do so provided the responses by the Citizens under the Pennsylvania Rules of Civil Procedure will be due not later than October 7, 1983.

9. As soon as Philadelphia has completed its discovery on the issue stated in paragraph 7 above, but certainly no later than October 7, 1983, the status of Philadelphia's discovery on this issue shall be reported to the Board by Philadelphia.

10. If the question of the Citizens' standing in this matter is still unresolved after completion of Philadelphia's discovery on the issue stated in paragraph 7, a preliminary hearing on that question will be scheduled as soon as conveniently possible.

11. Further Orders, as to discovery on the issues stated in paragraphs 4(i) and 4(ii), and as to the scheduling and scope (including the allowed number of Citizen witnesses) of the hearing on the merits of this appeal will be issued as required, after holding the preliminary hearing described in paragraph 10.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: August 19, 1983

cc: Bureau of Litigation
Howard J. Wein, Esquire
Chere' Winnek-Shawer, Esquire
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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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MAGNUM MINERALS, INC. :

:

Docket No. 82-230-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION TO DISMISS

On September 3, 1982, DER denied Magnum Minerals' ("Magnum") application for a mine drainage permit on the stated grounds:

> 1. You have not demonstrated that pollution of the surface and groundwaters from, but not limited to, iron, manganese, and acid mine drainage will not occur.

Magnum timely appealed this permit denial on September 27, 1982. The Board, in accordance with its usual practice, then issued its Pre-Hearing Order No. 1, which required Magnum to file its pre-hearing memorandum on or before December 14, 1982, and required DER to file its pre-hearing memorandum within fifteen (15) days after receipt of Magnum's pre-hearing memorandum. Paragraph 4 of Pre-Hearing Order No. 1 states:

> A party may be deemed to have abandoned all contentions of law or fact not set forth in its pre-hearing memorandum.

Magnum filed its pre-hearing memorandum on December 9, 1982, and DER filed its answering pre-hearing memorandum on December 27, 1982; on January 26, 1983 DER also filed a technical amendment to its pre-hearing memorandum, attaching three documents it intended to introduce into evidence. No other amendments have been filed to the parties' pre-hearing memoranda. Nevertheless, now some eight months after their original pre-hearing memoranda were filed, the parties still are not ready to proceed to a hearing on the merits of this appeal. The delay has been occasioned largely by the parties' requests for leave of the Board to conduct additional discovery, combined with various wranglings over the scope of discovery; these disputes were the occasions for a February 28, 1983 Opinion and Order by us in this matter, oral arguments by the parties on March 22, 1983, and an Order by us on May 13, 1983.

On July 28, 1983 DER filed a Motion to Dismiss this appeal on grounds of mootness "because this Board is unable to grant the relief requested." This motion, which Magnum opposes of course, is the occasion for the instant Opinion and Order. In essence, DER argues that the permit application originally submitted by Magnum is incomplete under DER's new forms for such applications. The new application forms indeed do ask for much more information than did the older version of those forms completed by Magnum (before the new forms had been made available to would-be permittees). DER further argues that the additional information requested on the new forms is required by DER's new regulations, 25 Pa. Code Chapters 86 and 87. Therefore, DER concludes, as a matter of law it cannot issue the permit which is the subject of this appeal, so that the appeal necessarily is moot. According to DER, Magnum's only recourse is to begin the permit approval process all over again, by submitting a new application on the new forms.

Magnum argues that the Board

> must review the action of the Department at the time of the denial of the permit in accordance with the regulation then in effect and upon which the Department bases its denial.

In addition, says Magnum, since the Board's review is de novo, the Board should hold hearings to see if Magnum could meet the new regulations, and should order DER to grant the permit if the Board finds Magnum has met its burden in this appeal. Magnum contends that because the Board can issue such an order, the appeal cannot be termed moot. Magnum also contends DER is estopped to raise the issue of Magnum's failure to furnish the information required on the new forms because (Magnum alleges) DER has refused Magnum's offer to submit a revised application containing the information required by the new regulations. Indeed, Magnum requests the Board to order DER to accept such a revised application in the event the Board grants DER's Motion to Dismiss.

The Board does not entirely follow Magnum's logic in making the arguments just recounted. Nevertheless, we are not going to grant DER's Motion, for reasons about to be detailed.

DER's Motion appears to rest on the thesis that any failure to abide by existing regulations is per se a conclusive reason--not overturnable by this Board--for DER to refuse a permit application. The Board rejects this thesis. Regulations may be attacked before this Board, if their enforcement against an appellant would be an abuse of discretion. See our recent discussion of the Board's jurisdiction in challenges to regulations, in Coolspring Township v. DER, EHB Docket No. 81-134-G (Adjudication, August 8, 1983). Whatever the regulations on which denial of the permit is to be based, Magnum--having filed a timely appeal--must be given the opportunity to show that denial of the permit on that basis under the facts of this case would be an abuse of discretion.

Moreover, although in general under the authority of Doraville Enterprises v. DER, EHB Docket No. 79-002-H, 1980 EHB 489 (Opinion and Order), our de novo review of a permit denial should be based upon the regulations in effect at the time of the review, this rule is not absolute. Considerations of fundamental fairness, necessary to afford an appellant his due process rights, cannot wholly be ignored. Western Hickory Coal Company v. DER, EHB Docket No. 82-141-G (Adjudication, June 2, 1983). In Western Hickory, the Board, on grounds of fundamental fairness, refused to regard present regulations as the automatic basis for assessing a penalty for violation of the Surface Mining and Reclamation Act, where the present regulations might make the penalty larger than reasonably would have been expected from the regulations in effect when the violation was committed.

Similarly, the rule that the applicable regulations generally are those in effect at the time of our review does not obviate concomitant applications of established equitable principles such as estoppel and waiver. Magnum has alleged it has an estoppel defense to DER's insistence that Magnum furnish the information required by the new forms; Magnum is entitled to try to establish this defense.

In addition, there are strong reasons for holding that under the Board's rules DER has waived--as grounds for rejecting Magnum's appeal--Magnum's failure to furnish the information required by the new regulations. Paragraph 4 of our Pre-Hearing Order No. 1 already has been quoted; the threat of waiver therein is supported by 25 Pa. Code §21.124, which permits the Board to preclude the introduction of evidence not disclosed in compliance with any order. Neither DER's original pre-hearing memorandum, filed December 27, 1982, nor its January 26, 1983 amendment to its pre-hearing memorandum, make any reference to a DER need for further information consistent with the requirements of the new regulations. The

record before us does not disclose when the new forms first became available; however, we cannot be unmindful of the fact that the new regulations in 25 Pa. Code Chapters 86 and 87--which according to DER's July 28, 1983 Motion mandate rejection of Magnum's permit application--became effective as long ago as July 31, 1982. Nor was failure to comply with the new regulations cited as a reason for denying Magnum's permit in the appealed-from DER letter of September 3, 1982 to Magnum. The sole reason stated in that letter for denying the permit has been quoted at the outset of this Opinion. This Board previously has limited DER's attempts to introduce reasons for its actions which had not been stated in DER's pre-hearing memorandum. Melvin D. Reiner v. DER, EHB Docket No. 81-133-G (Adjudication, July 28, 1982).

In conclusion, the Board believes it has the power to order DER to grant Magnum a mine drainage permit, should the Board (after a hearing) decide that denial of Magnum's permit would be an abuse of discretion. Magnum's burden at such a hearing will be to demonstrate that granting the permit to Magnum will not result in pollution of the waters of the Commonwealth. The Board believes this burden is consistent with the foregoing discussion, with DER's pre-hearing memorandum filed December 27, 1982 (see especially Contention of Law 4), with our own rules and regulations including 25 Pa. Code §21.101(c)(1), with the applicable Commonwealth statutes and July 31, 1982 regulations as limited by equitable principles, and with applicable federal statutes and regulations under the same limitation.

At the aforesaid hearing, DER will have the opportunity to counter Magnum's attempt to meet its burden; if the information on which Magnum is resting its case is insufficient to demonstrate Magnum will not cause pollution, DER will be able to so argue. However, to minimize the possibility of surprise to either

side, it is recommended that Magnum file as soon as possible an amended application containing the information required by the new forms, as Magnum already has offered to do. In so ruling, we are not accepting Magnum's presently unsupported (on the record so far) contention that DER has refused to accept such an amended application, a contention we find difficult to believe.

An Order consistent with this Opinion follows.

O R D E R

WHEREFORE, this 22nd day of August, 1983, it is Ordered that:

1. DER's Motion to Dismiss this appeal on grounds of mootness is rejected.

2. Magnum's burden in this appeal is to demonstrate that granting the disputed permit will not result in pollution of the waters of this Commonwealth.

3. It is recommended that Magnum file as soon as possible an amended permit application containing the information required by the new forms.

4. In the meantime, the parties are requested to expeditiously and cooperatively complete discovery (recall paragraph 2 of our Order of August 11, 1983 in this matter).

5. For the purposes of the immediately preceding paragraph, the time for discovery is extended to September 30, 1983; either party may initiate, without further leave of the Board, any discovery which under the Pennsylvania Rules of Civil Procedure must be completed by September 30, 1983.

6. On September 30, 1983, each party shall inform the Board of the status of its discovery needs, and whether it finally is ready for a hearing on the merits of this appeal.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY, Member

DATED: August 22, 1983

cc: Bureau of Litigation
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Alan S. Miller, Esquire
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WILLIAM FIORE, d/b/a MUNICIPAL AND INDUSTRIAL DISPOSAL COMPANY :

:

Docket No. 83-160-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION FOR SUPERSEDEAS

In a letter dated August 4, 1983, the Commonwealth Department of Environmental Resources ("DER") suspended the Phase I - Industrial Waste Pit portion of Fiore's Solid Waste Disposal Permit No. 300679, originally issued March 24, 1980. On August 5, 1983, Fiore appealed the permit suspension to this Board, and simultaneously filed a petition for supersedeas of the appealed-from DER action. A hearing on the supersedeas petition was held August 12, 1983, consistent with the Board's apparent obligations under the Solid Waste Management Act ("SWMA"), 35 P.S. §6018.108.

The Board's rules governing the criteria for granting a supersedeas read as follows [25 Pa. Code §21.78]:

> 21.78 Circumstances affecting grant or denial.
>
> (a) The circumstances under which a supersedeas shall be granted, as well as the criteria for the grant or denial of a supersedeas, are matters of

substantive common law. As a general matter, the Board will interpret said substantive common law as requiring consideration of the following factors:

(1) irreparable harm to the petitioner;
(2) the likelihood of the petitioner's prevailing on the merits; and
(3) the likelihood of injury to the public.

(b) A supersedeas shall not issue in cases where nuisance or significant (more than de minimis) pollution or hazard to health or safety either exists or is threatened during the period when the supersedeas would be in effect.

Our rule 21.78, quoted supra, makes it apparent that a hearing on a supersedeas petition is not intended to be--and indeed, because there has been no opportunity for discovery, hardly can be--a substitute for a full hearing on the merits of the appeal; the Board's decision on the supersedeas petition involves the Board's appraisals of likelihoods, e.g., that the petitioner ultimately will prevail on the merits. Moreover, Fiore's petition suggested that whatever supersedeas relief he deserves should be granted promptly, before he will have lost his customers and "be unable to continue operating" his business. Consequently, at the very outset of the hearing, the Board announced its intention "to limit this hearing to one day and if possible to render an adjudication at the end of it." (N.T. p. 3).[1] Neither party registered any objection to this announced limitation on the hearing procedure, which limitation lies within the Board's general powers to conduct hearings, 25 Pa. Code §21.90.

The Board first asked each party to outline its respective case. Then, after some argument between the parties and some questioning of the parties' attorneys by the Board, the parties--beginning with Fiore--put on their witnesses.

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1. The Notes of Transcript ("N.T.") refer to a transcript very rapidly prepared by a reporting service at the apparent request of Fiore. As of this date, August 24, 1983, the Board's official court reporter, who also was present, has not yet filed her version of the transcript.

Actually DER presented only one witness, Charles Duritsa, for comparatively brief testimony; the very major portion of the hearing time devoted to the taking of evidence was spent on Fiore's five witnesses (one of whom also was Charles Duritsa). Every witness offered by Fiore actually was permitted to testify, although the Board--ever mindful of the desirability of completing the hearing that day--did refuse to allow testimony it deemed irrelevant or incompetent. After DER had closed its case the Board asked Fiore if Fiore wished to put on any rebuttal testimony; this opportunity was declined by Fiore. All in all, the Board saw no reason to believe that the salient features of Fiore's case had not been well outlined during the hearing.

Therefore, at the end of the hearing, the hearing examiner, one of the two members presently on the Board, did not hesitate to announce his ruling that the supersedeas had been denied, a ruling the hearing examiner saw no way to avoid. The hearing examiner also put in the record his reasons for denying the supersedeas. The instant Opinion is a more considered presentation of those reasons originally declared orally by the hearing examiner after only a few minutes to compose his thoughts and no opportunity to research any of the legal issues in controversy. In essential substance the instant Opinion confirms the hearing examiner's reasons stated at the end of the hearing; if there should appear to be discrepancies between this Opinion and those reasons, this Opinion is controlling.

A. Irreparable Harm

Fiore presented testimony that suspension of the permit will cost Fiore approximately $12,000 per day in lost revenues (N.T. p. 176). There also was testimony that other costs of complying with the August 4, 1983 suspension letter --notably removing to an off-site facility certain materials Fiore already had

deposited on his site--would cost Fiore $1.8 million (N.T. p. 170). Although these cost estimates can be challenged as exaggerated, and were so challenged by DER's counsel (N.T. pp. 172-174, 177-181), the Board does not doubt that Fiore will suffer very significant financial losses if he is forced to comply with DER's appealed-from Order. Furthermore, these financial losses will not be recoupable should Fiore ultimately prevail on the merits of this appeal; in other words, these losses will be irreparable. Correspondingly, the Board agrees with Fiore's claim that the loss of customers threatened by the suspension notice (the August 4, 1983 letter says DER will inform Fiore's customers that Fiore no longer is authorized to accept their waste) is likely to be irreparable.

DER argues that the preceding paragraph's irreparable consequences of obedience to the August 4, 1983 letter should not be considered irreparable harm in the sense of 25 Pa. Code §21.78(a)(1) quoted supra. In particular, DER argues that the expenses of compliance with an Order issued pursuant to the governing statute (in this case the SWMA) cannot be irreparable harm justifying a supersedeas. We do not disagree with this argument, but believe it begs the question: The issue in this appeal is whether the August 4, 1983 letter was an abuse of DER's discretion in the light of applicable statutes and regulations, i.e., whether the letter really was issued "pursuant to" the SWMA. We do not think our Rule 21.78 or the common law can imply that a petitioner should be denied a supersedeas from an egregiously unjustified order because his harm would result solely from compliance with the order. In other words, the Board finds that Fiore, who has the burden of proof in this matter, has met his burden--under 25 Pa. Code §21.78(a)(1)--of showing that failure to receive a stay of the August 4, 1983 letter will cause him irreparable harm, although we recognize the magnitude of the harm may depend on whether the August 4, 1983 letter was an abuse of discretion.

B. Injury To The Public

The August 4, 1983 letter asserted that "organic waste pollutants were being discharged without a permit" from Fiore's facility to a tributary of the Youghiogheny River. Fiore did not seriously challenge the fact that there was a discharge, and admitted that he did not have a water quality permit authorizing the discharge (N.T. pp. 40-43). Fiore did attempt to show that the discharge was environmentally inconsequential. His witness Kenneth Brown, a chemist and pharmacist employed at Chester Laboratories, had sampled the discharge and had chemically analyzed the samples; according to Mr. Brown, there were no detectable amounts of EPA-identified "priority pollutants" in the samples (N.T. pp. 67 and 74). DER's Mr. Duritsa countered this testimony with the assertions that DER had been able to detect pollutants in the discharge, and that DER's higher-than-Chester's values had been independently checked (N.T. pp. 183 and 191-193).

Fiore also attempted to show the discharge was environmentally inconsequential through opinion testimony by his witness E. Dennis Eschert, a chemical engineer whose testimony and resume (admitted into evidence as Fiore's Exhibit 19) established Mr. Eschert's expert familiarity with the permitting and operation of solid waste disposal sites. However, the hearing examiner saw no evidence that Mr. Eschert was experienced in epidemiology, oncology or any other health professional area. Consequently the hearing examiner, despite Fiore's vociferous objection, refused to allow Mr. Eschert to answer questions like (N.T. p. 104):

> Q. Do you know or can you testify as to whether or not those materials at a level which cannot be detected would have any effect on the health and safety of people?

The hearing examiner suggested that another witness, trained in the health professions, would be permitted to answer such questions (N.T. p. 109), but Fiore failed to offer any witness so trained.

The writer sees no reason to doubt the correctness of his original ruling concerning the limits of Mr. Eschert's expertise. However, even if Mr. Eschert had been allowed to give his opinion that the pollutant levels in the discharge could not affect the public health and safety, Fiore would not deserve a supersedeas under the criteria of 25 Pa. Code §21.78.

