Environmental Hearing Board

Adjudications and Opinions

1995

Volume III

COMMONWEALTH OF PENNSYLVANIA
George J. Miller, Chairman

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

1995

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1995.

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

ADJUDICATIONS

OPINIONS AND ORDERS

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SECRETARY TO THE BOAF

ELEANOR JEANE THOMAS	:	
	:	
v.	:	EHB Docket No. 95-046-E
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MOSTOLLER LANDFILL, INC., Permittee	:	
MICHAEL STRONGOSKY	:	
	:	
v.	:	EHB Docket No. 95-054-E
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MOSTOLLER LANDFILL, INC., Permittee	:	Issued: August 16, 1995

OPINION AND ORDER SUR MOTION FOR RECONSIDERATION

By: Richard S. Ehmann, Member

Synopsis

The Motion for Reconsideration of a Board opinion and order dismissing these two appeals for lack of standing is denied. The Motion fails to show that grounds for reconsideration exist under 25 Pa. Code §21.122. Each appellant was afforded ample opportunity to demonstrate either sufficient facts to show standing or that the motion to dismiss, and thence our opinion granting the motion, erroneously interpreted the law on standing, prior to entry of our decision. As a result, movants may not attempt such showings through their joint Motion For Reconsideration.

In a Motion For Reconsideration it is not sufficient to merely show that the facts as to standing are not as recited in our opinion. Movants must also show that these facts were unavailable to them to bring to the Board's

attention despite their exercise of due diligence, prior to issuance of our opinion.

OPINION

On June 23, 1995 the Board issued an Opinion in which the Board granted Mostoller Landfill, Inc.'s ("Mostoller") Motion To Dismiss the instant appeals.[1] Our order granting the Motion also unconsolidated these appeals from a companion appeal at Docket No. 95-031-E, which remains before us.[2]

On July 7, 1995 the Board received from Eleanor Jeane Thomas and Michael Strongosky (collectively "Thomas") a document titled "Reconsideration Of Opinion And Order Sur Mostoller Landfill, Inc.'s Motion To Dismiss Eleanor Jeane Thomas and Michael Strongosky From The Appeal EHB Docket No. 95-031-E (Consolidated) Under Section 21.122 Under (a) 2, Of Chapter 21 Environmental Hearing Board". As this filing seeks reversal of our dismissal of these appeals, we will treat it as a Motion For Reconsideration.

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1 The Order accompanying that opinion was not dated because of a Board oversite. A dated dismissal order was issued on June 27, 1995 but mistakenly bore the date of June 23, 1995. Because of its error the Board treats the order's issuance date as June 27, 1995. Because the presiding Board Member received Thomas' Motion too late for him to give consideration to its merits within the period specified in 25 Pa. Code §21.122(a), the Board withdrew the order dated June 23, 1995 while it considered the merit of this Motion.

2 At the time these appeals were filed they received individual docket numbers but the appeals were consolidated with the appeal at Docket No. 91-031-E for trial. When these appeals were dismissed the dismissed appeals were unconsolidated with the still pending appeal at Docket No. 91-031-E. Despite this fact, the two dismissed appellants filed for reconsideration using Docket No. 91-031-E. Because we previously unconsolidated these appeals we are addressing this motion under these original docket numbers.

On July 14, 1995 the Board received Mostoller's Memorandum Of Law responding to this Motion. The Department of Environmental Resources ("DER")[3] has failed to file a response to the Motion.

On July 21, 1995 Thomas filed a letter with this Board dated July 20, 1995. This letter says it encloses Thomas' Motion To Deny the Motion of Mostoller Landfill to Dismiss Our Motion For Reconsideration. It also states that it encloses Thomas' "Motion Requesting Delay Of This Appeal EHB Docket No. 95-031-E Until All Inquiries Are Answered To Find Mostoller Landfill Inc.'s Complying With P.L. 913, No. 367 And Re-issue The Decision After All The Documents Presented by EJT and MS Are Considered At [sic] Being Part Of This Appeal, A The Decision Issued Was Not A Legal Document, As Signatures Appeared Before The Legal Document Was Completed, And Our New Discovery Be Permissible In This Appeal."[4] The letter also says it encloses two other Thomas' Motions with captions of equal length, and a copy of a letter from Thomas to the Pennsylvania State Police asking for an investigation of landfills in Pennsylvania and DER's issuance of permits for landfills. However, the enclosures with this letter did not include any of these Motions. With Thomas' letter was a copy of her letter to the State Police, a document captioned "Memorandum Of Law of Eleanor Jeane Thomas and Michael Strongosky In Response To Motion To Require The Department Of Environmental Protection To Provide Documents To Prove Mostoller Landfill Inc., Complied To The P.L. 913

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3 DER, to the extent it issues permits for landfills, became the Department of Environmental Protection as of July 1, 1995. We continue to refer to it as DER here only for consistency's sake - that being how the agency was referred to in our Opinion issued June 23, 1995.

4 Apparently the EJT and MS initials are Thomas' reference to each of the appellants.

No. 367 And Memorandum Of Law Of Eleanor Jeane Thomas And Michael Strongosky Response To Mostoller Landfill Inc. Motion To Deny Reconsideration For The Opinion And Order Sur Mostoller Landfill, Inc. s [sic] Motion To Dismiss." Additionally, Thomas' letter enclosed four separate proposed orders all of which would give Thomas different types of relief if they were entered by the Board. However, no such motions accompanied Thomas' letter despite its contrary assertions.[5]

Reconsideration of a final order of this Board, such as our order dismissing this appeal, is governed by 25 Pa. Code §21.122 of our Rules of Practice and Procedure. Envyrobale Corp. v. DER, 1994 EHB 1842. As 25 Pa. Code §21.122 points out, compelling and persuasive reasons to reconsider are generally limited to two situations. The first is where a decision to issue a final order is based upon a legal ground not considered by any party, which ground the parties should have the opportunity to brief. The second is where crucial facts set forth in the Motion For Reconsideration are not as stated in the decision and would cause reversal of the decision (but as to such facts the evidence thereof must have been unavailable at the merits hearing despite the movant's due diligence.) Thus, if this factual evidence could have been brought before the Board prior to the dismissal of the appeal, it cannot constitute grounds for the granting of reconsideration. J.C. Brush v. DER, et al., 1992 EHB 258.

Clearly, as Mostoller's Memorandum Of Law points out, this Board wrote its opinion on the issue of standing because it was raised to the Board

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5 These motions are not addressed further herein and neither are any matters pending in the appeal captioned County Commissioners, Somerset County v. DER, et al., EHB Docket No. 95-031-E, which was previously consolidated herewith.

through Mostoller's Motion To Dismiss which asserted this issue, and Thomas' response thereto. Our opinion took pains to try to explain the legal concept of standing to these *pro se* appellants. There can be no suggestion, therefore, that the decision reflected in the Board's Opinion was based on a legal issue which Thomas and Mostoller had no opportunity to address and which in fairness they should now be allowed to brief. Thomas may not have briefed this issue to the extent she would now like, but it was presented squarely to her by the Motion and she had an ample opportunity to do so prior to our June 23, 1995 Opinion. Thus the first of these two grounds for reconsideration under §21.122 is not met here. Newlin Corporation, et al. v. DER, 1989 EHB 1219.

Thomas' Motion also fails to fit within the second general category of cases where reconsideration will be granted. Thomas' Motion makes a series of arguments to rebut our conclusion on standing. It also makes some factual allegations such as that the distance from Thomas' house to the landfill is five miles and that in a tire fire in a landfill elsewhere in Pennsylvania, the fire caused sufficient air pollution to warrant closure of a school twenty miles away. As to such allegations two problems arise. First, the truth of the Motion's factual allegations is neither sworn to by affidavit nor attested to by a verification. Moreover, and more importantly, Thomas' Motion fails to attempt to make any showing that these alleged facts could not, with due diligence on Thomas' part, have been offered to the Board prior to the issuance of our June 23, 1995 Opinion. As we said in Elmer R. Baumgardner, et al. v. DER, 1989 EHB 172 at 175:

> "We will not permit Baumgardner to wait until it receives an adverse decision, and then come forward with evidence which it should have introduced at the previous hearing. To do so would make a sham of the Board's hearing

> procedure... [T]he precedent created would prevent us from ever issuing a definite and final decision. The losing party would keep coming back with additional evidence..."

Neither Thomas nor any other appellant, whose appeal is dismissed for standing issues, is allowed to return again and again to this Board each time adding more factual allegations to attempt to establish standing. This appeal began in early March of 1995. Thomas had from the date she learned of DER's permit issuance decision (prior to the appeal's actual filing in March) until June 1, 1995, when her response to Mostoller's Motion To Dismiss was filed, to gather any evidence of standing and provide it to us. Absent a showing that this evidence was not previously available to Thomas, it is too late now. Finally to the extent Thomas' Motion seeks to now show standing it is an attempt to re-argue the position Thomas took earlier. We do not allow the concept of reconsideration to be used in that fashion. Pete Claim v. DER, EHB Docket No. 94-125-E (Opinion and Order issued May 8, 1995.)

25 Pa. Code §21.122 says reconsideration is generally limited to the two kinds of situations discussed above. This section thus implies there may be other circumstances where we will reconsider, so we must look at Thomas' specific arguments even after concluding they fit into neither general category set forth in 25 Pa. Code §21.122.

Thomas argues that the Board led her to believe she had credence in this appeal even though the Board knew she had no standing, by allowing her to file motions and engage in discovery and by ruling on her motions. Moreover, Thomas says the other parties aided in the misleading of Thomas by sending her copies of their filings and conducting discovery. From this argument it appears Thomas is asserting the Board's misleading of Thomas waives the adverse parties' right to subsequently raise a claim of her lack of standing.

We reject this argument because the Board did not mislead Thomas. This Board is not empowered to *sua sponte* decide an appellant lacks standing and dismiss an appeal. We only decide such issues when, and if, another party in the appeal raises them to us. Here, Mostoller raised this issue on May 10 and within a month after we received Thomas' response to Mostoller's Motion we decided this issue against Thomas. If it had never been raised by an opposing party, as is true in most appeals to this Board, we would never have reached any conclusion on whether Thomas had standing or not. Moreover, we observe that even if this were not so and that we had by our action unintentionally misled Thomas, the Board could not, by so doing, foreclose Mostoller's ability to raise this issue. Each party in this appeal has the right to raise or elect not to raise each legal or factual issue it has available to it. The parties cannot be foreclosed the right to timely raise such an issue by the actions of the Board in moving an appeal through the adjudicatory process.

Thomas' Motion also attacks Mostoller's use of experienced counsel to represent it and challenges counsel's representation of Mostoller because "common sense and moral values" should tell Mostoller's counsel that protecting area citizens from a landfill is more important than counsel's earning a better living. This unwarranted assault on counsel for an opposing party could be rejected and soundly criticized for a host of reasons. It certainly flies in the face of the concept of a party's right to retain the counsel of its choice. We will not discuss its lack of merit further but reject it because it has nothing to do with Thomas' lack of standing.

Also lacking any tie to Thomas' problems as to standing, are her allegations about non-compliance by Mostoller with her interpretation of the requirements of what Thomas previously identified as "Engineers Land Surveyors

and Geologist Registration Law Act of 1945 P.L. 913 No. 363 (amended December 16, 1992)" and which she now calls P.L. 913 or P.L. 913 No. 363. Although this was discussed briefly in our opinion on standing and characterized as a merits issue there, Thomas has reraised it in the instant Motion. It remains a merits issue and constitutes no grounds for reconsideration of our conclusion that she lacks standing.

Thomas' next group of complaints concerning our opinion on standing, is the opinion's failure to discuss each of the filings she made, even including a letter her state representative wrote to DER inquiring about a review of DER's decision to issue this permit. Again, these letters, discovery materials and motions did not address the issue of Thomas' standing to appeal although they clearly show the strength of her belief that the permit should not have been issued. In writing our decision we addressed every Thomas filing which addressed standing; we are not required to comment on every piece of paper Thomas files.

Thomas also asserts her long interest in fighting both landfills and sludge dumping in her county as a reason to allow the appeal to continue. We do not doubt this interest and her beliefs in regard thereto. We do not doubt that she has strong views on environmental issues and particularly the hazards which she believes landfills pose. However, the strength and sincerity of a belief, no matter how strong, do not create standing where none exists.[6]

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6 Thomas also complains that the Opinion failed to address her Motion to amend the instant appeal to include challenging Mostoller's permit. Putting aside the implicit admission therein that she continued to complain in this appeal about another landfill's permit rather than focusing on Mostoller's permit, amendment of Notices of Appeal are governed by the decision in Commonwealth of Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. (footnote continues)

Thomas next challenges standing as a concept. She contends it is antiquated, and in need of legislative revision to allow residents of a county where a landfill will locate, to have standing. To the extent the General Assembly wishes to reform the concept of standing to reflect Thomas' position our opinion is no bar thereto. It is free to do so. However, the possibility of future legislative reform does not change the concept today or create standing for Thomas today.

In Thomas' subsequently filed Memorandum of Law, she asserts that our Opinion issued on June 23rd was not a legal document because of the date's omission from the order dismissing her from that appeal.[7] Our unfortunate secretarial omission was rectified on June 27, 1995, as mentioned above. It does not change her lack of standing.

The Memorandum of Law also asserts Thomas' proof of Mostoller's violation of "P.L. 913" is sufficient reason to allow her appeal to continue and that the Board only dismissed Thomas' appeal after she produced proof of violation of this law. The Board has not ruled on the merits of Thomas' claims as to violation of P.L. 913. This is not a statute administered by DER and we are aware through copies of her letter that Thomas has raised her concerns over this law's violation with both another Board and the State

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(continued footnote)
Cmwlth. 78, 509 A.2d 877 (1986) *aff'd* on other grounds, 521 Pa. 121, 555 A.2d 812 (1989). As this decision would be applied here, had we not dismissed for lack of standing, it would have required denial of Thomas' Motion because Thomas' Notice Of Appeal contained no reservation of a right to later add new challenges; and this Motion was not filed until long after the permit's issuance.

7 As was also true with her Motion For Reconsideration, Thomas' Memorandum contains no citations to case law to support her various assertions. We attribute these omissions to her *pro se* status despite assertions that Thomas has taken paralegal training. Omission of such citations often leaves these arguments less than clearly focused.

Police. Before this Board the issue is whether DER violated various environmental statutes in issuing the landfill permit to Mostoller not whether affidavits as to the truth of answers to interrogatories must bear the seals of professional engineers who sign them on Mostoller's behalf. Even if Thomas could prove non-compliance with "P.L. 913" in affidavits on answers to interrogatories in this appeal, this does not create a reason to overlook Thomas' lack of standing or a ground for this Board to overturn DER's permit issuance decision.

Accordingly, the Board enters the following Order.

O R D E R

AND NOW, this 16th day of August, 1995, it is ordered that Thomas' Motion For Reconsideration is denied and the Board's decision issued on June 23, 1995 is reaffirmed with our prior Order dismissing Thomas' appeal, corrected to show that its issuance date was June 27, 1995.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: August 16, 1995

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M. DIANE SMITH
SECRETARY TO THE BOARD

ED HANSLOVAN COAL COMPANY :
:
v. : EHB Docket No. 95-037-E
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL PROTECTION : Issued: August 17, 1995

OPINION AND ORDER
SUR MOTION IN LIMINE

By: Richard S. Ehmann, Member

Synopsis

Ed Hanslovan Coal Company's ("Hanslovan") Motion In Limine, seeking to shift the burden of proof to the Department of Environmental Protection ("DEP") in this appeal from DER's refusal to release a portion of the mine site's bond, is denied. Pursuant to 25 Pa. Code §21.101(a), the burden of proof is on Hanslovan to prove it is entitled to bond release. Where an off-site discharge exists and is the cause of DEP's rejection of Hanslovan's request to release this bond, the burden remains on Hanslovan to prove its eligibility for bond release, including that its mine is not the cause of the discharge.

OPINION

Hanslovan filed the instant appeal with this Board on February 6, 1995. It challenges the DEP (formerly the Department of Environmental Resources) rejection of Bond Release Application No. 494102 for Hanslovan's mine in West Keating Township, Clinton County.

After the filing of the parties' Pre-Hearing Memorandum and before the merits hearing, counsel for Hanslovan advised the Board, in a telephonic

conference, of a dispute between the parties over the burden of proof here. Acting on the Board's advice and on June 15, 1995, Hanslovan filed its Motion In Limine, which seeks an order allocating to DEP the burden of proving the hydrological link between Hanslovan's mine site and several off-site discharges located as much as 900 feet from the mine's permit boundary.

Hanslovan's Motion asserts that DEP normally has this burden as to the link to off-site discharges, while the permittee normally has the burden of proof of entitlement to bond release. Hanslovan then argues that there is a conflict where a bond release denial is based on off-site discharges, and the better approach as to the burden of proof, despite contrary Board precedent, is to require proof of the discharge's link to the mine site by DEP rather than requiring Hanslovan to prove a "negative".

It can be no surprise that DEP opposes this Motion and maintains that it is Hanslovan's burden of proof from start to finish, including proof that its site is not linked to these discharges.

Based on a number of reasons, we agree with DEP. Our first reason for our agreement with DEP is the number of prior Board decisions stating that the burden of proof in appeals from denials of a bond's partial release is on the applicant under 25 Pa. Code §21.101(a). See for example, Dunkard Creek Coal, Inc. v. DER, 1988 EHB 1197, ("Dunkard Creek"); H&R Coal Co. v. DER, 1986 EHB 979; and C&K Coal Co. v. DER, 1992 EHB 1261. As is pointed out in these appeals, under 25 Pa. Code §21.101(a), the party asserting the affirmative of an issue bears the burden of proof and, in appeals of this type, it is the applicant for bond release who is asserting the affirmative, i.e., its entitlement thereto.

Secondly, Dunkard Creek is an opinion exactly on point as to this issue, contrary to Hanslovan's assertion. In it, DER denied three bond releases because of both contamination of an off-site spring and a separate off-site discharge which it alleged to be linked to Dunkard's two mines. There, Dunkard Creek also filed a motion in limine seeking to shift the burden of proof to DER as to the hydrologic link of the mine site to the contaminated spring and the discharge. DER opposed Dunkard Creek's motion, arguing that DER bears the burden of proof as to such links where it orders the miner to act to abate same, in other words where DEP acts affirmatively, but not where it acts respondingly, i.e., where it responds to the affirmative acts (a bond release request) of a miner.[1] We continue to agree with that decision and recognize the applicability here.

Additionally, the Board rejects Hanslovan's assertion that DEP normally has the burden of proof as to an off-site discharge's hydrogeologic link. Hanslovan paints with too broad a brush. Wherever DEP is ordering a miner to study, treat or abate an off-site discharge, it does bear the burden of proof, as Hanslovan argues, but it does so because it is acting affirmatively and directing the miner to act. Al Hamilton Contracting Co. v. DER, EHB Docket No. 92-471-E (Adjudication issued July 18, 1994), *affirmed* ___, ___ A.2d ___ (Pa. Cmwlth. 1995, No. 2057 C.D. 1994 Opinion issued May 11, 1995); Al Hamilton Contracting Co. v. DER, 1993 EHB 1651; Hepburnia Coal Co. v. DER, 1986 EHB 563. What is determinative in these appeals is who is acting affirmatively, not whether or not there is a link between an off-site

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[1]That these discharges are off-site is not clear within the four corners of the Dunkard Creek appeal cited above. As pointed out in DEP's Brief, however, this is clear from a reading of Dunkard Creek Coal, Inc. v. DER, 1993 EHB 536, where they are again discussed.

discharge and a mine site. As a result, when a bond release denial is at issue, it is not normal that DEP has the burden of proof, just as it is not normal that DEP has the burden of proof when a permit applicant challenges a permit denial (because there it is the prospective permittee who is asserting the affirmative, i.e., entitlement to its permit.) Willowbrook Mining Company v. DER, 1992 EHB 303; Croner, Inc., et al. v. DER, 1993 EHB 271.[2]

Hanslovan also argues that it should not have to prove a negative i.e., it should not have to prove its site is not causing these off-site discharges of mine drainage. It asserts the burden of going forward with the evidence should shift to DEP once Hanslovan shows no violations within the boundaries of its permit, because it is a DEP affirmative defense that off-site conditions create a reason to deny the bond release application.

We disagree with Hanslovan's characterization of the burden of proof as to off-site discharges as being an affirmative defense offered by DEP. If Hanslovan wants a bond release, it applies to DEP for same pursuant to 25 Pa. Code §86.171. Under 25 Pa. Code §86.171(f), DEP reviews this site and the application to determine: (1) if Hanslovan complies with Section 86.172; (2) if it has complied with applicable acts, regulations and permit conditions; and (3) whether pollution of surface or subsurface water is occurring (and the probability of future pollution or continued present pollution, and its abatement cost). Moreover, 25 Pa. Code §86.172(c) prohibits DEP granting a bond release if it would leave the remaining bonds at a figure which is less

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[2]Moreover, as DEP's Brief notes, where a permit applicant challenges a permit denial based on failure to prove that proposed mine will not result in water pollution, the applicant has a burden of proof similar to that here, i.e., that the mine is not now causing pollution. See Harman Coal Co. v. Commonwealth, DER, 34 Pa. Cmwlth. 610, 384 A.2d 289 (1978); Hepburnia Coal Co. v. DER, 1992 EHB 1315.

than is necessary to cause the mine site to comply with the applicable acts, regulations, and permit conditions. These acts and regulations referenced in §86.171(f) include The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1, which in turn prohibits discharges from mines and a DEP release of mining bonds when such discharges occur, Thompson & Phillips Clay Company v. DER, 136 Pa. Cmwlth. 300, 582 A.2d 1162 (1990), appeal denied, 528 Pa. 640, 598 A.2d 996 (1990). Thus, these regulations require a demonstration of compliance by the bond release applicant, rather than some affirmative defense offered by DER.

It is true that these regulations do not explicitly command that the applicant make the requested showings before DEP makes its decision on whether to release or not release these bonds. However, it is applicants like Hanslovan who have mined the site on which release is now sought and thus have the most intimate knowledge of what the conditions at the site have been throughout coal extraction and as much reclamation as has occurred up until submission of the release application. As such, applicants for bond release are the entities best able to say what has occurred on the site and adjacent thereto. In turn, this suggests that it is more logical that they make the demonstrations of compliance with the regulations and statutes, as opposed to DEP starting from scratch to gather the information to decide this question, with the site's miner merely submitting a request for bond release which does not contain the evidence to support same. Clearly, the Board's experience in other appeals to it, whether they be permits for solid waste disposal sites or sewage treatment plants, suggests applicants are to make the demonstration to DEP of their proposal's compliance with the law and applicable regulations.

Finally, having reviewed all of the cases cited to us by both sides only to find they are not directly on point, we note that while there is a general consensus in these cases that parties need not prove a negative, it is also clear that there is no general rule applicable without exception to all cases. Further, Barrett v. Otis Elevator Company, 431 Pa. 446, 246 A.2d 668 (1968); Carl v. Grand Union Co., 105 Pa, Super. 371, 161 A. 429 (1932); U.S. Gypsum Co. v. Birdsboro Steel Foundary & Machine Co., 160 Pa. Super. 548, 52 A.2d 344 (1947), seem to say that where a party asserts the affirmative of an issue, it assumes the burden of proof of the elements of that affirmative position even if one element of the issue is proof of a negative.

Accordingly, we enter the following order.

ORDER

AND NOW, this 17th day of August, 1995, it is ordered that Hanslovan's Motion In Limine is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: August 17, 1995

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M. DIANE SMITH
SECRETARY TO THE BOA

JOSEPH R. and DONNA R. SANTUS	:	
	:	
v.	:	EHB Docket No. 94-163-E
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES and	:	
NORTH CAMBRIA FUEL CO., Permittee	:	Issued: August 18, 1995

ADJUDICATION

By: Richard S. Ehmann, Member

Synopsis

The Board dismisses a third party challenge to the Department of Environmental Resources' (DER) (now the Department of Environmental Protection) renewal of a mining activity permit issued to the operator of a coal preparation facility located near the appellants' residence. The appellants have failed to sustain their burden of proving by a preponderance of the evidence that DER, in issuing the renewal permit, acted contrary to law or abused its discretion. The appellants have not established that the permit renewal application did not comply with section 3.1 of SMCRA, 52 P.S. §1396.3a(d), or did not comply with DER's regulations at Chapters 86 and 89 of 25 Pa. Code. While the appellants have shown that they are disturbed by noise and dust which they assert is associated with the tipple and trucks hauling coal to and from the tipple for processing, they have failed to prove that DER did not consider noise and dust emanating from the tipple or that noise and dust coming from the tipple is a public nuisance.

BACKGROUND

Appellants Joseph R. Santus and Donna R. Santus, *pro se*, commenced this appeal on June 28, 1994, objecting to DER's June 8, 1994 renewal of Mining Activity Permit No. 32901602 issued by DER for continued operation of a coal preparation facility owned and operated by North Cambria Fuel Company (North Cambria), known as the Route 22 Tipple, located in Burrell Township, Indiana County.[1] The appellants reside in Burrell Township approximately 700 feet from the Route 22 Tipple. They object to DER's issuance of the permit to North Cambria because of noise and dust they experience at their home which they assert emanates from the Route 22 Tipple.

A hearing on the merits of this appeal was held before Board Member Richard S. Ehmann on January 26-27, 1995 and January 30, 1995, at which the appellants appeared *pro se* despite the Board's encouragement of the retention of legal counsel to represent them. At the close of the appellants' case-in-chief, North Cambria and DER raised a motion to dismiss this appeal. (Notes of Testimony (N.T.) at 224) Board Member Ehmann advised the parties that as a single Board Member, he could not rule on this motion according to the Board's rules at 25 Pa. Code §21.86. (N.T. 229) North Cambria and DER then elected to proceed with a presentation of their cases-in-chief.

Upon receiving a copy of the transcript of the merits hearing from the court reporter, the parties were directed by a Board order issued February 16,

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[1] This appeal initially was consolidated with another appeal, Docket No. 94-169-E, at the instant Docket No. by Order of the Board issued September 1, 1994. When the appellant at Docket No. 94-169-E failed to respond to our rule to show cause why her appeal should not be dismissed for her failure to comply with our Pre-Hearing Order No. 1 by filing her Pre-Hearing Memorandum, the two appeals were unconsolidated by our order issued November 15, 1994, and the appeal at Docket No. 94-169-E was dismissed.

1995 to file their respective post-hearing briefs. We received the appellants' post-hearing brief on March 13, 1995, North Cambria's post-hearing brief on April 6, 1995, and DER's post-hearing brief on April 7, 1995. After seeking and receiving an extension of the deadline for filing their reply post-hearing brief, the appellants filed with the Board two documents, one captioned "Reply Brief to Steven Lachman [sic] Post-Hearing Brief", and the other, "Reply Brief to John Bonyas [sic] Post-Hearing Brief", on May 2, 1995. North Cambria then, on May 12, 1995, filed a motion to strike the appellants' reply post-hearing brief to North Cambria's post-hearing brief because matter raised by the appellants in their post-hearing brief is not of record. DER, in its post-hearing brief, likewise urges that any matter raised by the appellants in their briefs which is not of record should be stricken. The appellants responded to this motion to strike with a document filed on May 26, 1995. We will address this motion to strike in this adjudication before ruling on the merits of the appeal.

The record before us consists of a transcript of 566 pages and a number of exhibits. Any arguments not raised by the parties' post-hearing briefs are deemed waived. Lucky Strike Coal Co. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988). After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellants are Joseph R. Santus and his wife Donna R. Santus. (Notice of appeal)

2. Appellee is DER, which is the agency of the Commonwealth authorized to administer and enforce the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.; the Surface Mining Conservation and

Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq.; the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §4001 et seq.; the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 et seq.; and the rules and regulations promulgated thereunder.

3. Permittee is North Cambria, which is the owner and operator of a coal processing facility known as the Route 22 Tipple. North Cambria operates the Route 22 Tipple in Burrell Township, Indiana County, pursuant to Mining Activity Permit No. 32901602, issued by DER. (B Ex. 1)[2]

4. The Santuses' residence, which was built in 1946, is located in Burrell Township approximately 700 feet from the Route 22 Tipple. (N.T. 52, 212, 219, 327) The Santuses moved into their home in 1959. (N.T. 52) The Santuses' residence is highlighted in yellow on the map which is N Ex. 1. (N.T. 211)[3]

5. Route 22, which is a four-lane highway running east to west, is located midway between the Route 22 Tipple and the Santuses' residence, with the Route 22 Tipple lying north of Route 22 and the appellants' residence south of the Route 22 Tipple. (N.T. 56, 259; B Ex. 1) The Santuses' residence is 100 yards from Route 22. (N.T. 212) Indiana Avenue is located between Route 22 and the Santuses' residence. (N.T. 219; N Ex. 1)

6. The Santuses can hear noise from traffic on Route 22 from inside their home. (N.T. 56, 60)

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[2] "B Ex." is a reference to a stipulated Board exhibit. B Ex. 1 is the parties' joint stipulation of facts.