In the first place, under the doctrine of Pa. P.U.C. v. Israel, 356 Pa. 400, 52 A.2d 317 (1947), discharge without a water quality permit constituted injury to the public per se (see also DER v. Coward, 489 Pa. 327, 414 A.2d 91 (1980)). On the other hand, the Board is not convinced that Section 21.78 was intended to be interpreted so rigidly that via the Israel doctrine a purely technical violation having no environmental consequences necessarily weighs significantly against a supersedeas. But an unpermitted discharge of organic waste pollutants into a tributary of the Youghiogheny River, including "naphthalene, benzene, ethylbenzene, xylene, cumene and indene" (the language of the August 4, 1983 letter), is much too serious to be termed a "purely technical" violation, whether or not these pollutants would be discernible in the Youghiogheny itself. These are hazardous pollutants, in a discharge from a hazardous waste site. We already have explained that Brown's testimony--to the effect that there were no pollutants in the discharge even before it reached the Youghiogheny--was inconclusive. Under these circumstances, recognizing that the Environmental Quality Board ("EQB") has promulgated a comprehensive set of regulations governing discharges from hazardous waste disposal sites like Fiore's, there is a strong presumption that the discharge indeed is a threat to public health and safety, which presumption Fiore must rebut. See our recent discussion concerning our jurisdiction to entertain challenges to regulations, in Coolspring Township v. DER, EHB Docket No. 81-134-G (Adjudication, August 8, 1983).

Fiore did not rebut the aforementioned presumption at the August 12, 1983 hearing, and wouldn't have rebutted it even if the Board had allowed Mr. Eschert to give the excluded opinion testimony we have discussed. For instance, there was no suggestion that Fiore intended to offer evidence showing that allowing Fiore's present operation to continue would not in the coming months cause unquestionably dangerously high pollutant levels in the Youghiogheny. It is reasonable to suppose that the EQB strictly has banned discharges without water quality permits into any waters of the Commonwealth because the EQB recognized that if allowed to continue unabated the initial observation of a slightly polluting discharge may be the harbinger of future much more serious pollutant levels.

To summarize, even ignoring the fact that under the Israel doctrine there surely will be injury to the public, we conclude Fiore did not meet his minimum burden, under §21.78(a)(3), of showing that there would not be a significant likelihood of injury to the public were Fiore to be granted his supersedeas.

C. Likelihood of Fiore's Prevailing On The Merits

The August 4, 1983 letter employed the following language:

> In September 1982, the Department determined that organic waste pollutants were being discharged without a permit from your hazardous waste facility to a tributary of the Youghiogheny River. This discharge originated from a piped mine discharge which was placed below your Phase I Industrial Waste Pit during its construction...
>
> Prior to construction of the Phase I disposal pit, approval was granted to you on November 14, 1979 to construct a temporary waste storage pit adjacent to the Phase I Industrial Waste Pit. This temporary storage pit was to be removed after 90 days of operation.
>
> You were notified several times by the Department, through letters dated May 4, 1981, July 31, 1981, and November 5, 1982, to remove the waste materials stored

in the temporary storage pit and properly dispose of them. It is the opinion of the Department that hazardous waste materials are being discharged from the temporary storage pit and into the groundwater...

On January 25, 1983, the Department entered into a Consent Order Agreement with [your] Company to abate this discharge. This agreement allowed you to accept additional hazardous waste material sources at your Phase I Industrial Waste Pit for disposal.

The Consent Order and Agreement intended to abate the discharge primarily by requiring the removal of the temporary storage waste pit by June 15, 1983...

The Consent Order and Agreement was signed by you and your legal counsel...However, [your] Company has failed to remove the temporary storage pit by the agreed date and in fact no work has been initiated to remove the temporary storage pit. The closure plan which was submitted by your consultant was not prepared in accordance with the Consent Order and Agreement in that you indicated the waste from the temporary storage pit would be placed into the unpermitted Phase II Industrial Waste Pit. The Consent Order clearly states that the temporary storage pit was to be removed and placed in the Phase I Industrial Waste Pit or transported off-site for disposal at an approved hazardous waste disposal site. The Phase II Industrial Waste Pit is not permitted by the Department of Environmental Resources, does not have interim status from the Department as a hazardous waste disposal facility, and is being constructed without the Department's authorization...

You have failed to submit all required civil penalties on the specified time schedule to the Department, which you agreed to do in the Consent Order and Agreement dated January 25, 1983.

You have continued to construct the Phase II Industrial Waste Pit even after being notified by the Department, by letter dated September 22, 1982, that its construction was not authorized by the Department, and after agreeing to discontinue its construction in the January 25, 1983 Consent Order and Agreement.

Therefore,...Permit No. 300679...is hereby suspended.

Examination of the January 25, 1983 Consent Order and Agreement ("CO&A"), which was admitted into evidence as Board Exhibit 2, indicates that its substance was accurately summarized in the August 4, 1983 letter. Nevertheless, Fiore insisted--in his petition for supersedeas and at the hearing--that he would prevail on the merits of this appeal, i.e. would show that DER's appealed-from August 4, 1983 action of suspending Fiore's permit was an abuse of discretion.

This insistence of Fiore's appeared to rest on two distinct claims:

> 1. The CO&A was not a valid agreement between the parties, so that DER's reliance on it was misplaced.
>
> 2. The Phase II Industrial Waste Pit does have or should be deemed to have interim status and can lawfully receive the waste from the temporary storage pit, so that it is unreasonable for DER to insist the temporary storage pit waste must be transported off-site if it cannot be stored in the Phase I Industrial Waste Pit.

The implications of these claims now will be discussed.

1. Validity of the Consent Order and Agreement

At the hearing, Fiore's counsel contended that the CO&A was invalid for reasons of duress, lack of consideration and impossibility of performance. These contentions had not been raised previously in Fiore's Petition for Supersedeas filed August 5, 1983. In fact, they were not raised in an Amended Petition for Supersedeas received by the Board at the outset of the hearing. Nor were these contentions raised by Fiore's counsel in his opening statement describing his case (N.T. pp. 14-28); these contentions were urged by Fiore's counsel only after DER's counsel had described his case and explained that it rested very largely on Fiore's alleged failure to comply with the terms of the CO&A (N.T. pp. 43-46, 53-54).

On the facts described in the preceding paragraph, the hearing examiner legitimately could have ruled on procedural grounds that the validity of the CO&A

was outside the scope of the supersedeas hearing, so that evidence offered by Fiore in support of the aforesaid contentions of invalidity would have to be termed inadmissible; our rules, notably 25 Pa. Code §§21.51(e) and 21.77, would have authorized such restrictions on Fiore's presentation. As it happens, reliance on procedural requirements like §§21.51(e) and 21.77 was not necessary; there were substantive reasons (see infra), on which the hearing examiner did rely, apparently forcing the conclusion that the validity of the CO&A was outside the scope of the supersedeas hearing.

On its face the CO&A indicates that Fiore entered into the Agreement, and consented "to the entry of this Consent Order." The language of the CO&A is clear and unambiguous; it clearly states that "the parties hereto, intending to be legally bound by the mutual covenants set forth herein, hereby agree..." The document is equally clearly dated January 25, 1983. Fiore gave no indication that the question of the validity of the CO&A ever had been raised by him before he was confronted with the August 4, 1983 suspension letter. Consequently, to allow Fiore to raise this question at the supersedeas hearing, especially when he had not even pleaded the question in his amended supersedeas petition filed the morning of the hearing, would be inconsistent with equitable doctrine, particularly laches. If Fiore had legitimate reasons--such as duress, lack of consideration and impossibility--for seeking rescission of the CO&A, the time for setting forth those contentions surely had lapsed long before June 15, 1983, the deadline under the CO&A for removing the waste material from the temporary storage pit.

Moreover, even if Fiore never had given his written agreement to abide by the terms of the CO&A, the document did embody an Order of DER, which was labeled "Order". DER has the power to issue unilateral orders on solid waste

management matters, whether or not the recipients of such orders find them agreeable. 35 P.S. §6018.104(7). Orders which are not timely appealed to this Board become final. 71 P.S. §510-21. This Order had not been timely appealed to this Board. Therefore, by a long line of Board and higher court decisions stemming from Rostosky v. DER, 26 Pa. Cmwlth 478, 364 A.2d 761 (1976), we have no jurisdiction to entertain an attack on the validity of the DER Order embodied in the January 25, 1983 document. This conclusion is completely consistent with the recent holding in East Lampeter Township Sewer Authority v. Butz, 455 A.2d 220 (Pa. Cmwlth 1983), which ruled that a settlement agreement between DER and another party became final when not timely appealed; the analogy between a settlement agreement and a consent agreement like the document we have been discussing is very close.

On the aforesaid legal and equitable rationales, the hearing examiner informed Fiore's counsel that he (the hearing examiner) was very dubious about the admissibility of testimony aimed at supporting Fiore's contention that the CO&A was invalid. Nevertheless, the hearing examiner did not flatly preclude Fiore from presenting such testimony. The hearing examiner's actual language was (N.T. pp. 46 and 52-53):

> I think it is very unlikely that I would want to listen to that testimony, although I probably would if you insisted, but it would appear to me that where there's an agreement, which on the face of it, on its four corners is not ambiguous, where it's been signed by two consenting adults, I don't see that this Board is the proper jurisdiction to throw out such an agreement. It would appear to me that if that's the basis of your claim, that perhaps it should be looked at in another jurisdiction...
>
> I do not understand why I should not allow the Commonwealth to enforce this agreement which your client said he was going to do something by June 15, and it is now August 15...you say you have various defenses and I suppose I'm willing to listen to them since it is crucial... (emphasis added).

However, none of the witnesses called by Fiore offered any testimony bearing on the validity of the CO&A; in actuality the hearing examiner never had occasion to rule specifically on the admissibility of such proffered testimony. Furthermore, even if Fiore's testimony on the validity of the CO&A had been offered and received, and even if such testimony were held to be within the scope of the supersedeas hearing, it is extremely doubtful that Fiore's case for a supersedeas would have been strengthened. Compliance with the terms of the Consent Order obviously is not impossible, though more expensive than Fiore prefers; Fiore himself offered testimony on the costs of compliance, as discussed supra. Fiore's own counsel made it clear that Fiore received consideration for signing the CO&A, and that he signed the CO&A for business reasons, not because he was subjected to "duress". Fiore's counsel asserted (N.T. pp. 45 and 57-58):

> With respect to the consent order, and we are getting into the merits as opposed to supersedeas, but we will show testimony that what they did was blackmail Mr. Fiore into signing the consent order. They refused to give him approval for waste streams until he agreed to do certain things...
>
> As I understand it, he obtained a contract for disposal of certain materials at the site. The defendant had advised him they would not take action on his waste module unless he came in and signed a consent order. He came in and they presented him with the consent order and it was not a negotiated situation as far as I'm aware...
>
> What apparently happened is without taking a departmental action, modules approved or denied, they plopped that consent order on him, they said okay, you want more approvals, you sign this on our terms, on our form...or you are out of luck. They could have put him out of business at that point in time. He could have refused to.

Black's Law Dictionary , p. 594 (Revised Fourth Edition, 1968), states:

> [I]t is never "duress" to threaten to do that which a party has a legal right to do...Such as, instituting or threatening to institute civil actions.

Therefore we conclude there is essentially zero likelihood that, at a hearing on the merits of this appeal, Fiore would prevail in his contention the CO&A is invalid, implying DER's reliance on the CO&A is misplaced. We would have to conclude instead that the CO&A is a legally binding document, whose terms DER must be expected to enforce.

2. Interim Status of the Phase II Industrial Waste Pit

Much of Fiore's petition for supersedeas, and of his argument and testimony at the hearing, was devoted to the thesis that he had the legal right to put the hazardous materials removed from the temporary storage pit into the so-called Phase II Industrial Waste Pit. The Phase II disposal area presently is under construction by Fiore, is two and one-half times larger than the Phase I disposal area, and is empty (N.T. p. 142) whereas the Phase I disposal area now is full (N.T. p. 173). DER disagrees with Fiore's claim that he is allowed to store hazardous materials in the Phase II area. The issue is highly important to Fiore because the CO&A--and the appealed-from August 4, 1983 letter--require Fiore to remove the materials presently stored in the temporary storage pit. This removal would be very much less expensive to Fiore if he could place the removed hazardous materials in the Phase II area, instead of in some distant facility wholly off Fiore's own site (N.T. pp. 169-170).

Fiore's aforementioned thesis rests on his contention that the Phase II area had received "interim status"; Fiore agrees that he does not have a permit to store hazardous wastes in the Phase II area (N.T. pp. 17 and 146). According

to the regulations, particularly 25 Pa. Code §75.265(z)(5), an operator of a hazardous waste management facility having interim status "shall be treated as having been issued a permit" until DER takes final action on at least Part A of the facility's application for a hazardous waste management permit. Phase I received a permit on March 24, 1980, the portion of Permit No. 300679 whose suspension is the subject of the instant appeal. Page 5 of this permit (Fiore's Exhibit 5) lists a number of plans, originally submitted by Fiore as part of his permit application, which were "approved in support of" the Phase I permit. These plans also show the intended Phase II disposal area (N.T. pp. 130-132). Fiore argues that this approval--in the Phase I permit--of plans showing tne Phase II area was sufficient to confer interim status on the Phase II area; in the alternative, Fiore argues that this approval by DER reasonably led Fiore to believe that Phase II had interim status, on which mistaken belief he relied to his detriment, thereby estopping DER from forbidding disposal of the temporary storage pit materials into the Phase II pit.

The appealed-from August 4, 1983 letter quoted supra specifically forbids disposal of the temporary storage pit materials in the Phase II area. As we have explained, the August 4, 1983 letter accurately reflects the terms of the January 25, 1983 CO&A. We already have concluded that our hearing on the merits surely would convince us the CO&A is a legally binding document, whose terms DER must be expected to enforce. Thus whether or not the Phase II area had interim status, or reasonably could have been thought to have interim status, becomes irrelevant to the merits of this appeal, which solely involve whether the appealed-from letter was an abuse of DER's discretion.

Irrespective of this important point, however, we cannot agree that the aforementioned approval--in the Phase I permit--of plans also showing the

Phase II area implied, or reasonably could be thought to imply, that the Phase II area had been given interim status. The pertinent regulations, in 25 Pa. Code §75.265(z), though not free of ambiguity as Fiore argues, nowhere suggest that an area could gain interim status, conferring the important right to dispose of hazardous wastes in the area, merely by the casual mention--in a permit for an entirely different area--that plans showing both areas had been approved. A reasonable man in Mr. Fiore's place would not have relied on having so casually earned interim status for Phase II without consulting with DER; Mr. Duritsa testified that DER's approval of the aforementioned plans was intended to apply solely to their Phase I portions (N.T. pp. 195-197).

Furthermore, even if Phase II had received interim status as Fiore contends, 25 Pa. Code §75.265(z)(6), which tracks the time limits in 35 P.S. §6018.404(a)(4) of the SWMA, clearly forbids storage of hazardous waste under interim status without a permit after September 5, 1982; this September 5, 1982 deadline preceded both the August 4, 1983 letter and the January 25, 1983 signing of the CO&A. Any contentions that DER wrongly had refused to grant the Phase II area interim status before September 5, 1982, when interim status had not yet expired, lapsed and became irrelevant after Fiore agreed to, and did not appeal from, the CO&A's terms forbidding deposition of the temporary waste pit's contents in the Phase II pit.

D. Conclusion

For reasons which have been discussed, we see no way for this Board to conclude that Fiore would prevail on the merits of this appeal. The CO&A is valid, Fiore is not entitled to deposit the temporary storage pit waste in the Phase II area, and there is a long line of decisions upholding DER's discretion to enforce the terms of a consent order. DER v. Bethlehem Steel Corporation,

469 Pa. 578, 367 A.2d 222 (1976), Lower Paxton Township Authority et al. v. DER, EHB Docket No. 80-205-W (Adjudication, July 16, 1982). Indeed, the likelihood of Fiore's prevailing on the merits is so small, the balancing prescribed by 25 Pa. Code §21.78(a) (quoted supra) becomes comparatively easy. Since Fiore will not prevail on the merits, and since the irreparable harm he fears will have to be endured once the appeal is dismissed, there is no basis for giving him a supersedeas, even assuming purely arguendo that Fiore had managed to show there was no likelihood of causing injury to the public by granting the supersedeas. Moreover, our conclusion that Fiore will not prevail on the merits actually removes his claim of irreparable harm, which (as we explained) was contingent on whether the appealed-from letter would be deemed unjustified. Fiore's alleged harm will result solely from his having to comply with the letter; there is no other independent source of his harm. Under this circumstance DER's argument described earlier becomes relevant; harm resulting from complying with a DER order which is not an abuse of discretion cannot be irreparable harm justifying a supersedeas. As the Court approvingly quoted in Bethlehem, supra, litigation should be "carried out on the polluter's time, not the public's." Thus Fiore's showing of irreparable harm actually was specious, and there is absolutely no reason, under the balancing of 25 Pa. Code §21.78(a), to award Fiore a supersedeas.

O R D E R

WHEREFORE, this 24th day of August, 1983, the hearing examiner's decision to deny Fiore's petition for supersedeas is affirmed.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY, Member

DATED: August 24, 1983

cc: Bureau of Litigation
Howard J. Wein, Esquire
Robert P. Ging, Jr., Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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BOROUGH OF LITTLESTOWN :

:

Docket No. 82-277-M

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR COMMONWEALTH'S
MOTION FOR SANCTIONS

By notice filed November 3, 1982, the Borough of Littlestown (appellant) appealed the Department of Environmental Resource's (DER) action, dated September 24, 1982, assigning appellant a total of seventy (70) points for its projected sewer project.

The Board issued its Pre-Hearing Order No. 1 on November 15, 1983, requiring, inter alia, that appellant file its pre-hearing memorandum on or before February 1, 1983. On the date the said pre-hearing memorandum was due to be filed, appellant filed, instead, a Motion for Stay of Proceedings, which motion was denied by the Board order dated March 14, 1983 and required appellant to file its pre-hearing memorandum within fifteen (15) days of receipt of the Board's order of March 14, 1983. On March 24, 1983, appellant filed a Motion for Enlargement of Time within which to file its Pre-Hearing Memorandum.

Not having received for filing the appellant's Pre-Hearing Memorandum as of May 18, 1983, the Board issued a notice requiring appellant to comply with the Board's Pre-Hearing Order No. 1 by May 31, 1983, or "the Board may apply sanctions under its rule 21.124".

Appellant failed to file its pre-hearing memorandum by May 31, 1983.

By order dated June 8, 1983, appellant was required to file its pre-hearing memorandum not later than June 17, 1983.

On June 17, 1983, appellant filed a document entitled "Pre-Hearing Memorandum of of Borough of Littlestown, appellant".

On June 23, 1983, DER filed a Motion for Sanctions alleging that appellant's pre-hearing memorandum failed to comply with the Board's Pre-Hearing Order No. 1 in that:

1. The pre-hearing memorandum failed to set forth a statement of facts.

2. The pre-hearing memorandum failed to set forth contentions of law and detailed citations to authorities relied upon.

3. The pre-hearing memorandum failed to properly advise DER of the facts appellant intended to prove, and that, therefore, the appeal of the Borough of Littlestown should be dismissed.

Appellant has failed, as of August 24, 1983, to respond to the Commonwealth's Motion for Sanctions.

The appellant herein has, by its inaction and persistent refusal to abide by the rules of practice before the Board, forced the Board to take action which it would rather not take.

However, the Board should not, and indeed will not, countenance a course of conduct which exhibits a disdain for established procedures in the prosecution of an appeal.

The pre-hearing order issued by the Board on November 15, 1982 explicitly outlined the form and content of the pre-hearing memorandum required to be filed by appellant pursuant thereto, and the date by which the memorandum was to be filed. Overlooking for the moment the fact that a motion for stay of proceedings was filed on the day the memorandum was due to be filed, the Board was thereafter required to send two additional notices to appellant before appellant deigned to file its pre-hearing memorandum. Such a cavalier approach to Board directives leads the Board to wonder at the seriousness of appellant's grounds for filing its appeal in the first instance.

In addition to its tardy filing of the pre-hearing memorandum, the appellant further assaults the orderly processes of the Board's rules of practice by filing a document which is not responsive to the order of the Board.

Pre-Hearing Order No. 1 required the appellant to file a pre-hearing memorandum to contain, inter alia, a statement of facts appellant intended to prove. The statement of facts contained in the appellant's pre-hearing memorandum is as follows:

> "The Statement of Facts which the Borough of Littlestown intends to prove herein are parallel and analagous to those of Allegheny County Sanitary Authority, except as appropriately modified to reflect the particular application for funding of the Borough of Littlestown, rather than Allegheny County Sanitary Authority."

The assumption by appellant that this Board would have the knowledge to "appropriately modify" the facts is tantamount to ascribing to the Board the ability to read appellant's mind in this appeal, and we frankly admit that such power is beyond the Board. Needless to say, the memorandum is sadly deficient as to the requirement that it contain a statement of the facts sought to be proved by appellant.

Also, the pre-hearing order of the Board required appellant to state the contentions of law and to make detailed citations to authorities, including specific sections of statutes, regulations, etc., relied upon by appellant. The memorandum submitted by appellant completely omitted this most important aspect of the requirements of the Board's Pre-Hearing Order No. 1.

The memorandum filed by appellant is also deficient in that it failed to describe any scientific tests relied upon by appellant, as a summary of testimony of experts, or the lack of reliance of appellant upon scientific tests or experts.

The memorandum filed by appellant is further deficient in that it did not list documents which it would seek to introduce, with copies attached, or state that it (appellant) would not seek to introduce any documents into evidence.

The filed memorandum of appellant did contain a list of witnesses and dates when counsel would not be available for hearings.

The Board also notes that after having been apprised of the above noted deficiencies in its pre-hearing memorandum by the filing by DER of Commonwealth's Motion

for Sanctions, appellant continued its previously displayed disdain for orderly administration of appeals before the Board by failing to answer the Commonwealth's Motion for Sanctions for a period in excess of sixty (60) days.

Appellant has been advised on at least three (3) occasions during the course of these proceedings that the Board may impose sanctions against it (appellant) for failure to comply with its orders and rules. The sanctions which are available to the Board include the authority to dismiss an appeal upon a finding that Board orders and rules of practice have not been complied with. Appellant was made aware of the authority of the Board to dismiss its appeal by DER in its Motion for Sanctions wherein DER moved for dismissal of appellant's appeal for failure of appellant to abide by Board orders and rules of practice. (See 25 Pa. Code §21.124).

Under the circumstances, we believe that our dismissal of this appeal under the authority of 25 Pa. Code §21.124 is consistent with the precepts recently discussed by our Supreme Court in *De Angelis v. Newman*, 460 A.2d 730 (Pa. 1983).

O R D E R

AND NOW, this 24th day of August, 1983, upon Motion of the Commonwealth for Sanctions against appellant, and after review of the documents filed of record with the Board in this appeal, the appeal of the Borough of Littlestown, at EHB Docket No. 82-277-M is hereby ORDERED to be, and is, dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: August 24, 1983

cc: Bureau of Litigation
John R. White, Esquire
Louis A. Naugle, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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BENJAMIN COAL COMPANY :

:

: Docket No. 82-213-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER RE
OVERDUE STATUS REPORTS

This appeal was filed September 14, 1983. Thereafter the parties have engaged in numerous settlement negotiations, which however have not yet culminated in actual settlement.

On April 1, 1983, the Board continued this matter until May 31, 1983, to permit renewed settlement negotiations. On or before May 31, 1983, each party was to file a report on the status of these negotiations, accompanied by a request for appropriate action by this Board, e.g., by a request for:

a. A further continuance pending settlement negotiations

b. Prompt scheduling of a hearing on the merits.

As of this date, neither party has filed such a status report; indeed, there have been no communications of any kind from the parties since April 1, 1983. The accompanying Order, which is consistent with our action in DER v. PennTech Papers, EHB Docket No. 82-058-CP-G (Opinion and Order April 1, 1983),

thereby becomes understandable. As we said in PennTech supra:

> The Board certainly has no wish to force the parties to a hearing on the merits...if genuine settlement negotiations are continuing. On the other hand, the Board is in no mood to spend its time reminding the parties that status reports are due.

O R D E R

WHEREFORE, this 26th day of August, 1983, it is Ordered that:

1. This matter is continued to August 26, 1984, one year from now.

2. At that time, if nothing further has been heard from the parties, the above-captioned appeal will be marked discontinued without prejudice on grounds of inactivity; no further notice of possible discontinuance on grounds of inactivity will be sent to the parties.

3. Either party wishing to terminate its settlement negotiations, and to proceed to a hearing on the merits of either or both of these matters, has the responsibility of so informing the Board.

4. The Board no longer requires, nor desires, status reports from the parties.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY, Member

DATED: August 26, 1983

cc: Bureau of Litigation
Donald A. Brown, Esquire
Steven L. Friedman, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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KEYSTONE TALL TREE GIRL SCOUT COUNCIL :

:

Docket No. 83-123-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and BENJAMIN COAL COMPANY, Permittee

OPINION AND ORDER
SUR MOTION TO QUASH

This appeal was filed June 16, 1983. The Notice of Appeal states, "The Appellant did not receive notice of the issuance of the permit until on or about May 16, 1983." According to the rule for computation of time applicable to proceedings before this Board, 1 Pa. Code §31.12, June 16, 1983 is 31 days after May 16, 1983.

Consequently the Permittee has filed a Motion to Quash and an Amended Motion to Quash this appeal, on grounds of lack of jurisdiction under 25 Pa. Code §21.52(a). The Amended Motion was filed on July 25, 1983. On July 6, 1983 the Board mailed our Pre-Hearing Order No. 2 to the parties. Paragraph 3 of Pre-Hearing Order No. 2 states:

> Any party desiring to respond to a petition or motion filed by another party must do so within 15 days of receipt of the petition or motion being responded to...THE BOARD WILL NOT NOTIFY THE PARTIES THAT A RESPONSE MAY BE DUE.

On August 24, 1983, as the Board was about to rule on this matter, a response from the Appellant to the Motion to Quash finally was received. Paragraph 6 of this response reaffirms that "the Appellant did not receive notice of the issuance of said permit until on or about May 16, 1983."

If the notice of the issuance of the permit was received no later than May 16, 1983, then on the above facts we have no choice but to dismiss the appeal for lack of jurisdiction. Joseph Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976), Multichem Corporation v. DER, EHB Docket No. 83-047-M (Opinion and Order May 5, 1983), George and Barbara Capwell v. DER, EHB Docket No. 83-019-M (Opinion and Order March 4, 1983). However, we are troubled by Appellant's phraseology that notice of issuance of the permit was not received until "on or about" May 16, 1983. Receipt of notice one day later, on May 17, 1983, would make the appeal timely. But on the record before us we see no basis for finding that notice was received on May 17, 1983, rather than May 16, 1983 as the Permittee alleges.

O R D E R

WHEREFORE, this 6th day of September , 1983, the Motion to Quash is granted, with the proviso that we will be willing to reconsider this ruling if the Appellant can show notice was received on May 17, 1983, and if he can explain satisfactorily why this crucial fact was not brought to the Board's

attention in a timely response to the Permittee's Motion, as our rules for reconsideration require. 25 Pa. Code §21.122.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

cc: Bureau of Litigation
Alan S. Miller, Esquire
Robert P. Ging, Jr., Esquire
Carl A. Belin, Jr., Esquire

DATED: September 6, 1983

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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HENRY PALKO AND GARY G. WILCOX :

:

Docket No. 83-045-G

: v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION TO DISMISS

On February 8, 1983, DER wrote Mr. Palko that DER was forfeiting the non-negotiable Growth Savings Certificate No. 60098, in the amount of $5,000, drawn on Mellon Bank, payable to Henry Palko and assigned to DER as a collateral bond on Palko's Special Reclamation Project No. 227. On March 10, 1983 the Board received a handwritten letter, addressed originally to J. Anthony Ercole, Director DER Bureau of Mining and Reclamation, appealing the bond forfeiture, but not in conformity with the requirements of our rules, 25 Pa. Code §21.51. The letter was signed by Mr. Wilcox, but was headed with the names of both appellants.

Because March 10, 1983 falls witnin the 30-day appeal period prescribed by 25 Pa. Code §21.52(a), the appeal was accepted by the Board and--in accordance with our usual practice--docketed as a skeleton appeal under the authority of 25 Pa. Code §21.52(c). On March 14, 1983, still in accordance with our usual

practice, Mr. Wilcox was sent our standard form headed Acknowledgement Of Appeal And Request For Additional Information. This form states, in pertinent part:

> Your appeal fails to comply with section 21.51 of the rules of practice and procedure, a copy of which is attached.
> Unless the following is submitted within ten (10) days of the date of receipt of this notice, your appeal may be dismissed.

The additional information to be submitted included the telephone number of the appellant, specification of reasons for appealing, and whether the persons upon whom service of the Notice of Appeal is required by 25 Pa. Code §21.51(f) indeed had been served.

As of this date, there has been no response to the Board's March 14, 1983 letter to Wilcox, nor has the Board received any further communication from either appellant. Therefore, on the grounds of non-compliance with the Board's rules, DER--on June 23, 1983--moved to dismiss the appeal. DER also moved to dismiss Wilcox as an appellant on the separate grounds that he had not been aggrieved by the Board's forfeiture of Palko's bond and thus had no standing to appeal.

DER certified that copies of the foregoing Motion to Dismiss had been served on Mr. Palko and Mr. Wilcox, by United States Mail; Mr. Wilcox's copy was sent to the address he had given in his original March 10, 1983 letter, and Mr. Palko's copy was mailed to the address at which he originally had received the DER February 8, 1983 notice of bond forfeiture. On July 14, 1983, no response to the Motion having been received from either appellant, the Board advised these appellants--by certified mail to the same addresses used by DER--that an answer was required on or before August 1, 1983. The receipt from this mailing was returned to the Board by Mr. Wilcox; Mr. Palko's letter was returned unclaimed.

Under the facts just recounted, we have no alternative but to grant DER's Motion. The appeal is dismissed, with prejudice, as to each appellant, for failure to obey the Board's rules, under the authority of 25 Pa. Code §21.52(c). It is possible that Palko can give a legitimate explanation for his failure to furnish the information the Board requested on March 14, 1983. If so, he should move for reconsideration under 25 Pa. Code §21.122; the Board favors giving an appellant like Mr. Palko, who has had a bond forfeited, every reasonable opportunity to plead his case. Mr. Wilcox, on the other hand, never had standing and never should have been an appellant at all; the Board sees no reason to give him any further opportunities in this matter.

This Opinion and Order will be sent certified to the addresses we have been using, as the best we can do. If Mr. Wilcox, who apparently does receive mail so addressed, is in contact with Mr. Palko, he is requested to inform Mr. Palko of our ruling.

O R D E R

AND NOW, this 6th day of September, 1983, the above-captioned appeal is dismissed with prejudice, as to both appellants, and the forfeiture of Palko's Growth Savings Certificate No. 60098, drawn on Mellon Bank, is affirmed.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR., Member

Edward Gerjuoy

EDWARD GERJUOY, Member

cc: Bureau of Litigation
Michael Arch, Esquire
Gary G. Wilcox
Henry Palko

DATED: September 6, 1983

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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PARKER SAND AND GRAVEL :

:

Docket No. 83-134-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION FOR SUPERSEDEAS

On June 28, 1983, DER denied Parker Sand and Gravel's ("Parker") application for a 1983 Surface Mining Operator's License. According to DER, denial of the application was required by the Surface Mining Conservation and Reclamation Act ("SMCRA"), 52 P.S. §1396.3a(b), because of Parker's past and continued violations of surface mining laws. This denial was appealed by Parker on July 8, 1983. Simultaneously a petition for supersedeas was filed.

A hearing on the supersedeas petition was held July 25, 1983. By agreement between the parties, the facts were stipulated, so that the hearing was confined to oral argument. DER reserved the right to challenge some of the stipulated facts at the hearing on the merits of this appeal, but granted all stipulated facts for the purposes of the supersedeas hearing. On August 12, 1983, after reviewing the transcript of the hearing and memoranda of law filed by the parties, the Board granted the supersedeas, but failed to issue an Opinion explaining its decision. This deficiency is remedied by the instant Opinion, which of

course has been based on the stipulated facts only, unless otherwise noted.

A. Facts

The salient facts are as follows.

Parker is in the business of mining sand and gravel by the surface mining method. For about the past three years, Parker has conducted its sand and gravel operations under the authority of a surface mining license No. 3-02031 issued by DER. In reality, DER's appealed-from action was a denial of Parker's application for renewal of its surface mining license; Parker needed this license in order that it might mine sand and gravel during 1983.

The renewal application first was filed with DER on November 26, 1982. On or about January 7, 1983, DER returned the license application and asked Parker to provide additional information concerning the association of Byron E. Henderson ("Henderson") with Lucinda Coal, Inc. ("Lucinda"). Henderson is--and on or about January 7, 1983 was--the sole owner and principal officer of Parker. Indeed, Parker merely is a small family business, whose operations are performed completely by Henderson, Henderson's wife and four male employees.

On or about January 31, 1983, Parker resubmitted its application to DER, with the requested additional information. On April 28, 1983 DER notified Parker that DER "intended" not to renew Parker's license; Parker was specifically informed, however, that this "intention" was not yet a final decision of DER's, and that Parker had the right to an informal hearing before the final decision was made. The informal hearing, conducted by DER officials, was held on June 20, 1983. On June 28, 1983, DER took the final denial action giving rise to the instant appeal. During the 1983 months preceding June 28, 1983, including the period from April 28, 1983 to June 28, 1983, DER did not prohibit Parker from operating, and in fact Parker did operate, although during those months Parker did not have its 1983 surface mining license.