[3] "N Ex." is a reference to a North Cambria exhibit. "C Ex." indicates a reference to a Commonwealth exhibit, and "A Ex." indicates a reference to an exhibit of the appellants.

7. During 1993 and 1994, Route 22, in the area of the Route 22 Tipple and the Santuses' home, underwent reconstruction which involved tearing up and resurfacing four lanes of highway, installing a "jersey" barrier, and demolishing and reconstructing a railroad bridge which is located between 700 and 800 feet from the Santuses' residence. (N.T. 261, 330-331) This reconstruction work involved the use of rotary jackhammers, concrete saws, backhoes, bulldozers, and trucks. (N.T. 261, 544, 551-552) This reconstruction work caused dust and noise. (N.T. 261-262, 544)

8. The traffic on Route 22 creates a lot of dust and noise because not all of the trucks travelling on Route 22 hauling coal cover their loads with tarps, and many trucks travelling along Route 22 use jake brakes[4]. (N.T. 262, 269)

9. North Cambria's Route 22 Tipple is the company's only tipple. (N.T. 244) North Cambria first loaded coal from this tipple in 1977. (N.T. 244) The tipple has sedimentation control, including hay bales and a sediment pond, to treat run-off at the permitted area. (N.T. 289-290)

10. DER initially issued Mining Activity Permit No. 32901602 to North Cambria on September 27, 1982. (N.T. 534)

11. Truckloads of coal are hauled to the Route 22 Tipple using Route 22. The tipple receives approximately 200 loads of coal during a normal work shift. Once the coal is brought to the tipple, it is weighed and dumped into a "raw" coal pile. The coal is dumped into separate piles for blending purposes and is then dumped into an underground bin. The coal then is processed through a rotary breaker which separates the coal from rock. The

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[4] "Jake brakes" are safety devices which slow down a truck's engine, but create a loud noise in doing so. (N.T. 255)

coal continues to a belt line which takes the coal to a rotary stacker.[5] The rotary stacker places coal onto a "clean" coal pile. (N.T. 245-246, 257; B Ex. 1)

12. Two or three front-end loaders load the coal from the "clean" pile onto waiting train cars. (N.T. 246; A Exs. 13-1, 13-2, 13-3, 13-4, and 13-5) The trains arrive at the Route 22 tipple by proceeding from the west of the Route 22 Tipple, moving eastward slowly and continuously as the coal is loaded onto the cars. (N.T. 257) The train has between 85 and 105 cars, and each car has a 100 ton capacity. (N.T. 247) North Cambria has no control over the time of day during which the trains are loaded since the train schedules are set by Conrail. (N.T. 258) It takes approximately four to five hours to completely load the coal onto a train. (N.T. 247) Conrail requires the Route 22 Tipple to complete the loading of each 8,500 ton train within 289 minutes, with a penalty assessed for each minute over this limit. (N.T. 258) North Cambria currently loads between four and five trains each month, taking about 25 hours per month to do so. Prior to 1992, North Cambria had loaded as many as twelve trains each month at the tipple. (N.T. 244)

13. There is a high volume of traffic on Route 22 in the area of the Route 22 Tipple and the appellants' house. According to the 1994 daily logs kept by the Pennsylvania Department of Transportation, the average daily traffic is 7,618 vehicles travelling eastward and 7,604 vehicles travelling westward. (N.T. 263; N Ex. 2) Ten percent of the eastbound vehicles and eight percent of the westbound vehicles travelling on Route 22 on a daily

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[5] The "rotary stacker" is a belt run on a system of wheels. The rotary stacker places clean coal in piles for loading on trains while minimizing dust production because its belting prevents wind from blowing dust off the piles. (N.T. 256-257)

basis are trucks. (N Ex. 2) Of these, 200 trucks are transporting coal to the Route 22 Tipple. (N.T. 257)

14. Not all of the trucks which travel on Route 22 are destined for the Route 22 Tipple; more trucks hauling coal on Route 22 are not headed to or from the Route 22 Tipple than are headed to it. (N.T. 60, 269)

15. Trains also run on the railroad track adjacent to the Route 22 Tipple which are not headed to the tipple. (N.T. 259)

16. North Cambria submitted to DER an initial application for a mining activity permit for the Route 22 Tipple in 1989, when DER was formulating regulations which would control whether the tipple would be required to have a permit. (N.T. 365-366)

The Santuses' 1990 Complaint

17. DER received a complaint from Santus on May 15, 1990 on behalf of himself and other area residents regarding dust and noise being generated by the Route 22 Tipple. (N.T. 461; A Ex. 1)

18. George Chakot has been a Surface Mine Conservation Inspector (SMCI) with DER for the past seven years. Prior to his employment as an SMCI, Chakot was a Mining Specialist with DER for the previous seven years. (N.T. 458) Chakot's duties include inspecting coal processing facilities for compliance with DER's mining regulations. (N.T. 403, 458)

19. Chakot has been responsible for inspecting the Route 22 Tipple for DER's mining program since August of 1988. During Chakot's inspections of the Route 22 Tipple, he addresses fugitive dust[6] and water quality. (N.T. 403, 459) Chakot did not inspect the Route 22 Tipple for noise conditions nor had

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[6] "Fugitive dust" is any type of airborne material which would leave the permitted site. (N.T. 459)

he ever made note of noise conditions at the facility. (N.T. 461) Chakot is not responsible for inspecting the Route 22 Tipple as to air quality issues. (N.T. 403)

20. DER Air Quality Inspector Timothy Kuntz has been an air quality specialist with DER for five and a half years. (N.T. 540) Kuntz has inspected the Route 22 Tipple to make sure it is in compliance with air quality regulations at least once a year since 1989. Kuntz also drives by the Route 22 Tipple once or twice each week to look over conditions at the site, and he addresses with North Cambria any build-up of dirt or dust he notices at the tipple. (N.T. 539-541)

21. In response to the Santuses' complaint, DER's Inspector Supervisor, Tom McKay, directed Chakot to investigate the Route 22 Tipple. (N.T. 461; A Ex. 4) Chakot also contacted Kuntz, who accompanied Chakot on his site investigation. (N.T. 403, 540, 556)

22. Chakot spoke with Santus and arranged a meeting with Santus and the other residents of the area near the Route 22 Tipple. (N.T. 461) Chakot met with the Santuses and the other residents on May 17, 1990 at the Santuses' house. (N.T. 462) The residents expressed their concerns about noise and dust at the meeting. Chakot advised them that he was without authority to address their noise concerns, but that he would relay these concerns to North Cambria and make recommendations to the company on how to address these concerns. (N.T. 462; A Ex. 3)

23. Chakot met with North Cambria officials after the May 17, 1990 meeting, relaying the citizens' concerns to the company, and made recommendations to the company as to how to address concerns about noise from North Cambria's facility. (N.T. 463)

24. Girard G. Bloom has been a supervisor of North Cambria's operations for the past 38 years. Bloom is responsible for the Route 22 Tipple. (N.T. 242)

25. Chakot subsequently received a handwritten letter from Bloom which stated that Bloom had met with the area residents about their concerns and set forth the actions North Cambria would implement to address these concerns. (N.T. 463)

26. Donald Barnes, who was employed by DER's Bureau of Mining and Reclamation, wrote Santus a letter dated May 24, 1990, in which he noted Santus' noise and dust concerns and that the tipple permit application was currently under review by DER, and advised Santus that he was entitled to request an informal review of DER's decision. (N.T. 112; A Ex. 4) The appellants subsequently on May 31, 1990 submitted to DER a written request for an informal review. (N.T. 114; A Ex. 5)

27. By letter dated June 5, 1990, DER's William Plassio, who was Chief of DER's Coal Refuse/Prep Plant Section, advised the appellants that he was in receipt of their letter. (N.T. 116; A Ex. 6)

North Cambria's Mining Activity Permit Renewal Application

28. After DER decided to require North Cambria to submit a mining activity permit application, DER received an application from North Cambria for renewal of Mining Activity Permit No. 32901602 in June of 1991. (N.T. 365)

29. Upon DER's receipt of a mining activity permit application, DER's staff checks the application for administrative completeness and notifies various state and local agencies of the permit application. These agencies are then given time to comment on the application. (N.T. 367-368) The permit

application is then reviewed by an engineer and a hydrogeologist. An informal public conference is held, if one is requested, and written findings are made. If DER is satisfied that the application complies with its regulations, DER issues a bond request and compliance checks are conducted. Once DER is satisfied that the compliance is adequate and the bond is paid, DER issues the permit. (N.T. 368) DER did not complete its technical review of North Cambria's application until 1994 because of a large number of permit applications and a DER staff shortage which existed. (N.T. 367)

30. The informal conference regarding North Cambria's permit application, which Santus had requested, was on January 18, 1994. The appellants received notice of the informal hearing by way of a letter from DER to them dated December 23, 1993; the appellants attended this conference. (N.T. 121, 130; B Ex. 1; A Exs. 7 and 9) The purpose of this conference was to allow the residents to comment on North Cambria's permit renewal application. At this conference, the residents raised their complaints concerning dust and noise. (N.T. 130, 369; B Ex. 1; A Ex. 9)

North Cambria's Air Quality Permit

31. As part of its mining activity permit, North Cambria was required to secure an air quality permit from DER because North Cambria processed coal in excess of 200 tons per day or more than 50,000 tons per year at the Route 22 Tipple. (N.T. 370) DER's Bureau of Air Quality Control, in 1982, had issued to North Cambria Air Quality Permit No. 32-305-019, pursuant to the Air Pollution Control Act, for the Route 22 Tipple. (B Ex. 1)

32. DER's Air Quality Inspector Kuntz would issue a Notice of Violation (NOV) if he were to notice that the Route 22 Tipple was in violation of the

conditions of its Air Quality Permit or if there was visible dust coming from the facility site. (N.T. 542)

33. Kuntz did not observe any visible dust coming from the Route 22 Tipple during his inspections prior to January of 1994. (N.T. 542)

34. In reviewing an application to renew an Air Quality Permit, DER's Bureau of Air Quality Control issues a report and recommendation based on an evaluation conducted while the source is operating; DER does a compliance history check of the facility; and the facility is required to pay a permit reissuance fee. (N.T. 520-521)

35. Regarding North Cambria's Air Quality Permit renewal application, DER's Kuntz recommended granting the permit; DER found North Cambria had operated its facility in compliance with DER's regulations; and North Cambria paid the required fees. (N.T. 521)

36. DER's Bureau of Air Quality Control issued a renewal of Air Quality Permit No. 32-305-019 for the Route 22 Tipple on January 26, 1994. (C Ex. 4) Notice of this renewal of North Cambria's Air Quality Permit was published in the Pennsylvania Bulletin. There was no appeal by Santus to the Board of this permit renewal. (N.T. 527, 536; B Ex. 1)

37. North Cambria's Air Quality Permit includes the measures North Cambria is required to take to control dust at the Route 22 Tipple. These conditions are: 1) all coal trucks going to the Route 22 Tipple must be tarped; 2) the paved road into the facility must be swept at least once per day; 3) the drop height of the rotary stacker cannot be more than four feet; and 4) the "clean" coal storage pile should be kept at a minimum height. (N.T. 522; C Ex. 4)

DER's Investigation and Response to the Residents' Complaints

38. Joseph Leone has been Chief of DER's Bituminous Mining Permit Section for the past nine and a half years. (N.T. 364) Leone is responsible for, *inter alia*, oversight of permit application reviews including those related to coal processing facilities. (N.T. 365)

39. Following the informal conference held in January of 1994, Leone contacted DER's Bureau of Air Quality and scheduled a meeting at the site in March of 1994 to address the residents' concerns. (N.T. 372, 377-379) Representatives of DER's Bureau of Air Quality, the mine inspector responsible for the Route 22 Tipple, Leone and members of his staff, as well as representatives of North Cambria were in attendance at this meeting. (N.T. 371-372) Leone discussed with the North Cambria representatives the noise and dust complaints raised at the informal conference, and the North Cambria representatives explained the measures they had taken to address these noise and dust concerns. (N.T. 380) Although this meeting took place inside North Cambria's scale house at the Route 22 Tipple, which is approximately 150 feet from the area of the Route 22 Tipple in which the front-end loaders were being operated, it was not necessary to speak louder than in a normal conversational level. (N.T. 378-379)

40. Leone requested DER's Thomas Whitcomb to conduct a study of the noise levels at the Route 22 Tipple. (N.T. 373) Whitcomb is employed as a hydrogeologist with DER's Bureau of Mining and Reclamation in the Central Office. Whitcomb has worked both as a hydrogeologist or a geologist since June of 1970. (N.T. 406) Whitcomb was admitted as an expert witness in the area of noise. (N.T. 412)

41. After Whitcomb was contacted by Leone, Whitcomb arranged for field sound tests to be conducted in the area of the Route 22 Tipple. Whitcomb conducted sound tests at the site with McKay, who is the Inspector Supervisor for the area, and Chakot, on March 22, 1994. (N.T. 412)

42. On his way to conduct the sound tests, Whitcomb spoke with Santus. (N.T. 219, 221, 413) He also spoke with some of the North Cambria officials between measurements. (N.T. 413)

43. Whitcomb used a General Radio Model 1565-D sound level meter, calibrated three months prior to the testing, to take decibel readings at five locations surrounding the Route 22 Tipple. (N.T. 412-414) Whitcomb used a scale of 80 to 90 decibels to measure noise levels around the Route 22 Tipple. He could also read ten decibels below the low end of the scale. (N.T. 419)

44. The five locations at which Whitcomb conducted his tests are indicated in black numbers 1 through 5 on N Ex. 1. The decibel levels recorded by Whitcomb at each location were:

1. 50 feet from the area where the front-end loaders were loading coal onto a train. Here, the decibel level reading varied from 78 to 87 decibels. Whitcomb attributes this variation to the movement of the front-end loaders.

2. The north side of Route 22 between the Santus residence and the tipple. The decibel levels recorded at this location were 65 decibels without traffic and 85 decibels with traffic on Route 22.

3. Near a group of homes along the south side of Route 22 between the Santus residence and the tipple. The decibel level readings at this location were: 82 decibels with westbound traffic opposite of where he was standing; 90 decibels with eastbound traffic; and 60 decibels without any traffic.

4. Along Indiana Avenue approximately 100 to 150 feet from the Santus residence. Here, Whitcomb recorded 60 decibels with no traffic passing, and 75 decibels with normal traffic in the distance.

5. On a hill north of the tipple. At this location, Whitcomb recorded 75 decibels.

(N.T. 414-416; N Ex. 1)

45. North Cambria did not alter its operations at the Route 22 Tipple from its normal operations on March 22, 1994, and its employees were not made aware that the sound testing was being conducted. (N.T. 266, 331)

46. While Whitcomb was conducting his sound testing, he observed front-end loaders loading a train with coal as the train moved slowly through the tipple. He also observed trucks driving in and out of the tipple and a conveyor being operated while he was conducting the sound test. (N.T. 266, 416)

47. Whitcomb compared the noise level readings from his March 22, 1994 testing with the federal Environmental Protection Agency's guidance document in order to determine the relevance of the noise levels he recorded at the Route 22 Tipple. (N.T. 424) When compared against this EPA guidance, the noise from the Route 22 Tipple in the vicinity of the Santus residence, without Route 22 traffic, is lower than the average sound level experienced by a "suburban housewife", and with Route 22 traffic is lower than that to which "an average suburban child" is exposed. (N.T. 425-426)

48. On April 26, 1994, DER's Plassio notified the appellants by letter that the results of the sound level test indicated that the noise produced at the Route 22 Tipple did not exceed the level considered to be a public nuisance and, therefore, that DER had no compliance authority regarding noise at that time. (N.T. 151; A Ex. 10)

49. Whitcomb informed Leone of the results of the noise study and analyses by a memorandum dated May 13, 1994. (N.T. 374; A Ex. 11)

50. It is Whitcomb's expert opinion that the noise from the Route 22 Tipple in the vicinity of the Santus residence was not a public nuisance.

(N.T. 425-426) Whitcomb opines that the decibel levels would be fifteen decibels lower than his results if measured within the Santuses' house with the windows open, and, with the windows closed, the decibel levels would be lowered by at least 25 decibels from his results. (N.T. 426)

51. Michael Mendicino, who is DER's Chief of Operations of its Air Quality Control Division, and Kuntz noticed dust coming from the load-out area of North Cambria's Route 22 Tipple while they were driving past the facility on March 17, 1994. When Mendicino and Kuntz entered the tipple, they determined that there were three areas of concern as to dust production: 1) the tipple's stacker was at a height greater than four feet; 2) the paved road leading to the scales was excessively dusty; and 3) there was dust being generated on trucks leaving the tipple and entering Route 22. (N.T. 518, 523-524) Mendicino and Kuntz spoke with North Cambria officials during this site inspection. North Cambria immediately lowered the excessive height of the stacker (which had not been generating any dust). North Cambria then immediately took corrective action to sweep the in-plant roadways with a street sweeper. DER concluded that the dust which was being dragged onto Route 22 was occurring because North Cambria could not use the tipple's center entrance due to Route 22 construction, and that the low level dust cloud leaving the tipple site was not travelling very far. Kuntz followed up on the inspection with a notice of violation. (N.T. 522-525)

52. DER did not seek any civil penalty from North Cambria for this violation because North Cambria quickly addressed DER's concerns. (N.T. 524-525)

53. DER's Joe Szunyog, who is a hydrogeologist at DER, wrote a memorandum to Leone to comment on the agencies which had been contacted about

the permit and to note that the noise study which Whitcomb conducted showed "no adverse affect [sic]". (N.T. 376; C Ex. 1) This memorandum stated that the Pennsylvania Historic and Museum Commission, and the Pennsylvania Fish Commission had no objections, that no comments had been received from the Pennsylvania Game Commission, and that the Bureau of Air Quality had a "permit on hand". (C Ex. 1)

54. Leone concluded, using the May 13, 1994 memorandum from Whitcomb and the memorandum from Szunyog, that there were no adverse effects which would preclude DER's issuance of the permit to North Cambria based on noise or air quality requirements. (N.T. 376) Leone determined that North Cambria's permit application complied with Chapters 86 and 89 of the regulations. (N.T. 366, 404)

DER's Issuance of the Mining Activity Permit to North Cambria

55. DER issued Coal Mining Activity Permit No. 32901602 to North Cambria for the Route 22 Tipple on June 8, 1994. (N.T. 366; A Ex. 12; C Ex. 2)

56. The appellants, on June 28, 1994, filed the instant appeal challenging DER's issuance of the permit to North Cambria. (Notice of appeal)

The Appellants' Complaints

57. Appellant Donna R. Santus is 58 years of age and suffers from a number of mental and physical ailments for which she takes a variety of prescription medications. (N.T. 35, 41, 57) She is being treated for depression, high blood pressure, anxiety, chest pains, asthma, degenerative disc disease and a back injury she sustained in 1992. (N.T. 52-53) Mrs. Santus has been a depressed person from birth. (N.T. 53)

58. Donna Santus is disturbed in her home by noise and dust which she believes to be associated with North Cambria's operations at the Route 22 Tipple or coal trucks travelling on Route 22 to and from the tipple. The Santuses' house, including the walls, floors, and windows, shakes and rattles, which interferes with Donna Santus' ability to use the portions of her home in which she would like to sleep and watch television, and interferes with her ability to get a solid night's sleep. (N.T. 37-50) She believes that her medications for insomnia have been increased as a result of the stress she experiences from her inability to relax in her home. (N.T. 40-46)

59. Donna Santus also has been unable to make use of her outdoor swimming pool (which she installed in 1989 to use for aquatic therapy for her medical conditions) because there is too much black dust in it, making daily maintenance difficult. (N.T. 47-48, 54-55, 60) She believes this black dust is coal dust. (N.T. 47)

60. The appellants' son, Joseph A. Santus, lived in his parents' home for his entire life until he started college at the age of 18. He subsequently lived there during his summer breaks from college and after graduation between September of 1993 and December of 1994. (N.T. 27, 33)

61. Joseph A. Santus finds the noise levels coming from front-end loaders and the other machinery at North Cambria's tipple to be annoying and distracting to his studies when he resides at his parents' house. The noises from the nighttime operations at the tipple interfere with his ability to get a sound night's sleep, even with the windows closed. (N.T. 19-25) Joseph A. Santus has observed increased tension in his parent's home which he attributes to their loss of sleep and annoyance about the noise levels at their home. (N.T. 19, 25, 32)

62. Appellant Joseph R. Santus is employed by Westinghouse Blairsville Plant where he runs a pilger machine, which pounds down zirconium metal. Santus leaves for work at 2:20 p.m. and returns home at 12:20 a.m. (N.T. 214, 219) He is required to wear earplugs at work because the pilger process creates quite a bit of noise. (N.T. 219-220)

63. Joseph R. Santus suffers from numerous mental and physical ailments. He suffers from depression and anxiety, for which he takes tranquilizers, and is undergoing counseling sessions with a social worker concerning his depression. He also suffers from diabetes. (N.T. 191-194) Joseph R. Santus attributes his depression and anxiety to stress caused him by the noise from North Cambria's facility. (N.T. 196) He also complains that North Cambria's facility creates noise levels which cause his house to shake and that he is disturbed by trucks travelling to the tipple. (N.T. 191, 194)

64. Joseph R. Santus does not attribute the cause of his diabetic condition to North Cambria's facilities. (N.T. 212)

65. Joseph R. Santus spoke with DER personnel who were conducting the sound testing near his home on March 22, 1994 for about five minutes before he left for his counseling session; when he returned the testing was completed. (N.T. 216-217) The location where Joseph R. Santus observed DER conducting the sound test on Indiana Avenue near his home is indicated by an "x" on N Ex. 1. (N.T. 217)

North Cambria's Efforts to Minimize Dust and Noise at the Tipple

66. Subsequent to the appellants' May 15, 1990 complaint to DER concerning noise emanating from the Route 22 Tipple, North Cambria has replaced some of the tipple's older model front-end loaders with newer machinery with muffled engines. (N.T. 464) The front-end loaders North

Cambria is currently using have rubber tires, mufflers, and sound suppression cabs. (N.T. 248-249) All of these pieces of equipment are equipped with back-up alarms, which are required by the federal Mine Safety and Health Administration (MSHA). (N.T. 249, 464)

67. The MSHA requires North Cambria to use a start-up siren in order to alert its workers that its conveyor belt and other pieces of equipment have been activated. (N.T. 251, 464) North Cambria disconnected one of the Route 22 Tipple's sirens and turned the other siren so that it faces away from the Santuses' house and the other residences along Route 22. (N.T. 251-252, 464) DER's Whitcomb could not hear the siren at the North Cambria Tipple when he stood near the appellants' residence. (N.T. 421)

68. Every truck which enters the Route 22 Tipple is covered with a tarp to minimize dust. It is North Cambria's policy to ban any truck from ever returning to the Route 22 Tipple if it enters the facility without a tarp. (N.T. 254, 268-269) North Cambria has terminated business dealings with truck drivers who drove their trucks onto the Route 22 Tipple site without a tarp. (N.T. 268)

69. North Cambria constructed a dirt mound barrier east of the facility which prevents winds from blowing from the west over the coal piles and acts as a dust suppressant. (N.T. 252)

70. A tree line which North Cambria planted between the Route 22 Tipple and Route 22 also serves to suppress dust and noise. (N.T. 253)

71. The main entrance to the Route 22 Tipple is paved and is brush swept by a mechanical street sweeper daily. This street sweeping equipment is also equipped with a water system to spray water onto the road. (N.T. 253-

254) North Cambria sprays water to suppress dust on the unpaved roads at the tipple. (N.T. 253-254)

72. North Cambria has signs posted at the Route 22 Tipple which require that trucks within the facility observe a 15 mile per hour speed limit which is supposed to suppress dust and noise. (N.T. 254-255, 556)

73. North Cambria prohibits truck drivers from using jake brakes within the tipple site, and North Cambria has a sign posted at the facility to advise truck drivers of this policy. (N.T. 255, 464-465, 556) North Cambria representatives have spoken with truck drivers regarding their use of jake brakes at the tipple and have asked the drivers not to slam their trucks' tailgates while at the tipple. (N.T. 464-465)

74. North Cambria maintains the level of the rotary stacker at the same height as the coal pile so that the coal does not fall an excessive distance from the stacker to the coal pile and create dust. (N.T. 256-258)

75. The Route 22 Tipple initially had lights on top of the stacker which faced Route 22, but North Cambria redirected these lights in 1993 so that they shine on the clean coal pile and the railroad tracks, not on Route 22 or the Santuses' residence. (N.T. 247-248)

76. North Cambria monitored the dustfall in the area of the Route 22 Tipple on a monthly basis between December 20, 1991 and July 21, 1993. (N.T. 338; N Ex. 4) These samples were collected at three locations on a continual basis; two of these locations were between the Route 22 Tipple and the Santus' home, with the one location within 200 feet of the Santuses' home, and the other location within 400 feet of the Santuses' home. (N.T. 340-341, 345) The third sample collection location was at the intersection of Routes 22 and 119, which is more than a mile east of the Route 22 Tipple. (N.T. 340) This

sampling was analyzed by an independent laboratory, Cardan Laboratories, Inc. (N.T. 338)

77. The maximum dustfall permitted under North Cambria's air quality permit was 1.5 milligrams per centimeter squared per month (mg/sq.cm./mo.) (N.T. 341)

78. Four of the samples collected at the intersection of Routes 22 and 119 exceeded 1.5 mg/sq.cm/mo. (N.T. 341, 546) Regarding the January 20, 1992 to February 20, 1992 sample, the amount of dustfall was 1.76 mg/sq.cm./mo. Of this amount, 5 per cent was coal; 5 per cent was insects, 10 per cent was vegetative matter; and 80 per cent was dirt. (N.T. 342) For the period between March 20, 1992 and April 20, 1992, the amount of dustfall was 1.65 mg/sq.cm./mo. (N.T. 343) Of this amount, 10 per cent was coal; 5 per cent was insects; 20 per cent was vegetative matter; and 65 per cent was dirt. (N.T. 343) For the period between April 20, 1992 and May 20, 1992, the amount of dustfall was 1.64 mg/sq.cm./mo. (N.T. 343) Of this amount, 5 per cent was coal; 10 per cent was insects; 25 per cent was vegetative matter; and 60 per cent was dirt. (N.T. 343) For the period between November 20, 1992 and December 21, 1992, the amount of dustfall was 1.86 mg/sq.cm./mo. (N.T. 344) Of this amount, 5 per cent was coal; 5 per cent was vegetative matter; and 90 per cent was dirt. (N.T. 344)

79. DER's Kuntz testified that these four samples were collected over one mile from the Route 22 Tipple and that he does not believe that the Route 22 Tipple would have any effect on the dustfall at that location. (N.T. 547)

80. Chakot has inspected the Route 22 Tipple once a month since 1988, with each inspection lasting between 1 and 4 hours. (N.T. 459, 495) Chakot does not warn North Cambria as to when he will be inspecting the facility.

(N.T. 459-460) Chakot has never issued any orders to North Cambria based on dust or noise violations. (N.T. 471) North Cambria has never failed to address issues regarding dust which have been raised in Chakot's inspection reports. (N.T. 467)

81. Chakot has only ever observed dust blowing from the Route 22 Tipple on one occasion, which was in November of 1993. This dust was caused by an acccumulation of dirt on the road leading to North Cambria's scales, and the dust was not blowing in the direction of the Santuses' residence. North Cambria swept up the dust when Chakot informed the company of the condition. (N.T. 466-467)

82. When Chakot stood at the entrance to the Route 22 Tipple, the noise from the tipple was not as great as the noise from the highway. (N.T. 468-470, 502-503)

83. As of DER's issuance of the challenged permit to North Cambria in June of 1994, DER's Chakot has not received any citizen complaint regarding the Route 22 Tipple since he received Santus' May 15, 1990 complaint. (N.T. 465)

DISCUSSION

The appellants assert that noise and dust emanates from the Route 22 Tipple which disturbs them at their nearby residence and has caused them to suffer stress, which, in turn, has aggravated their respective mental and physical ailments. The Santuses contend that noise and dust coming from the Route 22 Tipple is a problem which DER should have addressed and resolved in its review of North Cambria's permit renewal application. The Santuses bear the burden of proving by a preponderance of the evidence that DER acted contrary to law or abused its discretion in issuing the mining activity permit

renewal to North Cambria. Snyder Township Residents for Adequate Water Supplies v. DER, et al., 1988 EHB 1202; Warren Sand and Gravel Co., Inc. v. Commonwealth, DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975); 25 Pa. Code §21.101(c)(3).

North Cambria argues that we should dismiss the Santuses' appeal on the basis that their post-hearing brief fails to comply with our February 16, 1995 order (which directed them to file a post-hearing brief containing proposed findings of fact with citations to the location in the record where the facts supporting the the proposed findings may be found, a discussion of the law as applied to those proposed findings of fact, and proposed conclusions of law based thereon).

The appellant's post-hearing brief is not in the form contemplated by this Board's February 16, 1995 order; however, we will not dismiss this appeal for this reason. While the Santuses' post-hearing brief lacks the clarity of a brief filed by legal counsel, we do not agree that the appellants have waived, pursuant to Lucky Strike, supra, all of the arguments raised by their appeal and addressed by the testimony at the merits hearing simply on the basis that their brief is unsophisticated.

The appellants did not object to DER's issuance of the mining activity permit to North Cambria on the basis that they were disturbed by lights at the tipple facility. Thus, we agree with North Cambria that this issue is waived. See Commonwealth, Pennsylvania Game Commission v. Commonwealth, Department of Environmental Resources, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), affirmed on other grounds, 521 Pa. 121, 555 A.2d 812 (1989).

North Cambria further asserts the appellants have waived any argument that they are adversely affected by dust from the tipple by failing to raise

dust-related contentions in their post-hearing brief. The appellants' argument concerning dust was clearly raised in their notice of appeal, and, given the confusing nature of their post-hearing brief, we cannot agree that this issue has been waived.

Emission of dust from the tipple is addressed by the the Air Pollution Control Act, 35 P.S. §4001 et seq., and the regulations promulgated thereunder at 25 Pa. Code Chapters 123 and 127. DER's Bureau of Air Quality Control, in 1982, initially issued to North Cambria Air Quality Permit No. 32-305-019, pursuant to the Air Pollution Control Act, for the Route 22 Tipple. DER's Bureau of Air Quality Control issued a renewal of Air Quality Permit No. 32-305-019 for the Route 22 Tipple on January 26, 1994. Notice of this renewal of North Cambria's Air Quality Permit was published in the Pennsylvania Bulletin. There was no appeal of this permit renewal by Santus to the Board. We agree with North Cambria's contention that the appellants' failure to timely appeal DER's renewal of North Cambria's Air Quality Permit in January of 1994 precludes them from objecting to DER's renewal of that permit.[7] We will address the appellants' dust concerns in this appeal to the extent that conditions at the tipple could have changed between January of 1994 and June of 1994, when DER renewed North Cambria's mining activity permit, because conditions at the tipple might have changed as to air quality during that time period and DER's renewal of the company's mining activity permit could, thus,

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[7] We note that while Santus claims a lack of knowledge about the Pennsylvania Bulletin in his Reply Brief to John Bonyas [sic] Post-Hearing Brief, the Commonwealth Court, in Lower Allen Citizens Action Group, Inc. v. Department of Environmental Resources, 119 Pa. Cmwlth. 236, 538 A.2d 130 (1988), affirmed, ___ Pa. Cmwlth. ___, 546 A.2d 1330 (1988), has held that the citizens' group involved in that matter, as an interested "person" pursuant to 25 Pa. Code §21.36 rather than a "party" pursuant to 25 Pa. Code §21.2, had thirty days from the date of publication of DER's action in the Pennsylvania Bulletin in which to file its appeal to the Environmental Hearing Board. See 25 Pa. Code §21.36.

be an abuse of DER's discretion. See Arthur Richards, Jr., V.M.D., et al. v. DER, et al., 1990 EHB 382.

Motion to Strike

The appellants, in their post-hearing brief, break down the testimony offered by the witnesses at the hearing as to the testimony with which the Santuses agree and that with which they do not agree. Likewise, in their reply post-hearing briefs, the Santuses cite to portions of their opponents' post-hearing briefs with which they disagree and state the bases for their disagreement.

North Cambria has filed a motion to strike the appellants' reply post-hearing brief to North Cambria's post-hearing brief. North Cambria argues that the appellants' reply post-hearing brief fails to comply with the Board's order issued February 16, 1995 because it contains numerous allegations of fact which are not supported by the record, which are contrary to the evidence in the record, or which reference the results of sound meter testing Santus allegedly conducted which were not admitted into evidence. DER, in its post-hearing brief, also seeks to have stricken the matter raised in the appellants' post-hearing briefs which is not part of the evidence in the record. The appellants filed a reply in which they oppose North Cambria's motion to strike.

We have previously explained that testimony cannot be offered once a party has rested his case and the record has been closed, in the absence of a showing that the requirements for reopening the record found at 1 Pa. Code §35.231 have been met. Solomon Run Community Action Committee v. DER, 1991 EHB 1660. Solomon Run involved an appeal by a citizens' group, *pro se*, challenging DER's approval of a revision to an Official Plan for sewage

service under the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 et seq. After the parties in Solomon Run had rested their case at the merits hearing and had been ordered by the Board to file post-hearing briefs, the spokesman for the citizens' group attempted to file a notarized written statement signed by himself in which he set forth a series of facts allegedly relevant to the contentions which the citizens' group was raising in the appeal. We denied the appellants' request to reopen the record in the appeal to allow the appellants to submit this document, as the spokesman's testimony should have been offered during the merits hearing and did not meet the requirements for reopening the record set forth at 1 Pa. Code §35.231.

As was the situation in Solomon Run, the Santuses elected to proceed *pro se*, against the Board's advice that they should retain counsel to handle their case. In the instant appeal, the Santuses have included in their post-hearing brief and reply post-hearing briefs statements which Joseph R. Santus did not make during his testimony at the merits hearing. His offering these statements now to dispute the testimony of his opponents' witnesses amounts to an attempt to get us to consider factual assertions which are not in the record. There are no allegations in the appellants' response to North Cambria's motion to strike which support our finding that the record should be reopened pursuant to 1 Pa. Code §35.231. See Spang & Company v. Commonwealth, DER, 140 Pa. Cmwlth. 306, 592 A.2d 815, 818 (1991), *allocatur denied*, ___ Pa. ___, 600 A.2d 543 (1991).

If Joseph R. Santus disputed the factual allegations made by his opponents' witnesses in their testimony, he had to deal with these factual allegations during his examination of the witnesses or by offering evidence to

counter it during the merits hearing. Likewise, the results of sound meter testing which Santus allegedly conducted at his home between December of 1993 and January of 1994 (A Ex. 14) were not admitted into evidence because Santus failed to show that he had the expertise to interpret sound meter readings and because Santus had not disclosed in his deposition or his pre-hearing memorandum that he intended to offer this testimony. (N.T. 158-174, 182) We have previously warned appellants opting to appear before this Board *pro se* that a lay person assumes the risk that his lack of legal expertise could prove to be his "undoing". See, e.g., Hubert D. Taylor v. DER, et al., 1991 EHB 1926; Michael F. and Karen Welteroth v. DER, et al., 1989 EHB 1017. As we can only consider evidence of record, we grant North Cambria's motion to strike any matter outside the record from the appellants' post-hearing briefs. See Concerned Residents of the Yough, Inc., et al. v. DER, et al., 1993 EHB 107 at 136-137, affirmed 162 Pa. Cmwlth. 669, 639 A.2d 1265 (1994); Warren Sand and Gravel, supra.

Did DER Act Contrary to Law or Abuse Its Discretion In issuing the Permit Renewal?

In order to prove that DER acted contrary to law in issuing the mining activity permit to North Cambria, the Santuses must show that DER issued the permit in violation of statutes or regulations pertaining to its issuance of the permit.

Section 3.1 of SMCRA provides:

> [DER] shall not issue any surface mining permit or renew or amend any permit if it finds, after investigation and an opportunity for an informal hearing, that 1) the applicant has failed and continues to fail to comply with any provisions of this act or any of the acts repealed or amended hereby or 2) the applicant has shown a lack of ability or

> intention to comply with any provision of this act or of any of the acts repealed or amended hereby as indicated by past or continuing violations....

52 P.S. §1396.3a(d).

The evidence shows that DER investigated the appellants' complaints concerning the Route 22 Tipple and held an informal conference on January 18, 1994 regarding these complaints. The Santuses assert the complaints they made at the informal conference were recorded on an audio cassette tape offered at the merits hearing as A Ex. 8 but not admitted into evidence. The presiding Board Member ruled that this tape would not be played at the merits hearing and that its admission would be denied on the basis of the joint hearsay objection raised by DER and North Cambria.[8] (N.T. 131-136) In conjunction with this ruling, North Cambria and DER stipulated that at the informal conference on January 18, 1994, the Santuses had raised complaints regarding dust and noise. (N.T. 136) DER followed up on the complaints which were raised at this conference and evaluated noise and dust when reviewing North Cambria's permit renewal application.

The evidence supports DER's determination that North Cambria has a good compliance history with regard to the Route 22 Tipple and that the company has always been willing to cooperate in limiting the noise coming from the tipple site and in keeping dust off its roads. The appellants did not introduce any evidence which proves that North Cambria's Route 22 Tipple has failed to comply with DER's regulations regarding dust generated at the facility.

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[8] While the Santuses, in their post-hearing brief, object that the people conducting the January 18, 1994 meeting should have "sworn in" the Santuses so that their statements which were recorded on the audio cassette tape would not be hearsay, they do not challenge the presiding Board Member's ruling on the admissibility of this audio cassette tape. We thus do not address the propriety of this ruling.

George Chakot, who is an SMCI with DER, has been responsible for inspecting the Route 22 Tipple since August of 1988. Chakot has inspected the Route 22 Tipple once a month since 1988, with each inspection lasting between 1 and 4 hours. Chakot does not warn North Cambria as to when he will be inspecting the facility. During his monthly inspections, Chakot inspects the Route 22 Tipple for fugitive dust, which is airborne dust or other material which could be blown from the premises, and water quality. Chakot had never inspected the Route 22 Tipple for noise conditions nor had he ever made note of noise conditions at the facility. Chakot never issued any orders to North Cambria based on violations of dust, air quality, or noise regulations. SMCI Chakot has only ever observed dust blowing from the Route 22 Tipple on one occasion. This dust was caused by an acccumulation of dirt on the road leading to North Cambria's scales, and the dust was not blowing in the direction of the Santuses' residence. North Cambria swept up the dust when Chakot informed the company of the condition. North Cambria has never failed to address issues regarding dust which have been raised in Chakot's inspection reports.

DER Air Quality Inspector Kuntz has inspected the Route 22 Tipple at least once a year since 1989. Kuntz also drives by the Route 22 Tipple once or twice each week to look over conditions at the site, and he addresses with North Cambria any build up of dirt or dust he notices at the tipple. Kuntz did not observe any visible dust coming from the Route 22 Tipple during his inspections prior to January of 1994. Regarding North Cambria's Air Quality Permit renewal application, DER's Kuntz recommended granting the permit because he found North Cambria had operated its facility in compliance with DER's regulations.

North Cambria's Air Quality Permit includes the measures North Cambria is required to take to control dust at the Route 22 Tipple. (N.T. 522) These conditions are: 1) all coal trucks going to the Route 22 Tipple must be tarped; 2) the paved road into the facility must be swept at least once per day; 3) the drop height of the radial stacker cannot be more than four feet; and 4) the "clean" coal storage pile should be kept at a minimum height. (N.T. 522; C Ex. 4) The only citation issued by DER to North Cambria for the Route 22 Tipple was issued on March 17, 1994 for an Air Quality Permit violation. At that time, DER's three areas of concern as to dust production were: 1) the tipple's stacker was at a height greater than four feet; 2) the paved road leading to the scales was excessively dusty; and 3) there was dust being generated on trucks leaving the tipple and entering Route 22. DER spoke with North Cambria officials during this site inspection, and North Cambria immediately lowered the excessive height of the stacker (which had not been generating any dust). North Cambria also immediately swept the in-plant roadways with a street sweeper. DER concluded that the dust which was being dragged onto Route 22 was occurring because North Cambria could not use the tipple's center entrance due to Route 22 construction, and that the low level dust cloud leaving the tipple site was not travelling very far. (N.T. 522-525) DER did not seek any civil penalty from North Cambria for this violation because North Cambria quickly addressed DER's concerns.

The appellants did not offer any evidence that North Cambria has failed to comply with the SMCRA as to noise or that North Cambria has committed violations as to noise.

Thomas Whitcomb, who is with DER's Bureau of Mining and Reclamation in the Central Office and testified as an expert witness in the area of noise on

behalf of DER at the merits hearing, conducted sound tests at the Route 22 Tipple site with Tom McKay, who is DER's Inspector Supervisor for the area, and DER SMCI George Chakot on March 22, 1994. Whitcomb used a General Radio 1565-D Model sound level meter, calibrated three months prior to the testing, to take decibel readings at five locations surrounding the Route 22 Tipple. Whitcomb informed Joseph Leone, who is Chief of DER's Bituminous Mining Permit Section, of the results of the noise study and analyses by a memorandum dated May 13, 1994. DER's Joe Szunyog, who is a hydrogeologist at DER, also wrote a memorandum to Leone to comment on the the agencies which had been contacted about the permit and to note that the noise study which Whitcomb conducted showed "no adverse affect [sic]". Leone concluded, using the May 13, 1994 memorandum from Whitcomb and the memorandum from Szunyog, that there were no adverse effects which would preclude DER's issuance of the permit to North Cambria based on noise or air quality requirements.

DER's regulations at Chapter 86 of 25 Pa. Code provide the requirements for coal mining activity permits. According to section 86.13 of 25 Pa. Code,

> [a] person may not conduct coal mining activities except under permits issued under this chapter and in compliance with the terms and conditions of the permit and the requirements of this chapter and Chapters 87-90 and the statutes under which they were promulgated.

Leone determined that North Cambria's permit application complied with Chapters 86 and 89 of DER's regulations. The appellants failed to introduce any evidence to show that DER's determination that North Cambria's application met the requirements of Chapters 86 and 89 of 25 Pa. Code was improper.

We have recently issued an adjudication in Plumstead Township v. DER, et al., EHB Docket No. 91-214-M (Adjudication issued June 14, 1995), which was a third party appeal challenging DER's issuance of a noncoal surface mining

permit pursuant to the Noncoal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3301 *et seq.*, and the regulations thereunder, for operation of, *inter alia*, an argillite quarry. Among the appellant's objections in Plumstead was that the quarry would produce operational noise which DER failed to adequately address in issuing the permit. We determined that DER's issuance of the permit in Plumstead would be an abuse of discretion if the appellant showed either: that DER failed to evaluate noise when reviewing the permit application; or that the noise generated by the quarry would constitute a public nuisance.

Citing Muehlieb v. City of Philadelphia, 133 Pa. Cmwlth. 133, ___, 574 A.2d 1208, 1211 (1990); Commonwealth v. Danny's New Adam & Eve Bookstore, 155 Pa. Cmwlth. 281, ___, 625 A.2d 119, 121 (1993); and Kwalwasser v. DER, 1986 EHB at 64, we explained in Plumstead Township, supra at 51, that the Board applies the *Restatement (Second) of Torts*, §821B, as the applicable standard for determining whether an activity rises to the level of a public nuisance.

Following our reasoning in Plumstead Township, in order to prove that DER abused its discretion in issuing the mining activity permit renewal to North Cambria, the Santuses must show that: DER failed to evaluate noise and dust when reviewing the permit application; or that the noise and dust to be generated by the tipple will constitute a public nuisance. As the evidence establishes that DER considered noise and dust concerns in reviewing North Cambria's permit application, the question we must address is whether the noise and dust from the Route 22 Tipple after the permit renewal will unreasonably interfere with a right common to the general public.

The evidence offered by the appellants in their case-in-chief was that the appellants and their son are disturbed in their residence by noise and

dust which they claim emanates from the Route 22 Tipple.[9] They complain that North Cambria's facility creates noise levels which cause their house to shake and that they are disturbed by trucks travelling to and from the tipple. Joseph R. Santus attributes his depression and anxiety, for which he is undergoing counseling sessions with a social worker, to stress caused him by the noise from North Cambria's facility. Donna R. Santus has been depressed since birth. She takes medications for a number of mental and physical ailments, including degenerative disc disease in her back. Mrs. Santus likewise attributes her depression and anxiety to stress related to noise disturbance from the Route 22 Tipple. Mrs. Santus has been unable to make use of her outdoor swimming pool as aquatic therapy for her medical conditions because there is too much black dust in the pool.

As to the dust generated by the tipple, the Santuses did not introduce any expert testimony to support their argument that the dust which is entering their property is coal dust associated with the tipple and trucks travelling to and from the tipple, as opposed to other sources. The Santuses did not put before us any admissible evidence to quantify the amount of noise coming from the tipple, as opposed to Route 22 traffic noise. The appellants argue that

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[9] As we acknowledged in County of Schuylkill, et al. v. DER, et al., 1991 EHB 1, where a party with the burden of proof and initial burden of proceeding fails to make out a *prima facie* case, the Board may grant a motion to dismiss made by the opposing party at the close of the presentation of the evidence. The motion must be viewed in the light most favorable to the non-moving party, and should be granted only where the non-moving party's case is clearly insufficient. Id. at 6. Because neither North Cambria nor DER specifically addresses in its post-hearing brief whether this appeal should be dismissed in its entirety because of the joint motion to dismiss which was made at the close of the appellants' presentation of their case-in-chief at the merits hearing, we do not address it further here.

DER's expert testimony is "wrong", but they failed to prove, through expert testimony or otherwise, what would be acceptable noise levels from the tipple.

DER, on the other hand, introduced expert testimony regarding the noise levels coming from the tipple. DER's Whitcomb compared the noise level readings from his March 22, 1994 testing with the federal Environmental Protection Agency's guidance document in order to determine the relevance of the noise levels he recorded at the Route 22 Tipple. When compared against this EPA guidance, the noise from the Route 22 Tipple in the vicinity of the Santuses' residence, without Route 22 traffic, is lower than the average sound level experienced by a "suburban housewife", and with Route 22 traffic is lower than that to which "an average suburban child" is exposed. Whitcomb opines that the decibel levels would be fifteen decibels lower than his results if measured within the Santuses' house with the windows open, and, with the windows closed, the decibel levels would be lowered by at least 25 decibels from his results. It is Whitcomb's expert opinion that the noise from the Route 22 Tipple in the vicinity of the Santuses' residence is not a public nuisance.

The appellants ask us to ignore the results of the sound testing conducted by Whitcomb as "false and misleading", asserting that North Cambria shut down the Route 22 Tipple operation while Whitcomb was taking his sound meter readings.

We reject the appellants' argument, however, because the testimony does not establish that North Cambria shut down the Route 22 Tipple while DER conducted the sound testing. Santus testified that on March 22, 1994, the day on which Whitcomb conducted the sound testing, North Cambria was loading a train at the Route 22 Tipple for an hour and a half, during which time the

Santuses' house was rattling and shaking, and then became silent. (N.T. 150, 215) At this point, which was approximately 10:00 a.m., Santus noticed men taking sound meter readings at the Route 22 Tipple while the tipple was shut down. (N.T. 150, 215) The location where Joseph R. Santus observed DER conducting the sound test on Indiana Avenue west of his home is indicated by an "x" on N Ex. 1. (N.T. 217) After speaking with DER personnel who were conducting the noise testing for approximately five minutes, Santus left for his counseling session in Greensburg. (N.T. 216) When Santus returned to his home at approximately 1:00 p.m., DER was no longer conducting the testing. (N.T. 217) He is uncertain of when the noise resumed. (N.T. 217) Mrs. Santus testified that on March 22, 1994, she was in her home and after her husband had left, there was a lull which lasted for 10 or 15 minutes, and then work at the tipple resumed and the noise was "terrific" while her husband was gone. (N.T. 223) Whitcomb spoke with Santus on his way to conduct the sound tests. (N.T. 221) Whitcomb also spoke with some of the North Cambria officials between measurements. (N.T. 219, 412) While Whitcomb was conducting his sound testing, he observed front-end loaders loading a train with coal as the train moved slowly through the tipple. He also observed trucks driving in and out of the tipple and a conveyor being operated while he was conducting the sound test. (N.T. 266, 416) North Cambria did not alter its operations at the Route 22 Tipple from its normal operations on March 22, 1994, and its employees were not made aware that the sound testing was being conducted. (N.T. 266, 331)

The appellants further assert that Whitcomb's sound meter readings are incorrect, basing this argument on the results of sound meter testing Santus allegedly conducted in the appellants' home five months prior to Whitcomb's

testing. The results of this alleged testing were not admitted into evidence, however. Thus, we do not consider these alleged results.[10]

While the Santuses' testimony showed that they are quite disturbed by their quality of life at their residence, there was ample evidence at the merits hearing from which we can conclude that noise and dust disturbing the Santuses at their home is associated with their living both along Route 22, and, separately, near the tipple. The evidence admitted at the merits hearing establishes that Route 22, in the area near the appellants' residence, underwent reconstruction activity during 1993 and 1994. This reconstruction involved tearing up and resurfacing four lanes of highway, installing a "jersey" barrier, and demolishing and reconstructing a railroad bridge which is located between 700 and 800 feet from the Santuses' residence. The highway reconstruction work involved the use of rotary jackhammers, concrete saws, backhoes, bulldozers, and trucks. This reconstruction work caused dust and noise. Additionally, there is a high volume of traffic on Route 22 in the area of the Route 22 Tipple and the appellants' house. According to the 1994 daily logs kept by the Pennsylvania Department of Transportation, the average daily traffic is 7,618 vehicles travelling eastward and 7,604 vehicles travelling westward. Ten percent of the eastbound vehicles and eight percent of the westbound vehicles travelling on Route 22 on a daily basis are trucks. Of these, 200 trucks are transporting coal to the Route 22 Tipple. Not all of the trucks which travel on Route 22 are destined for the Route 22 Tipple; more trucks hauling coal on Route 22 are not headed to or from the Route 22 Tipple

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[10] While the appellants assert in their reply post-hearing brief that a sound meter is simple to use, they do not argue in their post-hearing brief that the presiding Board Member erred in ruling that the results of Santus' sound testing were inadmissible. We therefore do not address this ruling.

than are headed to it. The traffic on Route 22 creates a lot of dust and noise because not all of the trucks travelling on Route 22 hauling coal cover their loads with tarps, and many trucks travelling along Route 22 use jake brakes. When Chakot stood at the entrance to the Route 22 Tipple, the noise from the tipple was not as great as the noise from the highway. Trains also run on the railroad track adjacent to the Route 22 Tipple which are not headed to the tipple.

At the same time, the evidence at the merits hearing showed that North Cambria has taken steps to ensure that its facility is in compliance with DER's regulations and to minimize any noise or dust emanating from the tipple facility.

Subsequent to the appellants' May 15, 1990 complaint to DER, North Cambria has replaced some of the tipple's older model front-end loaders with newer machinery with muffled engines. The front-end loaders North Cambria is currently using have rubber wheels, mufflers, and sound suppression cabs. All of these pieces of equipment are equipped with back-up alarms, but they are mandated by MSHA. MSHA also requires North Cambria to use a start-up siren in order to alert its workers that its conveyor belt and other pieces of equipment have been activated. North Cambria disconnected one of the Route 22 Tipple's sirens and turned the other siren so that it faces away from the Santuses' house and the other residences along Route 22. DER's Whitcomb could not hear the siren at the North Cambria Tipple when he stood near the appellants' residence. North Cambria prohibits truck drivers from using jake brakes within the tipple site, and North Cambria has a sign posted at the facility to advise truck drivers of this policy. North Cambria representatives have spoken with truck drivers regarding their use of jake

brakes at the tipple and have asked the drivers not to slam their trucks' tailgates while at the tipple. Although DER's March 1994 meeting took place inside North Cambria's scale house at the Route 22 Tipple, which is approximately 150 feet from the area of the Route 22 Tipple in which the front-end loaders were being operated, it was not necessary to speak louder than a normal conversational level.

Regarding dust concerns, every truck which enters the Route 22 Tipple is covered with a tarp to minimize dust. It is North Cambria's policy to ban any truck from ever returning to the Route 22 Tipple if it enters the facility without a tarp. North Cambria has terminated business dealings with truck drivers who drove their trucks onto the Route 22 Tipple site without a tarp. North Cambria constructed a dirt mound barrier east of the facility which prevents winds from blowing over the coal piles and acts as a dust suppressant. A tree line which North Cambria planted between the Route 22 Tipple and Route 22 also serves to suppress dust and noise. The main entrance to the Route 22 Tipple is paved and is brush swept by a mechanical street sweeper daily. This street sweeping equipment is also equipped with a water system to spray water onto the road. North Cambria uses a water truck to suppress dust on the unpaved roads at the tipple. North Cambria has signs posted at the Route 22 Tipple which require that trucks at the facility observe a 15 mile per hour speed limit which is supposed to suppress dust and noise. North Cambria maintains the level of the rotary stacker at the same height as the coal pile so that the coal does not fall an excessive distance from the stacker to the coal pile.

North Cambria also monitored the dustfall in the area of the Route 22 Tipple on a monthly basis between December 20, 1991 and July 21, 1993. These

samples were collected at three locations on a continual basis; two of these locations were between the Route 22 Tipple and the Santuses' home, with the one location within 200 feet of the Santuses' home, and the other location within 400 feet of the Santuses' home. The third sample collection location was at the intersection of Routes 22 and 119, which is more than a mile from the Route 22 Tipple. This sampling was analyzed by an independent laboratory, Cardan Laboratories, Inc. The maximum dustfall permitted under North Cambria's air quality permit was 1.5 mg./sq.cm./mo. Four of the samples collected at the intersection of Routes 22 and 119 exceeded 1.5 mg/sq.cm/mo. DER's Air Quality Inspector Kuntz testified that these four samples were collected over one mile from the Route 22 Tipple and that he does not believe that the Route 22 Tipple would have any effect on the dustfall at that location. The Santuses did not introduce any expert testimony to rebut Kuntz' opinion. More importantly, there was no evidence of violations as to dust at the two sample collection points near the Santuses' home.

The Santuses did not offer any evidence which would establish that the black dust in their swimming pool is, in fact, coal dust and that it has come to the appellants' residence from activities associated with the Route 22 Tipple. They also produced no medical or expert technical evidence which would link their mental and physical conditions to the Route 22 Tipple. This link was only established by their own testimony. This is not sufficient to establish that the Route 22 Tipple is the source of their problems or that noise and dust from the tipple has caused them stress which has resulted in the need for them to take increased levels of medication. Nor did the other area residents testify to produce evidence of a general objection to noise or dust from this source. The appellants, thus, have not shown by their evidence

that noise and dust coming from the Route 22 Tipple is an unreasonable interference with a right common to the general public. In so concluding, we do not suggest that the Route 22 Tipple is noise free. It is not. However, it adds its noise to that existing by virtue of Route 22's use and to that routinely generated by ourselves and our neighbors through use of motorcycles, lawn mowers, "boom boxes", can openers, and air conditioners. Our modern society, whether for better or for worse, is not a quiet one. Nor is it dust free. To secure what we call the "benefits" of this society, limited amounts of noise and air contaminants are created. To the extent that there has not been a showing of a public nuisance and there is ample evidence that DER did address noise and dust coming from the tipple site, there is nothing more that DER was required to have done for the appellants. There is, thus, no showing that DER abused its discretion or committed an error of law in issuing the challenged permit renewal to North Cambria. We accordingly make the following conclusions of law and issue the following order dismissing the appellants' appeal.[11]

CONCLUSIONS OF LAW

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

2. The Santuses bear the burden of proving by a preponderance of the evidence that DER's issuance of the mining activity renewal permit to North

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[11] We do not address whether DER's issuance of the permit renewal to North Cambria violated DER's duties under Article I, §27 of the Pennsylvania Constitution because we find no reference to either the Pennsylvania Constitution generally or Article I, §27 specifically in the Santuses' notice of appeal. This argument, therefore, was waived. See Plumstead Township, supra; Benco, Inc. of Pennsylvania v. DER, 1994 EHB 168; Game Commission, supra; Croner, Inc. v. Cmwlth., Department of Environmental Resources, 139 Pa. Cmwlth. 43, ___, 589 A.2d 1183, 1187 (1991).

Cambria for the Route 22 Tipple was contrary to law or an abuse of DER's discretion. Snyder Township, supra; Warren Sand and Gravel, supra; 25 Pa. Code §21.101(c)(3).