Parker's operations never have been the subject of a cease and desist order issued by DER, nor has Parker ever been assessed a fine or penalty. Moreover, if called to testify, the present DER inspector cognizant of Parker's operations would testify that Parker's operations are in compliance with DER's applicable rules and regulations, that Parker's operation involves no environmental deficiencies, and that Henderson is a good, conscientious operator.

In short, DER's grounds for not renewing Parker's surface mining license were based solely on Henderson's past involvement with Lucinda. During the time period of interest, Lucinda was engaged in the surface mining of coal. From May 1978 until December 1980, Henderson was employed by Lucinda as Manager of its mining operations; from June 21, 1978 until December 12, 1980, Henderson was President of Lucinda as well. During the time that Henderson was Manager of Lucinda, DER cited Lucinda for the following violations at Lucinda's Dietz Mine:

(a) May 22, 1979
    (i) backfilling not concurrent with mining.
(b) June 6, 1979
    (i) inadequate reclamation (failure to plant backfilled area)
(c) August 10, 1979
    (i) mining off the permitted area.
    (ii) pit exceeded the size allowed in the permit.
    (iii) water accumulation in the pit.
    (iv) backfilling not concurrent with mining.
(d) June 11, 1980
    (i) affecting area within the barrier of a gas well.
    (ii) backfilling not concurrent with mining.
(e) November 26, 1980
    (i) water impoundment in the pit.

Little or no mining has been done at the Dietz Mine since June 1980. Also, the Dietz operation has not been reclaimed. Failure to reclaim an area affected by surface mining constitutes violations of the SMCRA and the Clean Streams Law ("CSL"), 35 P.S. §691.1 et seq. Reclamation of the Dietz Mine would involve

substantial work to complete backfilling, regrading, erosion control and revegetation. Indeed, DER estimates that to complete reclamation of the Dietz area will cost more than $120,000, a figure considerably exceeding Lucinda's bonds for the Dietz Mine; these bonds already have been forfeited by DER, on June 1, 1982, for Lucinda's failure to reclaim and to correct outstanding and continuing violations.

At the time Henderson began working as Lucinda's Manager, Lucinda's operations already were not in compliance with DER's rules and regulations, in that the following conditions existed: There were a total of four open cuts with an average highwall height of 65 feet and a total length of 2800 feet; there was water in the pits; backfilling was not concurrent; the gas well barrier [see (d)(i) above] already had been violated; and reclamation was inadequate. In fact, at the time Henderson began working as Lucinda's Manager, Lucinda's operations already had affected approximately 115 acres, of which only 4.6 acres had been reclaimed sufficiently for Lucinda to file a completion report. During Henderson's tenure as Manager, DER accepted completion reports on 62 acres. By the time Henderson terminated his employment with Lucinda, in December 1980, the aforementioned 2800 feet of open highwall had been reduced to less than 1000 feet. Actually, during Henderson's entire employment by Lucinda less than 15 previously unaffected acres were affected, all of which have been restored to approximate original contour (though not necessarily fully reclaimed).

Nevertheless, it is agreed that some areas of Lucinda's operations which were mined during Henderson's tenure as President and Manager of Lucinda have not been fully reclaimed. In particular, among the Lucinda bonds DER forfeited on June 1, 1982 was Surety Bond B55079 covering mining of a ten acre site at the Dietz

Mine; the bond form for Surety Bond B55079 was executed by Henderson as President of Lucinda, on or about June 28, 1979. Moreover, as Manager and President of Lucinda, Henderson was the supervisor of Lucinda's day-to-day mining and reclamation activities. On the other hand, all of Lucinda's major decisions, which included when to work machinery on production or backfill, were made by Veronica Carroll ("Carroll"), Lucinda's owner; Henderson, as Lucinda's--and therefore Carroll's--employee, was required to carry out these decisions.

When Henderson began working for Lucinda, in May, 1978, the liabilities of Lucinda exceeded its assets. Lucinda's financial situation has not improved; Lucinda now is bankrupt.[1] Henderson never owned any stock in Lucinda and was not a director of Lucinda; Henderson did receive a salary from Lucinda, but his compensation in no way was contingent on Lucinda's profits.

B. Discussion

1. Can We Stay a Refusal of a License Renewal?

We begin with a threshold issue, which the parties have not addressed. Even assuming arguendo the criteria in 25 Pa. Code §21.78 favor granting a supersedeas, does the Board have the power to grant a supersedeas in this appeal from DER's refusal to renew Parker's license? In the past, the Board has taken the view that the purpose of a supersedeas is to preserve the lawful status quo. Therefore, the Board has refused to grant a supersedeas from a permit denial or a license denial, because the status quo before such appealed-from DER actions was "no permit" or "no license"; to grant the supersedeas would mean ordering DER

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[1] The assertion that Lucinda is bankrupt is not part of the stipulated record. However, the Board sees no reason to doubt that Lucinda is bankrupt, as was subsumed by the parties during oral argument (N.T. p. 30): in any event, whether or not Lucinda really is bankrupt is not at all crucial to this Opinion.

to grant the disputed permit or license, i.e., DER would be ordered to alter the status quo. Jack Sable v. DER, EHB Docket No. 77-125-W (Opinion and Order, December 29, 1977).

In the instant appeal, however, Parker has been refused a license renewal. The status quo before DER's action involved Parker's active operations, which were suspended only on June 28, 1983 when DER finally refused the renewal. Consequently the reasoning of Sable, supra does not imply a supersedeas would be inappropriate in the instant appeal. Of course, the status quo the supersedeas is intended to restore should be lawful, as indicated in the preceding paragraph. Surface mining operations without a valid license unquestionably are unlawful. 52 P.S. §1396.3a(a). Therefore it would be an abuse of our discretion to grant the supersedeas in the instant appeal if so doing meant ordering DER to allow Parker to operate without a permit. But DER itself allowed Parker to operate without its 1983 license until the renewal was refused on June 28, 1983; before that date, DER presumably regarded Parker as operating lawfully on an automatic extension of Parker's 1982 license. On that reasonable presumption, granting the supersedeas returns Parker's operation to a lawful status quo ante.

Furthermore, it must not be forgotten that the key issue in this appeal is whether the refusal to renew Parker's license was an abuse of DER's discretion. Now assuming arguendo the refusal was an abuse of discretion, the consequences of the refusal are very different for a first-time license applicant and for a renewal applicant like Parker. Parker has a well-developed property interest in its license, as well as in the sand and gravel business which depends on Parker's retention of its license. Wholly denying Parker any opportunity to stay the termination of the license and business in which it has property interests, even though DER's refusal to renew Parker's license may have been utterly egregious, certainly comes very close to--and well may be--a denial of due process to Parker.

For the above reasons we rule that if the criteria under 25 Pa. Code §21.78 favor granting a supersedeas in the instant appeal, the supersedeas is not made inappropriate by Sable, supra or other precedents the Board has examined.

2. Criteria for the Supersedeas

25 Pa. Code §21.78 reads as follows:

> (a) The circumstances under which a supersedeas shall be granted, as well as the criteria for the grant or denial of a supersedeas, are matters of substantive common law. As a general matter, the Board will interpret said substantive common law as requiring consideration of the follow factors:
>
> (1) irreparable harm to the petitioner;
> (2) the likelihood of the petitioner's prevailing on the merits; and
> (3) the likelihood of injury to the public.
>
> (b) A supersedeas shall not issue in cases where nuisance or significant (more than de minimis) pollution or hazard to health or safety either exists or is threatened during the period when the supersedeas would be in effect.

On the facts stated supra, no pollution or hazard to health or safety is threatened by allowing Parker to operate pursuant to his requested supersedeas. Nor is there any likelihood of other injury to the public were a supersedeas to issue. Therefore neither §21.78(a)(3) nor §21.78(b) furnish any reason for rejecting the supersedeas. In earlier portions of this Opinion, we have not detailed the facts concerning the harm confronting Parker from non-renewal of his license. It was stipulated, however, that non-renewal of his license will put Parker in breach of contract with his customers, and will cause Parker to suffer financial losses. The Board finds that these very serious non-recoupable consequences of the license non-renewal do constitute irreparable harm to Parker.

Consequently, insofar as 25 Pa. Code §21.78 is concerned, the only question remaining to be discussed is §21.78(a)(2), the likelihood of Parker's prevailing on the merits. DER maintains that under 52 P.S. §1396.3a(b) it has a

mandatory duty to refuse Parker's license renewal application. Parker rejects this contention of DER's. Although the parties' oral arguments and filings spar about some other issues, it is clear that the parties agree--as we agree--that the implications of 52 P.S. §1396.3a(b) are the crux of the instant appeal. Thus our examination of 25 Pa. Code §21.78(a)(2) in the context of the instant supersedeas petition focuses on the language of 52 P.S. §1396.3a(b).

The pertinent terms of 52 P.S. §1396.3a(b) are:

> Any person, partnership, association or corporation which has engaged in unlawful conduct as defined in section 18.6 or which has a partner, associate, officer...which has engaged in such unlawful conduct shall be denied any license or permit required by this act unless the license or permit application demonstrates that the unlawful conduct is being corrected to the satisfaction of the department...Following the department's decision whether to approve or deny a renewal, the burden shall be on the opponents of the department's decision.

Section 18.6 of the SMCRA, 52 P.S. §1396.24 reads:

> It shall be unlawful to fail to comply with any rule or regulation of the department or to fail to comply with any order or permit or license of the department, to violate any of the provisions of this act or rules and regulations adopted hereunder, or any order or permit or license of the department, to cause air or water pollution in connection with mining...

DEP argues that because Henderson is Parker's sole owner, Parker and Henderson can be considered one and the same legal entity insofar as application of the above language from §1396.3a(b) is concerned. We need not reach this point, however, because Henderson is an officer of Parker. Thus the basic issue in this appeal has become quite simple. If Henderson "has engaged in unlawful conduct" under the SMCRA, DER indeed is mandated to refuse the license renewal

(the statutory language is "shall be denied"). On the other hand, if Henderson has not engaged in unlawful conduct under the SMCRA, neither the SMCRA nor the facts quoted supra suggest any basis for denying Parker its renewal license.

DER claims that Henderson did engage in unlawful conduct under the SMCRA because, as President and Manager of Lucinda when Lucinda received the citations (1979-1980) listed supra, he "participated directly" in the surface mining activities which led to those citations. In particular, DER argues, Henderson as President and Manager of Lucinda participated in mining operations at the Dietz Mine which have not been reclaimed to this day, in violation of Lucinda's mining permit and therefore unlawful under 52 P.S. §1396.24.

DER's case in support of the claims stated in the preceding paragraph is essentially that Lucinda's violations can be imputed to Henderson ex officio, as a necessary consequence of the fact that Henderson was President and Manager of Lucinda, in which capacity he supervised Lucinda's day-to-day mining and reclamation activities. DER has not offered, nor suggested it could offer, evidence directly showing that Henderson, during his tenure as President and Manager of Lucinda, deliberately or even negligently failed to comply with the requirements of Lucinda's mining permits (e.g., as to reclamation). DER does argue that Henderson's participation in securing the now forfeited Surety Bond B55079 for the Dietz Mine, though Henderson knew Lucinda was insolvent, "constitutes the kind of conduct for which corporate officers are held personally responsible." In support of its view, DER cites Amabile v. Autokleen Car Wash 249 Pa. Super. 240, 376 A.2d 247 (1977) and Chester-Cambridge Bank and Trust Co. v. Rhodes, 346 Pa. 427, 31 A.2d 128 (1943).

The contention that the president of a corporation necessarily is "personally responsible" for violations of the SMCRA occurring during his tenure

as president has been rejected previously by the Board. W. C. Leasure v. DER, Docket No. 82-007-G (Opinion and Order, April 12, 1982). In Leasure, supra, the Board discussed the Amabile and Chester-Cambridge cases cited by DER. The Board sees no reason to modify its previous reasoning. In particular, the Board does not see how these cases cited by DER imply that Henderson's participation in securing the now forfeited Surety Bond B55079 makes him "personally responsible" for Lucinda's violations, to a degree constituting unlawful conduct under 52 P.S. §1396.24. Even if Lucinda was insolvent when Surety Bond B55079 was obtained, and even if Henderson was aware of this insolvency (these are allegations which were not stipulated to, which DER would have to prove), Lucinda's noteworthy improvement of its reclamation efforts during Henderson's tenure as Manager suggests Henderson's conduct in helping secure the bond may have been far from reprehensible. DER has not pointed to any other specific actions by Henderson which could be termed unlawful conduct under §1396.24. It appears, therefore, that DER is attempting to hold Henderson--as supervisor of Lucinda's day-to-day operations--responsible for his alleged nonfeasance of actions which might have prevented or remedied Lucinda's violations. As we explained in Leasure, supra, after citing Chester-Cambridge, supra, nonfeasance alone cannot suffice to make a corporate officer responsible for a corporation's wrongful acts.

Our reluctance, under the facts of this appeal, to rule that Henderson has engaged in unlawful conduct can be viewed in a larger context. The SMCRA, notably in 52 P.S. §§1396.22 and 1396.23, gives DER wide powers to impose civil and criminal penalties against "any person...who violates any provision of this act" (language of 52 P.S. §1396.23(a)). In 52 P.S. §1396.3 it is made clear that under the penalty provisions of the SMCRA the term "person" encompasses Henderson as an officer of Lucinda. Consequently DER has had the power, ever since Henderson's

tenure as President and Manager of Lucinda, to penalize Henderson directly for his alleged violation of the SMCRA. It surely is unnecessary, and seems unwisely circuitous, to use the terms of 52 P.S. §1396.3a(b), governing the criteria for license renewal, as a vehicle for litigating the issue whether or not Henderson has been in violation of the SMCRA. We doubt it was the Legislature's intention that 52 P.S. §1396.3a(b) be used as a substitute for 52 P.S. §§1396.22 or 1396.23 in penalizing violations of the SMCRA.

3. Burden of Proof

This brings us to the issue of the burden of proof in this petition for supersedeas. We have quoted 52 P.S. §1396.3a(b), which states that

> Following the department's decision whether to approve or deny a renewal, the burden shall be on the opponents of the department's decision.

At a hearing on the merits of the instant appeal, therefore, Parker will have the burden of proof; the statutory language is unmistakable on this point. What the statute does not precisely state, however, is what Parker is supposed to prove. DER argues that Parker must prove "Henderson is not personally liable for the outstanding violations of law at the Lucinda site." We think this is a heavier burden than the Legislature intended to impose on Parker, for reasons explained in the immediately preceding paragraph. We do not believe the Legislature intended that 52 P.S. §1396.3a(b) be a vehicle for litigating the issue whether or not Henderson has violated the SMCRA. If DER were to attempt to penalize Henderson under the SMCRA penalty clauses 52 P.S. §§1396.22 and 1396.23, DER would have the burden of proving Henderson was in violation; we see no reason to believe the Legislature intended to relieve DER of this burden when it enacted 52 P.S. §1396.3a(b). Consequently we rule that where DER intends to invoke the mandatory license denial clause in 52 P.S. §1396.3a(b), it is DER's burden to prove the unlawful conduct

receive a supersedeas will cause Parker irreparable harm, the Board on August 12, 1983 decided--and now affirms--that Parker deserves a supersedeas in this matter.

Our conclusion is consistent with a broad overview of the instant circumstances. DER has attempted to infer Henderson's unlawful conduct from the undisputed facts that during Henderson's tenure as Lucinda's Manager Lucinda was cited for violations and initiated some presently unreclaimed mining areas. On the other hand, it also is undisputed that very considerable reclamation, including reduction of open highwalls, was accomplished by Lucinda during Henderson's tenure. These environmentally positive accomplishments of Henderson's suggest that--without further facts in support of DER's aforementioned would-be inference--the inference is unsound.

Henderson's attempts to evade responsibility for Lucinda's deficiencies on the grounds that Henderson had to take orders from Lucinda's owner Carroll are unacceptable; as Manager and supervisor of Lucinda's day-to-day operations Henderson is responsible for any orders he issued to his workers, whatever the ultimate source of those orders. But surface mining is a complex operation and Henderson did have to operate within Lucinda's financial constraints; for example, the workers did have to be paid. Therefore one cannot automatically assert that the present existence of unreclaimed areas implies some of Henderson's orders to his men constituted unlawful conduct under the SMCRA, especially when so many of those orders apparently resulted in positive reclamation accomplishments. Similarly, one should not automatically infer Henderson engaged in unlawful conduct just because Lucinda received a number of citations (listed supra) for violations of its mining permits. At the same time, it is not inconceivable DER will convince the Board that some of Lucinda's citations must have stemmed from Henderson's unlawful conduct. Certainly it is difficult to see how Henderson--as the Manager

in charge of Lucinda's day-to-day responsibilities--can escape responsibility for violations like mining off the permitted area. Nevertheless, on a balance of the stipulated facts before us, we do not believe that DER (at a hearing on the merits of this appeal) will be able to sustain its burden of showing that Henderson engaged in unlawful conduct.