3. North Cambria's motion to strike references in the appellants' post-hearing briefs and reply briefs which are not based on evidence of record, with which DER agrees, is granted, as the Board's adjudication must be based on evidence of record, and the appellants have not shown that the record should be reopened pursuant to 1 Pa. Code §35.231 to admit into evidence the assertions in their briefs which are not part of the record. See Solomon Run, supra; Spang & Company, supra; Concerned Residents of the Yough, supra; Warren Sand and Gravel, supra.

4. The Santuses failed to show that DER's issuance of the permit renewal to North Cambria was contrary to law; the evidence does not establish that North Cambria' permit renewal application failed to comply with the requirements of Section 3.1 of SMCRA, 52 P.S. §1396.3a(d), or DER's regulations at Chapters 86 and 89 of 25 Pa. Code.

5. DER's issuance of the mining activity renewal permit to North Cambria would be an abuse of discretion if: DER failed to evaluate noise and dust when it reviewed the permit renewal application; or the noise and dust generated by the tipple constitutes a public nuisance. See Plumstead Township, supra.

6. The Santuses failed to prove that DER did not evaluate noise and dust when it reviewed North Cambria's permit renewal application.

7. The Santuses failed to prove that there is noise and/or dust emanating from the Route 22 Tipple which constitutes a public nuisance.

ORDER

AND NOW, this 18th day of August, 1995, it is ordered that North Cambria's motion to strike from the appellants' post-hearing brief and reply post-hearing briefs any references to evidence not of record (with which DER agrees) is granted. It is further ordered that the Santuses' appeal from DER's June 8, 1994 issuance of Mining Activity Permit No. 32901602 to North Cambria is dismissed.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: August 18, 1995

cc: **DER Bureau of Litigation:**
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Southwestern Region
For Appellant:
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M. DIANE SMITH
SECRETARY TO THE BOAR

P.A.S.S., INC. :
:
v. : EHB Docket No. 95-106-E
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL PROTECTION and:
WHEELABRATOR CLEAN WATER SYSTEMS, INC., :
Permittee : Issued: August 25, 1995

OPINION AND ORDER SUR DAVID L. JOHN'S PETITION TO INTERVENE

By: Richard S. Ehmann, Member

Synopsis

David L. Johns' Petition To Intervene in this appeal is denied. While Johns' Petition asserts he owns land next to a tract of ground on which sewage sludge will be spread under the modified permit issued to Wheelabrator Clean Water Systems, Inc. ("Wheelabrator"), mere ownership of contiguous property is not by itself facially sufficient to show that Johns is a sufficiently "interested" party to be granted the status of an intervening appellant.

OPINION

The instant appeal was filed by P.A.S.S., Inc. ("PASS") on June 16, 1995. It challenges a letter from the Department of Environmental Protection ("DEP") which transmits to Wheelabrator a pair of revisions to this permit. The revisions are to permit Conditions 1 and 37.

PASS's Notice of Appeal challenges the issuance of this modified permit

In P.A.S.S., Inc. v. DER, et al., 1994 EHB 1875, PASS had challenged this entire unrevised permit's initial issuance. PASS was unsuccessful in that appeal in all regards but one. As a result, PASS cannot generally challenge the issuance of this modified permit. However, PASS's initial appeal was at least partially successful as to the issue of the degree of slope on which sewage sludge could be applied, and it is as to this issue that DEP modified the permit. Thus, it is only as to this issue that PASS could commence this appeal.

On August 10, 1995, Johns filed a one page Petition to Intervene in this appeal. While DEP does not support or oppose the Petition, Wheelabrator has filed a response strongly opposing same.

Since Johns took no timely personal appeal from the issuance of the two modifications, he may not now challenge them by filing his own appeal. Rostosky v. Commonwealth, DER 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). However, he may and has petitioned to intervene in PASS's timely appeal of these two modifications.

A potential intervening party who has no timely appeal is limited in his petition and as a party, if the petition is granted, to the issues raised by the timely appellant. As Wheelabrator correctly points out, a petitioning intervenor may not raise new grounds for appeal in intervention since that would circumvent our rule on the timeliness of appeals. New Morgan Landfill Company, Inc., v. DER, 1992 EHB 1690.

However, not every person may intervene in any appeal pending before this Board. To intervene the petitioning person must demonstrate that he or she is a sufficiently "interested" person to cause this Board to grant him or her full party status. According to Borough of Glendon v. DER, et al. 145 Pa.

Cmwlth. 238, 603 A.2d 226 (1992), to be "interested" and thus to be allowed to intervene, a petitioner must show his interest is substantial, immediate, and direct and comes within the zone of interest protected by the statute.

The instant Petition avers Johns, who is a *pro se* petitioner, is an individual who owns property contiguous to the property covered by the modified permit. It also states that Johns is an interested party. However, as Wheelabrator's Response To Petition To Intervene points out, the petition fails to point out or explain how Johns is an "interested" party as this phrase is defined above. Since "interested" means more than that a person is one of a group of people generally interested in what happens in this appeal according to Browning-Ferris, Inc. v. DER, 143 Pa. Cmwlth. 243, 598 A.2d 1057 (1991), it is incumbent on a petitioner to demonstrate in his petition that he has the required degree of "interest". A petition which only says that petitioner is interested or that he owns contiguous property fails to make the demonstration. As no other effort to make such a showing is even attempted here, there is no option but to deny this Petition. By so doing, the Board is not saying Johns is not an interested party or that he could not make a showing of adequate interest, but only that this Petition fails to do so.[1] Accordingly, we enter the following order.

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[1]In so concluding, we have not addressed Wheelabrator's argument that an intervention does not outlive the original appeal, so if the original appeal is dismissed, the entire appeal is ended. However, had we reached it, we would have rejected it. Clements Waste Services, Inc., et al. v. DER, et al., 1992 EHB 484, as cited by Wheelabrator stands for the opposite principle from that for which Wheelabrator cited it. If an intervenor is allowed to intervene on the same side as the appellant, he becomes a full-party, just like the original appellant, and the appeal could thus continue if the original appellant later ceased to be party in the appeal. Appeal of Municipality of Penn Hills, 519 Pa. 164, 546 A.2d 50 (1988).

ORDER

AND NOW, this 25th day of August, 1995, it is ordered that Johns' Petition To Intervene is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: August 25, 1995

cc: **Bureau of Litigation**
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Northwest Region
For Appellant:
Jane Shumaker, Chairperson
Timblin, PA
For Permittee:
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Harrisburg, PA
For Petitioning Intervenor:
David L. Johns
Mayport, PA

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M. DIANE SMITH
SECRETARY TO THE BOA

EMPIRE COAL MINING AND DEVELOPMENT, INC. :
:
v. : EHB Docket No. 91-115-MR
:
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL PROTECTION : Issued: August 29, 1995

ADJUDICATION

By Robert D. Myers, Member:

Syllabus:

The Board affirms the denial by the Department of Environmental Resources (DER), now known as the Department of Environmental Protection, of an application for a coal surface mining permit on a site occupied by a municipal waste landfill. Where a coal mining operator enters a site and begins surface mining with the approval of DER's Bureau of Waste Management and the consent of the township operating the landfill, the county owning the mineral estate, and the corporation owning the surface estate, then subsequently applies for a coal surface mining permit at the insistence of DER's Bureau of Mining and Reclamation and pursuant to terms of a consent order and agreement, then (after expiration of the surface lease) claims the right to surface mine (by reason of the chain of title to the mineral estate) without the consent of the surface owner, the operator has the burden of proving that surface mining was intended to be authorized by the parties to the deed of severance at the time it was executed. Since the operator failed to prove this intent and has no other documented right to enter and surface mine the site, DER was justified in denying the application.

Where a coal mining operator enters a site and begins surface mining pursuant to documents subordinating the mining rights to the operation of the landfill, and where (during the pendency of the coal mining operator's application for a coal surface mining permit) the landfill is required by DER to close, and where, in order to close in an environmentally safe manner, the landfill needs to occupy 450 feet of the area encompassed within the coal mining operator's proposed permitted area, and where the coal mining operator refuses to delete that area from the application, DER was justified in denying the application.

Procedural History

Empire Coal Mining and Development, Inc. (Empire) filed a Notice of Appeal on March 18, 1991 seeking Board review of the February 12, 1991 action of DER denying Empire's application for a surface mining permit with respect to a site in Mount Carmel Township, Northumberland County.

On April 19, 1991 DER filed a Motion for Summary Judgment to which Empire filed a Response on May 24, 1991. On February 11, 1992 the Board issued an Opinion and Order granting summary judgment to DER on the ground that Empire had not satisfied the statutory and regulatory requirement for a "written consent of the landowner" to be obtained and filed with the application (1992 EHB 95). Empire appealed our Opinion and Order to Commonwealth Court (No. 546 C.D. 1992) which reversed and remanded in a decision dated August 19, 1992 (150 Pa. Cmwlth. 112, 615 A.2d 829). DER's application for reargument was denied by Commonwealth Court on October 6, 1992 and its petition for allowance of appeal was denied by the Supreme Court of Pennsylvania (No. 0431 M.D. Allocatur Docket 1992) on September 3, 1993.

After completion of discovery and filing of pre-hearing memoranda, hearings commenced in Harrisburg before Administrative Law Judge Robert D. Myers,

a Member of the Board, on July 11, 1994 and continued during July 12, July 13, September 19, September 20, September 21, September 22 and October 14, 1994. Both parties were represented by legal counsel and presented evidence on behalf of their legal positions.

Empire filed its post-hearing brief on January 3, 1995 and DER filed its post-hearing brief on March 6, 1995. The record consists of the pleadings, a partial stipulation of facts (Stip.), a transcript of 1,571 pages and 95 exhibits.[1] After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. Empire is a Pennsylvania corporation, incorporated on November 30, 1987, with a registered office at 333 South Pine Street, Mount Carmel, PA 17851, and a business office at 230 South Vine Street, Mount Carmel, PA 17851 (Stip.; Exhibit C-13).

2. Dennis M. Molesevich has been president of Empire since its incorporation; Joseph Sotonak has been its secretary/treasurer (Stip.).

3. DER (now known as the Department of Environmental Protection) is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.*; the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510.17; and the rules and regulations promulgated under those statutes,

[1]Empire adopted a number of DER exhibits as its own and actually moved the admission of a majority of DER exhibits.

including the regulations governing surface mining of coal at 25 Pa. Code Chapters 86 through 88.

4. The land involved in this appeal (Site) is a 60-acre tract in Mount Carmel Township (Township), Northumberland County, near the southern edge of Big Mountain, extending east from Pa. Route 54 about 2/3 of a mile southeast of the village of Natalie (Stip.; Exhibits C-1 and C-2).

5. Part of the Site is an abandoned strip mine with a pit approximately 3,000 feet long and of varying width and depth. Abandoned deep mine tunnels and shafts also exist beneath the Site (Exhibits C-1 and C-2).

6. Since September 29, 1961 The Susquehanna Coal Company (Susquehanna), as owner of the 301.08-acre Jesse Brooks Tract, has been the record owner of the surface estate of the Site (Stip.; Exhibit E-21(7)).

7. The surface estate and the mineral estate of the Jesse Brooks Tract were severed on December 18, 1940 when Susquehanna Collieries Company, which owned both the surface and the minerals, conveyed the minerals to Pennwill Coal Mining Co. (Exhibit E-21(6)).

8. Through a series of conveyances the mineral estate of the Jesse Brooks Tract became vested in the Commissioners of Northumberland County on August 24, 1960 (Exhibits E-21(7) through E-21(13)).

9. On or about May 29, 1981 the Township filed with DER an Application for a Solid Waste Disposal Permit to construct and operate a sanitary landfill on the Site. This filing was a re-submission, the original submission having occurred at some prior date (Exhibits C-1 and C-2).

10. In March 1982, while DER was reviewing the Township's Application, the Commissioners of Northumberland County (County) recommended that DER deny the Application, *inter alia*, because construction of the landfill would

prevent the County from recovering the coal that the County owned beneath the Site (Stip.; N.T. 88-91; Exhibit C-6).

11. After receipt of the County's recommendations, personnel in DER's Bureau of Mining and Reclamation (Pottsville Regional Office), were assigned to study the coal reserves underlying the Site. They concluded that not much minable coal was left beneath the Site and reported this to DER's Bureau of Solid Waste Management (Williamsport Regional Office) (N.T. 374-383).

12. On August 19, 1983 Susquehanna and the Township entered into an Amended Lease Agreement for the Site, superseding a prior Lease Agreement dated October 1, 1974. The term of the Amended Lease Agreement was twenty years from October 1, 1974 (Stip.; Exhibit C-1).

13. On November 16, 1983 DER's Bureau of Solid Waste Management issued to the Township Solid Waste Disposal Permit No. 101174 (Landfill Permit) for the construction and operation of a sanitary landfill on the Site. The Landfill Permit, *inter alia*,

(a) allowed the natural attenuation[2] of leachate;

(b) allowed the disposal only of residential and commercial solid wastes and Class I, II and III demolition waste;

(c) allowed the landfill to be constructed in phases;

(d) required an engineer to supervise placement of renovating soils in the base of the pit for each phase;

(e) prohibited disposal of solid waste before renovating soils were in place for each phase;

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[2]"Attenuation" of leachate is a decrease in concentration or quantity resulting from physical, chemical or biological reactions. "Natural attenuation" is accomplished by the presence of suitable renovating soils beneath the solid waste. 25 Pa. Code §271.1. This type of leachate treatment is no longer allowed.

(f) required certification by a Registered Professional Engineer that each phase was constructed in accordance with approved plans and regulations; and

(g) required coal seams and outcrops encountered during construction to be buffered by a minimum thickness of 25 feet of renovating soil (Stip.; Exhibit C-7).

14. Notice of DER's issuance of the landfill Permit was published in the *Pennsylvania Bulletin* on December 3, 1983 (13 Pa. Bull. 3784; Stip.).

15. The County did not appeal to the Board the issuance of the Landfill Permit (Stip.).

16. The landfill uses a grid coordinate system[3] in which the baseline at station 0+00 is a line running roughly north-south that is located approximately at the eastern boundary of the permitted area of the landfill. In the grid coordinate system, the station designations indicate lines parallel to the 0+00 baseline that lie a specified distance to the west of that baseline. For example, station 9+00 lies 900 feet to the west of the 0+00 baseline, and station 11+80 lines 1,180 feet to the west of the baseline. (Stip.)

17. Landfilling began at station 0+00 and proceeded toward the west. By November 1986 renovating soil had been placed as far as station 14+00 but landfilling had not progressed beyond station 9+50. The intention of the Township was to continue landfilling until the entire permitted disposal area was filled (N.T. 1101-1102; Exhibits E-1, C-63, C-64 and C-65).

18. During 1987 the Township requested DER's Bureau of Solid Waste Management to authorize the Township to remove coal from the permitted disposal area of the landfill (Stip.).

---

[3]a common design practice that facilitates the locating of design features by station numbers.

19. At or about the same time the Township contacted Molesevich and Sotonak, among others, to see if they were interested in excavating coal from the Site (N.T. 916).

20. After reviewing the 1982 Northumberland County documentation on available coal reserves, Molesevich and Sotonak expressed an interest in the project (N.T. 916-917; Exhibit C-6).

21. A drawing prepared for Molesevich and Sotonak on September 8, 1987 showed the coal veins within the permitted area of the landfill and the approximate location of landfilling operations as of August 25, 1987 (station 14+50) (N.T. 104-107; Exhibit C-8).

22. On October 1, 1987 the Township informed Molesevich and Sotonak by letter that, *inter alia*,

(a) the Township Supervisors on September 22, 1987 voted to permit the removal of coal "in principle," meaning the coal removal could not "in any way interfere" with the landfill "lease, permit or operation;"

(b) if interference occurred, permission would be withdrawn;

(c) Molesevich and Sotonak were to develop and submit to the Township for approval a mining plan addressing, among other items, DER regulations (both mining and solid waste); and

(d) proposed changes in DER regulations were expected to require the landfill to be lined within about 24 months, thus necessitating the mining to be completed expeditiously

(Stip.; Exhibit C-9).

23. A meeting at the Site was held on October 19, 1987, attended by representatives of DER's Bureau of Solid Waste Management, DER's Bureau of Mining and Reclamation, the Township, and Molesevich and Sotonak, for the purpose

of discussing the proposed mining operation (Stip.; N.T. 921-922, 1151-1152; Exhibit C-10).

24. On October 22, 1987 DER's Bureau of Solid Waste Management informed the Township by letter (a copy of which was received by Molesevich and Sotonak several days later) that it approved the removal of coal with the following conditions:

1. All coal mining activities shall be conducted to the west of the current filling location in areas not yet filled.

2. The mining activity shall not be conducted within 100 feet of the filled area.

3. The mining activity shall in no way interfere with the landfill operation.

4. The mining activity shall not be conducted within 100 feet of any landfill monitoring well.

5. All exploratory drillings must be closed out in accordance with Bureau of Mining and Reclamation procedures.

6. All strip cuts in the landfill area which have not yet received waste shall be backfilled with adequate renovating soils meeting the requirements of Chapter 75.24(c)(2)(x). The amount of backfill meeting this specification must assure that the one-to-one ratio of renovating soil to waste will be met.

7. Any mining activities outside the active disposal area must receive approval and/or a permit from the Bureau of Mining and Reclamation.

(Stip.; Exhibit C-10).

25. DER was under the impression that it was approving incidental mining of coal encountered during landfilling operations which, if not removed, would have to be buffered by a minimum thickness of 25 feet of renovating soil (see Finding of Fact No. 13) (N.T. 20, 108-109, 1152-1153).

26. After receipt of the Township's October 1, 1987 letter (see Finding of Fact No. 22) and DER's October 22, 1987 letter (see Finding of Fact

No. 24). Molesevich and Sotonak prepared and submitted to the Township an Operations Plan accompanied by the drawing identified as Exhibit C-8 (see Finding of Fact No. 21). The Operations Plan stated, *inter alia*, that

(a) mining would be conducted in two phases: Phase I involving coal removal from the permitted disposal area under the Landfill Permit and Phase II involving coal removal from areas outside of Phase I but within the 60-acre permitted Site[4];

(b) mining would be conducted to provide larger refuse disposal areas for, and would not interfere with, landfilling operations;

(c) no mining would be done within 100 feet of filled areas or monitoring wells;

(d) drill holes, if any, would be plugged in conformance with current DER Bureau of Mining and Reclamation requirements;

(e) blasting, if any, would be coordinated with landfill personnel to insure that no damage occurs to monitoring wells;

(f) strip cut areas would be backfilled with adequate renovating soils meeting the requirements of the Landfill Permit;

(g) overburden would be cast aside for use by the Township in landfilling operations;

(h) collection ditches would be installed to prevent off-site drainage from entering mining areas; and

(i) existing landfill roads would be used and repaired, if damaged by mining vehicles

(N.T. 1039-1040; Exhibits C-8 and C-55).

---

[4]The Operations Plan stated further that no mining permits would be required for Phase I but would be required for Phase II.

27. Even though this was his first mining contract, Molesevich expected to make a great deal of money by excavating to, and then mining, the basin coal that underlay the Site (N.T. 1031).

28. On November 12, 1987, Susquehanna, as lessor, and Empire Mining and Development Company (referred to as a Pennsylvania corporation), as lessee, entered into a "Coal Lease for Surface Mining" and two Addenda thereto, pertaining to the surface estate of the Site (collectively referred to as the Surface Lease). Among the provisions was the following:

> Nothing herein contained shall, however, permit the Leasee to interfere with the operations of the Mount Carmel Township Supervisors acting in accordance with their rights set forth in Amended Lease Agreement dated August 19, 1983, to operate a sanitary landfill upon a portion of the described realty. Lessee shall, in any event, conduct its operations so as not to unduly interfere with the operation by the Township Supervisors of the sanitary landfill.

(Stip.; Exhibit C-11).

29. On November 20, 1987, the County, as lessor, and Joseph Sotonak and Dennis Molesevich (referred to as t/a Empire Coal Mining and Development Co.), as lessee, entered into an Official Coal Land Lease of Northumberland County Commissioners for Strip Mining, pertaining to the Site (Mineral Lease). The Mineral Lease authorized Empire to strip mine and remove coal "from the hereinafter described premises upon the conditions hereinafter set forth...." Paragraph 1 read as follows:

> 1. The land from which the coal is to be removed is described as follows, excepting and reserving therefrom, however, such rights as may have been acquired by any person, firm or corporation prior to the date of this Agreement.
>
> BEING STRIP MINE OPERATION M-561, IN THE 6, 7, 8, 9 VEINS North And South DIPS AT OR NEAR The Vicinity Of The Mt. Carmel Township Landfill Area LOCATED ON Jesse Brooks TRACT, 60 ACRES SITUATE IN THE TOWNSHIP OF Mt. Carmel

More particularly described as follows:

> The area described is within the boundaries of the Mt. Carmel Township Landfill area situated in Mt. Carmel Township, Northumberland County.
>
> Lessee is responsible for establishing any property lines between the landfill active area and the proposed strip mine area.
>
> Since the area to be stripped is within the boundaries of the 60 acres of surface now leased by Mt. Carmel Township, a map showing the area is attached hereto and made a part hereof.

A map attached to the Mineral Lease depicted the 60-acre Site labeled "Landfill Area"

(Stip.; Exhibit C-12).

30. Empire was incorporated on November 30, 1987 with Molesevich, Sotonak and Raymond Kraynak as incorporators (Exhibit C-13).

31. On January 6, 1988, DER approved a Landfill Permit modification authorizing the Township to increase its average daily volume of waste received at the landfill from 35 tons to 350 tons and its maximum daily volume to 1,000 tons. The issuance of this modification was published in the *Pennsylvania Bulletin*; no appeals were filed challenging the modification (N.T. 78-79, 180-183, 270-272).

32. Empire began coal mining operations at the Site on or about April 1988, starting approximately at station 14+00 and proceeding toward the west (Stip.; N.T. 559, 930, 1018; Exhibit C-69).

33. Initially, the mining operations (conducted mainly by Molesevich and Sotonak who could not devote their full time to it) progressed at a satisfactory pace but after a few months they began to slow down (N.T. 1028-1033, 1105).

34. During this period, because of regulatory changes that became effective April 9, 1988, Township Supervisors were considering whether to close the landfill or change it to a lined (rather than a natural attenuation) facility (N.T. 1106, 1172).

35. Ultimately, the Township Supervisors decided to close the landfill because Empire's mining operation was interfering with landfill operations (N.T. 1106-1107, 1172).

36. About June 1988 a DER inspector with the Bureau of Mining and Reclamation noticed that Empire had brought a drag line onto the Site and had begun to use the drag line to excavate a mining pit (Stip.).

37. DER's Bureau of Mining and Reclamation determined that Empire's mining operations should be covered by a separate surface mining permit. During the summer of 1988, representatives of DER's Bureau of Mining and Reclamation, DER's Bureau of Solid Waste Management, Empire and the Township began discussions about the permitting and regulation of Empire's mining activities (Stip.).

38. Between April 1, 1988 and December 1, 1988, Empire removed 5,034.69 gross tons (2,240 pounds per ton) of raw coal from the Site (Stip.).

39. On January 5, 1989 DER's Bureau of Mining and Reclamation sent to Empire application forms for a surface mining permit and informed Empire that a Consent Order and Agreement was being drafted (Stip.; Exhibit C-14).

40. Between January 1, 1989 and February 24, 1989, Empire removed 442.80 gross tons of raw coal from the Site. No raw coal was removed during the remainder of 1989. (Stip.).

41. On April 4, 1989 DER's Bureau of Solid Waste Management sent a letter to the Township stating that overfill discovered between stations 2+00 and 4+00 (approximately 10 feet in depth) and overfill of demolition waste in the northeastern part of the Site had to be removed and disposed of in other

permitted disposal areas on the Site in order to bring the landfill back within permitted elevations (Exhibit C-57).

42. On May 25, 1989 DER's Bureau of Solid Waste Management approved the Township's request to increase the average daily volume of waste received at the landfill from 350 tons to 455 tons and the maximum daily volume from 1,000 tons to 1,300 tons. Pursuant to DER policy relating to landfills that were going to close, the tonnage increase was approved without the Township going through the formal procedures for permit modification (N.T. 270-273; Exhibits E-2 and C-70).

43. On July 18, 1989 DER's Bureau of Solid Waste Management denied the Township's request to waive the current landfill boundaries in order to permit the overfill to remain where it was (Exhibit C-58).

44. On July 28, 1989 DER and Empire entered into a Consent Order and Agreement(CO&A), stating that Empire's mining on the Site (although conducted in reliance on the October 22, 1987 letter from DER's Bureau of Solid Waste Management - Exhibit C-10) was unlawful without a surface mining permit, and providing, *inter alia*,

(a) for a prompt determination of the acres affected, and to be affected, by mining and the posting of bonds to cover them;

(b) for Empire to file an application for a surface mining permit within 120 days;

(c) for Empire to comply with all DER requests for amendment, supplement or modification of the application; and

(d) for civil penalties

(Stip.; Exhibit C-15).

45. The Bureau of Mining and Reclamation allowed Empire to continue mining during and after the summer of 1988 and while its application for a

surface mining permit was being prepared and processed, because (a) Empire had begun in reliance upon the Bureau of Solid Waste Management's approval, and (b) suspending the mining operation during the permitting process would interfere with operations of the landfill (N.T. 1525-1527; Exhibit C-15).

46. Inspections of the landfill by DER's Bureau of Solid Waste Management between July 18, 1989 and February 7, 1990, *inter alia*, found the Township to be in violation of its permit boundaries by exceeding its vertical elevation. Notices of Violation (NOVs) were sent on August 14, September 18, September 27 and November 3, 1989 (N.T. 314-361; Exhibits E-4 through E-13).

47. On August 4, 1989, DER's Bureau of Solid Waste Management withdrew its approval for removal of coal from the landfill Site citing, as its reason, the interference of the mining operation with closure of the landfill (Stip.; Exhibit C-16).

48. The Township's solicitor conveyed this message to Empire. When Empire sought to obtain a copy of the closure plan from DER's Bureau of Solid Waste Management, it was told that no plan had been filed (Exhibit C-60).

49. The Township began removing and relocating overfill waste on August 21, 1989 (Exhibit C-61).

50. On August 23, 1989 Empire, in compliance with terms of the CO &A, submitted to DER's Bureau of Mining and Reclamation an irrevocable letter of credit in the amount of $50,000 to cover the costs of reclaiming the acreage affected by its mining operations at the Site prior to July 28, 1989 and any acreage which might be affected during pendency of Empire's application for a surface mining permit (Exhibits C-15 and C-66).

51. On August 29, 1989 DER's Bureau of Solid Waste Management wrote to Empire's then legal counsel (Robert B. Sacavage, Esquire) stating, *inter alia*,

(a) that a closure plan for the landfill had been received on August 25, 1989;

(b) that, although DER had not approved the Township's request to waive the current landfill boundaries, it was conceivable that closure of the landfill would require the overfill to be deposited in portions of the permitted area not currently used for waste disposal; and

(c) that mining approval had been withdrawn, in part, because mining operations had prevented the Township from relocating the overfill for four months, thereby interfering with landfill operations (Exhibit C-62).

52. On October 19, 1989, DER's Bureau of Mining and Reclamation approved the bonding submitted by Empire on August 23, 1989 (Exhibit C-22).

53. In a letter dated November 21, 1989, Empire's legal counsel (W. Boyd Hughes, Esquire) requested DER's Bureau of Mining and Reclamation to grant a 60-day extension of the deadline in the CO & A for Empire to file an application for a surface mining permit. An extension was granted to December 29, 1989 (Stip.).

54. On December 1, 1989 the Township filed with DER's Bureau of Solid Waste Management a second Closure Plan prepared by Michael J. Pasonik, Jr., Inc. (Pasonik Closure Plan). This Plan, *inter alia*,

(a) sought to overcome deficiencies DER's Bureau of Solid Waste Management had found with the closure plan submitted previously on August 25, 1989; and

(b) provided that overfill would be relocated to other portions of the permitted disposal area between stations 8+50 and 16+50. (N.T. 142-143, 162-164; Exhibit E-3).

55. On December 29, 1989, Empire submitted to DER's Bureau of Mining and Reclamation Application No. 49900102 (Application) for a surface mining permit for the Site (Stip.).

56. Although the Application was "grossly incomplete" and would have been returned to the applicant under normal circumstances, DER's Bureau of Mining and Reclamation chose to work with Empire in order to speed the process along (N.T. 387-388, 404-408, 500; Exhibit C-21).

57. DER's Bureau of Mining and Reclamation wrote to Empire on February 20, 1990 complaining that no mining had been done on the Site despite approval of bonding on October 19, 1989; that, as a result, the drag line was resting in an area needed by the Township to close the landfill; and that the drag line had to be moved no later than March 15, 1990 (Stip.; Exhibit C-22).