O R D E R

WHEREFORE, this 9th day of September, 1983, our Order of August 12, 1983 in this matter, granting Parker's petition for supersedeas, is affirmed.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: September 9, 1983

cc: Bureau of Litigation
Stanley R. Geary, Esquire
Henry Ray Pope III, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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TOWNSHIP OF SOUTH PARK :
(extension of ban)

:

Docket No. 83-069-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION TO DISMISS

On March 9, 1983, the Township received notification from DER (in the form of a letter dated March 4, 1983) that approval of a planning module for an apartment complex, known as the South Park Apartments, had been denied, pending the Township's satisfying DER that the planning module would be consistent with the requirements of 25 Pa. Code chapter 94.

On April 6, 1983, the Township filed the instant appeal, on the sole grounds (quoting from the Township's Notice of Appeal):

> The Notice of March 4, 1983 appealed from constitutes an extension ban. The Building Permit on the subject Project was issued on December 15, 1982, which is prior to the ban and pursuant to Chapter 94, Sub Part C of Part I of the DER Regulations, Sec. 94.55. An Exception should have been granted for this Project.

A formal request for an exception was communicated to DER by the Township in a letter dated April 5, 1983.

On April 6, 1983, the Township also filed another appeal based on the same March 4, 1983 DER letter. This Notice of this second appeal, docketed at EHB No. 83-068-G begins as follows:

> The Notice appealed from consitutes a ban on sewer extensions issued by the Department of Environmental Resources.

On April 28, 1983, DER filed a motion to dismiss the instant appeal (at Docket No. 83-069-G) on the grounds that no appealable action involving a "sewer extension ban" has been taken by DER. On May 12, 1983, the Board informed the Township that its response to DER's Motion to Dismiss must be filed on or before May 27, 1983. As of this date, the Township has not responded to DER's Motion. However, the parties, with the Board's encouragement, have engaged in extensive settlement negotiations, which are continuing. But these settlement negotiations have not been successful, and DER, on September 2, 1983, has renewed its Motion. This Opinion and Order reflects the Board's agreement that disposition of this Motion should not be further delayed.

DER's Motion makes the following arguments in support of its thesis that there has been no appealable action by DER:

1. The March 4, 1983 letter does not constitute an extension ban; in fact, DER is not authorized to impose an "extension ban." Therefore the extension ban action appealed from never occurred, and could not have occurred.

2. It is the Township, not DER, which has the authority to restrict new sewer connections to a hydraulically overloaded system; DER has not restricted any new connections.

3. DER does not have the authority to rule on requests for exceptions to new sewer connections restrictions; but even if DER does have such authority, the appeal is premature because DER has not ruled on the Township's request for an exception.

We fully agree with DER's argument 3 supra; there has been no appealable refusal of an exception. However, we are not convinced that DER's arguments 1 and 2 are wholly to the point. The March 4, 1983 letter requires the Township to (inter alia):

> Restrict new connections to the sewer system tributary to the overloaded sewerage facilities to only those connections which fall within the exceptions stated in 25 Pa. Code Sections 94.55, 94.56 and 94.57 until the requested plan and schedule is approved by the Department.

On the other hand, 25 Pa. Code §94.1 includes the definition:

> Ban--A restriction placed by the Department on additional connections to an overloaded sewer system or a sewer system tributary to an overloaded plant and such other necessary measures as the Department may require to prevent or alleviate an actual organic or hydraulic overload or an increase in an organic or hydraulic overload.

Therefore, the Township's denomination of the March 4, 1983 letter as a "ban" on connections is understandable, even if the regulations in 25 Pa. Code chapter 94 do not use the particular term "extension ban."

The real issue, which DER's Motion does not address, is whether the March 4, 1983 letter, no matter how denominated, constitutes an appealable action under 25 Pa. Code §21.2(a), as that section has been construed by the Board and the courts. Section 21.2(a) defines:

> Action--Any order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any persons, including, but not limited to, denials, modification, suspensions and revocations of permits, licenses and registrations; orders to cease the operation of an establishment or facility; orders to correct conditions endangering waters of the Commonwealth; orders to construct sewers or treatment facilities; orders to abate air pollution; and appeals from and complaints for the assessment of civil penalties.

Construction of this definition has stressed the principle that the action, to be appealable, must affect "personal or property rights, privileges, duties or obligations," George Emeric v. DER, Docket No. 75-283-C, 1976 EHB 324; Howard

Minnich v. DER, Docket No. 82-047-H (Opinion and Order, June 2, 1982); Perry Brothers Coal v. DER, Docket No. 82-122-H (Opinion and Order, October 13, 1982). At the present stage of these proceedings, we simply are unable to decide whether or not DER's March 4, 1983 letter is appealable under 25 Pa. Code §21.2(a) and pertinent rulings thereon. Did the March 4, 1983 letter affect the Township's "rights, privileges, etc.," or was the letter merely a recommendation to the Township, which did not affect the Township's rights, and which the Township was free to ignore?

For reasons just indicated, we are unable to rule on DER's Motion at the present time; however, we also see no need to do so. The distinction between the Township's two appeals, docketed at 83-068-G and 83-069-G, has not been made apparent to us. As we already have explained, the appeal at Docket No. 83-068-G starts out by arguing the main thesis of the instant appeal at 83-069-G, namely that the March 4, 1983 letter constituted an extension ban. Aside from the claim that DER should have granted the Township an exemption, the instant appeal at 83-069-G appears to be fully contained within the appeal at 83-068-G. DER has not moved to dismiss the appeal at 83-068-G.

Consequently we believe the objectives of DER's Motion can be accomplished, while fully protecting the Township's rights at the present stage of these proceedings, by consolidating the two appeals, as our rules permit us to do. 25 Pa. Code §21.80(a). We do rule, for reasons explained supra, that DER's failure (as of now) to grant the Township its requested exception is not part of the consolidated appeal.

O R D E R

WHEREFORE, this 12th day of September, 1983, it is Ordered that:

1. The appeals at Docket Nos. 83-068-G and 83-069-G are consolidated under the Docket No. 83-068-G.

2. DER's alleged failure (as of this date) to grant the Township its April 5, 1983 request for an exception to sewer connection restrictions is not part of the subject matter of this consolidated appeal.

3. DER's Motion to Dismiss, filed April 28, 1983, is denied.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: September 12, 1983

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
John F. McGinty, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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ARMOND WAZELLE :

:

Docket No. 83-063-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On March 18, 1983, DER informed Armond Wazelle ("Wazelle") that his solid waste permit No. 100412, for operation of his Sanitary Landfill, was being revoked for various environmental violations, including failure to comply with previous orders of DER.

DER's action was timely appealed to this Board, on March 28, 1983. The Notice of Appeal was accompanied by a covering letter from Wazelle's attorney stating that "it is Mr. Wazelle's understanding that this Appeal will act as a supersedeas." On April 13, 1983, the Board advised Wazelle's counsel that under the applicable law, the appeal would not act as a supersedeas. 71 P.S.A. §510-21(d). In response, a petition for supersedeas of DER's March 18, 1983 Order was filed by Wazelle on April 20, 1983. On May 11, 1983, however, while attempts to schedule a hearing on the supersedeas petition were in process, Wazelle informed the Board he was agreeable to postponing the supersedeas hearing pending settlement negotiations. Then, on July 20, 1983, DER informed the Board that the settlement negotiations had

broken down, and that DER was available for a supersedeas hearing at the Board's convenience. Nevertheless, no supersedeas hearing has been scheduled, for reasons we proceed to explain.

On April 7, 1983, in accordance with the Board's usual practice, Wazelle was served with our Pre-Hearing Order No. 1, ordering Wazelle to file his pre-hearing memorandum on or before June 30, 1983. On August 4, 1983, no pre-hearing memorandum having been received, the Board notified Wazelle's counsel by certified mail that sanctions, including possible default of Wazelle's appeal, might be imposed unless Wazelle's pre-hearing memorandum was received by August 14, 1983. On August 19, 1983, the Board received a letter dated August 15, 1983 from Wazelle's counsel, claiming the Board's certified letter had been received only a few days prior to August 15, 1983, and asking for "an extension of ten (10) days for the filing of that memorandum, which will be sent directly to your office." Neither in this letter written August 15, 1983 nor in any other letter since May 11, 1983 has Wazelle's counsel said anything about his April 20, 1983 supersedeas petition; certainly he has not renewed his request for a supersedeas hearing.

The August 15, 1983 letter was written after the Board's August 14, 1983 deadline date for filing Wazelle's pre-hearing memorandum. Wazelle made no attempt to secure an extension of the August 14, 1983 deadline before that date was reached. For these reasons, the Board did not respond in writing to Wazelle's August 15, 1983 letter; to so respond courteously would have been to condone openly Wazelle's cavalier treatment of Board deadlines. Nonetheless, the Board was prepared to accept the pre-hearing memorandum if filed within the 10-day extension period Wazelle's counsel requested. But as of this date the pre-hearing memorandum has not been filed.

Under the circumstances, the Board feels sanctions against Wazelle, for failure to file his pre-hearing memorandum as repeatedly ordered, are appropriate. Under our powers, 25 Pa. Code §21.124, we rule that Wazelle's participation, at a hearing on the merits of this appeal, will be limited to cross examination of DER's witnesses and to presentation of such evidence as normally would be offered in rebuttal, not in Wazelle's case-in-chief; Wazelle also will be permitted to file post-hearing briefs. We believe these sanctions are consistent with the Supreme Court's recent ruling in DeAngelis v. Newman, 460 A.2d 730 (Pa. 1983). Although 25 Pa. Code §21.124 includes the sanction of dismissal, under 25 Pa. Code §21.101(b)(2) DER has the burden of proof in this matter; to dismiss Wazelle's appeal for his refusal to obey our orders, although in many ways a fitting sanction, would have the unfair effect of shifting the burden of proof from DER to Wazelle.

The Board will reconsider this ruling only upon very good cause shown, by Wazelle, for paying so little attention to our deadlines. We are willing to reconsider mainly, really solely, because Wazelle has pleaded--and the Borough of Punxsutawney and the Jefferson County Redevelopment Authority have written the Board--that Wazelle's landfill operation is vital to the surrounding community. Therefore, we are very reluctant to have this appeal decided under the cloud of Wazelle's having waived presentation of his case-in-chief. But we cannot permit our orders to be unrestrainedly flouted.

As for Wazelle's supersedeas petition, because he has shown no interest in pursuing it we are deferring it indefinitely, pending a hearing on the merits, which we hope to schedule soon.

O R D E R

WHEREFORE, this 13th day of September, 1983, it is ordered that:

1. A hearing on Wazelle's petition for supersedeas is indefinitely deferred.

2. A hearing on the merits of this appeal will be scheduled soon.

3. At the hearing on the merits, Wazelle's participation will be limited to cross examination of DER's witnesses, to presentation of such evidence as normally would be offered in rebuttal (rather than in Wazelle's case-in-chief) and to filing post-hearing briefs.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: September 13, 1983

cc: Bureau of Litigation
Patti Saunders, Esquire
R. Edward Ferraro, Esquire
Fred Lewis - Borough of Punxsutawney

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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CONCERNED CITIZENS AGAINST SLUDGE :
by Charles Small, Jr., Trustee ad Litum :

Docket No. 82-221-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and CITY OF PHILADELPHIA, Permittee

OPINION AND ORDER

On August 19, 1983 we issued the most recent of our series of Opinions and Orders in this matter. Hopefully, the instant Opinion and Order will be the last.

On August 19, 1983 we ruled that the Citizens' standing in this appeal cannot be based upon alleged injury to William Kraynak, because of apparent inconsistencies--between allegations in the Citizens amended pre-hearing memorandum and admissions the Citizens filed--concerning William Kraynak's business dealings with Modern Earthline Companies. The Citizens were invited to explain these apparent inconsistencies, if the Citizens felt our ruling against William Kraynak was ill-conceived.

On August 29, 1983 the Board received the Citizens' response to the Board's August 19, 1983 Order. The Citizens' counsel wrote:

> The Concerned Citizens Against Sludge is a local committee which is very loosely formed. It is extremely difficult to get an answer as to questions pertaining to the application of sludge

> from the property owners. Mr. William Kraynak stated he did not give permission for Modern Earthline or the City of Philadelphia to dump sludge because of the pressures of the issues. When I received the Request for Admissions and confronted Mr. Kraynak with the statements from the City of Philadelphia, he did, then, agree permission was given.
>
> Mr. Kraynak did not lie under oath nor did he intentionally deceive the Hearing Board. Since he must live in the area in close harmony with his neighbors he simply could not admit openly to them he had actually given his permission.

The above quotation gives the Board no reason to modify its previous ruling that the Citizens' standing in this appeal cannot be based upon alleged injury to William Kraynak. Furthermore, the above quotation does not provide the Citizens with a satisfactory excuse for having filed untrue factual allegations, in their pre-hearing memoranda. We recognize that our Pre-Hearing Order No. 1, which ordered the Citizens to file a pre-hearing memorandum, did not require that the pre-hearing memorandum be verified (as defined in Rule 76 of the Pa. Rules of Civil Procedure). Nevertheless, the implication that a party's pre-hearing memorandum should contain only those factual allegations the party expects he can prove is clear from the language of Pre-Hearing Order No. 1, particularly its paragraph 2A. In any event, ordinary citizens are deemed to know they should not make untrue statements to judicial or quasi-judicial bodies, a concept embodied in 1 Pa. Code §33.12, which reads:

> Except as otherwise required by statute, it shall not be necessary to verify under oath any pleading, submittal or other document filed with an agency; but any individual who shall execute any pleading, submittal or other document knowing that it contains a false statement and who shall cause or suffer it to be filed in any agency shall be deemed to have committed a misdemeanor of the second degree in violation of section 4904(a) of the Crimes Code (18 Pa. C.S. §4904(a)).

Mr. William Kraynak has caused the Board to waste much of the time the Board has devoted to this matter. Although no action under the possible authority of 1 Pa. Code §33.12 will be initiated against William Kraynak at this time, the Board reserves the right to initiate such action in the future.

The Citizens previously have filed: their original pre-hearing memorandum on April 18, 1983; an amended pre-hearing memorandum on May 26, 1983; and, on June 27, 1983 (in response to our Order of June 15, 1983 in this matter), a second, presumably "final" amended pre-hearing memorandum. These pre-hearing memoranda failed to demonstrate that the Citizens had standing to pursue this appeal, for reasons discussed in our Opinions and Orders of February 9, 1983, May 4, 1983 and August 19, 1983. Nonetheless, as the Board already had reiterated in its August 19, 1983 Opinion and Order, we were unwilling to deprive the Citizens of a possibly deserved opportunity to be heard merely because their pleadings may have been more inartful and less convincing than need be.

Therefore, our August 19, 1983 Order gave the Citizens one "last final" opportunity to file a pre-hearing memorandum listing:

> (i) The names of those property owners (other than William Kraynak) who are members of the Citizens' association and on whose properties sludge allegedly has been or is threatened to be deposited without permission.
>
> (ii) The facts the Citizens intend to prove in connection with the claims under (i) above, stated in a form consistent with the requirements of our Pre-Hearing Order No. 1.
>
> (iii) The names of any witnesses, not already named under (i) and (ii) above, who are expected to testify on the issue of whether there are property owners who are members of the Citizens' association on whose properties sludge deposition without permission has occurred or is threatened.

In response, the Citizens' August 29, 1983 filing has listed George Kraynak as the owner of property on which sewage sludge deposition is allowed under the permit which is the subject of this appeal. No other property owners who possibly might fall into the category (i) above are mentioned, except for William Kraynak, A. G. Lamkie and William Lamkie. The Citizens have stated no facts--in the category (ii) above--pertinent to A. G. Lamkie or William Lamkie, so that the Lamkie's cannot be the source of the Citizens' standing; the bearing of William Kraynak's alleged injuries on the Citizens' standing already has been discussed.

The Citizens' August 29, 1983 filing also states:

> 25. George Kraynak is an eighty-three (83) year old man residing at R.D. #1, Glen Campbell, Pennsylvania, 15742.
>
> 26. Thomas Kraynak, Dick Kraynak and William Kraynak are close family members, Thomas and William being sons of George Kraynak, and as such are legal heirs of George Kraynak.
>
> 27. Thomas Kraynak, Dick Kraynak and William Kraynak are members of Concerned Citizens Against Sludge.

The above quotation does not allege--and the Citizens' previous versions of their pre-hearing memorandum have not alleged--that George Kraynak is a member of Concerned Citizens Against Sludge. In our earlier February 9, 1983 Opinion and Order on this matter, we ruled that the Citizens would have "standing to represent its members if some of its members would have standing to sue in their own right." Nowhere in Pennsylvania law, however, including the cases cited in support of representational standing in our February 9, 1983 Opinion, is there any indication that the Citizens would have standing to sue if a non-member relative of some of its members appears to have standing. As is stated in the leading case of William Penn

Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975), a person seeking judicial resolution of a controversy cannot merely "assert the common interests of all citizens in procuring obedience to the law." Concerned Taxpayers of Allegheny County v. Commonwealth of Pa. and Grace Sloan, State Treasurer, 33 Pa. Cmwlth 518, 382 A.2d 490 (1978).