58. To discuss deficiencies in the Application and point out the area needed by the Township to close the landfill, DER's Bureau of Mining and Reclamation scheduled a meeting to be held at the Pottsville District Office on February 27, 1990. Representatives of DER and Empire attended the meeting (Stip.; N.T. 388-390, 410-412, 503).

59. On April 5, 1990 DER's Bureau of Mining and Reclamation wrote to Empire, reminding it that it had failed to file revisions to the Application during the month since the February 27 meeting and notifying it that, unless revisions were filed by April 14, 1990, the Application would be denied (Stip.; Exhibit C-23)

60. On April 9, 1990 the Township landfill ceased doing business (Stip.).

61. On April 10, 1990 DER's Bureau of Mining and Reclamation rejected Empire's request for an extension to May 1, 1990 but granted an

extension to April 23, 1990 for the filing of revisions to the Application (Stip; Exhibit C-24).

62. On April 11, 1990 Empire submitted a Consent Order Bond Location Map, detailing the areas to be covered by Empire's previously-submitted bonding. The transmittal letter stated that the bonded area included 7.18 acres of active mining, 21.06 acres of support areas, and a total bond calculation of $49,780 (N.T. 559-560; Exhibits E-16 and C-67).

63. On April 23, 1990, Empire resubmitted the Application to DER. DER accepted the Application for review and, on April 27, 1990, sent notice of its receipt of the Application to the required government entities. Notice of DER's receipt of the Application was first published in the *Pennsylvania Bulletin* on May 19, 1990. 20 Pa. Bull. 2672 (Stip.).

64. On April 24, 1990, DER's Bureau of Mining and Reclamation wrote to Empire in response to the Consent Order Bond Location Map submitted on April 11, 1990. In the letter, the Bureau

(a) informed Empire that the map was unacceptable because it covered more than the 10 acres that had previously been agreed upon by Empire and DER;

(b) requested the submission of a new map;

(c) advised Empire that, if any part of the 10 acres had been affected by the landfill, Empire could delete that acreage and add an equivalent area onto the western end;

(d) admonished that no mining could take place outside of the 10 acres previously agreed upon without DER approval; and

(e) reiterated that no mining could interfere with landfill operations

(Exhibit E-17).

65. On May 2, 1990, Attorney Hughes wrote to DER's Bureau of Mining and Reclamation,

(a) submitting, under protest, a revised Consent Order Bond Location Map showing 9.98 acres of active mining area and 1.65 acres of support area;

(b) denying that Empire and DER had ever agreed that only 10 acres either had been affected or would be affected during pendency of its Application; and

(c) reserving its right to affect more than 10 acres by mining in a westerly direction

(Exhibits E-18 and C-68).

66. On May 7, 1990, DER's Bureau of Mining and Reclamation approved the Consent Order Bond Location Map submitted on May 2, 1990 (revised slightly on May 3, 1990 to increase the bonded amount per acre from $3,000 to $4,000 because of the depth to which mining was expected to go), subject to the following conditions:

(a) bonded area to be surveyed and field marked before any new work is undertaken;

(b) all mining activities must be conducted within the bonded area,

(c) no mining activities within 100 feet of any solid waste disposal area or in a manner that would interfere with any landfill operations,

(d) adherence by Empire to all applicable state rules and regulations and all directives from Bureau of Mining and Reclamation

(Stip.; Exhibits C-27 and C-69).

67. Empire did not appeal to the Board DER's approval with conditions of the Consent Order Bond Location Map.

68. When Empire submitted the Application on December 29, 1989, Module 5.1b identified and included copies of the Surface Lease and a coal lease pertaining to a site in West Cameron Township, Northumberland County, as "the documents [upon] which the applicant bases the legal right to enter and commence coal mining activities" (Stip; Exhibit C-19).

69. On May 2, 1990, Empire submitted copies of the Mineral Lease to replace the West Cameron Township lease mistakenly included in Module 5.1b (Stip.)

70. Neither the original filing of the Application on December 29, 1989 nor the revised filing on April 23, 1990 (as supplemented on May 2, 1990) identified, included copies of, or mentioned any abstract of title, mineral reservation clause or any deed or other document of conveyance pertaining to the Site, other than the documents referred to in Findings of Fact Nos. 68 and 69 (Stip. Exhibit C-19).

71. Because the Township was interfering with Empire's access to the Site, Empire began an action in equity in the Court of Common Pleas of Northumberland County at 90 Civ. 1552. A Temporary Restraining Order, issued on May 3, 1990, was dissolved by a June 14, 1990 Order approving a Stipulation of Settlement (N.T. 1001-1005; Exhibits E-25 and E-26).

72. Two representatives of DER's Bureau of Mining and Reclamation visited the Site on May 17, 1990 as part of the Bureau's processing of Empire's Application. Active mining was going on at the time, 100 feet or less from the toe of the landfill. Leachate was ponded between the two operations (N.T. 414-425, 429-430, 443, 516-518; Exhibit C-50).

73. Molesevich met on May 24, 1990 with the District Mining manager and another DER employee at the Bureau of Mining and Reclamation's Pottsville office and raised questions about landfill closure and the possibility of mining

outcrops at the eastern end of the Site. On June 4, 1990 the Bureau responded in a letter stating that (1) the landfill closure plan was being reviewed at the Bureau of Solid Waste Management's Williamsport office, where questions should be directed, and (2) the outcrops lay beyond the boundaries of any actual or proposed mining areas and could not be mined without interfering with landfill closure (Exhibit E-19).

74. Empire's engineering consultant responded to DER's June 4, 1990 letter on June 15, 1990, pointing out that the outcrops, while not presently included in the mining Application, could be added easily and mined out quickly. The consultant added that, since no approved closure plan existed, it was possible to coordinate the mining of these outcrops with closure activities (Exhibit E-20).

75. DER's Bureau of Solid Waste Management found the Pasonik Closure Plan, which was filed on December 1, 1989, to be deficient. Failing in its efforts to get a satisfactory plan submitted, the Bureau decided to prepare a plan of its own and mandate its use by the Township (Exhibit C-48).

76. In preparing the closure plan, the Bureau of Solid Waste Management

(a) calculated the volume of overfill to be 61,319 cubic yards;

(b) determined that the overfill could be placed between station 17+80 and station 19+75, the only suitable locations on the Site[5];

(c) determined that erosion and sedimentation control facilities and stormwater handling devices would require another 250 feet beyond the toe of the fill; and

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[5]Trucking the overfill off-site to another disposal area was not considered practical or economically feasible (N.T. 130, 155).

(d) concluded that Empire's mining operation, which was then at or near station 19+50, interfered with the proper closure of the landfill (N.T. 224, 255-256, 284-292, 294, 297-298, 1177-1190; Exhibit C-48).

77. On June 22, 1990 representatives of DER's Bureau of Solid Waste Management and representatives of DER's Bureau of Mining and Reclamation met at the Site to discuss the impact of the landfill closure on Empire's mining activity. Representatives of both Bureaus agreed that the mining activity would have to be moved about 450 feet to the west to station 22+50 (N.T. 426-430, 433-437, 438-439; Exhibit C-50).

78. Between January 1, 1990 and June 30, 1990, Empire removed 246.38 gross tons of raw coal from the Site. Empire produced no coal during the months of February, March, and May 1990 (Stip.).

79. On July 19, 1990, DER's Bureau of Solid Waste Management issued an Administrative Order to the Township enclosing a Closure Plan for the landfill and requiring the Township to implement it. The Closure Plan, *inter alia*, mentioned Empire's mining activity being conducted about 150 feet from the toe of the landfill and stated that it would have to be moved an additional 300 feet to the west (Stip; Exhibit C-48).

80. The Township did not appeal the Administrative Order to the Board. Empire did appeal it at Board Docket No. 90-344-F, and the Board dismissed the appeal on May 21, 1992: *Empire Coal Mining and Development, Inc. v. DER*, 1992 EHB 657. Empire filed a Petition for Review with the Commonwealth Court of Pennsylvania, which affirmed the Board's dismissal of Empire's appeal in a decision issued on March 18, 1993: *Empire Coal Mining & Development, Inc. v. Department of Environmental Resources*, 154 Pa. Cmwlth. Ct. 296, 623 A.2d 897 (1993). By an Order dated July 26, 1993, the Supreme Court of Pennsylvania

denied Empire's Petition for Allowance of Appeal from the Commonwealth Court's March 18, 1993 decision. ____ Pa. ____, 629 A.2d 1384 (Stip.).

81. On July 30, 1990 DER's Bureau of Mining and Reclamation sent Empire a so-called "correction letter" regarding its Application, listing 37 items needing additional work. Item 16 required revision to Modules 6, 9 and 18 to exclude a 450-foot zone west of the existing toe of fill needed to close the landfill (Stip.; Exhibit C-28).

82. At the time the correction letter was sent, the toe of the landfill was at or near station 18+00 (Stip.).

83. On August 14, 1990, Attorney Hughes wrote to DER's Bureau of Mining and Reclamation, enclosing a copy of the Notice of Appeal of the Closure Order (Board Docket No. 90-344-F) and stating Empire's legal objections to accommodating the closure of the landfill (Stip.; Exhibit C-29).

84. Representatives of DER's Bureau of Mining and Reclamation met with representatives and consultants of Empire on September 7, 1990 and discussed the items in the correction letter. During that meeting, DER explained that the Foster Wheeler Cogeneration facility located directly across Pa. Route 54 from the Site had to be shown on the maps and plans contained in the Application (Stip.).

85. On September 17, 1990, legal counsel for Susquehanna (Joseph J. Prociak, Esquire) sent notice to Empire that the Surface Lease which would expire on November 11, 1990 would not be renewed and that Empire was expected to vacate the premises by the end of the term (Stip.; Exhibit 33).

86. From April 1988 through approximately September 1990, Empire paid royalties to Susquehanna for coal removed from the Site under the terms specified in the Surface Lease (Stip.)

87. On October 15, 1990 DER's Bureau of Mining and Reclamation received a copy of the September 17, 1990 notice to Empire of termination of the Surface Lease (Stip.)

88. On October 25, 1990, Attorney Hughes wrote to Attorney Prociak

(a) claiming that Empire has become vested with legal title to coal underlying the Site;

(b) referring to a Pennsylvania Supreme Court decision (unidentified by name or citation) interpreting the very language used in the coal reservation clauses applicable to the Jesse Brooks Tract as giving the right to mine the coal without the consent of the surface owner;

(c) arguing that, as a result, Empire did not need a lease with Susquehanna; and

(d) demanding a return of royalties paid by Empire under the Surface Lease

(Exhibit C-34).

89. On October 31, 1990, Empire's engineering consultant wrote to DER's Bureau of Solid Waste Management requesting a copy of the Closure Plan for the landfill "so that we may incorporate your closure into our...Application" (Stip.; Exhibit C-35).

90. The Surface Lease terminated on November 11, 1990. Empire has not held a Surface Lease from Susquehanna since that date (Stip.).

91. On November 19, 1990, DER's Bureau of Mining and Reclamation wrote to Empire (with a copy to Attorney Hughes)

(a) reminding that information requested in the correction letter was overdue;

(b) reporting that the Bureau had been informed of the termination of the Surface Lease; and

(c) requesting submission of a renewed lease

(Stip.; Exhibit C-47).

92. On November 19, 1990, Attorney Prociak responded to the October 25, 1990 letter of Attorney Hughes,

(a) taking issue with the legal analysis behind Empire's position; and

(b) demanding that Empire vacate the premises and pay all remaining rentals.

A copy of this letter was directed to DER's legal counsel (Kurt J. Weist, Esquire)

(Stip.; Exhibit C-37).

93. At no time prior to November 19, 1990 did Empire indicate to DER that Empire believed that it did not need a surface lease for the Site in order to have the legal right to conduct coal extraction operations on the Site using the surface mining method (Stip.).

94. At no time prior to November 19, 1990 did Empire indicate to DER that Empire believed that it possessed the right, based upon the mineral reservation clause in the relevant deeds, to conduct coal extraction operations on the Site using the surface mining method regardless of whether Susquehanna authorized or consented to such mining activity. (Stip.).

95. On or shortly after November 21, 1990, DER's Bureau of Solid Waste Management sent to Empire's engineering consultant a copy of the single, oversized site plan that is part of the Closure Plan for the landfill. The remaining portions of the Closure Plan had previously been provided to Attorney Hughes (Stip; Exhibit C-38).

96. Empire submitted a revised Application on December 18, 1990. The revised Application responded to items 14, 16, 22 and 25 of the correction

letter by referring to the August 14, 1990 letter from Attorney Hughes (see Finding of Fact No. 83) which was attached as Appendix B. (Stip. N.T. 514; Exhibit C-41).

97. Despite the expiration of the Surface Lease, Module 5 of the revised Application continued to identify the Surface Lease as one of the documents on which Empire based its right to enter and mine the site, continued to include a copy of the Surface Lease as an exhibit, and continued to utilize the Consent of Landowner executed on behalf of Susquehanna. Also included for the first time was a copy of Attorney Hughes' letter of October 25, 1990 to Attorney Prociak. Empire had not previously sent a copy of this letter to DER (Stip; N.T. 514; Exhibit C-41).

98. The revised Application continued to show proposed mining activities in the 450-foot zone needed to close the landfill. For that reason, the erosion and sedimentation controls and stormwater facilities were not coordinated with the landfill. In addition, the entire haul road and the Foster Wheeler Corporation facility were not shown on the maps and plans (N.T. 469, 753, 771-788, 1448-1453; Exhibit C-41).

99. Between July 1, 1990 and December 31, 1990, Empire removed 845.79 gross tons of raw coal from the Site. Empire produced no coal during the months of July, August, September and December 1990 (Stip.).

100. Having reviewed the revised Application and having concluded to deny it, representatives of DER's Bureau of Mining and Reclamation held a pre-denial telephone conference with Molesevich on January 30, 1991 to discuss the deficiencies and find out if Empire wanted to submit any more documents. Empire declined. (Stip.; N.T. 1536-1544).

101. On February 12, 1991, DER's Bureau of Mining and Reclamation issued a letter to Empire denying the Application for several major reasons:

(a) failure to establish a right to enter and mine the Site;

(b) interference with closure of the landfill; and

(c) shortcomings of maps and plans

(Stip.; Exhibit C-42).

102. From the time of the telephone conference on January 30, 1991 until the date of DER's denial letter, Empire submitted no additional documents or information; nor did DER request any in writing (Stip.)

103. In the permit denial letter, DER's Bureau of Mining and Reclamation, citing provisions of the CO & A, ordered Empire to cease mining immediately and to initiate restoration within 30 days (Exhibit C-42).

104. Between January 1, 1991 and February 15, 1991 Empire removed 32 gross tons of raw coal from the Site (Stip.)

105. Between February 15, 1991 and March 8, 1991, Empire removed 511.36 gross tons of raw coal from the Site. Empire has not removed any coal since March 8, 1991 (Stip.).

106. On March 15, 1991, Empire filed a Notice of Appeal, instituting the present proceeding before the Board at Docket No. 91-115-MR.

107. As of March 19, 1991, and continued to the present, Empire has not begun backfilling and reclamation at the Site (Stip.).

108. The mining pit Empire had begun to excavate by February 1990 is the same pit that remains open today. Its east-west dimension (100 feet) occupies an area roughly between stations 19+50 and 20+50. Its north-south dimension is approximately 150 feet and its depth is about 75 to 85 feet. Empire's drag line and the overburden Empire has cast toward the landfill occupy an area roughly between stations 18+75 and 19+50 (N.T. 610-611, 616-617, 1217-1219, 1294; Exhibit C-71).

109. The Township has been unable to close the landfill because of the presence of Empire's overburden pile, drag line and mining pit. The overfill has not been completely relocated and, therefore, the final grading and capping has not been done. Leachate remains ponded in the area between the landfill and the mine (N.T. 154, 1108-1110, 1177-1179, 1234-1235, 1427-1428; Exhibit C-42).

110. The longer the landfill remains unclosed and uncapped the greater the potential for leachate generation and outbreaks, contamination of surface water and groundwater, and production of methane (N.T. 1168-1171, 1234-1238, 1326, 1339-1340; Exhibit C-42).

111. Prior to the hearing, Empire submitted to DER copies of deeds and other documents showing the chains of title to the surface estate and the mineral estate of the Site. These documents were admitted into evidence at the hearing (Exhibits E-21(1) through E-21(3), E-22 and E-23).

DISCUSSION

Empire has the burden of proof: 25 Pa. Code §21.101 (c)(1). To carry the burden, Empire must show by a preponderance of the evidence that DER acted unlawfully or abused its discretion in denying the Application: 25 Pa. Code §21.101(a). Both parties have filed comprehensive post-hearing briefs. Issues not raised in the briefs are deemed waived: *Lucky Strike Coal Co. and Louis J. Beltrami v. Commonwealth, Dept. of Environmental Resources*, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

Paraphrasing the language in the brief, Empire contends that (1) Empire is legally entitled to surface mine the Site without the consent of Susquehanna, (2) DER's Bureau of Mining and Reclamation lacked legal authority to require Empire to move its mining operations 450 feet west of the toe of the landfill, (3) DER's Bureau of Mining and Reclamation and DER's Bureau of Solid Waste Management acted in concert in requiring Empire to move its mining

operations 450 feet west of the toe of the landfill and in denying Empire's Application if it did not move, (4) DER's Bureau of Mining and Reclamation, alone or in concert with DER's Bureau of Solid Waste Management, attempted to impose unlawful conditions precedent upon Empire, as a result of which Empire did not receive a fair and impartial review of its Application, and (5) since Empire did not receive a fair and impartial review of its Application and since the evidence establishes that Empire is entitled to a surface mining permit, DER's denial must be reversed and the issuance of a permit must be ordered.

These five contentions can be consolidated into two major issues: Empire's right to mine the site and DER's power to require Empire to move its operations. We will deal first with the right to mine.

Before Empire began any coal mining operations, it secured the Surface Lease from Susquehanna and the Mineral Lease from the County. It paid royalties under both Leases. When it filed its Application for a surface mining permit, it had to complete Module 5: Property Interests/Right of Entry. This Module had four subparts. Under the first (5.1) Empire had to provide for each parcel of land within the permit area (a) names and addresses of all legal and equitable owners of the land and the coal, (b) the documents upon which Empire based its right to enter and surface mine the Coal, and (c) a consent of landowner.

In response to 5.1(a) Empire identified Susquehanna as the owner of the Site, the County as the owner of the coal and the Township as the owner of a leasehold interest (a copy of the Amended Lease Agreement between Susquehanna and the Township, pertaining to the landfill, was enclosed as an exhibit). In response to 5.1(b) Empire identified, and attached copies of, the Surface Lease

and the Mineral Lease.[6] In response to 5.1(c) Empire attached a Contractual Consent of Landowner, executed by Susquehanna on December 7, 1987.

Module 5 was basically unchanged in the April 23, 1990 revised filing. Prior to the December 18, 1990 revised filing, the Surface Lease had expired and DER (under the impression that Empire and Susquehanna would come to a new agreement) had requested a renewed lease. Nonetheless, Empire submitted the same Module 5 as before but included a copy of Attorney Hughes' October 25, 1990 letter to Attorney Prociak. While this letter set forth Empire's legal position that Susquehanna's consent was not necessary, it did not provide the chain of title Empire was relying on or even name the Supreme Court decision which, it claimed, validated its position. In DER's hands at that time were (1) the Surface Lease which had expired and which Hughes' letter asserted was superfluous but which Module 5 still identified as one of the documents giving Empire its right to enter and mine, and (2) the Consent of Landowner, executed by Susquehanna prior to expiration of the Surface Lease, which Attorney Hughes claimed was superfluous but which Module 5 still identified as a supporting document.

DER discussed the inconsistence and incompleteness of this filing with Empire in the January 30, 1991 pre-denial telephone conference and asked if Empire intended to submit any additional documents. Empire elected to let Module 5 stand as it was.

25 Pa. Code §86.61 *et seq.*, at the time of DER's denial of Empire's Application, governed this subject. §86.61 stated that the applicant shall submit information, *inter alia*, on the "ownership and control of the property to be affected by the operations." The information required to be submitted under

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[6]Initially, Empire submitted another mineral lease for a different site, a mistake that was corrected several months later.

§§86.61, 86.62 and 86.64 was to be looked upon as a "minimum" requirement. §86.62(a)(1) called for the identification of record holders of interests in the "coal to be mined and areas to be affected by surface operations and facilities." §86.64 provided as follows:

> §86.64. Right of entry.
>
> (a) Each application shall contain a description of the documents upon which the applicant bases his legal right to enter and commence coal mining activities within the permit area and whether that right is the subject of pending court litigation.
>
> (b) The application shall provide for lands within the permit area:
>
> (1) a copy of the written consent of the current surface owner to the extraction of coal by surface mining methods; or
>
> (2) a copy of the document of conveyance that expressly grants or reserves the right to extract the coal by surface mining methods and an abstract of title relating the documents to the current surface land owner.

An applicant had two options to satisfy §86.64(b) - submit a signed Consent of the Landowner or submit title documents and a title chain showing the applicant's right to surface mine. As noted, Empire chose the first option in its initial filing of the Application and stayed with that option through the April 23, 1990 revisions. It was only after the Surface Lease (on which Susquehanna's Consent was based) expired that Empire began to claim a right to surface mine without Susquehanna's consent. Nonetheless, it still clung to the first option when it filed the December 18, 1990 revisions. Attorney Hughes' letter, filed with other revisions at that time, claimed the right to surface mine by document of conveyance (the second option) but submitted no copies and no chain of title.

Knowing the Surface Lease was no longer in effect, DER could not in good faith accept the three-year old Consent of Landowner as giving Empire a current right to enter and surface mine. Without any other documents to show that Empire had the right without the Surface Lease, DER had no choice but to deny the Application.

When Empire appealed the denial to this Board, its Notice of Appeal cited *Mount Carmel R. Co., et al. v. M.A. Hanna Co.*, 371 Pa. 232, 89 A.2d 508 (1952), as the Supreme Court decision establishing the right of the owner of the coal to surface mine the Jesse Brooks Tract without the consent of the holder of a right-of-way over a portion of the tract. While the judicial authority was thus disclosed, the chain of title linking the rights to Empire was still a mystery. When DER moved for summary judgment, Empire's response relied on the *Mount Carmel* decision but again made no effort to connect that case with Empire. This void was mentioned by the Board in its February 11, 1992 Opinion and Order granting summary judgment to DER (1992 EHB 95). After mentioning the absence of any evidence that the Jesse Brooks Tract involved in the *Mount Carmel* case is the same Jesse Brooks Tract involved in this appeal, the Board stated

> Besides, the [*Mount Carmel*] case involved a right-of-way 60 feet wide running through the tract and occupying in the aggregate no more than 30 acres. Even if we accept Appellant's unsupported contention that the Mining Site is on the same Jesse Brooks Tract as mentioned in the [*Mount Carmel*] case, we would have to conclude that the 60-acre Mining Site occupies much more of the tract than the right-of-way. Since the ruling in the [*Mount Carmel*] case construed the document establishing the right-of-way, the rights adjudicated related solely to that 60-feet wide strip of land. The ruling cannot be extended to other portions of the tract without proof that the same words were used in other documents tied to those portions. No such proof is before us.
>
> (1992 EHB 95 at 103).

Empire claimed in its appeal to Commonwealth Court that neither DER nor this Board had given it the opportunity to provide the deeds and chain of title showing how Empire benefits from the *Mount Carmel* decision. Commonwealth Court accepted the argument and remanded the case to the Board. We issued an Order reopening discovery and setting dates for the filing of pre-hearing memoranda. When Empire filed its pre-hearing memorandum on April 11, 1994, thirteen deeds were submitted. Empire contended in its pre-hearing memorandum that the *Mount Carmel* case involved a "virtually identical mineral reservation clause on the same tract of land." The thirteen deeds contained a gap in the chain of title and a fourteenth deed (from The Susquehanna Anthracite Company, formerly Susquehanna Collieries Company, to The M.A. Hanna Company, December 31, 1947) was presented shortly before the hearing.

During the hearing, Empire's expert witness, Albert J. Magnotta, testified that the surface estate and mineral estate of the Jesse Brooks Tract merged in 1914 in Susquehanna Coal Company.[7] This entity conveyed both estates to Susquehanna Collieries Company in 1917 and that company continued to own both estates until 1940. On December 18 of that year the estates were severed when Susquehanna Collieries Company conveyed to Pennwill Coal Mining Company "all the coal and other minerals under and beneath the surface of the following described tracts of land" (one of which was the Jesse Brooks Tract), "Together with the right to mine and remove said coal and other minerals, excepting and reserving as aforesaid." The surface estate passed to The M.A. Hanna Company in 1947 and to The Susquehanna Coal Company in 1961, where it still resides. The mineral

[7]The record is silent as to whether this "Susquehanna Coal Company" is the same entity as "The Susquehanna Coal Company" which acquired the surface estate in 1961 and still owns it.

estate passed through several hands until November 23, 1960 when it was conveyed by Treasurer's Deed to the County.

Magnotta was called upon to interpret the language in the 1940 deed of severance and gave his opinion that the language authorized any means of coal removal that was "economically feasible." He gave his opinion, in addition, that "surface mining was prevalent in the 1940s" in the "general anthracite region." Magnotta was not asked about the *Mount Carmel* case and the language interpreted there by the Supreme Court; and, in its post-hearing brief, Empire no longer cites the case as supporting its right to enter and surface mine the Site.

The reason is obvious. The document construed in the *Mount Carmel* case was an 1891 grant of a right-of-way over a portion of the Jesse Brooks Tract for construction of a railroad. The grantor (owner of both the surface estate and mineral estate) reserved the right to mine and it was this reservation clause that was in dispute. Obviously, the reservation clause applied only to the right-of-way (60 feet wide and covering 30 acres at the most), as we pointed out in our earlier Opinion and Order. Apparently, Empire discovered when it ran the chain of title that the right-of-way was not on the 60-acre Site of the landfill and that the *Mount Carmel* case, therefore, was of no support to its claim.

Empire acknowledges now that its right to surface mine the Site, if any, arise out of the 1940 deed of severance and must be interpreted by the circumstances surrounding its execution at that time. This is a correct statement of the law. The Supreme Court observed in *Rochez Bros., Inc. v. Duricka et ux*, 374 Pa. 262, 97 A.2d 825 (1953), that because of the violence done to the surface of the land, no landowner can be presumed to have authorized strip mining casually. The intention to do so must be clear and the one asserting the right has the burden of establishing it. The court distinguished *Commonwealth v. Fisher*, 364 Pa. 422, 72 A.2d 568 (1950), and the *Mount Carmel* case (1952), on

the basis that the language of the documents in those cases made the intention clear.[8]

In *Stewart v. Chernicky*, 439 Pa. 43, 266 A.2d 259 (1970), the Supreme Court restated the principle that a party who wishes to engage in strip mining must either own (or lease from the owner) both the surface estate and the mineral estate or own (or lease from the owner) a mineral estate which includes the right to employ strip mining. The Court also reiterated that the language in the deed of severance controls and that the intention of the parties at the time of the transaction governs.

Commonwealth Court has applied these principles on at least two occasions, in *GRC Coal Company v. Commonwealth, for use of Pennsylvania Game Commission*, 63 Pa. Cmwlth. 10, 437 A.2d 512 (1981), and in *Compass Coal Company, Inc. v. Commonwealth, Pennsylvania Game Commission*, 71 Pa. Cmwlth. 252, 454 A.2d 1167 (1983). The former case involved a 1941 deed with a clause reserving all coal and the right to mine and remove it without liability for surface damage. The court found that only deep mining was done in the area at the time of the deed and that the right to surface mine could not be presumed. Significantly, the Court also found that recent strip mining in the area by persons other than the original parties cannot be used to reflect the tenor of the bargain and that current economics of mining is not controlling.

Compass involved a 1934 deed with a lengthy reservation clause concerning mining. The Court held that the clause was doubtful and that the *intention* of the parties would control. According to the evidence, both surface mining and deep mining were occurring in the area but the deep-mined coal could

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[8]The reservation in *Fisher* authorized the "excavation" of the coal which the Supreme Court interpreted to mean mining down from the surface. The reservation in *Mount Carmel* specifically authorized "any method of mining."

be more feasibly sold. Consequently, only deep mining was intended. The Court observed that the transfer of "all coal" was not enough to establish the right to strip mine and that the current economics of strip mining were not relevant.