Therefore, the Citizens' standing in this appeal cannot be based on the allegations of injury to George Kraynak, a non-member of the Citizens' Association. Nor can the alleged injury to George Kraynak (assuming arguendo such injury is provable) be translated into an injury--to those members of the Citizens' Association who are George Kraynak's relatives--of the "substantial, immediate and direct" sort sufficient to convey standing under the William Penn, supra test. Although George Kraynak may be a quite old man, and although Thomas Kraynak allegedly is his son and heir, the Board has found no precedent in Pennsylvania law--and the Citizens have cited none--holding that a son has standing to protest an alleged injury to his father's property, where the father remains alive and competent to preserve his property interests. Such precedents as the Board did find on this issue run against the Citizens. In re Montague's Estate, 403 Pa. 558, 170 A.2d 103 (1961).

The Citizens have had their "last final" chance to plead facts sufficient to confer standing. They again have failed to do so. We do not believe it is in the interests of justice to give the Citizens yet another "last final" chance to show standing, thereby once again postponing action on Philadelphia's deserving request that this appeal be finally adjudicated without further delay.

ORDER

WHEREFORE, this 14th day of September, 1983, the above-captioned appeal is dismissed for lack of standing. All previously scheduled hearings in this matter are cancelled, of course.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: September 14, 1983

cc: Bureau of Litigation
Howard J. Wein, Esquire
Chere' Winnek-Shawer, Esquire
Martha Gale, Esquire
Marguerite Goodman, Esquire
Benjamin Stonelake, Jr., Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

GERALD F. COONS, et al. : Docket No. 80-149-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and FRED GROFF, Permittee-Intervenor

OPINION AND ORDER

On August 20, 1980, the Department of Environmental Resources (DER), through its Bureau of Water Quality Management, issued Water Quality Management Permit No. 2290404 and Authorization to Discharge Under the National Pollutant Discharge Elimination System (NPDES) Sewage Permit No. PA0080381 to one Fred Groff, of Hummelstown, PA.

By separate notices of appeal filed on September 15, 1980, Gerald F. Coons and Ralph E. and Virginia L. Dieffenderfer appealed the grant by DER of the above-specified permits.

On October 21, 1980, the permittee, Fred Groff, filed a Petition to Intervene, and the same was allowed by order of the board docketed October 23, 1980.

By order of the board docketed January 27, 1981, the appeals of Coons and Dieffenderfer were consolidated at EHB Docket No. 80-149-H.

After efforts by intervenor-permittee to have public treatment and collection facilities to the area encompassed by the issued permits, during which

time the appeal was continued generally, counsel for intervenor-permittee (Groff) advised the board, by letter dated July 11, 1983 that Groff had "no intention of pursuing his plans to install the treatment facility".

By letter filed with the board on July 18, 1983, Gerald F. Coons advised the board that he wished to withdraw his appeal since he had "moved from the area", and by order dated August 3, 1983 the board ordered Coons' appeal withdrawn.

By notice dated August 2, 1983, the board requested the Dieffenderfers to respond to its order dated July 1, 1983 requiring a status report, and said notice of August 2, 1983 was sent by certified mail return receipt requested, and received by the Dieffenderfers on August 3, 1983.

The August 2, 1983 notice to the Dieffenderfers ordered compliance with the board's order by August 17, 1983, and further advised the Dieffenderfers that if they did not comply with the notice, to submit a status report, "The Board may apply sanctions under its rule 21.124."

The board's rule 21.124 (25 Pa. Code §21.124) entitled "Sanctions" provides as follows:

> "The Board may impose sanctions upon a party for failing to abide by a Board order or Board rule of practice and procedure. Such sanctions may include the dismissal of any appeal..."

The Dieffenderfers have failed, on two occasions, to abide by a board order, and therefore the board may properly dismiss their appeal by reason of their refusal to submit the requested reports.

However, in order not to preclude their appeal on purely procedural grounds, and thereby foreclose their right under this appeal, the board will afford the Dieffenderfers one last opportunity to proceed with this appeal, and therefore issues the following.

O R D E R

AND NOW, this 21st day of September, 1983, upon the failure of Ralph E. Dieffenderfer and Virginia L. Dieffenderfer to submit reports to the Environmental Hearing Board as required, it is hereby ORDERED that the appeal of Ralph E. Dieffenderfer and Virginia L. Dieffenderfer by dismissed with prejudice, unless the said parties' to this appeal submit to the board their response, in proper form to the board's Pre-Hearing Order No. 1, a copy of which is attached hereto and forming a part of this ORDER.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.
ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy
EDWARD GERJUOY
Member

DATED: September 21, 1983

cc: Bureau of Litigation
Lynn Wright, Esquire
Mr. and Mrs. Ralph Dieffenderfer
Herbert A. Schaffner, Esquire

COMMONWEALTH OF PENNSYLVANIA

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MAGNUM MINERALS, INC. :

:

Docket No. 82-230-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION FOR RECONSIDERATION

On August 22, 1983 the Board issued an Opinion and Order in the above-captioned matter. On September 9, 1983 DER filed a Petition for Reconsideration of that Opinion and Order. As DER recognizes, our rules and regulations, 25 Pa. Code Chapter 21, do not explicitly provide for reconsideration of interlocutory rulings, such as our August 22, 1983 Opinion and Order. However, as explained in Old Home Manor, Inc. and W. C. Leasure v. DER, Docket Nos. 82-006-G and 82-007-G (Opinion and Order, May 10, 1983), the Board does have inherent authority to reconsider its rulings at any time prior to final adjudication. On the other hand, the Board's limited resources do not permit reconsideration of interlocutory rulings in other than exceptional circumstances.

A. Claim That DER's Reply Brief Was Not Considered

Our August 22, 1983 Opinion and Order dealt with a DER Motion to Dismiss the instant appeal on grounds of mootness. This Motion was filed July 28, 1983,

and was accompanied by a Brief in support of the motion. On August 4, 1983 the Board, in accordance with its customary practice at the time, informed the appellant that appellant's response to the aforesaid Motion to Dismiss must be filed on or before August 22, 1983. Magnum's response, in the form of an "Answer by Appellant to Department's Motion to Dismiss," was filed August 15, 1983. On August 18, 1983, the Board received a "Reply Brief of the Commonwealth of Pennsylvania" in response to appellant's August 15, 1983 Answer. The Board denied DER's Motion to Dismiss on the already mentioned August 22, 1983 date. In what follows, the reader is presumed to have read our August 22, 1983 Opinion and Order, whose discussion will not be repeated here.

DER's petition for reconsideration contends:

> The Board's decision was rendered without the benefit of the Department's Reply Brief which was timely filed. Since Appellant's waiver and estoppel allegations were first presented in Appellant's Answer to the Department's Motion to Dismiss, the Department's only opportunity to point out the deficiencies in these arguments was in the Reply Brief. Since the Board's decision rested upon allegations of waiver and estoppel, and since the Board did not review the Department's Reply Brief which addressed these issues, the decision rests upon grounds addressed by the Department but not considered by the Board. The Department should have had the opportunity to have its timely filed argument on those issues considered by the Board. 25 Pa. Code §21.122(a)(1).

The Board has decided that the circumstances alleged in the immediately preceding quotation may be sufficiently exeptional to warrant reconsideration; thus we will not deny DER's petition out of hand. We remark, however, that the above contentions of DER's are not fully substantiated by the record, and indeed are not completely accurate. It is true that the writing of the August 22, 1983 Opinion and Order had been completed by Friday August 19, 1983, before DER's

Reply Brief (received only one day earlier) had been brought to the writer's attention. But the writer did become aware that the Reply Brief had been filed, and did take the opportunity to read it hastily, before copies of the August 22, 1983 Opinion and Order actually went out in the mail. Had we felt that the Reply Brief cast doubt on the correctness of our ruling, we doubtless would have delayed release of our August 22, 1983 Opinion and Order, at least until we had found the time (which we now have found) to more carefully examine the Reply Brief's contentions. In fact, therefore, it is inaccurate to contend that our August 22, 1983 Opinion and Order was rendered without "the benefit of the Department's Reply Brief."

Nevertheless, we must admit that the August 22, 1983 Opinion and Order was issued without careful consideration of DER's Reply Brief filed August 18, 1983. The question we ask is, "So what?" How does this admission support the conclusion that our August 22, 1983 Opinion and Order should be reconsidered? Our rules concerning briefs, 25 Pa. Code §21.116(a), state:

> The parties may, upon request, submit briefs within such time as the Board shall prescribe and shall serve a copy of the brief on the other parties (emphasis added).

Thus briefs need not be considered by the Board unless first requested; if requested, they must be filed within a time prescribed by the Board.

These restrictions, applicable to post-hearing briefs preceding final adjudication, surely must apply also to briefs submitted in anticipation of merely an interlocutory ruling. In the present instance, the Board never requested DER to file a Reply Brief to appellant's Answer to Motion to Dismiss, nor did our August 4, 1983 letter to Magnum--which notified the appellant that a response to DER's Motion to Dismiss was expected--suggest that we also expected

a reply from DER to Magnum's response. DER's Petition for Reconsideration states that it received appellant's Answer on or about August 11, 1983. Consequently DER had plenty of time (before the Board prepared its August 22, 1983 Opinion and Order) to request the Board, pursuant to 25 Pa. Code §21.116(a), to accept and consider DER's Reply Brief before deciding on DER's Motion. DER never made such a request, which the Board certainly would have granted. DER cites no authority for DER's seeming belief that the Board--though already in possession of a comprehensive brief by DER, filed July 28, 1983 in support of its Motion--had an affirmative duty to wait for an unrequested Reply Brief from DER before ruling on DER's Motion to Dismiss. Therefore the Board sees no reason to apologize for having ruled on DER's Motion promptly--rather than tardily--after receiving Magnum's Answer to the Motion.

B. Careful Consideration of DER's Reply Brief Would Not Have Altered Earlier Ruling

Implicit in the above quotation from DER's Petition for Reconsideration is DER's further belief that our August 22, 1983 Opinion and Order would have held differently, more in favor of DER, had the Board carefully considered DER's Reply Brief's arguments concerning waiver and estoppel. We already have explained that we do not believe we were required to give careful consideration to the Reply Brief. Nonetheless, we now have carefully reviewed the Reply Brief, and have found that this careful review confirms the opinion we reached from our hasty reading of the Reply Brief just before our August 22, 1983 Opinion and Order was released. In other words, our careful review of the Reply Brief has not caused us to doubt the correctness of our August 22, 1983 Opinion and Order.

We shall amplify this last assertion. At the present stage of these proceedings, wherein no evidence has yet been taken and the parties have filed no

stipulations, DER's Motion to Dismiss is akin to a motion for judgment on the pleadings. The court rules on a motion for judgment on the pleadings as a matter of law, based solely on the pleadings before it; issues which cannot be decided as a matter of law on this basis must be resolved against the moving party. Evans v. Marks, 421 Pa. 146, 218 A.2d 802 (1966); Eberhart v. Nationwide Mut. Ins. Co., 238 Pa. Super 558, 362 A.2d 1094 (1976). In the instant circumstances, the "pleadings" before us at the time we prepared our August 22,1983 Opinion and Order were appellant's Notice of Appeal, the parties' pre-hearing memoranda, DER's Motion to Dismiss and its Brief in support of the motion, and appellant's Answer to the Motion to Dismiss. DER contends that its Reply Brief should have been included in this list, and that such inclusion would have changed our August 22, 1983 discussion in regard to waiver and estoppel.

Magnum's Answer to DER's Motion to Dismiss stated:

> The Department did not object to nor cite as a reason for its denial of the application that the application did not contain sufficient information, nor meet the "primacy" requirements. Therefore, the Department is now barred and estopped from raising that reason for the denial at the present time. In effect, the Department waived its right to object to the form of the application by failing to object at the time of the denial.

This quotation from Magnum's Answer is hardly pellucid, but the Board took it to mean that Magnum believed it could establish defenses of estoppel and/or waiver to DER's contention that "any failure to abide by existing regulations is per se a conclusive reason--not overturnable by this Board--for DER to refuse a permit application" (as we put it in our August 22, 1983 Opinion and Order).

DER's Reply Brief mainly reiterated this just-stated rigid legal contention of DER's, which the Board rejected on August 22, 1983 and still rejects.

With respect to the appellant's possible defense of waiver, DER's Reply Brief--citing Melvin D. Reiner v. DER, Docket No. 81-133-G (Adjudication, July 28, 1982) --argued there would be no waiver because by the time the Board held its hearing de novo Magnum would have received sufficient notice that the application was being denied for failure to submit all the information required by the new regulations. It is undisputed that the appellant will have received such notice by the time of any de novo hearing on the merits of this appeal; indeed, Magnum already had such notice when it prepared its August 15, 1983 Answer. It also is true that in Reiner, supra the Board refused to regard as waived by DER under the terms of paragraph 4 of our Pre-Hearing Order No. 1 (i.e., as made inadmissible at the hearing on the merits) any reasons for DER's appealed-from action of which the appellant had received sufficient notice, e.g., via DER's pre-hearing memorandum. However, the reasons possibly favoring waiver mentioned in our August 22, 1983 Opinion and Order were not confined to DER's failure to comply with paragraph 4 of our Pre-Hearing Order No. 1; also our reading of the law concerning waiver does not indicate that Magnum's conceded knowledge of DER's insistence on having the information required by the new regulations necessarily would negate Magnum's waiver defense. Estoppel, §28, 14 P.L.E. 205

With respect to the appellant's possible defense of estoppel, DER's Reply Brief argued primarily that Magnum had failed to allege or show it had taken any detrimental action in reliance upon any DER representation. DER's Reply Brief also denied Magnum's allegation (offered in support of the estoppel defense, but strongly questioned by us in our August 22, 1983 Opinion and Order) that DER previously had refused to accept an amended application from the appellant containing the information required by the new forms. It is true that Magnum has not yet alleged facts--such as detrimental actions taken by Magnum in reliance upon DER

representations--needed to sustain a defense of equitable estoppel. Rockwood Insurance Company v. DER, Docket Nos. 78-168-S and 78-166-S (Adjudication, February 18, 1981); Reiner, supra. On the other hand, on August 22, 1983 we did not feel--and we do not now feel after reading DER's Reply Brief--that it is a priori obvious Magnum will not be able to prove the facts necessary to establish estoppel. Magnum's allegation that DER had refused to accept an amended application containing the information required by the new forms reinforces our conclusion that the appellant's ability to establish its estoppel defense has not (and had not as of August 22, 1983) been foreclosed by anything on the record. Under the applicable law governing rulings on motions for judgment on the pleadings, Evans and Eberhart supra, we were bound to accept as true this allegation of Magnum's concerning DER's refusal to accept its amended application) whether or not the allegation was to be denied by DER in a Reply Brief to Magnum's Answer to the Motion.

To summarize the two immediately preceding paragraphs, our review of DER's Reply Brief has not led us to conclude that the success of Magnum's estoppel or waiver defenses is foreclosed.

C. Significance of Earlier Ruling

In the Board's view, the analysis in the preceding two sections shows that the instant circumstances are not sufficiently exceptional to warrant reconsideration of our August 22, 1983 interlocutory ruling. The Board was not required to review DER's Reply Brief carefully before issuing the August 22, 1983 Opinion and Order, and such review would not have led to modification of our August 22, 1983 pronouncements concerning the appellant's possible waiver and estoppel defenses. Nonetheless, having gone this far, we shall discuss some of the

criticisms of our August 22, 1983 substantive holdings advanced in DER's Petition for Reconsideration.

DER's Petition for Reconsideration, though far from frivolous, is flawed by DER's apparent failure to keep in mind that our August 22, 1983 Opinion and Order did not adjudicate the merits of Magnum's grounds for appeal. In particular, we did not hold that Magnum had established, or would be able to establish, estoppel or waiver defenses to DER's contention that Magnum's failure to abide by existing regulations was a conclusive reason for refusing its permit application. We certainly did not hold that Magnum would not have to comply with all the new regulations. We ruled merely that (on the record before us at the time) we were not prepared to conclude as a matter of law that Magnum would be unable to win its appeal, whatever the estoppel or waiver or other defenses (e.g., an attack on the validity of the regulations) Magnum has suggested it might offer.

DER claims this ruling of ours is incorrect and should be reconsidered because Magnum has not pleaded all the necessary elements of its suggested defenses. For example, DER quite accurately complains that Magnum nowhere sets forth any allegation that any specific regulation DER seeks to enforce is invalid or unconstitutional. DER has similar quite legitimate objections (stated originally in DER's Reply Brief and discussed in part in section B supra) concerning the appellant's estoppel and waiver defenses. However, this Board traditionally has been reluctant to dismiss an appeal solely on the grounds of inartful pleading, thereby extinguishing a possibly meritorious appellant's opportunity to establish the merits of its case; thus before granting a motion to dismiss an appeal the Board often gives an appellant a chance to amend its pleadings, to make apparent the actual dimensions of its case. Concerned Citizens of Rural Ridge v. DER, Docket No. 82-100-G

(Opinions and Orders dated September 15, October 12 and November 22, 1982); Concerned Citizens Against Sludge v. DER, Docket Nos. 82-220-G and 82-221-G (Opinions and Orders dated February 9, May 4, August 19 and September 14, 1983).