Turning to the present case, the 1940 deed of severance conveyed "all the coal...under and beneath the surface of [the Jesse Brooks Tract]...together with the right to mine and remove said coal..." The words "excavate" and "any method of mining," which were critical to the interpretation upheld in *Fisher* and *Mount Carmel* are not used here. The transfer of "all coal" also is not enough, according to *Compass*; so Empire has to do more to carry its burden of proving that surface mining was intended. Empire attempts to fill the void by arguing (based on the *Fisher* case, *supra*) that the right to mine the coal carries with it the right to employ any method economically feasible. That concept was specifically rejected in the *Stewart* case, *supra* with the admonition that the language to that effect in *Fisher* "should be disregarded." Commonwealth Court also rejected the argument in *GRC* and *Compass*, *supra*.

Empire asserts that surface mining was a prevalent practice in 1940 and, as a result, would have been one type of mining intended by the parties to the deed of severance. Magnotta's testimony, on which the assertion is based, leaves something to be desired. He testified, first of all, that surface mining was prevalent during the "1940s" without pinning it down any further. Second, he spoke of the "general anthracite region" and admitted a lack of specific knowledge of mining practices in Northumberland County in 1940. Our own research has revealed that the Act of June 18, 1941, P.L. 133, 52 P.S. §1471 *et seq.*, regulated strip mining for the first time. This statute was followed in 1945 by the Bituminous Coal Open Pit Mining Conservation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.*; and in 1947 by the Anthracite Strip Mining and Conservation Act, Act of June 27, 1947, P.L. 1095, as amended, 52 P.S.

§681.1 *et seq.* These enactments suggest that strip mining was becoming more and more widespread as the 1940s passed into history.

In order to discern the mining practices in Northumberland County during 1940, we looked to and hereby take judicial notice of the *Annual Reports, 1931-1945, of the Commonwealth of Pennsylvania Department of Mines and Mineral Industries, Anthracite Division*, Harrisburg, Pennsylvania, pages 292-294. Production figures for Northumberland county in 1940 from operations identified as "strips" amount to about 17% of the total coal production (about 4.5 million net tons) from the County during that year. This statistic suggests that coal stripping was a known practice at the time but was hardly "prevalent," which, according to *Webster's Ninth New Collegiate Dictionary*, Merriam-Webster, Inc. Springfield, Massachusetts (1987), means "dominant...generally or widely accepted, practiced, or favored: widespread."

We conclude that Empire has not sustained its burden of proving that, when the deed of severance was executed in 1940, the parties contemplated the mining of the coal by the stripping method. Consequently, Empire needs the consent of Susquehanna, owner of the surface estate, to surface mine the Site. Since that consent no longer was in effect after November 11, 1990, DER was justified in denying Empire's application for a surface mining permit on that basis.[9]

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[9]Empire's attempt to liken this case to *Sedat, Inc. v. Fisher*, 420 Pa. Super Ct. 469, 617 A.2d 1 (1992) is abortive. In *Sedat* there was no question whether the owner of the mineral estate had the right to surface mine. The conveyance made that right clear. Nevertheless, the owners of the surface estate refused to sign the Consent of Landowner. The Superior Court held that their signatures were not necessary, that the mineral owner was a "landowner" according to §1396.4(a)(2)(F)(ii) of SMCRA and could sign the consent form. Commonwealth Court followed this reasoning in a subsequent case arising out of DER's denial of a mining permit: *Sedat, Inc. and Seven Sisters Mining Co., Inc. v. Commonwealth, Department of Environmental Resources and Kenneth J. Fisher and Ann Fisher*, 165 Pa. Cmwlth. 431, 645 A.2d 407 (1994). Empire, in this case, was given the opportunity to proceed without a Consent of Landowner by presenting the

We will next consider DER's power to require Empire to move its coal mining operations in order to allow for proper closure of the landfill. Even though we could sustain DER's action on the sole basis of Empire's failure to prove a right to enter and surface mine the Site, the landfill issue is so important that it needs to be resolved in the hope of avoiding future litigation.

As already noted, the surface estate and mineral estate had been severed in 1940. By 1981 the former was owned by Susquehanna, the latter by the County.

When the Township applied for a permit to put a landfill on the Site, the County objected because the presence of the landfill would prevent the mining of the coal. DER issued the permit despite the County's objections, having become convinced that not much minable coal existed on the Site. No one, including the County, appealed this action.

Empire entered the picture in 1987, after the landfill had progressed to about station 9+50. We are not entirely certain of all that was said by the Township or by Empire concerning the coal and the extent of mining that was contemplated. DER's Bureau of Solid Waste Management clearly understood that only incidental mining would be done to eliminate some outcrops. The Township obviously thought the mining would not be a major undertaking either, because they thought it would last only about one year. Empire's agenda (secret or otherwise), however, was to get down to the basin coal 85 to 90 feet beneath the surface, expose it and remove it.

Whatever the extent of the mining operation finally agreed to (if any such agreement existed), the documents establish at least the following:

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deeds in its chain of title. Contrary to the *Sedat* situation, Empire has not shown that it has the right to surface mine the Site.

1. Coal removal could not occur within 100 feet of filled areas or interfere in any way with the landfill lease, permit or operations (Exhibit C-9, 10/1/87 letter, Township to Empire; Exhibit C-10, 10/22/87 letter, DER to Township; Exhibit C-55, Operations Plan, Empire to Township);

2. Because regulation changes expected in about 24 months would require the landfill to be lined, the mining must be expedited so that the liner could be installed without any shutdown of landfill operations (Exhibit C-9, 10/1/87 letter, Township to Empire).

The Surface Lease which Empire secured from Susquehanna repeated the "no interference" provision (Exhibit C-11). The Mineral Lease which Empire secured from the County (Exhibit C-12) stressed the fact that the coal lands were within the boundaries of the landfill and had a map attached to it showing the landfill location. Moreover, the authority to surface mine on the Site was limited by "such rights as may have been acquired by any person, firm or corporation prior to the date of this Agreement." Certainly, one of those prior rights was the Township's right to operate a landfill that would affect the County's ability to recover the coal. The County's failure to appeal from the issuance of the Landfill Permit made that action and the resulting impact on the County's mineral estate final: *Department of Environmental Resources v. Wheeling-Pittsburgh Corp.*, 473 Pa. 432, 375 A.2d 320 (1977), *cert. den.*, 434 U.S. 969 (1977). The Mineral Lease specifically required Empire to establish boundaries between the "landfill active area and the proposed strip mine area," making it abundantly clear that the two operations could not co-exist.

All of the documents that authorized Empire to enter the Site and surface mine it acknowledged the supremacy of the landfill over the mine. How then did Empire acquire rights that could not be interfered with on behalf of the landfill? Empire never identified the steps in the reasoning process that

supposedly elevated its mining rights above that of the landfill. But it places great emphasis on two factors. One is an alleged conversation between Molesevich and Hornberger prior to the time the CO & A was signed. According to Molesevich, Hornberger represented that, if Empire signed the CO & A, it would be able to continue mining legally (even while its Application was pending) and would be under the jurisdiction of Mines and Reclamation rather than Solid Waste Management. Empire seems to contend that, when it signed the CO & A and posted a bond, it acquired greater rights to mine the Site than it had before.

Again, the steps of the reasoning process were not disclosed and the Board is at a loss to find them itself. While it is true that the CO & A made legal a mining operation that previously was illegal (because of the lack of a permit), it did not affect and could not affect the terms of the relationships between Empire and the Township, Empire and Susquehanna, or Empire and the County. Thus, Empire remained subject to the prior rights of the Township in the operation of the landfill even after its mining was legitimized by the CO & A.

The Bureau of Mining and Reclamation made this apparent to Empire as early as February 20, 1990 (less than two months after the Application was filed) when it complained that Empire's lack of progress[10] caused its operation to be in an area needed by the landfill for proper closure. Empire was directed to complete mining operations in the existing pit and remove its equipment by March 15, 1990.

Empire's subsidiary position to the landfill was restated by The Bureau of Mining and Reclamation in its April 24, 1990 letter commenting on the Consent Order Bond Location Map and its May 7, 1990 letter approving the revised

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[10]Empire removed no coal from February 1989 (five months before the CO & A was executed) through the end of that year. Apparently, some coal was removed in January 1990 but none during February (Stip.).

map. While Empire's legal counsel took issue with portions of the April 24 letter on May 2, 1990, he did not object to the stipulation that mining could not interfere with landfill operations. Clearly, by this point, Empire could not still be under the impression that the CO & A had magically raised its rights above the landfill's. It was only when it learned that proper closure of the landfill would necessitate the mining operation to move 450 feet west that Empire began to assert a legal right superior to the landfill. But where did it come from? What bestowed it upon Empire?

The second factor is Empire's apparent belief that the Mineral Lease, which conferred the right to mine the coal, gave Empire rights which are absolute. As we have discussed, however, the rights which the County possessed did not include the right to surface mine without Susquehanna's consent and did not include the right to interfere with the landfill. Since the County could give Empire only such rights as the County possessed, Empire's right to mine the coal was encumbered with these limitations.

Even though Empire's mining rights were subordinate to the landfill, DER's insistence that Empire move its operation has to be examined to see if it was an abuse of discretion. One reason behind the requested move was the necessity of freeing up space to relocate overfill. The other reason was to provide room for the installation of erosion and sedimentation controls and stormwater handling facilities. Because a natural attenuation landfill depends upon a layer of renovating soil to cleanse the leachate, the volume of waste allowed to be deposited depends on the thickness of the renovating soil. If more waste is deposited than authorized, the leachate will not be properly renovated and contamination of groundwater and surface water can ensue. That is the reason why the permitted elevations are critical.

DER discovered in April 1989 that two areas of the landfill exceeded their permitted elevations. The Township was directed to remove the overfill and relocate it to the area currently being filled. The Township first requested DER to waive the elevations but, when this was rejected, began relocating the overfill on August 21, 1989. The operation was hindered by the proximity of Empire's mining operation, however, and very little overfill actually was relocated. When the Township elected to close the landfill later in 1989, it was obvious that relocation of the overfill would have to be a part of the closure.

DER's calculations revealed that the 61,319 cubic yards of overfill could be placed on Site west of the previously filled areas - between station 17+80 and station 19+75. In DER's opinion, this was the only suitable area on-Site. Trucking the waste to a permitted disposal facility off-Site was not considered to be an acceptable alternative because of the cost and the environmental risk.

The space between station 19+75 and station 22+50 was needed for the proper installation of erosion and sedimentation controls and stormwater handing devices - all critical to the proper closing of the landfill, according to DER.

Empire has not presented any evidence to dispute the presence of the overfill, its volume or the space needed to relocate it. It has not shown that the area between station 17+80 and 19+75 is excessive or unsuitable. It has not shown that there are other suitable areas on-Site. It has not shown that trucking the waste off-Site is practical. Nor has Empire attempted to challenge the need for, and the space required for, erosion and stormwater facilities between station 19+75 and station 22+50. We are left then with DER's evidence which we find to be persuasive and sensible. Since the Landfill Permit covered the entire 60 acres and the disposal area extended the length of the pit, the Township had every right to relocate the waste to that area and install the

stormwater controls there. In fact, DER could have been charged with abuse of discretion by the Township if it had ordered the overfill to be trucked off-Site.

The fault which Empire finds in this scenario is DER's failure to discover the overfill earlier. The evidence does not show when the overfill occurred. Because it was located between station 2+00 and station 4+00, it could have existed several years before DER discovered it. On the other hand, it might have been placed there more recently. Presumably, if DER had been more diligent in its inspecting, the overfill never would have occurred. We fail to see how this would have benefited Empire, however, because the 61,319 cubic yards of waste still would have been disposed of on-Site and the landfill still would have extended to station 19+75 to accommodate this waste. Empire, instead of beginning its mining operations at station 14+00, would have had to start further west.

Empire also complains about DER's approval for the landfill to increase its daily tonnage. The average daily tonnage was increased from 35 to 350 in January, 1988 (before coal mining began) and from 350 to 455 in May 1989. Empire contends that these increases allowed the Township to accelerate the landfill operations to the point where Empire could not keep ahead of it; but it presented no evidence to show that the average tonnage did, in fact, go up. Empire's claim that it was under the impression that the landfill would exist for 30 years also fails for lack of proof. The Township's October 1, 1987 authorization letter to Empire (Exhibit C-9) specifically states that mining had to be completed within 24 months when it was believed a liner would have to be installed.

The coal production figures strongly suggest that Empire slowed down significantly after 1988. As noted earlier, it began mining on or about April 1, 1988 and mined over 5,400 gross tons of raw coal during the next twelve

months. Serious mining stopped at that point - the total gross tons produced over the next two years (April 1989 to March 1991) amounting barely to 1,600 - and 500 of that amount being produced after denial of the permit. No coal at all was produced during 16 of those months. Even allowing for the fact that there were some extenuating circumstances (including Empire's trouble getting access to the Site in 1990), the production figures are still dismal compared to the first year. Empire has offered no satisfactory explanation for its failure to perform better, especially when DER specifically allowed it to continue mining while its Application was being processed. If it had acted diligently, it likely would have been far enough west that closure of the landfill could have proceeded without interference. While it seeks to blame DER and the Township, the fault, for the most part, was Empire's.

We find no abuse of discretion in DER's determination that the landfill, to close properly, had to be able to occupy the area up to station 22+50. Since Empire's coal mining rights were subordinate to the landfill's, Empire had no legal basis to continue to seek approval to mine in that area. Its refusal to delete the area from its Application justified DER in denying it.

In the denial letter, DER cited 25 Pa. Code §86.37(a)(4) as its authority. That section provides that an application will not be approved unless it affirmatively demonstrates, and DER determines, that an assessment has been made by DER of the probable impact of the coal mining on the hydrologic balance described in §§87.69, 88.49, 89.36 or 90.35 and the activities proposed in the application have been designed to prevent damage to the hydrologic balance within and outside the proposed permit area. "Hydrologic balance" is defined in 25 Pa. Code §87.1 as the "relationship between the quality and quantity of water inflow to, water outflow from and water storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake or reservoir. It encompasses the dynamic

relationships among precipitation, runoff, evaporation and changes in groundwater and surface water storage."

Both Chapter 87 (Surface Mining of Coal) and Chapter 88 (Anthracite Coal) apply to this Application in addition to Chapter 86 (Surface and Underground Coal Mining: General). Chapter 89 (Underground Mining of Coal and Coal Preparation Facilities) and Chapter 90 (Coal Refuse Disposal) are inapplicable.

Section 87.69 of Chapter 87, referred to in §86.37(a)(4), requires an application to contain a detailed description of measures to be taken to ensure protection of the quality and quantity of surface and groundwater systems both within and without the permit area from the adverse effects of surface mining. The application must contain a determination of the probable hydrologic consequences of the proposed surface mining on the hydrologic regime and on the quantity and quality of surface water and groundwater systems. Chapter 88, §88.49, also referred to in §86.37(a)(4), imposes identical requirements.

Reference is made in §87.69 to §§87.102, 87.115, 87.116 and 87.117. These sections all deal with hydrologic balance, setting effluent standards for discharges, monitoring requirements for surface water and groundwater and measures to restore recharge capacity.

Clearly, the protection of the waters of the Commonwealth is a primary concern of these mining regulations. Accordingly, the burden is placed upon the applicant to demonstrate affirmatively the probable impact of the mining on the waters on and adjacent to the mine site and the measures taken to protect those waters. No application can be approved if this has not been done.

Because Empire refused to eliminate from its permit area the 450 feet needed to close the landfill, it had to demonstrate affirmatively how its mining in a waste disposal area would impact the surface and groundwaters and the

measures it would take to protect them. But, since Empire refused to acknowledge the presence of the landfill in that area, it made no effort to do this.

The proximity of a mining operation (which totally disrupts the surface and subsurface features of the land to a depth of 85 feet or more) to a municipal waste landfill (which depends on the presence of adequate renovating soils to cleanse its leachate) presents obvious threats to the surface and groundwater. DER properly insisted that Empire demonstrate how its mining would protect those waters from contamination. Moving 450 feet west was the obvious solution; but Empire refused to do so. Consequently, it had to satisfy §86.37(a)(4) in order to get its permit. It did not do so.

Empire's complaint that DER's Bureau of Mining and Reclamation and Bureau of Solid Waste Management conferred on Empire's Application and that the former deferred to the latter where landfill closure is involved is complementary rather than a basis for criticism. DER's Bureaus regularly confer on permit applications and DER systematically requests the views of other governmental agencies at all levels. Deference is usually given to the views of officials having expertise in subjects under consideration. This collegial approach is bound to produce more effective government action. Besides, the recommendations of the Bureau of Solid Waste Management in this case were legal and appropriate. Empire has presented no evidence to the contrary.

DER also denied the Application for some other technical deficiencies. We sense that these alone would not have brought about the denial and, accordingly, will not discuss them.

CONCLUSIONS OF LAW

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

2. Empire has the burden of proving by a preponderance of the evidence that DER acted unlawfully or abused its discretion in denying Empire's Application.

3. DER had no choice but to deny the Application because documents submitted by Empire in Module 5 did not show Empire's right to enter and surface mine the Site.

4. Empire's citing of the *Mount Carmel* case as giving it the right to enter and surface mine the Site was not sufficient.

5. Empire's mineral rights to the Jesse Brooks Tract stem from a December 18, 1940 deed severing the surface estate and the mineral estate, while the mineral rights involved in the *Mount Carmel* case stemmed from a reservation in an 1891 document establishing a right-of-way over the Jesse Brooks Tract.

6. The mineral clauses in the two documents (1940 and 1891) are not "virtually identical" as contended by Empire.

7. The language in the 1940 deed conveying "all the coal", "together with the right to mine and remove said coal" did not expressly authorize surface mining as did the 1891 document in the *Mount Carmel* case which specifically reserved "any method of mining."

8. No landowner can be presumed to have authorized surface mining casually. The intent to do so must be clear and the one asserting the right has the burden of establishing it.

9. The language in the deed of severance controls and the intention of the parties at the time of the transaction governs.

10. The transfer of "all coal" is not adequate proof of intention to allow surface mining.

11. Current economics of strip mining are not relevant to the interpretation of a 1940 deed of severance.

12. Surface mining was not a prevalent practice in Northumberland County in 1940.

13. Empire has not carried its burden of proving that the deed of severance carried with it the right to surface mine without the consent of the surface owner.

14. DER was justified in denying the Application because Empire failed to show a right to enter and surface mine the site.

15. The County's failure to appeal DER's action in issuing the Landfill Permit made that action and the resulting impact upon the County's mineral estate final.

16. The Mineral Lease specifically limited the mining rights given to Empire by any rights acquired previously, thereby subordinating Empire's mining rights to the rights of the landfill.

17. The Mineral Lease specifically made Empire responsible for establishing boundaries between the landfill active area and the proposed mining area, reflecting an understanding that the two operations could not co-exist.

18. All the documents authorizing Empire to enter and surface mine the Site acknowledged the supremacy of the landfill over the mine.

19. Empire has not shown how its mining rights supposedly became elevated above those of the landfill.

20. The CO & A, entered into between Empire and DER, could not, and did not, affect the relationship between Empire and the Township or between Empire and Susquehanna.

21. The Mineral Lease gave Empire only the rights that the County possessed and, therefore, was encumbered by the limitations imposed by Susquehanna's ownership of the surface and the Township's operation of the landfill.

22. DER's conclusion that Empire's mining operation had to move 450 feet to the west in order to enable the landfill to close properly was supported by scientific evidence and was not an abuse of discretion.

23. Since Empire's coal mining rights were subordinate to the landfill's rights, Empire had no legal basis to continue seeking approval to mine in that 450-foot area.

24. DER was justified in denying Empire's Application since it sought approval to mine in the 450-foot area but yet did not affirmatively demonstrate the impact of mining in a waste disposal area on the hydrologic balance and the steps taken to protect it.

25. The cooperation between DER's Bureau of Mining and Reclamation and Bureau of Solid Waste Management and the deference of the former to the latter concerning what was needed to close the landfill is commendable rather than censorious.

O R D E R

AND NOW, this 29th day of August, 1995, it is ordered that Empire's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

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MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: August 29, 1995

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M. DIANE SMITH
SECRETARY TO THE BOA

JOSEPH J. KRIVONAK, JR.	:	
	:	
v.	:	EHB Docket No. 94-247-E
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	Issued: August 30, 1995
and NEW ENTERPRISE STONE & LIME CO.,	:	
Permittee	:	

OPINION AND ORDER
SUR APPELLANT'S MOTION TO RECONSIDER
MOTION TO VACATE "NEW ENTERPRISE"
PERMIT NO. SMP 250946

By Richard S. Ehmann, Member

Synopsis:

Joseph J. Krivonak's ("Krivonak") "Motion to Reconsider Motion to Vacate 'New Enterprise' Permit No. SMP 250946" is denied. Krivonak's initial Motion, treated as a motion for summary judgment, was denied because it failed to meet the necessary minimums as to content to allow the Board to consider its merits. Krivonak's current Motion, while conceding that his first Motion was "wanting," asks the Board to examine the whole permit issuance process, but fails to suggest any reason why the Board's prior denial of his Motion was in any way improper.

OPINION

The Board has already written two opinions in this appeal setting forth therein the procedural history of this appeal. Those opinions are dated June 1, 1995, and July 20, 1995. We will not repeat this general history a third time, but refer the reader there.

Krivonak's prior "Motion to Vacate Permit No. SMP 250946" was denied in our Opinion and Order dated July 20, 1995. In part, it was denied because it sought relief which had been granted to Krivonak (denial of New Enterprise Stone & Lime Co., Inc.'s Motion to Dismiss) prior to his filing of his Motion. The remainder of Krivonak's motion - the portion seeking an order vacating this permit - was denied because it failed to meet the minimum standards for the content of such a motion as set forth in Pa.R.C.P. 1035.

Krivonak's Motion for Reconsideration asks reconsideration of our Order of July 20, 1995, pursuant to 25 Pa. Code §21.122. It argues that while that filing may have been "wanting," it should have been enough for the Board to investigate the entire permit issuance process.

The Department of Environmental Protection ("DEP") has elected not to respond to this Motion, but New Enterprise has responded in opposition thereto. For several reasons, we must deny Krivonak's Motion.

As pointed out by New Enterprise, 25 Pa. Code §21.122 applies to reconsideration of final orders of this Board rather than interlocutory orders such as that this Board issued on July 20, 1995 in response to Krivonak's

prior Motion. Adams Sanitation Company, Inc. V. DER, 1994 EHB 1482. As a result, 25 Pa. Code §21.122 is inapplicable here.

Secondly, we grant reconsideration of interlocutory orders only when the movant demonstrates the existence of such exceptional circumstances as warrant it. Cambria Coal Company v. DER, 1991 EHB 361; City of Harrisburg v. DER, 1993 EHB 220. No such circumstances are suggested in Krivonak's Motion. While conceding that the documentary support for his Motion was brief and wanting, he contends the omissions from New Enterprise' permit application were so serious that the Board should look into the whole permit process. Krivonak is a *pro se* appellant who has refused to retain counsel to represent his interests because he that he is a "fast learner." This Motion makes it clear why being a "fast learner" is simply not enough. Krivonak fails to understand that this Board's function is not that of investigative grand jury, ombudsman or inspector general as to DEP. We do not investigate allegations of DEP misconduct or negligence. Our function is basically that of a court which adjudicates the rights of contesting parties based upon application of the laws of this state to the admissible evidence presented to us in a formal hearing. Thus, we do not "look into the whole matter" based on a party's allegations as is sought in this Motion.

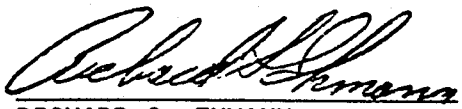
On July 20, 1995, we denied movant's prior Motion to Vacate because it was so deficient on its face that it failed to meet the minimum requirements for motions for summary judgment as set forth in our prior decisions and the

applicable rules. See Pa.R.C.P. 1035; Lycoming Supply, Inc. V. DER., 1992 EHB 115; Snyder v. Department of Environmental Resources, 138 Pa. Cmwlth. 534, 588 A.2d 1001 (1991). In other words, we could not reach the merits of any of the issues Krivonak attempted to raise in that Motion because it was too content deficient. Nothing in Krivonak's instant Motion demonstrates any other possible conclusion. To the extent Krivonak swears in this Motion that his allegations in his prior Motion are true, such "bootstrapping" does not make our prior conclusion incorrect. Moreover, even with his current oath that the facts therein are true and correct, his initial Motion and this current Motion still fail to meet the minimum standards for motions of this type. As such, they fail to display the grounds either to grant the Motion to reconsider our prior decision decision or to grant his prior Motion. Accordingly, we enter the following order.

O R D E R

AND NOW, this 30th day of August, 1995, it is ordered that Krivonak's Motion for Reconsideration is denied.

ENVIRONMENTAL HEARING BOARD



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: August 30, 1995

cc: DER Bureau of Litigation:
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Cairnbrook, PA
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SECRETARY TO THE BOAI

RAND AM, INC., MELCROFT COAL CO., INC. and PENNAMERICAN COAL, INC. :

v. : EHB Docket No. 95-161-E

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION : Issued: September 7, 1995

OPINION AND ORDER SUR PETITION TO INTERVENE OF MOUNTAIN WATERSHED ASSOCIATION, INC.

By: Richard S. Ehmann, Member

Synopsis

Where a non-profit corporation seek to intervene in an appeal from denial of an application to operate a deep mine beneath the property of its "members" because of concerns about pollution or destruction of the aquifer from which the members draw their water, the petition will be granted because the appeal challenges DEP's conclusion that the permit application fails to demonstrate there is no presumptive evidence of potential pollution of the waters of the Commonwealth. Since the petitioner's members are not aggrieved by this permit application's denial however, they will not be permitted to raise or offer evidence on issues dealing with other reasons why this permit should have been denied by DEP, but are limited to the issues raised by the Notice of Appeal.

OPINION

The instant appeal was commenced on July 28, 1995. In it, Rand Am, Inc., Melcroft Coal Co., Inc. and PennAmerican Coal, Inc. (collectively "Rand

Am") challenge the Department of Environmental Protection's ("DEP") June 30, 1995 denial of Rand Am's deep mine permit application No. 26931301 for an underground mine to be located in Fayette and Westmoreland Counties. In DEP's denial letter, DEP says the application is deficient because Rand Am failed to submit sufficient information to demonstrate that there is no presumptive evidence of the potential for pollution of the waters of the Commonwealth as required by 25 Pa. Code §86.37(a). No other grounds for permit denial are recited in DEP's letter. Rand Am challenges DEP's decision with 23 separate objections thereto.

On August 14, 1995, Mountain Watershed Association, Inc. ("Mountain") a non-profit Pennsylvania Corporation, filed a Petition To Intervene in this appeal. On August 28, 1995, the Board received DEP's response to the Mountain's Petition. DEP does not oppose intervention to the extent extraneous and irrelevant matters are not raised, but opposes the Petition if all of Mountain's extraneous matter is allowed in. On August 28, 1995, Rand Am also filed its Response To Petition To Intervene. Rand Am opposes any intervention by Mountain.

Not every petitioner may intervene in an appeal pending before the Board. To have a petition granted, the petitioner must demonstrate that he has a sufficient "interest" to cause the Board to allow him to be a party. According to Borough of Glendon v. DER, et al., 145 Pa. Cmwlth. 238, 603 A.2d

226 (1992), ("Glendon") this interest is defined as an interest which is substantial, immediate, and direct, and comes within the zone of interest protected by the statute.[1]

Where DEP has denied Rand Am's permit application because of a lack of sufficient proof of no presumptive evidence of a potential for water pollution, we must focus our review of the petition's adequacy on how its allegations demonstrate that the petitioner has sufficient interest in issues raised by DEP's adoption of this position. Rand Am contends Mountain's Petition fails in this regard.

While Mountain itself may have no "interest" sufficient to grant its petition on its behalf, Mountain is appealing as a non-profit corporation on behalf of its members. This Board has long recognized that such a petitioner's interest is measured by its members' interest. Lobolito, Inc. v. DER, 1992 EHB 889 ("Lobolito"). Thus, we look to the allegations of impact on Mountain's members. According to Mountain's Petition, many of its members live above the area which would have been mined if DEP had issued this permit (and which will be mined if DEP's permit denial is reversed through successful pursuit of this appeal). However, such contiguous property ownership by itself will not create standing. P.A.S.S., Inc. v. DEP, et al., EHB Docket No. 95-106-E (Opinion and Order issued August 25, 1995). However, Mountain's Petition also recites that many of its members also use aquifers located above the coal proposed to be mined under this permit as their water supply source and are concerned over the impact of mining as to their health and welfare.

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[1]Under the Commonwealth Court's decision in Glendon intervention is now based on "interest" rather than issues such as whether petitioner's interests are adequately represented by other parties or the types of evidence the petitioner will attempt to present.

To the extent that the concerns for Mountain's members go to either contamination or loss of their water supplies caused by Rand Am mining, their interest in defending the permit's denial exceeds the general public's interest in having the laws of the Commonwealth obeyed. Their interest is thus substantial under Glendon. Here, the denial is based on the potential for creation of water pollution through operation of the proposed mine. While it is not completely clear yet, the inference from the filings by the parties in this appeal suggest this could include both surface and groundwater (the aquifers). Such a potential suggests Mountain's members may be harmed directly by such mining and the harm to them, if it occurs, is not of some remote type. Thus, their substantial interest could be immediately and directly impacted, too. Having said this, we add that the Petition could have stated this in a much clearer, concise fashion. In this regard we agree with Rand Am that Mountain did not verbalize this position as clearly as it might have, but opine that, based on the allegations now before us, this is one of the fair readings of Mountain's Petition and Rand Am's response thereto.

Having drawn the conclusion that the Petition To Intervene should be granted, the Board is nevertheless compelled to conclude that much of the evidence which Mountain seeks to offer in this appeal is irrelevant to the issues raised by DEP's letter and Rand Am's Notice Of Appeal therefrom. While Mountain's Petition proposes intervention in opposition to the permit's issuance, a close reading of the Petition shows that it seeks to raise issues/reasons for permit denial not raised either by DEP's letter or Rand Am's Notice Of Appeal. Thus, it appears Mountain's position is antagonistic to both Rand Am and DEP.

Where we are faced with a petition to intervene which seeks to broaden the issues before us in this appeal, our path is clear. Here, Mountain is not injured by DEP's denial of Rand Am's application. With the permit's denial, no mining can occur. Accordingly, Mountain lacks standing to raise the additional issues in its Petition in this appeal. If, in the future, DEP issues a permit to Rand Am for this mine then, but only then, may Mountain raise such issues.

In reaching this conclusion, the Board expressly rejects Rand Am's suggestion that this is cause for denial of the Petition. As pointed out in Lobolito and again in New Morgan Landfill Company, Inc., 1992 EHB 1690, the better course is to allow intervention but bar evidence from Mountain on certain points. This is the course we will follow here. All evidence not going to the specific issue raised by Rand Am's objections to DEP's denial letter, is beyond the scope of this appeal. This includes evidence as to DEP's "user friendly" policy; DEP's alleged refusal to enforce the Clean Streams Law and/or Mining Act[2]; DEP's refusal to consider this community's "economic interest"; DEP's failure to verify coal ownership; DEP's failure to investigate or resolve citizens' complaints, and subsidence concerns of Mountain's members. Other subject matter areas of potential evidence mentioned in Mountain's Petition as concerns of its members are also limited as set forth above, although the Board cannot yet see the nature of the evidence which Mountain may offer so it cannot conclude that some of it, such

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[2]DEP's exercise of its prosecutorial discretion is not reviewable by this Board in any case. Westtown Sewer Company v. DER, et al., 1992 EHB 972.

as pollution from other permitted mines in this area or a report from a hydrogeologist, could not in some fashion relate in part to the objections before us.

Accordingly, the Board enters the following Order.

ORDER

AND NOW, this 7th day of September, 1995, it is ordered that Mountain's Petition To Intervene is granted as set forth in the foregoing opinion and the caption is amended to read:

RAND AM, INC., MELCROFT COAL CO., INC. and PENNAMERICAN COAL, INC.	:	
v.	:	**EHB Docket No. 95-161-E**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MOUNTAIN WATERSHED ASSOCIATION, INC., Intervenor	:	

It is further ordered that Mountain shall comply with Pre-Hearing Order No. 1 on the same schedule as DEP. Finally, it is ordered that Mountain, like the rest of the parties, is limited to offering relevant evidence germane to the issues raised by Rand Am's Notice of Appeal and Mountain is barred from offering evidence going to issues identified in Mountain's Petition which vary from those set forth in the Notice of Appeal.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: September 7, 1995

cc: **Bureau of Litigation**
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OLEY TOWNSHIP, PINE CREEK VALLEY WATERSHED ASSOCIATION, OLEY VALLEY YOUTH LEAGUE, INC., PIKE OLEY DISTRICT PRESERVATION COALITION, J. SCOT WILLIAMS and BRUCE LITTLEFIELD :

v. : EHB Docket No. 95-101-R

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and WISSAHICKON SPRING WATER, INC., Permittee : Issued: September 8, 1995

OPINION AND ORDER SUR
MOTION FOR EXTENSION AND CROSS-MOTION TO COMPEL

By: Thomas W. Renwand, Member

Synopsis

The Board grants the appellants a short extension of time to file answers and responses to interrogatories and request for production. Such an extension will not prejudice the rights of any party. Moreover, counsel are encouraged to cooperate and accommodate each other on discovery matters as long as the rights of their clients are not prejudiced.

OPINION

Appellants, Oley Township, Pine Creek Valley Watershed Association, Oley Valley Watershed Youth League, Inc., Pike Oley District Preservation Coalition, J. Scot Williams, and Bruce Littlefield (hereafter referred to collectively as "Oley Township"), commenced this appeal challenging the Department of Environmental Protection's ("Department") issuance of a public water supply permit to Wissahickon Spring Water, Inc. ("Wissahickon"). Presently before the Board are two Motions: 1) Oley Township's Motion for

Extension of Time to File Answers to Interrogatories and Responses to Request for Production, and 2) Wissahickon's Cross-Motion to Compel Answers to Interrogatories and Request for Production of Documents. Before turning to the merits of the Motions a brief review of the facts may be helpful.

Oley Township filed this appeal on June 12, 1995. On July 24, 1995, Wissahickon served its first set of Interrogatories and Request for Production of Documents on Oley Township. Following a telephone status conference with counsel, on August 9, 1995, the Board extended discovery until October 27, 1995. In this same order, the Board also scheduled an additional telephone status conference for October 16, 1995. One of the items that will be discussed at the telephone status conference as set forth in the order is whether the parties need additional discovery.

The Motions were necessitated by Oley Township's failure to answer the Discovery within 30 days of service pursuant to the Pennsylvania Rules of Civil Procedure. On August 21, 1995, Oley Township's attorney requested an additional 15 days to file answers to Wissahickon's discovery requests. Counsel for Wissahickon denied the request but instead agreed to extend the deadline for responding to August 25, 1995. On August 24, 1995 Oley Township filed its Motion for Extension requesting until September 20, 1995 to file its answers and responses. On August 30, 1995 Wissahickon filed its cross-motion requesting that the Board deny Oley Township's Motion and order answers and responses to be filed within 5 days of the Board's order. According to Wissahickon, "[t]here is no justification for the Board to condone Appellants' tardiness." (Memorandum In Opposition To Appellants' Motion for Extension of Time and in Support of Wissahickon's Cross-Motion to Compel Discovery at page 5.)

Practice before the Environmental Hearing Board ("Board") is governed by both the Practices and Procedures of the Environmental Hearing Board, see 25 Pa. Code §21.1 *et. seq.*, and the Pennsylvania Rules of Civil Procedure. Although the Board's present rules provide only a 60 day period[1] for discovery, its new rules (which will become effective upon publication in the *Pennsylvania Bulletin*) will extend the discovery period to 90 days. Of course, the parties can still request additional time. Moreover, under the new rules the parties, within 45 days of the date of the prehearing order, may submit a Joint Proposed Management Order to the Board. In this manner, the parties may propose alternate dates for the conclusion of discovery and the filing of dispositive motions. See new rule 25 Pa. Code §1021.81(a)(3) and (b).

The parties are thus encouraged to cooperate and agree on discovery proposals for submittal to the Board. Since no one knows a case better than counsel for the parties, they are certainly in the best position to accurately estimate how much time they need to complete discovery and prepare their cases for hearing. The information which needs to be factored into the equation not only includes the subject case but also other cases currently assigned to counsel plus the other circumstances of their personal and professional lives. In some cases 90 days to complete discovery will be sufficient. However, in other cases counsel may need far longer in order to adequately represent their clients' interests and obtain the necessary information through discovery in order to fully prepare for trial. This does not mean that counsel are invited

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[1]25 Pa. Code §21.111 provides "(a) Discovery shall be available to parties without leave of the Board... for a period of 60 days after the appeal or complaint has been filed with the Board. Discovery requested subsequent to the 60-day period is available only upon leave of the Board."

to ignore the time constraints of the Pennsylvania Rules of Civil Procedure but merely means that one size discovery does not necessarily fit all cases. The Board's new rules clearly recognize this fact and afford counsel a larger role in shaping their discovery period.

Discovery must also be conducted in good faith. The purpose of the discovery rules is to secure the just, speedy, and inexpensive determination of every action. Pa.R.C.P. 126. Discovery is not intended to be an "intermediate arena for jousting" in the time between the close of the pleadings and the filing of the pre-hearing memorandum. Boyle v. Stieman, 429 Pa.Super. 1, 631 A.2d 1025, 1031 (1993). As overseer of discovery, and when requested by a party or parties, the Board must examine carefully and quickly any discovery issues to make sure the interests of justice are being served. If counsel is simply dilatory the Board must act swiftly and order the discovery. However, where counsel seek a short extension counsel are encouraged and, indeed, are expected to be accommodating to each other as long as their clients' rights are not prejudiced.[2] If counsel believe an extension will harm their client because they will not have sufficient time to schedule depositions or additional discovery based on the answers to the proposed discovery they have a wide range of inexpensive options. First, they can file a motion seeking more time to complete discovery and set forth that it is needed because opposing counsel seeks an extension to respond to already

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[2]A lawyer's task is to represent her client zealously. Cooperation with other counsel on procedural matters is consistent with this mandate. It is certainly not a sign of weakness. On the contrary, such cooperation among counsel usually results in less expense to clients as the litigation runs much more smoothly. Unnecessary disputes over scheduling and discovery often escalate and raise stress levels to an uncomfortable level. This is unfortunate as the practice of law in general and especially before this Board should be an enjoyable and rewarding experience.

propounded discovery. Second, they could ask the Board for an immediate telephone or in person status conference to review discovery and request an extension. As long as the case has not been pending for more than 12-15 months this Board Member will likely grant an extension so that the rights of all litigants are well-protected. Even in older cases the granting of an extension may be required if it is the just and fair thing to do.

Turning to the present case, the Interrogatories and Request for Production served on Oley Township by Wissahickon are very comprehensive. Wissahickon propounded 36 Interrogatories with multiple subparts. Wissahickon basically seeks the identity of all facts, witnesses, and documents which could be relevant to the litigation. Wissahickon is also seeking a detailed explanation of the issues raised in Oley Township's Notice of Appeal.

Oley Township's request for a brief extension of time to answer and respond to these discovery requests is not unreasonable, and therefore will be granted. If Wissahickon believes the extension prejudices it in any manner it can file a motion to extend discovery.

ORDER

AND NOW, this 8th day of September, 1995, upon consideration of Oley Township's Motion for Extension and Wissahickon's Cross-Motion in Opposition and to Compel, together with a review of the actual Interrogatories and Request for Production, it is ordered as follows:

1) Oley Township's Motion for Extension is **granted.**

2) Wissahickon's Cross-Motion in Opposition and to Compel is **denied.**

3) Oley Township **shall answer and/or respond** to Wissahickon's Interrogatories and Request for Production on or before **September 20, 1995.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: September 8, 1995

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KEVIN SWEENEY :
:
v. : EHB Docket No. 95-019-E
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: September 11, 1995
and ENLOW FORK MINING COMPANY

OPINION AND ORDER SUR
PETITION FOR LEAVE TO
APPEAL NUNC PRO TUNC

By: Richard S. Ehmann, Member

Synopsis

Pa.R.A.P. 1701(a) bars this Board's consideration of Kevin Sweeney's ("Sweeney") Petition For Leave To Appeal Nunc Pro Tunc because he has appealed our dismissal of this appeal to the Commonwealth Court and that appellate proceeding is on-going in that forum.

OPINION

On January 24, 1995, Sweeney appealed to this Board from two Department of Environmental Resources' ("DER")[1] administrative orders to Enlow Fork Mining Company ("Enlow") to plug two wells on Sweeney's property in Washington County. Thereafter, DER moved to dismiss Sweeney's appeal as

[1]Since issuance of these orders, DER's functions have been split between the Department of Environmental Protection ("DEP") and the Department of Conservation and Natural Resources. The statute under which DER acted is now administered by DEP, however, the Board will continue to reference DER/DEP as DER to avoid creating any confusion.

untimely filed. After Sweeney filed his response thereto and on April 13, 1995, this Board issued an Opinion and Order sustaining DER's Motion and dismissing this appeal.

Thereafter, in early May, Sweeney filed a Petition For Review of that Board decision with the Commonwealth Court. It has been assigned Commonwealth Court Docket No. 1161, C.D. 1995. In accordance with standard practice and at the direction of the Commonwealth Court, on May 24, 1995 the Board forwarded the true and correct record in this appeal to that court. In that appeal Sweeney is seeking reversal of our Order of April 13, 1995. The Board is unaware of any decision by the Commonwealth Court and believes that that Court has yet to render any decision therein.

On August 7, 1995, despite the pendency of his appeal with the Commonwealth Court, Sweeney filed a Petition For Leave To Appeal Nunc Pro Tunc with this Board. It bore the instant docket number and was accompanied by a document captioned Notice Of Appeal Nunc Pro Tunc but not a brief.

Based upon receipt of this Notice Of Appeal Nunc Pro Tunc the Secretary to the Board incorrectly concluded this was a new appeal and assigned it Docket No. 95-167-E. None of the parties brought this error to the Board's attention.[2] Through issuance of our standard Pre-Hearing Order No. 1, and our letter to DER setting a time limit for its response to the Petition, the Board compounded that error. Only when DER's Response To Appellant's Petition For Leave To File Appeal Nunc Pro Tunc was received by

---

[2]Indeed, Enlow filed a Petition To Intervene on this new proceeding even though it is already a party in the instant appeal and DER filed its response to Sweeney's Petition at that new docket number rather than the instant appeal's docket number. We address elimination of this error in the Order following the Opinion.

this Board on September 6, 1995 and we began to prepare this opinion thereon, did the Board realize its error in docketing.

In response to Sweeney's Petition, DER alleges that Sweeney's Petition is asking this Board to reinstate his appeal and consider it on its merits. This DER states, is precisely the relief which Sweeney also seeks from the Commonwealth Court. Based upon this simultaneous prayer for relief, DER concludes that Pa.R.A.P. 1701(a) bars action by this Board on the Petition.[3]

Pa.R.A.P. 1701(a) provides:

> Except as otherwise prescribed by these rules, after an appeal is taken or review of a quasi-judicial order is sought, the trial court or other government unit may no longer proceed further in the matter.

As Sweeney elected to file no Brief in support of his Petition, the Board is unaware of whether Sweeney believes he fits within the exceptions to this prohibition set forth in other sections of Pa.R.A.P. 1701. This Board sees no exceptions there which address the situation presented by Sweeney's Petition. Because this is our conclusion, the case law makes it clear that the Board is barred from acting in any fashion on this Petition while this matter remains in the appellate courts. Clark v. Department of Corrections, ___Pa. Cmwlth ___, 648 A.2d 1344 (1994); Commonwealth v. Aaron, 419 Pa.Super 470, 615 A.2d 735 (1993).

---

[3]DER also avers that Sweeney's Petition is also a thinly veiled Motion For Reconsideration. DER avers such a motion is untimely under 25 Pa.Code §21.122 (and as a result this Board cannot consider the merits of its allegations) and the motion fails to meet the standards for such motions under §21.122. Finally, DER also asserts that on its merits Sweeney's Petition fails to state good cause for allowance of an appeal *nunc pro tunc*. The entire Board has not considered these issuues because we are barred from doing so under Pa.R.A.P. 1701(a).

Accordingly, the Board enters the following Order.

ORDER

AND NOW, this 11th day of September, 1995, it is ordered that all action by this Board on Sweeney's Petition For Leave To Appeal Nunc Pro Tunc is stayed because this Board lacks jurisdiction to entertain this Petition during the pendency of Sweeney's appeal to the Commonwealth Court. In connection with the Notice Of Appeal Nunc Pro Tunc docketed by the Board at No. 95-167-E, however, it is ordered pursuant to Pa.R.A.P. 1701(b)(1), that the docket at that number is closed and the Secretary to the Board is ordered to transfer all entries in the docket at that number to the docket at No. 95-019-E.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: September 11, 1995

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M. DIANE SMITH
SECRETARY TO THE BOAF

COUNTY COMMISSIONERS, SOMERSET COUNTY	:	
	:	
v.	:	EHB Docket No. 95-031-E
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
and MOSTOLLER LANDFILL, INC., Permittee	:	Issued: September 11, 1995

OPINION AND ORDER SUR PERMITTEE'S MOTION FOR SANCTIONS

By: Richard S. Ehmann, Member

Synopsis

The Board imposes sanctions on appellant where the appellant's amended and supplemental responses to interrogatories do not meet the requirements laid out by the Board's previous order regarding these interrogatories.

OPINION

This appeal was commenced on February 1, 1995, with the County Commissioners, Somerset County (Somerset) filing a notice of appeal with this Board, challenging the Department of Environmental Resources' (DER)(now the Department of Environmental Protection or DEP) issuance of Permit No. 101571 to Mostoller Landfill, Inc. (Mostoller) for construction and operation of a landfill to be located in Somerset and Brothersvalley Townships, Somerset County.[1]

Upon consideration of Mostoller's Motion to Dismiss Objections of Appellant County Commissioners, Somerset County and to Compel Responses to Permittee's

[1] Mostoller's appeal was consolidated with two other appeals at this docket number which now have been dismissed for lack of standing. See Opinion and Order Sur Motion for Reconsideration, issued August 16, 1995.

First Set of Interrogatories, filed on April 13, 1995, we issued an order dated May 16, 1995, granting the motion. Our order required Somerset to prepare and file new answers to each of the interrogatories in Mostoller's First Set of Interrogatories directed to Somerset in conformance with our order. We directed that Mostoller may properly seek disclosure, in summary form, of the salient facts on which Somerset bases its factual contentions, and that Somerset may not respond by generally referencing the permit appication and permit. We further required that Somerset must identify any specific document it believes is significant in this appeal. We directed Somerset to identify in its responses the persons who have knowledge of the "discoverable" matter.

Somerset served Amended Answers of County Commissioners to Mostoller's Interrogatories (Amended Answers) on Mostoller on May 31, 1995. Mostoller's Motion for Sanctions Against Appellant County Commissioners, Somerset County for Failure to Comply With the Board's Order of May 16, 1995 was filed with us on June 30, 1995. Mostoller has attached a copy of Somerset's Amended Answers to its motion as Exhibit A. Mostoller argues that these Amended Answers fail to comply with the Board's May 16, 1995 order by not identifying: 1) the facts supporting allegations made in the appeal; 2) relevant documents; and 3) fact witnesses expected to testify at the merits hearing. Mostoller's motion requests that we issue an order, pursuant to 25 Pa. Code §21.124 and Pa.R.C.P. 4019, imposing sanctions on Somerset which:

> 1. establish the allegations in the appeal addressed by interrogatories 2-4, 8, 10-14, 16, 17, 26-32, 34, 35, 37, and 39 in favor of Mostoller (as outlined in Mostoller's Exhibit B to its motion);
>
> 2. establish in Mostoller's favor the contents of the permit application with regard to the allegations in the appeal which are the subject of interrogatories 3-17, 22-31, 34, 35, and 38-40 (as outlined in Exhibit C to Mostoller's motion);

3. preclude the admission into evidence of any other document not identified in the amended answers.

4. prohibit fact testimony from anyone not identified in Somerset's amended answers to interrogatories 1(d), 3(c), 4(c), 5(d), 6(c), 8(d), 9(c), 10(c), 11(c), 12(c), 13(c), 14(c), 15(c), 16(d), 20(c), 22(d), 23(c), 24(b), 25(d), 26(c), 28(b), 29(c), 30(b), 31(d), 34(d), 35(c), 39(b), 40(d), and 43.

Somerset filed its pre-hearing memorandum with the Board on July 6, 1995. Additionally, on July 24, 1995, Somerset filed with us a copy of Supplemental Answers of County Commissioners, Somerset County to Permittee's First Set of Interrogatories (Supplemental Answers).

We subsequently received Somerset's response to Mostoller's motion on July 25, 1995, in which Somerset contends that it has made a "good faith" effort to comply with our order as to providing the necessary summary of facts. Somerset argues that insofar as its objection to DEP's issuance of the permit is that the permit application and permit do not contain the information, analysis, scientific protocol or assessment, or the detail or review which is necessary to ensure protection of human health and the environment, Somerset cannot identify any document which is non-existent or not present in the application or permit. Somerset takes the position that if Mostoller disputes Somerset's allegation that this is absent from the application or permit, then Mostoller should attempt to produce or reference such a document. Somerset also contends that our order required Somerset to identify persons with knowledge of facts, which it says it has done, but did not require it to identify persons who will be its fact witnesses. Somerset argues that Mostoller should be aware of what Somerset intends to present and prove at the merits hearing.

Mostoller filed a reply on July 26, 1995, opposing Somerset's contentions, and arguing that Somerset's responses have not served the purposes of discovery.

In addressing Mostoller's motion, we, thus, must examine what Mostoller's interrogatories sought from Somerset and what Somerset has provided in response.

Has Somerset Failed to Comply With the Board's Order?

Interrogatory 1

With respect to the allegations in Paragraph 1 of the appeal that "[t]he permit . . . and the application . . . failed to demonstrate that the application complied with all statutes and regulations relevant to the disposal of solid waste . . .", Mostoller's interrogatory 1(b) requests Somerset to identify all facts supporting the allegations. In its Amended Answers, Somerset responds to interrogatory 1(b): "[t]he 'facts' supporting the allegations are that the Application does not contain information which demonstrates compliance with the requirements of these sections of Pennsylvania law. The Appellant reviewed the Application and compared it to the statutes and found that the Application failed to demonstrate compliance with sections set forth in 1a. above. The appellant will be presenting expert testimony at the hearing to demonstrate such lack of compliance, however, the expert report is not yet complete. Appellant states that the Application as a whole is lacking in demonstrating compliance with the section set forth in 1a. above."

Interrogatory 1(c) asks Somerset to identify all documents that support, refer or relate to such allegations and/or facts. In its Amended Answers, Somerset responds to interrogatory 1(c) by stating that the Appellant alleges that the Application and Permit fail to address the compliance areas referenced in 1a. above. Somerset adds to this, "Appellant cannot reference a document other than to state that no such document or information is present in the Application. Appellant cannot be compelled to prove a negative other than by stating that the information is non-existent in the Application. If permittee

believes that such documents are present in the Application then it may certainly produce them and present them to the board [sic]." (Absence of document statement) Somerset adds to this statement that the application lacks technical information about the chemical interactions that are likely to occur in the landfill. (Lack of technical information statement.) Somerset then adds a two-page statement concerning its lack of knowledge. This statement provides:

> The Application lacks information concerning the wide range of pH's and chemical types which are to be present in the landfill and the inevitable incompatibilities that will exist between different combinations of these wastes and their derivatives.
>
> The Application has a complete absence of knowledge about the chemical and physical properties of the many types of leachate that will certainly be produced at MMWL and their possible interactions with the leachate containment system (e.g., liners, seams).
>
> A review of the Application demonstrates that the leachate treatment system was designed without substantive knowledge about the composition of the leachates that are to be treated.
>
> A review of the Application demonstrates the likelihood that hazardous and toxic chemicals will exist in the landfill, and be released via fugitive dust emissions and other mechanisms due to lack of any information concerning a system to control such actions.
>
> The Application does not contain any detailed evaluation of health, safety and environmental risks. The Application fails to contain information concerning the identity and concentration of chemicals within the landfill as a function of time and location.
>
> The Application does not contain information concerning the impact upon the wetland of discharging leachates of unknown chemical and physical properties.
>
> Appellant believes that DER's review and assessment of the landfill are clearly inadequate and improper due to the clear lack of necessary information in the Application.
>
> The Application fails to contain information sufficient to demonstrate that fugitive dust, VOCs and other air pollutants, contaminated surface water, contaminated ground water and other multimedia releases will not occur at the proposed MMWL facility. Therefore health and environmental threats posed by the landfill include, but are not necessarily limited to:

1. exposure to contaminated fugitive dust emissions (this dust could contain heavy metals and other toxic chemicals such as PCBs, polychlorinated dibenzofurans, polychlorinated dibenzodioxins).

2. exposure to contaminated private drinking water supplies in the event that seams and other aspects of the liner system are incompatible with wastes placed in the cell (there was no leachate specific compatibility testing performed by MLI).

3. exposure to odors present in gases that will be released.

4. exposure to contaminated trout and other fish in Kimberly Run.

5. exposure to inadequately "treated" leachate that is planned for discharge into the adjoining wetland.

6. occupational inhalation exposure to fugitive dust, volatile chemicals, and products from on-site fires.

7. damage to the ecosystem of adjoining wetlands.

8. damage to the ecosystem of Kimberly Run and the unnamed tributaries to Kimberly Run that receive water from the adjoining wetland.

All of the above areas of lack of information in the Application cause appellant to believe that the landfill may present a danger to health, safety and the environment.

The Appellant is having an expert review the Application and will include an expert report with its pre-hearing memorandum. The expert report may expand upon the areas set forth herein and should be viewed as an expansion or amendment of the answer. The expert report is not yet complete.

(Two-page statement.)

Somerset also states in its Amended Answers to interrogatory 1(c), "The appellant alleges that the application and permit fail to address the compliance areas referenced above."

Interrogatory 1(d) asks Somerset to identify all persons with knowledge of such allegations and/or facts. Somerset responds in its Amended Answers, "[c]ounsel for the Appellant, Kim R. Gibson, Esquire, who has such knowledge

based upon his review of the Application, Permit, and statutes." (Counsel for appellant statement.)

Somerset's Supplemental Answers to interrogatories 1(b), 1(c), and 1(d) refer Mostoller to Somerset's pre-hearing memorandum, which it incorporates as a supplement to its Amended Answers.

Interrogatory 2

Interrogatory 2 requests Somerset "[s]tate the factual basis for the allegation in Paragraph 3 of the Appeal that the Permit and/or permit application fail to demonstrate that the Permittee and DER complied with Article I, §27 of the Pennsylvania Constitution."

Somerset responds with its lack of technical information statement. It then sets forth the two-page statement. Somerset's Supplemental Answers refer to Somerset's pre-hearing memorandum.

Interrogatory 3

Interrogatory 3(a) asks Somerset to identify all facts supporting the allegations "in Paragraph 4 of the Appeal that the issuance of Solid Waste Permit 101571 was arbitrary, capricious and an abuse of discretion." Interrogatory 3(b) asks Somerset to identify "[a]ll documents which support, refer to or relate to such allegations and/or facts". Interrogatory 3(c) requests Somerset to identify all persons with knowledge of such allegations and/or facts.

Somerset responds to interrogatory 3(a) in its Amended Answers with its lack of technical information statement. It then sets forth the two-page statement. In response to interrogatory 3(b), Somerset uses the absence of document statement. In response to interrogatory 3(c), Somerset uses the counsel for appellant statement.

Somerset's Supplemental Answer to interrogatories 3(a), (b), and (c) refers Mostoller to Somerset's pre-hearing memorandum.

Interrogatory 4

Interrogatory 4(a) seeks for Somerset to identify all facts supporting the allegation "in Paragraph 5 of the Appeal that the Department failed to submit an environmental assessment which contained all the information required by 25 Pa. Code §271.127." Interrogatory 4(b) asks Somerset to identify all documents which support, refer or relate to such allegation and/or facts. Interrogatory 4(c) requests Somerset to identify all persons with knowledge of such allegation and/or facts.

Somerset responds in its Amended Answers to interrogatory 4(a) with the lack of technical information statement. To this, it adds its two-page statement. Somerset's Amended Answers to interrogatory 4(b) sets forth its absence of document statement. Somerset's Amended Answer to interrogatory 4(c) is the counsel for appellant statement.

Somerset's Supplemental Answers to interrogatories 4(a), (b), and (c) refer to Somerset's pre-hearing memorandum.

Interrogatory 5

Interrogatory 5(a) seeks from Somerset an identification of the potentially affected persons and appropriate government agencies Somerset is alleging that DEP failed to consult regarding the environmental assessment provided under 25 Pa. Code §271.127. Interrogatory 5(b) seeks an identification of all facts supporting Somerset's assertion. Interrogatory 5(c) asks for an identification of all documents that support, refer or relate to such assertion and/or facts. Interrogatory 5(d) requests Somerset to identify all persons with knowledge of such assertion and/or facts.