Indeed, the Board is bemused by DER's refusal to recognize the incongruity between its two contentions that: (1) Magnum's failure to file the information required by the new regulations (effective July 31, 1982) now is a legitimate reason for denying Magnum's permit, although neither DER's original denial (filed September 3, 1982) nor its pre-hearing memorandum (filed December 27, 1982 and amended January 26, 1983) make any reference to a need for such information, and (2) Magnum's defenses to DER's Motion to Dismiss must be limited to those specific allegations Magnum could muster in the twenty days available for filing its Answer to DER's Motion. Because Magnum remains deprived of its permit, our refusal to grant DER's Motion to Dismiss does not threaten pollution of the waters of the Commonwealth. All in all, therefore, after reconsideration we see no need to modify our August 22, 1983 refusal to dismiss Magnum's appeal; similarly, we continue to stand by our August 22, 1983 discussion of the reasons for refusing dismissal, although that discussion should be understood in the light of the explanations and elaborations offered supra.

D. Magnum's Burden

On page 5 of our August 22, 1983 Opinion, after explaining our reasons for denying DER's Motion to Dismiss, we went on to state that at a hearing on the merits of this appeal: "Magnum's burden...will be to demonstrate that granting the permit to Magnum will not result in pollution of the waters of the Commonwealth." DER's Petition for Reconsideration objects that this description of Magnum's burden is unduly restrictive and is contrary to law. Here, despite

Magnum's arguments in its Answer to DER's Petition for Reconsideration, the Board feels DER has raised a valid point. The language just quoted is overly restrictive, although it was not so intended when written. For this poor writing the Board does apologize. To remedy the difficulty the Board now vacates the following language on Page 5 of our August 22, 1983 Opinion: the first complete paragraph beginning with "In conclusion...," and continuing through the first sentence of the next paragraph, so that the last vacated phrase is "to so argue." What we intended to imply, and what we should have written, is explained infra.

Our August 22, 1983 Opinion and Order did not reject the basic principle, from Doraville Enterprises v. DER, Docket No. 79-002-H, 1980 EHB 489 (Opinion and Order), that our de novo review of a permit denial should be based upon the regulations in effect at the time of the review. We merely opined that in any specific appeal it may not be legitimate for DER to insist on rigid adherence to the Doraville basic principle, because of conflicts with other equally or more basic principles. We felt and feel that Magnum has raised the possibility that, under the facts of this appeal, principles of estoppel or waiver may constitute lawful defenses by Magnum to blind application of the Doraville rule. Establishing these or other defenses to application of the Doraville rule, or--if these defenses cannot be established--establishing that presently applicable regulations are complied with, is Magnum's threshold burden in the instant appeal. DER's view, with which we disagree, is that Magnum's threshold burden necessarily is restricted to establishing that all presently applicable regulations are complied with, with no option of establishing defenses to such compliance. However, we did not intend that our August 22, 1983 rejection of DER's view of Magnum's threshold burden would leave Magnum with no threshold burden at all. Magnum's threshold burden cannot be less than as we have just prescribed.

Underlying the Doraville rule is the presumption that an applicable regulatory scheme, duly promulgated by the Environmental Quality Board, meets the objectives of the underlying statute. Coolspring Township, et al. v. DER, Docket No. 81-134-G (Adjudication, August 8, 1983). In the present appeal, the new regulations DER seeks to enforce are contained in 25 Pa. Code chapters 86 and 87, which have been issued under the authority of various sections of the Clean Streams Law ("CSL"), 35 P.S. §§691.1 et seq. and the Surface Mining Conservation and Reclamation Act ("SMCRA"), 52 P.S. §§1396.1 et seq. The purpose of the SMCRA includes: "to aid in the prevention of the pollution of rivers and streams." 52 P.S. §1396.1. The object of the CSL is to prevent further discharge of pollution into the waters of the Commonwealth. Commonwealth v. Barnes and Tucker Co., 472 Pa. 115, 371 A.2d 461 (1977). Moreover, the stated reason for DER's original September 3, 1982 denial of Magnum's permit application was Magnum's alleged failure to demonstrate that pollution of the waters of the Commonwealth would not occur.

The considerations of the preceding paragraph imply that under the facts of the instant appeal Magnum's defenses to automatic application of the Doraville rule must be limited by the precept that Magnum cannot be allowed to pollute the waters of the Commonwealth; otherwise the Legislature's intent in passing the CSL and the SMCRA clearly would be violated. At this stage of these proceedings, it is conceivable that Magnum will find defenses (to application of at least some of the new regulations) lying within this limitation. For example, in Coolspring, supra, the Board upheld issuance of a permit (for agricultural utilization of residential septic tank waste) despite allegations that certain procedural regulations requiring, e.g., that applications be notarized, had been violated; the

Board ruled that such "easily correctable environmentally inconsequential" deficiencies of the permit application had been waived.

In other words, if Magnum manages to establish defenses to automatic application of the Doraville rule, it still will have the burden quoted supra from our August 22, 1983 Opinion and Order. The August 22, 1983 Opinion and Order certainly failed to make it clear that Magnum is not excused from meeting its threshold burden defined earlier, and was additionally deficient in failing to explain that Magnum's defenses to automatic application of the Doraville rule are limited by Magnum's additional burden of showing that granting the permit to Magnum will not result in pollution of the waters of the Commonwealth. Of course, if Magnum can show it has complied with all presently applicable regulations, without reference to possible defenses to enforcement of those regulations, it will have made a prima facie (though conceivably not necessarily conclusive) case that the waters of the Commonwealth will not be polluted, because of the presumption, explained supra, underlying the applicability of the Doraville rule.

We trust that this section D of the instant Opinion, along with the Order which follows, remedy the deficiencies of our August 22, 1983 Opinion and Order. To minimize any further confusion, we stress that any discrepancies between the instant Opinion and Order and the August 22, 1983 Opinion and Order are to be resolved in favor of the present version.

O R D E R

WHEREFORE, this 22nd day of November, 1983, after consideration of DER's Petition for Reconsideration of our August 22, 1983 Opinion and Order in this matter, along with Magnum's Answer to this Petition, it is ordered that:

1. Insofar as it requests us to dismiss Magnum's appeal and/or to remand the appeal to DER for review in the light of 25 Pa. Code chapters 86 and 87, the Petition for Reconsideration is rejected.

2. Insofar as it requests us to modify our holdings concerning Magnum's burden of proof, the Petition for Reconsideration is granted.

3. Consistent with paragraph 2 supra, we vacate:

a. Language on page 5 of our August 22, 1983 Opinion as delineated in section D of the instant Opinion.

b. Paragraph 2 of our August 22, 1983 Order.

4. Magnum's burden in this appeal is as described in section D of the instant Opinion.

5. Nothing in this Opinion and Order is intended to be inconsistent with any part of our Order of October 7, 1983 in this matter, especially paragraph 4 of that Order.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: November 22, 1983

cc: Bureau of Litigation
Alan S. Miller, Esquire
Ward T. Kelsey, Esquire
Leo M. Stepanian, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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TOWNSHIP OF SOUTH PARK :

:

Docket No. 83-068-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

The above captioned matter involves two appeals, initially docketed at 83-068-G and 83-069-G. The two appeals were consolidated under the above caption in an Opinion and Order at Docket No. 83-069-G, dated September 12, 1983. The subject matter of this consolidated appeal, and its history to September 12, 1983 from the April 6, 1983 date the two original appeals were filed, has been described in our aforementioned September 12, 1983 Opinion and Order and will not be repeated here except insofar as is needful for the instant Opinion.

Our September 12, 1983 Opinion and Order was issued in response to a request by DER, dated September 2, 1983, that we rule on a Motion to Dismiss the appeal at 83-069-G; this Motion had been filed on April 28, 1983. DER's request manifested considerable impatience with the slow pace of settlement negotiations, in both appeals. Moreover, on August 30, 1983 the Township wrote the Board:

> In view of the foregoing, we believe that a further continuance in this matter would serve the interests of all parties and the Board. Would you

> please accept this letter as our request for a continuance of these proceedings until October 7, 1983. If at that time the matter is not settled, I would suggest that we proceed since the uncertainty of this entire situation requires some definitive solution.

Therefore, the Board accompanied its Opinion and Order of September 12, 1983 with a separate Order, extending until October 17, 1983 (an extra ten days beyond the Township's requested October 7, 1983 date) the due date for filing of the Township's pre-hearing memorandum, originally due on June 30, 1983 according to our Pre-Hearing Order No. 1 issued April 7, 1983. Enclosed with this Order extending the Township's pre-hearing memorandum due date was a letter of explanation, also dated September 12, 1983, from the Board to counsel for the parties. This letter stated, in pertinent part:

> As the enclosed Order states, I am continuing this matter until October 17, 1983, which gives you a little more time than you requested for purposes of continuing settlement negotiations. However, except for very good cause shown, the Board will not grant the Township any additional extensions of time for filing its pre-hearing memorandum. Unless this matter has been settled, the Township's pre-hearing memorandum--prepared in conformity with the requirements of our Pre-Hearing Order No. 1--must be filed on or before October 17, 1983.

As of this date, there has been no response from any party to the Board's September 12, 1983 letter we have just quoted. The Township has not filed its pre-hearing memorandum; the Township has not asked for another extension of time "for very good cause shown."

Under the circumstances, the Board feels sanctions against the Township, for failure to file its pre-hearing memorandum by October 17, 1983, are appropriate. Under our powers, 25 Pa. Code §21.124, we rule that the Township's participation at a hearing on the merits of this consolidated appeal (should a hearing be required) will be limited to cross examination of DER's witnesses and to presentation of such

evidence as normally would be offered in rebuttal, not in the Township's case-in-chief. The Township also will be permitted to file post-hearing briefs. These rulings are consistent with, and have much the same motivation as, our similar rulings in Armond Wazelle v. DER, Docket No. 83-063-G (Opinion and Order, September 13, 1983).

Our rulings in the preceding paragraph are premised on the Board's belief that DER may have some burden of proof in this matter. The word "may" has been used advisedly. The Township has appealed a DER letter to the Township dated March 4, 1983. This letter began by asserting that the Township's sewer system is hydraulically overloaded. The Township then was informed that because of the overload, 25 Pa. Code §94.21 required the Township: (1) to submit a plan for reducing the overload, and (2) to restrict new connections to the sewer system. The Township then was informed that until a satisfactory plan for reducing the overload had been submitted, the Township's recently submitted planning module for South Park Apartments would be regarded as inadequate; the planning module therefore was being returned by DER, without approval.

Our uncertainty about the burden of proof stems from our uncertainty about the precise subject matter of the Township's appeal. The Notice of Appeal is not wholly transparent on this point, and we cannot turn to the Township's pre-hearing memorandum to resolve ambiguities in the Notice of Appeal. If the Township only is appealing DER's refusal to approve the planning module, then our past holdings indicate that the burden of proof falls on the Township. The Krawitz Company v. DER, Docket No. 77-118-W (Adjudication, 1978 EHB 224); Raymond L. Butera v. DER, Docket No. 80-114-H (Adjudication, 1981 EHB 53); Dover Township Board of Supervisors v. DER, Docket No. 78-090-W (Adjudication, 1980 EHB 124). On the other

hand, if the Township also is appealing the requirement that it submit a plan for reducing the alleged hydraulic overload of the sewer system, then 25 Pa. Code §21.101(b) seems to apply; this section of our rules and regulations assigns the burden of proof to DER when DER orders a party to take affirmative action to abate air or water pollution. Our uncertainty about the burden of proof in this matter is compounded by our additional uncertainty concerning the intent of DER's March 4, 1983 letter. As discussed in our September 12, 1983 Opinion and Order, it is not clear whether the March 4, 1983 letter orders the Township to submit a plan for reducing the overload and to restrict new connections, or merely recommends that the Township take these actions.

As of this writing it appears to us that the Township only is appealing DER's refusal to approve the planning module. In this event, our ruling that the Township will not be allowed to present its case-in-chief implies that the Township's appeal can be dismissed now, without further ado. However, as we explained in Wazelle, supra, we are very reluctant to have the Township's appeal decided under the cloud of the Township's having lost the right to present its case-in-chief. Therefore, before taking final action, we will give the Township the opportunity to convince us that its appeal should not yet be dismissed. We want to be fair to the Township, but we cannot permit our orders to be wholly ignored.

The accompanying Order reflects the above considerations. For illustrations of the recent attitudes of Pennsylvania courts toward dismissal of an action for procedural deficiencies, see De Angelis v. Newman, 460 A.2d 730 (Pa. 1983); Byard v. Brogan, 460 A.2d 1093 (Pa. 1983); Croom v. Selig, 464 A.2d 1303 (Pa. Super. 1983). We believe our handling of the instant matter is consistent with the court decisions just cited.

O R D E R

WHEREFORE, this 2nd day of December, 1983, it is ordered that:

1. Should there be a hearing on the merits of this consolidated appeal, the Township's participation will be limited to cross examination of DER's witnesses, to presentation of such evidence as normally would be offered in rebuttal (rather than in the Township's case-in-chief), and to filing post-hearing briefs.

2. On or before December 20, 1983, the Township, if it so wishes, may file any of the following items:

a. A statement clarifying the subject matter of its appeal, and expressing its beliefs concerning DER's burden of proof in this matter.

b. A petition for reconsideration of this ruling; though reconsideration of an interlocutory order is not specifically provided for in our rules, we will allow the petition under our general powers to conduct appeals to the Board. 25 Pa. Code §§21.82(c) and 21.122.

c. A memorandum of law in support of items a and/or b immediately supra.

3. In the event the Township does file an item or items in compliance with paragraph 2 supra, DER shall respond within twenty days; DER is reminded that it, no less than the Township, is subject to sanctions for failure to obey our orders. 25 Pa. Code §21.124.

4. After DER's response is received, the Board will rule on issues raised by the Township's filings, if any, under paragraph 2 supra; if the Township does not take advantage of the opportunity provided by paragraph 2 supra, this consolidated appeal will be dismissed without further notice or discussion.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: December 2, 1983

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
John F. McGinty, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

LAWRENCE COAL COMPANY :

:

: Docket No. 81-021-CP-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

The Commonwealth of Pennsylvania, acting through its authorized agency, the Department of Environmental Resources (DER) filed a complaint for civil penalties against Lawrence Coal Company, which filing eventually led to approximately ten (10) days of hearings on the merits of the complaint before the then Chairman of the Environmental Hearing Board, Dennis J. Harnish.

The hearings were concluded in November, 1982, and post-hearing briefs were submitted in February, 1983.

Dennis J. Harnish resigned as Chairman and as a Member of the Board as of May 16, 1983.

The matter was assigned by the Board to Edward R. Casey, an attorney-examiner retained by the Board, for review and the eventual drafting of a recommended adjudication for decision by the Board.

After review of the record by Casey, he wrote a letter to counsel for DER and Lawrence Coal Company wherein he presented his overview of the case, a suggested method of amicable settlement, and a request for comment by counsel.

DER responded to Casey's correspondence with a charge Casey has disregarded former Chairman Harnish's recommendation for final determination of the case. This charge by DER was based upon a conversation which transpired between counsel for DER and Harnish on the day Casey's letter was received by counsel for DER. At the time of this conversation Harnish was not a member of the Environmental Hearing Board.

Based upon this conversation, and DER's notion of how the case should be decided, and upon DER;s assertions that Casey suffered from inexperience in handling "complex" environmental matters such that he grossly misunderstood the facts and the applicable law of the case, DER filed a Petition for Recusal and Motion for Reassignment of Case.

Lawrence Coal Company filed Answers to DER's Petition and Motion, as well as a Petition of its own. Lawrence's Petition requests several alternative courses of action to be taken by the Board.

The Board, in response to the Petition and Motion of DER, issued an ORDER, dated November 22, 1983, recusing Casey from further consideration of the case, and reassigning the matter to Board Member Mazullo for the purpose of drafting an adjudication.

The Matter is now ripe for decision by the Board on Lawrence's Petition. In its Petition Lawrence requests that the Board:

1. Dismiss the complaint against it.
2. Recuse Member Mazullo, and reassign the matter to a netural hearing examiner who was not a member of the Environmental Hearing Board (EHB) during the tenure of Dennis J. Harnish.
3. Schedule a hearing and order DER to produce any and all persons who had ex parte communication with Dennis J. Harnish to determine the extent and content of the communications.

It is of no small significance that none of the various petitions and motions allege that the remaining Board members were participants in discussions regarding the outcome of this case. This fact is most relevant when the process of adjudicating matters by the Board is questioned so strenuously by the participants in this matter. It

is also distressingly obvious, and unfortunate, that counsel appear to have forgotten this most relevant aspect of the Board's function in adjudicating cases before the Board.

DER vigorously argues that by reason of Casey's alleged disregard of Harnish's recommendations and his alleged misunderstanding of the facts and applicable law, DER's position is damaged. What is glaringly absent in DER's position is the fact that Harnish is presently precluded from playing any role in the adjudication of this case by reason of his resignation from the Board on May 16, 1983. Also absent from DER's analysis is the fact that Casey is retained by the Environmental Hearing to prepare a recommended adjudication. Neither Casey nor Harnish will make a binding decision on this complaint. The only persons with the authority, and the duty, to rule on this complaint are Board members, not attorney-examiners or former members.

It is therefore irrelevant what Harnish recommended to Casey, or what Casey opined about a recommended amicable settlement. The only relevant decision-making element is the vote of the present Board members.

The Board ordered recusal of Casey and reassigned the case to Member Mazullo for the reason that an indicia of conflict could be perceived from the disclosures made by Harnish to DER counsel, and the Board thought it in the best interest of all concerned that the members of the Board not involved in the unfortunate incident reserve unto themselves the final determination of the controversy.

For the same reasons as those listed above, the Board should not, and shall not, assign this matter to anyone other than a Board member.

The incident complained of by Lawrence Coal Company, i.e., the disclosure by Harnish to DER of his recommended decision and the alleged disregard of it by Casey, is not a sufficient reason to dismiss the complaint on the grounds that "the improper conduct of the DER's employees has irreparably prejudiced this matter and the petitioner (Lawrence) will be unable to obtain a fair determination". As was stated above, the members of the Board have not been alleged to have participated in any improper conduct and therefore cannot be accused of being tainted with any prejudicial

bias in the case. As with all cases decided by the Board, the record will form the basis for the Board's adjudication. Both sides agree that there is a sufficient record before the Board upon which to formulate an adjudication, and therefore dismissal of the compliant is not appropriate under the circumstances.

Finally, a hearing to determine if any other persons participated in ex parte communications with former member Harnish is irrelevant at this stage of the proceedings. The case is ripe for a final adjudication, and the Board shall proceed thereto after review of the record. Such a review will not be affected by an inquiry into the extent of ex parte discussions about the final decision "someone" not a member of the Board thought was the proper decision to reach in this case. The Board is not now, nor will it at any time, be swayed or biased by reason of conversations de hors the record. While such an inquiry might be the basis for an action before a forum other than the Board, it serves no useful purpose in the determination of DER's complaint for civil penalties in the instant case.

O R D E R

AND NOW, this 12th day of December, 1983, upon consideration of the Petition of Lawrence Coal Company, and DER's answer thereto, and upon review of the record pertaining thereto, it is hereby ORDERED that the Petition be and hereby is denied.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR., MEMBER

EDWARD GERJUOY, MEMBER

DATED: December 12, 1983

cc: Bureau of Litigation
William M. Radcliffe, Esquire
Stanley R. Geary, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
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CITIZENS OPPOSING SEWAGE TREATMENT SYSTEMS :

:

Docket No. 83-172-M

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and BEAR CREEK WATERSHED AUTHORITY, Permittee

OPINION AND ORDER

On May 26, 1983, the Department of Environmental Resources (DER) issued NPDES Permits, Nos. PA 0094200 and PA 0094218, to the Bear Creek Watershed Authority.

Pursuant to statutory requirements, which requirements are not herein contested, DER caused the fact of issuance of the said permits to be published in the Pennsylvania Bulletin dated June 11, 1983.

Citizens Opposing Sewage Treatment Systems (COSTS) (appellants), filed a notice of appeal with the Board on August 15, 1983, wherein the appellants contest the validity of the issuance of the said permits.

On August 24, 1983, DER filed a Petition to Quash Appeal, and appellants filed its Answer to Petition to Quash on September 30, 1983. The Permittee herein, Bear Creek Watershed Authority, filed its Petition to Quash on September 9, 1983.

Subsequent to the filing of the petitions to quash, and the response thereto, several other motions were filed by the parties, none of which will be discussed

herein for reasons which will become obvious under the ORDER to be entered upon the petition to quash.

In support of its petition, DER cites the Board to 25 Pa. Code 21.52(a) which provides, in pertinent part:

> "(a) Except as specifically provided in 21.53 of this title (relating to appeal nunc pro tunc), jurisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of such action or within 30 days after notice of such action has been published in the Pennsylvania Bulletin unless a different time is provided by statute, and is perfected in accordance with subsection (b) of this action."

DER argues that, under the mandatory provisions of the above specified regulation, the appeal cannot be heard by the Board since the notice of appeal was filed more than 30 days after publication of the facts of issuance of the contested permits in the Pennsylvania Bulletin.

In the answer filed by appellants, the appellants admit that the permits were issued on May 26, 1983, and that the fact of issuance of the permits was published in the Pennsylvania Bulletin on June 11, 1983. However, appellants aver therein that since the appeal was filed within 30 days of their receipt of "notice" of DER's action on the permits, the appeal was timely filed.

In support of the above stated position, appellants included in the notice of appeal a copy of a transmittal memo from one Terry Dreir, of DER's Bureau of Water Quality Management dated July 13, 1983 and addressed to one Mrs. Margaret Day. The memo refers to a conversation of July 12, 1983 relating to the issuance of the permits in question. Nowhere in the memo, or in appellant's Answer, is Mrs. Margaret Day identified as a representative of the appellants herein.

Appellant's reliance upon the transmittal memo of July 12, 1983 is misplaced.

No one contests the applicability of 25 Pa. Code 21.52(a) to this factual situation, and, in fact, all parties rely upon their own interpretation of that regulation as the basis for their position.

Appellants' would have the Board rule that having filed the notice of appeal within 30 days of receipt of the transmittal memo, the requirements of the regulation were satisfied and the notice of appeal was therefore timely filed. That position is unquestionably correct when DER is required to notify a "person" of its final action, and thereby give the recipient the opportunity to file an appeal should the recipient so desire. In such a situation, the finality of the action of DER is determined, and the requirement of due process in the form of appeal procedures is met. In such cases, the "final action" of DER contains therein the appeal rights of the recipient insofar as appeals to the Board are concerned.

In the instant case, DER had no duty to advise appellants of its final action upon Permittees application for NPDES permits. Appellants were not parties to that application process. DER fulfilled its duty to permittee by advising permittee of its final action on the application.

The duty owed to appellants by DER was to publish the fact of issuance of the permits in the Pennsylvania Bulletin. This requirement of 25 Pa. Code 21.52(a) provides the members of the "public", of which body appellants are members, who might be aggrieved by the issuance of the permits, with the due process notice of appeal rights to the Board.

It is obvious from a plain reading of 25 Pa. Code 21.52(a) that the notice requirements for appeals from final actions of DER are divided into two (2) categories, those wherein notice is given to the person engaged directly with DER in some function or process such that DER knows the identity of the person who will be affected by DER's final action, i.e., Permittee herein, and those situations wherein DER's final action may affect the public and the specific identity of members thereof is not known to DER. Appellants are members of that latter category. To place upon DER the burden of notifying directly all persons who may be adversely affected by its final actions, would be unreasonable and unworkable.

However, in order to serve notice of appeal rights to such members of the public as might be adversely affected by the final actions of DER, and in order to meet the

requirements of due process, the framers of the regulation, 25 Pa. Code 21.52 (a), properly provided for publication in the Pennsylvania Bulletin of the fact of DER final actions which have the potential of adverse effect upon the public.

The operative date of notice to appellants therefore was June 11, 1983, the date of publication in the Pennsylvania Bulletin and not the date of receipt of the transmittal memo, even assuming the memo was received by appellants on July 15, 1983.

Since the notice of appeal was filed more than 30 days after the operative date of publication in the Pennsylvania Bulletin on June 11, 1983, the appeal was not timely filed and the appeal must be dismissed, since the Board is without jurisdiction to hear appeals which are filed more than 30 days after notice of the final action of DER. *Joseph Rostosky Coal Company v. Commonwealth of Pennsylvania, DER,* EHB Docket No. 75-257-C (issued January 9, 1976), aff'd 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). *Thomas E. Siegel v. Commonwealth of Pennsylvania, DER,* EHB Docket No. 79-152-B (issued January 11, 1980).

By reason of the dismissal of this appeal, the various other motions filed in this appeal are rendered moot and therefore require no action by the Board.

O R D E R

AND, NOW, this 16th day of December, 1983, the appeal of Citizens Opposing Sewage Treatment Systems, at EHB Docket No. 83-172-M, is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: December 16, 1983

cc: Bureau of Litigation
Mark R. Morrow, Esquire
Richard S. Ehmann, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

W. PAUL GLENN :

:

Docket No. 83-233-M

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

By letter dated September 9, 1983, the Department of Environmental Resources (DER), Charles E. Gumbo, Assistant Director, Bureau of Mining and Reclamation, advised the appellant, W. Paul Glenn, that the several bonds posted by appellant upon mining sites in Union and Clover Townships, Jefferson County, Pennsylvania, were declared forfeit by reason of appellant's failure "to correct the violations and to reclaim the area affected by (appellant's) mining operations...."

The appellant received the above referenced "final action" letter of DER on September 12, 1983. An appeal was filed by appellant with the Board on October 13, 1983.

On October 21, 1983, DER filed a Petition to Quash appeal, for the reason that the appeal herein had not been filed within the statutorily prescribed time limit of thirty (30) days from the date of receipt of DER's final action, see 25 Pa. Code §21.52 (a).

As of December 6, 1983 the appellant had not filed a response to DER's Petition to Quash appeal.

There is no doubt as to the facts, which, as recounted above, show that the appeal herein was not filed with this Board until more than thirty (30) days had elapsed from the time the appellant received DER's forfeiture letter.

This Board has held, in a long line of appeals, that appeals filed more than thirty (30) days after the date of receipt of the Department's final action deprives the Board of jurisdiction to consider the appeal. *Borough of Grove City v. Commonwealth of Pennsylvania, DER* EHB Docket No. 74-267-C (Issued August 10, 1975); *Keystone Tall Tree Girl Scout Council v. Commonwealth of Pennsylvania, DER, and Benjamin Coal Co.*, EHB Docket No. 83-152-B (Issued September 6, 1983). Also the Commonwealth Court has upheld the Board's interpretation of this filing requirement as conferring or depriving jurisdiction in the Board. *Joseph Rostosky Coal Company v. Commonwealth of Pennsylvania, DER*, 26 Pa. Cmwlth. Ct. 478, 364 A.2d 761 (1976).

In view of the Board's prior rulings, and the decisions of the Commonwealth Court, the Board is powerless to consider this appeal.

O R D E R

AND NOW, this 20th day of December, 1983, for the reasons set forth in the foregoing Opinion, the appeal of W. Paul Glenn, at EHB Docket No. 83-233-M is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: December 20, 1983

cc: Bureau of Litigation
Joseph J. Lee, Esquire
Richard S. Ehmann, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

W. A. COTTERMAN :

:

Docket No. 83-155-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION FOR SANCTIONS

On June 27, 1983, DER sent the appellant three letters forfeiting approximately $120,000 in bonds covering appellant's surface mining operations at a number of sites; these sites were permitted under Mine Drainage Permits 3575SM36, 3676SM5 and 3676SM31, along with Mining Permits 603-12, 12(a), 14 through 14A6 and 16. The alleged reasons for the forfeiture were, inter alia, the presence of acid mine discharge and the failure to properly reclaim. Thereafter the appellant, who does not have an attorney, managed to perfect his appeal of these bond forfeitures. His Notice of Appeal, filed August 12, 1983, asserted the sites had been 90% backfilled, and further claimed that:

> The reason the seeding wasn't completed on the job was I had sickness, lack of coal sales due to the economy conditions, also Equipment breakdowns and short of funds.

On September 16, 1983, DER served Interrogatories and a Request for Production of Documents on the appellant. There were 48 individual interrogatories, of the following sort:

1. State all facts and information which in any fashion support or undermine the allegation in your Notice of Appeal that "The backfilling is 90% complete..."as to the site covered by Mining Permit No. 603-16...

15. Separately as to each mining site...state all facts or information which support or undermine the allegation in your Notice of Appeal that the site is ready to be seeded...

31. Between January 1, 1975 and June 27, 1983, identify by type and serial number each piece of operable backfilling equipment on a site by site basis..., and as to each identified piece of equipment, state the length of time it was on this site and the amount of that time it was operable.

Wherever relevant, each individual interrogatory contained the phrase: "Identify all documents which support or undermine this contention." The Request for Production asked for all documents identified in the answers to the Interrogatories, along with "All documents used to prepare W. A. Cotterman's Notice of Appeal."

On October 31, DER--asserting it had received no response either to its Interrogatories or to its Request for Production--filed a Motion for Sanctions. The Board was asked to order Cotterman to comply with DER's discovery requests, or in the alternative to impose sanctions such as dismissal of the appeal. On November 9, 1983 the Board ordered the appellant to comply with DER's discovery request by November 21, 1983. Failure to comply, the appellant was warned, risked sanctions under 25 Pa. Code §21.124, including possible dismissal of his appeal.

On November 28, 1983, DER--asserting the Board's November 21, 1983 deadline had passed without any response from appellant--renewed its Motion for Sanctions. As of this date, the appellant still has not responded; indeed the Board has had no communication from appellant since September 9, 1983, when he finally perfected his appeal. In the meantime the appellant's pre-hearing memorandum, due November 28, 1983 in accordance with our Pre-Hearing Order No. 1, has not been filed.

On the above facts, some sanctions on the appellant certainly are in order; we cannot permit this pro se appellant's inexperience with legal practice to be an excuse for his total refusal (since September 9, 1983) to heed this Board's orders. However, we are not going to dismiss the appeal. In a bond forfeiture appeal DER bears the burden of proof. Apollo Corporation v. DER, Docket No. 81-130-G, 1982 EHB 57; Rockwood Insurance Company v. DER, Docket No. 78-168-S, 1981 EHB 424. Although DER's discovery requests are within the boundaries of the Pa. Rules of Civil Procedure, Rules 4001ff, nevertheless it is inappropriate to permit DER to avoid its burden by first piling paperwork on this inexperienced appellant, and then granting DER's motion to dismiss the appeal when the paperwork is not accomplished.

The accompanying Order embodies what we believe to be appropriate sanctions on the appellant, consistent with recent rulings by this Board and by the Pennsylvania courts. De Angelis v. Newman, 460 A.2d 730 (Pa. 1983); Byard v. Brogan, 460 A.2d 1093 (Pa. 1983); Dunn v. Maislin Transport Limited, 456 A.2d 632 (Pa. Super. 1983); Armond Wazelle v. DER, Docket No. 83-063-G (Opinion and Order, September 13, 1983); Township of South Park v. DER, Docket No. 83-068-G (Opinion and Order, December 2, 1983). We are aware there may be countervailing authority to the opinions just cited, e.g., Marshall v. Southeastern Pa. Transportation Authority, 463 A.2d 1215 (Pa. Cmwlth. 1983). But we believe our authorities, which very much disfavor dismissal as a sanction, represent the better view under the circumstances of the instant appeal, especially the circumstance that DER bears the burden of proof. We see no reason why DER cannot present its case-in-chief without the benefit of the discovery it has requested; DER's interrogatories are directed primarily toward appellant's defenses against the bond forfeiture, as outlined by the appellant in his Notice of Appeal. Our Order provides for the possibility

that DER will need the requested discovery to meet the appellant's defenses. Our Order also takes into account the possibility that the appellant's silence since September 9, 1983 means he has abandoned this appeal, in which event dismissal would be appropriate.

O R D E R

WHEREFORE, this 22nd day of December, 1983, it is ordered that:

1. On or before January 6, 1984, the appellant is to file a statement with the Board affirming his intention to appear at a hearing on the merits of this appeal, to contest DER's claim that the bonds which are the subject of this appeal should be forfeited; a letter embodying this portion of the instant Order has been mailed separately to the appellant.

2. If appellant fails to file the statement called for in paragraph 1 supra, this appeal will be dismissed.

3. If appellant files the aforementioned statement, then DER is to file its pre-hearing memorandum in this matter on or before January 27, 1984.

4. A hearing on the merits of this matter, if necessary, will be scheduled shortly after DER files its pre-hearing memorandum.

5. At the hearing on the merits, the appellant's participation will be limited to cross examination of DER's witnesses, to presentation of such evidence as normally would be offered in rebuttal (rather than in the appellant's case-in-chief) and to filing post-hearing briefs.

6. Appellant will be expected to be personally present at the hearing on the merits, and to take the stand as a DER witness if DER so requests.

7. At the hearing on the merits, after appellant has presented his rebuttal testimony, DER will be permitted to move for a continuance on the grounds that DER--not having been able to engage in discovery--needs more time to present its case in opposition to the appellant's rebuttal.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: December 22, 1983

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
W. A. Cotterman