Somerset's Amended Answers respond to interrogatory 5(a): "[a]ll those government agencies and potentially affected persons identified in 25 Pa. Code §271.127 which are not specifically identified in the Permit Application." Somerset responds in its Amended Answers to interrogatory 5(b), "[t]he application fails to set forth this information concerning consultation." In response to interrogatory 5(c), Somerset uses its absence of document statement. Somerset responds to interrogatory 5(d) in its Amended Answers with its counsel for appellant statement.

Somerset's Supplemental Answers to interrogatories 5(a), (b), (c), and (d) refer Mostoller to Somerset's pre-hearing memorandum.

Interrogatory 6

Interrogatory 6(a) asks Somerset to identify, with respect to Paragraph 7 of its notice of appeal, the "severe and substantial construction problems which the Department has experienced with synthetic liners." Interrogatory 6(b) requests an identification of the municipal waste disposal facilities where such liner problems have occurred. Interrogatory 6(c) asks for an identification of persons with knowledge of such problems. Interrogatory 6(d) requests all documents which support, refer to or relate to such problems.

In its Amended Answers to interrogatories 6(a) and (b), Somerset states: "Examples are leaks which developed in liners at Mill Service owned landfill in Yukon and at RCC landfill in Somerset. Other examples are believed to be available from DER. This information has been requested from DER through a Request for Production, however, no response has yet been received by Appellant." In response to interrogatory 6(c), Somerset's Amended Answers use the counsel for appellant statement. To interrogatory 6(d), Somerset responds in its Amended

Answers, "documentation of liner problems and leaks is available from DER at 400 Waterfront Drive, Pittsburgh, Pennsylvania. (See a. & b. above)"

Somerset's Supplemental Answers to interrogatories 6(a), (b), (c), and (d) state that this information and these documents were formally requested from DEP, but DEP has failed to produce them.

Interrogatory 7

Interrogatory 7 asks Somerset to describe, with respect to interrogatory 6, all facts that support Somerset's allegation that DEP failed to consider its past experiences with synthetic liners, if any, when issuing the permit or reviewing the permit application.

In response to interrogatory 7, Somerset states in its Amended Answers, "There is no reference or indication contained in Permit Application or Permit that these liner problems were considered. Specific information and documents have been requested from DER, however no response has yet been received by Appellant." Somerset's Supplemental Answers add that this information was formally requested from DEP, but DEP has failed to produce it.

Interrogatory 8

Interrogatory 8(a) asks Somerset, with respect to its allegation that DEP failed to make any changes to the permit application to insure the integrity of the liner, to identify all changes which the Department should have required to insure the integrity of the liner. Interrogatory 8(b) requests from Somerset all facts supporting this allegation. Somerset responds in its Amended Answers to these interrogatories with the lack of technical information statement. It then sets forth its two-page statement.

Interrogatory 8(c) requests Somerset to identify all documents which support, refer or relate to such allegation and/or facts. In response to

interrogatory 8(c), Somerset's Amended Answers sets forth its absence of document statement. Interrogatory 8(d) asks Somerset to identify all persons with knowledge of such allegation and/or facts. Somerset responds in its Amended Answers with its counsel for appellant statement.

Somerset's Supplemental Answers to interrogatories 8(a), (b), (c), and (d) refer to Somerset's pre-hearing memorandum.

Interrogatory 9

With respect to Somerset's allegation that DEP failed to comply with 25 Pa. Code §271.127 by considering its experience with engineering design, construction, and operational deviances at comparable facilities, interrogatory 9(a) asks Somerset to identify all facts supporting this allegation. Somerset responds in its Amended Answers, "This information is not present in the Application or Permit. The lack of such information is the factual basis."

Interrogatory 9(b) asks Somerset to identify all documents which support, refer or relate to such allegation and/or facts. Somerset's Amended Answers respond with its absence of document statement. Interrogatory 9(c) requests Somerset to identify all persons with knowledge of such allegation and/or facts. Somerset's Amended Answer is its counsel for appellant statement.

Somerset's Supplemental Answers to interrogatories 9(a), (b), and (c) add that this information and these documents were formally requested from DEP, but DEP has failed to produce it.

Interrogatory 10

Interrogatory 10(a) requests Somerset, with respect to its allegation that the disposal of substances at the facility has the potential to cause fugitive emissions of the substances identified in Paragraph 11 of the appeal and potential health problems, to identify all facts which support this belief.

Interrogatory 10(b) asks Somerset to identify all documents which support, refer or relate to such a belief and/or facts. Interrogatory 10(c) seeks to have Somerset identify all persons with knowledge of such belief and/or facts.

Somerset's Amended Answers to interrogatory 10(a) give the lack of technical information statement. Somerset then sets forth its two-page response from interrogatory 1(c). In response to interrogatory 10(b), Somerset's Amended Answers set forth the absence of document statement. Somerset's Amended Answers respond to interrogatory 10(c) with the counsel for appellant statement.

Somerset's Supplemental Answers to interrogatories 10(a), (b), and (c) refer to Somerset's pre-hearing memorandum.

Interrogatory 11

Interrogatory 11(a) asks Somerset to identify all facts supporting its allegation in Paragraph 9 of its appeal that DEP has failed to comply with relevant provisions of the Air Pollution Control Act by failing to require the permittee to determine the nature and likelihood of fugitive emissions from the facility. Interrogatory 11(b) requests Somerset to identify all documents which support, refer or relate to such allegation and/or facts. Interrogatory 11(c) seeks to elicit from Somerset an identification of all persons with knowledge of such allegation and/or facts.

Somerset's Amended Answers at interrogatory 11(a) respond with the lack of technical information statement. Somerset then adds its two-page statement. To interrogatory 11(b), Somerset responds with its absence of document statement. To interrogatory 11(c), Somerset responds with the counsel for appellant statement.

Somerset's Supplemental Answers refer Mostoller to its pre-hearing memorandum as further response to interrogatories 11(a), (b), and (c).

Interrogatory 12

Mostoller's interrogatory 12(a) requests Somerset, with respect to the allegation in Paragraph 9 of its appeal that DEP has failed to comply with the relevant provisions of the Air Pollution Act by not requiring the permittee to control fugitive emissions from the facility, to identify all facts supporting the allegation. Interrogatory 12(b) asks Somerset to identify all documents which support, refer or relate to such allegation and/or facts. Interrogatory 12(c) asks Somerset to identify all persons with knowledge of such allegation and/or facts.

Somerset's Amended Answers to interrogatory 12(a) give the lack of technical information statement. It then sets forth the two-page statement. Somerset's Amended Answers respond to interrogatory 12(b) with the absence of document statement. To interrogatory 12(c), Somerset's Amended Answers respond with the counsel for appellant statement.

Somerset's Supplemental Answers refer to Somerset's pre-hearing memorandum.

Interrogatory 13

Interrogatory 13(a) asks Somerset to identify, with respect to Paragraph 12 of its appeal, all facts supporting its allegation that the permit application fails to demonstrate that the Department has made a determination that the residual wastes which it will allow the permittee to dispose of in the landfill are compatible with material used in the approved liner. In its Amended Answers, Somerset responds with the lack of technical information statement. It then sets forth the two-page statement.

Interrogatory 13(b) asks Somerset to identify all documents which support, refer or relate to such allegation and/or facts. Somerset's Amended Answers respond with the absence of document statement.

Interrogatory 13(c) asks Somerset to identify all persons with knowledge of such allegation and/or facts. Somerset's Amended Answers respond with the counsel for appellant statement.

Somerset's Supplemental Answers refer to Somerset's pre-hearing memorandum.

Interrogatory 14

Mostoller's interrogatory 14(a) requests Somerset, with respect to its allegation in Paragraph 13 of its appeal that the permittee failed to comply with 25 Pa. Code §287.132 regarding chemical analysis of the waste, to identify all facts supporting this allegation. Interrogatory 14(b) asks Somerset to identify all documents which support, refer or relate to such allegations and/or facts. Interrogatory 14(c) seeks to have Somerset identify all persons with knowledge of such allegation and/or facts.

Somerset's Amended Answers to interrogatory 14(a) respond with the lack of technical information statement. Somerset then incorporates its two-page statement. To interrogatory 14(b), Somerset responds with its absence of document statement. To interrogatory 14(c), Somerset replies with its counsel for appellant statement.

Somerset's Supplemental Answers to interrogatories 14(a), (b), and (c) refer to Somerset's pre-hearing memorandum.

Interrogatory 15

Interrogatory 15 seeks from Somerset an identification of all documents and/or persons with knowledge supporting the statement in Paragraph 13 of the Appeal that "it does not appear that the Department required any analysis of the waste which Permittee is likely to dispose . . . ." This interrogatory contains no subparagraphing. Somerset's Amended Answers break this interrogatory into three subparagraphs, (a), (b), and (c). Its response labelled as (a) is that the

Application and Permit do not contain this information. Its response labelled as (b) is its absence of document statement from interrogatory 1(c). Its response labelled (c) is its counsel for appellant statement.

Somerset's Supplemental Answers refer to Somerset's pre-hearing memorandum.

Interrogatory 16

Mostoller's interrogatory 16(a), with respect to the allegation in Paragraph 14 of Somerset's appeal that the permit application fails to demonstrate that the permittee complied with the requirements of 25 Pa. Code §287.133, regarding inclusion of a copy of a source reduction strategy for each residual waste to be disposed of or processed at the facility and each residual waste for which there is no source reduction strategy, asks Somerset to identify each residual waste for which there is no source reduction strategy. Somerset's response in its Amended Answers is that the application and permit fail to contain any information about any source reduction strategy for any residual waste.

Interrogatory 16(b) requests Somerset to identify all facts supporting its allegation. Somerset responds in its Amended Answers with its lack of technical information statement. It then sets forth the two-page statement.

Interrogatory 16(c) requests Somerset to identify all documents which support, refer or relate to such allegation and/or facts. Somerset responds in its Amended Answers with the absence of document statement.

Interrogatory 16(d) asks Somerset to identify all persons with knowledge of such allegation and/or facts. Somerset responds with its counsel for the appellant statement.

Somerset's Supplemental Answers to interrogatories 16(a), (b), (c), and (d) refer to Somerset's pre-hearing memorandum.

Interrogatory 17

Interrogatory 17(a) requests, with respect to Somerset's allegation in Paragraph 15 of its appeal that the application fails to demonstrate that the permittee complied with the requirements of 25 Pa. Code §287.134 regarding a waste analysis plan, to identify all facts supporting this allegation. Somerset responds in its Amended Answers with the lack of technical information statement. It then sets forth its two-page statement.

Interrogatory 17(b) asks Somerset to identify all documents which support, refer or relate to such allegation and/or facts. Somerset responds in its Amended Answers with its absence of document statement. Interrogatory 17(c) asks Somerset to identify all persons with knowledge of such allegation and/or facts. Somerset responds with its counsel for appellant statement.

Somerset's Supplemental Answers to interrogatories 17(a), (b), and (c) direct Mostoller to its pre-hearing memorandum.

Interrogatory 18

Interrogatory 18, with respect to paragraph 17 of the appeal, seeks to have Somerset identify persons and/or documents which advised DEP that there is currently no need for a third landfill in Somerset County and that the circumstances under which the Mostoller facility was placed in the approved county have changed, so that there is no longer a need for the facility.

In Somerset's Amended Answer to interrogatory 18, it directs Mostoller to attached correspondence to DEP, which is an 8-page letter from Attorney Gibson to DEP dated February 16, 1993, and a copy of a newspaper article, reflecting to be from the Daily American, Somerset, PA, June 25, 1992, concerning Mostoller's plans for its landfill facility. There is no Supplemental Answer to interrogatory 18.

Interrogatory 19

Interrogatory 19(a), with respect to the allegation in paragraph 19 of the appeal alleging that DEP failed to take into account and to properly analyze criteria to establish a need for the facility, asks Somerset to identify the criteria which DEP failed to take into account. Interrogatory 19(b) asks Somerset to identify all facts which support the allegation. Interrogatory 19(c) seeks an identification of all documents which support, refer or relate to such allegation and/or facts. Interrogatory 19(d) requests from Somerset an identification of all persons with knowledge of such allegation and/or facts.

Somerset's Amended Answer to interrogatory 19(a) refers Mostoller to the criteria set forth in DEP's Policy and Procedure Manual, Municipal Facilities dated November 29, 1993, pages 12 through 16. Somerset's Amended Answer to interrogatory 19(b), (c), and (d) refers Mostoller to the Amended Answer to interrogatory 18. There is no Supplemental Answer to interrogatory 19.

Interrogatory 20

Mostoller's interrogatory 20(a) asks Somerset, with respect to the allegation in Paragraph 20 of its appeal that DEP failed to consider the need for a third landfill in Somerset County when approving the permit application, to identify all facts supporting the allegation. Interrogatory 20(b) seeks from Somerset an identification of all documents which support, refer or relate to such allegation and/or facts. Interrogatory 20(c) requests Somerset to identify all persons with knowledge of such allegation and/or facts.

In response to these interrogatories, Somerset generally refers to its responses to interrogatories 18 and 19. Somerset's Supplemental Answers do not show any supplemented answer to interrogatory 20.

Interrogatory 22

Interrogatory 22(a), with respect to the allegation in Paragraph 21 of the appeal that the application failed to adequately identify all parties having an interest in the permittee, asks Somerset to identify all parties that the application failed to identify. Somerset responds in its Amended Answers that the owners and principals of the major shareholders of Mostoller Landfill, Inc. are not identified.

Interrogatory 22(b) requests Somerset to identify all facts supporting the allegation. Somerset responds in its Amended Answers, "[t]he information is not set forth in the application or permit. The fact is the lack of information."

Interrogatory 22(c) asks Somerset to identify all documents which support, refer or relate to such allegation and/or facts. Somerset responds in its Amended Answers to this interrogatory by setting forth its absence of document statement.

Interrogatory 22(d) seeks an identification of all persons with knowledge of such allegation and/or facts. Somerset responds in its Amended Answers with its counsel for appellant statement. There is no Supplemental Answer to interrogatory 22.

Interrogatory 23

Mostoller requests, at interrogatory 23(a), that Somerset identify all facts supporting its allegation in Paragraph 22 of its appeal that "the permit application fails to demonstrate that the proposed location of the facility is at least suitable as alternative locations giving consideration to environmental and economic factors." Somerset's Amended Answers state that the application and permit fail to contain this information, also directing Mostoller to the Amended Answers to interrogatories 18 and 19.

Interrogatory 23(b) asks Somerset to identify all documents which support, refer or relate to such allegation and/or facts. Somerset responds with its absence of document statement.

Interrogatory 23(c) requests Somerset to identify all persons with knowledge of such allegation and/or facts. Somerset's Amended Answers at interrogatory 23(c) state give the counsel for appellant statement. There is no Supplemental Answer to interrogatory 23.

Interrogatory 24

Interrogatory 24(a) asks Somerset to state the factual basis for its allegation in Paragraph 23 of the appeal that Somerset has excess reserve capacity in existing landfills and has no demonstrable need for a third landfill. Interrogatory 24(a) states that this response should identify all documents that support, refer or relate to such facts. Interrogatory no. 24(b) states that this response should identify all persons with knowledge of such facts. Somerset's Amended Answer to interrogatory 24 states, "See answer to Interrogatory 18 and 19." Somerset's Supplemental Answers do not contain supplements to the responses to interrogatory 24.

Interrogatory 25

In interrogatory 25(a), with regard to Somerset's allegation in Paragraph 24 of its appeal that the synthetics compatibility analysis submitted to DEP fails to adequately address the waste streams which are likely to be disposed of in the facility and to come into contact with the liner, Mostoller asks Somerset to identify the waste streams for which the synthetics compatibility analysis is allegedly deficient. Interrogatory 25(b) seeks from Somerset an identification of all facts supporting its allegation.

Somerset responds, in its Amended Answer to interrogatory 25(a), that the waste streams are not identified in the application or permit and, therefore, the synthetics compatibility analysis is deficient for all waste streams. It responds to subparagraph (b), "[t]he facts supporting the allegation is [sic] the lack of information in the Application and Permit."

Interrogatory 25(c) asks Somerset to identify all documents which support, refer or relate to such allegation and/or facts. Somerset's Amended Answers respond with the absence of document statement. Interrogatory 25(d) requests Somerset to identify all persons with knowledge of such allegation and/or facts. Somerset responds in its Amended Answers with its counsel for appellant statement.

Somerset's Supplemental Answers refer to its pre-hearing memorandum.

Interrogatory 26

Interrogatory 26(a) asks Somerset, with respect to its assertion at Paragraph 25 of its appeal that the compatibility analysis submitted with the permit application is speculative and provides an insufficient basis for DEP to rely on in issuing the permit, to identify all facts which support this assertion. Somerset responds in its Amended Answers with its lack of technical information statement. Somerset then sets forth its two-page statement.

Interrogatory 26(b) requests Somerset to identify all documents which support, refer or relate to such assertion and/or facts. Somerset responds in its Amended Answers with its absence of document statement.

Interrogatory 26(c) asks Somerset to identify all persons with knowledge of such assertion and/or facts. Somerset responds in its Amended Answers with its counsel for appellant statement.

Somerset's Supplemental Answers refer Mostoller to Somerset's pre-hearing memorandum.

Interrogatory 27

Interrogatory 27 asks Somerset to state the factual basis for the allegation in paragraph 26 of its appeal that the compatibility analysis is inadequate to comply with Pennsylvania's environmental laws and regulations. Somerset responds in its Amended Answers with its lack of technical information statement. It then sets forth the two-page statement. Somerset's Supplemental Answers refer to its pre-hearing memorandum.

Interrogatory 28

Interrogatory 28 requests Somerset to state the factual basis for its belief in Paragraph 27 of its appeal that the information submitted to DEP on Form 24 regarding the contents of the waste stream is inaccurate, inadequate and contrary to the terms of the permit. Mostoller's interrogatory further states at subparagraph (a) that the response should identify all documents that support, refer or relate to such belief and/or facts, and, at subparagraph (b), all persons with knowledge of such belief and/or facts.

Somerset's Amended Answers respond with the lack of technical information statement. Somerset then adds its two-page statement. Somerset responds to interrogatory 28(a) with its absence of document statement. It responds to interrogatory 28(b) with its counsel for appellant statement.

Somerset's Supplemental Answers refer to Somerset's pre-hearing memorandum.

Interrogatory 29

Mostoller seeks from Somerset, in interrogatory 29(a), an identification of all facts which support Somerset's belief and allegation in Paragraph 30 of the appeal that the potential for contamination of the air, ground and water

resources of the Commonwealth from a residual waste landfill is substantially greater than from a municipal waste landfill. Somerset responds in its Amended Answers with its lack of technical information statement. Somerset then adds the two-page statement from its Amended Answer to interrogatory 1(c).

Interrogatory 29(b) asks Somerset to identify all documents which support, refer to or relate to such belief and/or allegation. Somerset's Amended Answers sets forth the absence of document statement. Interrogatory 29(c) requets Somerset to identify all persons with knowledge of such belief and/or allegation. Somerset responds with its counsel for appellant statement.

Somerset's Supplemental Answers to interrogatory 29 refer to Somerset's pre-hearing memorandum.

Interrogatory 30

Interrogatory 30 asks Somerset to state the factual basis for its belief that the permit application, in its entirety, was deficient and incomplete with respect to information necessary to make the determinations that the disposal of residual waste will not cause a potential for pollution and endanger public health, safety and welfare. Interrogatory 30(a) asks that Somerset's response identify all documents that support, refer or relate to such belief and/or facts, while interrogatory 30(b) asks that Somerset's response identify all persons with knowledge of such belief and/or facts.

Somerset's Amended Answer to interrogatory 30 gives the lack of technical information statement. It then goes on to set forth the two-page statement. Somerset's Amended Answer to Interrogatory 30(a) responds with the absence of document statement. Its Amended Answer to interrogatory 30(b), Somerset responds with the counsel for appellant statement.

Somerset's Supplemental Answers to interrogatory 30 refer to Somerset's pre-hearing memorandum.

Interrogatory 31

Interrogatory 31(a) requests Somerset to identify, with regard to the allegations in Paragraph 32 of its appeal, that the site environmental conditions are not acceptable and, therefore, the permit is not consistent with the Somerset County Official Plan, the site environmental conditions which are not acceptable. Interrogatory 31(b) asks Somerset to identify all facts supporting the allegations. Somerset responds in its Amended Answers with its lack of technical information statement. To this Somerset adds its two-page statement.

Interrogatory 31(c) asks Somerset to identify all documents which support, refer or relate to such allegations and/or facts. Somerset's Amended Answers respond with the absence of document statement. Interrogatory 31(d) requests Somerset to identify all persons with knowledge of such allegations and/or facts. Somerset's Amended Answers respond with its counsel for appellant statement.

Somerset's Supplemental Answers refer to Somerset's pre-hearing memorandum.

Interrogatory 32

Interrogatory 32 requests Somerset to state the factual basis for the allegation at paragraph 33 of the appeal, that DEP failed to include permit terms and conditions necessary to carry out the provisions and purposes of the Solid Waste Management Act, the environmental protection acts, and regulations promulgated thereunder. Somerset responds in its Amended Answers with its lack of technical information statement. Somerset goes on to set forth the two-page statement. Its Supplemental Answers refer to Somerset's pre-hearing memorandum.

Interrogatory 33

Interrogatory 33 asks Somerset, with respect to its allegation in paragraph 35 of the appeal that DEP failed to consider public comments, to identify: (a) the comments that DEP failed to consider; (b) all facts supporting the allegation; (c) all documents supporting such allegation and/or facts; and (d) all persons with knowledge of such allegation and/or facts. Somerset responds in its Amended Answers, "See Answers to 18 & 19." There is no Supplemental Answer to interrogatory 33.

Interrogatory 34

Mostoller requests Somerset, in interrogatory 34(a), to identify, with respect to its allegation in paragraph 36 of the appeal that the permit was not complete and accurate, and therefore failed to comply with 25 Pa. Code §287.201, the specific areas of the permit application which were incomplete and inaccurate. Subparagraph (b) of this interrogatory asks Somerset to identify "the provisions of 25 Pa. Code §287.201 with which they do not comply." Somerset responds in its Amended Answers with its lack of technical information statement. Somerset continues by setting forth the two-page statement.

Subparagraph (c) of this interrogatory asks Somerset to identify all documents which support, refer or relate to such allegation. Somerset responds with its absence of document statement. In response to subparagraph (d), which asks Somerset to identify all persons with knowledge of such allegations, Somerset gives its counsel for appellant statement.

Somerset's Supplemental Answers to interrogatory 34 refer to Somerset's pre-hearing memorandum.

Interrogatory 35

Interrogatory 35 requests Somerset, with respect to its allegation in paragraph 37 of its appeal that "the residual waste management operations authorized by the Permit cannot be feasibly accomplished" pursuant to the DEP approved application, to identify all facts supporting the allegation. Somerset responds in its Amended Answers with its lack of technical information statement. It goes on to set forth the two-page statement. In response to interrogatory 35(b), which asks Somerset to identify all documents which support, refer or relate to such allegation and/or facts, Somerset responds with its absence of document statement. In response to interrogatory 35(c), which asks Somerset to identify all persons with knowledge of such allegation and/or facts, Somerset gives its counsel for appellant statement.

Somerset's Supplemental Answers refer to Somerset's pre-hearing memorandum.

Interrogatory 37

Interrogatory 37 asks Somerset to: "[i]dentify the elements required under 25 Pa. Code §288.132 which the Operation Plan submitted by the Permittee allegedly fails to demonstrate." Somerset responds, "Appellant does not believe that Permittee properly complies with any of the elements of §288.132 do [sic] to:" then inserts the lack of technical information statement and its two-page statement. Somerset's Supplemental Answer refers to its pre-hearing memorandum.

Interrogatory 38

At interrogatory 38, Mostoller asks Somerset to state the factual basis for its allegation, in paragraph 41 of its appeal, that DEP has experienced "severe, substantial and frequent leakage in liners installed pursuant to its regulations." Somerset responds in its Amended Answers: "Appellant is aware of testimony in deposition taken in Environmental Hearing Board proceedings and

actual cases where similar liners have leaked. The Mill Service No. 6 impoundment leaked almost immediately upon the commencement of operations. Appellant also believes the RCC liner in Somerset County leaked. Appellant is unaware of any facility where liners of similar design did not leak or fail. Appellant believes DER has documentation of additional instances of liners which have leaked or failed. This information has been requested from DER." In its Supplemental Answers, Somerset states that this information was formally requested from DEP, but DEP has failed to produce it.

Interrogatory 39

At interrogatory 39, Mostoller asks Somerset to state the factual basis for its allegation in paragraph 42 that the application, as a whole, fails to demonstrate that there will be no adverse impact on public health. Mostoller asks that Somerset's response identify: (a) all documents which support, refer or relate to such facts and/or allegation; and (b) all persons with knowledge of such facts and/or allegation. Somerset's Amended Answers give the lack of technical information statement and set forth the two-page statement. In response to subparagraph (a), Somerset sets forth its absence of document statement. In response to subparagraph (b), Somerset gives its counsel for appellant statement.

Somerset's Supplemental Answers refer to Somerset's pre-hearing memorandum.

Interrogatory 40

At interrogatory 40(a), Mostoller seeks from Somerset, with respect to Somerset's allegation in paragraph 43 of its appeal that the permit application fails to demonstrate that the facility will not have a potential impact on "the regional aquifer and water supplying formations and lithologies upon which Somerset County relies for drinking water and other uses", an identification of

the regional aquifer, water supplying formations, and lithologies which will be impacted by the facility. Subparagraph (b) asks Somerset for an identification of all facts supporting the allegation. Somerset responds in its Amended Answers to subparagraphs (a) and (b): "The basis for these allegations is a review of the Permit Application. Appellant believes that private water supplies, private wells, and municipal water supplies may be impacted adversely by the landfill. The Permit Application provides insufficient data concerning these issues. The landfill may adversely impact Kimberly Run, wetlands, the Mine Horizon Acquifer [sic], and the Upper Worthington Sandstone Acquifer [sic]. The ground water of these acquifers [sic] flows northwest, northeast and southeast."

Subparagraph (c) of this interrogatory asks Somerset to identify all documents which support, refer or refer [sic] to such allegation and/or facts". Somerset responds with its absence of document statement. Subparagraph (d) asks Somerset to identify all persons with knowledge of such allegation and/or facts. Somerset responds with its counsel for appellant statement.

Somerset's Supplemental Answers refer to Somerset's pre-hearing memorandum.

Interrogatory 41

Mostoller requests from Somerset, in interrogatory 41, an identification of each person Somerset expects to call as an expert witness at the merits hearing, including the subject matter on which each expert was consulted or is expected to testify; the substance of the facts and opinions relied upon, reached or to which the expert is expected to testify; a summary of the grounds for each opinion; and a list of all material the witness received, considered, or relied upon in formulating his or her opinions in this appeal. Somerset responds, "No final decision on this issue has been reached."

Somerset's Supplemental Answers state: "Melvyn Jerome Kopstein, Ph.D." As to subparagraphs (a) through (d), Somerset responds, "These answers are contained in the preliminary Expert Report attached hereto. It is noted that the expert report has been previously provided in the Pre-Hearing Memorandum filed by the Somerset County Commissioners on July 5, 1995."

Interrogatory 42

Interrogatory 42(b) asks Somerset, as to each person identified in the answer to interrogatory 41, to identify each document which each person has authored or coauthored. Subparagraph (c) asks for an identification of each document such person contends to support his expert opinion to be offered at the hearing, while subparagraph (e) asks for an identification of each document (including transcripts) which contains, refers to or constitutes expert testimony of each such person. Somerset responds by generally referring to interrogatory 41's Amended Answer.

In its Supplemental Answer to interrogatory 42, Somerset states, "For this information see the Preliminary Expert Report attached hereto. This information may be supplemented in an Amended or Final Expert Report which will be provided when available."

Interrogatory 43

Interrogatory 43 asks for an identification of each person, other than an expert witness, who Somerset plans to call as a witness at the hearing. Subparagraph (a) requests the subject matter of their expected testimony; subparagraph (b), the substance of the facts to which each witness is expected to testify; and subparagraph (c), a list of all material the witness received, considered or relied upon in formulating his testimony. Somerset's Amended Answers responds, "No final decision on this issue has been reached."

In Somerset's Supplemental Answers, it lists DEP's Tony Orlando, Somerset County Commissioners, and still unidentified "representatives of the Pa. Fish Commission".

In response to subparagraph (a), Somerset states that Tony Orlando will be questioned regarding his involvement with DEP's review and approval of the permit application, and about any contacts he had with the County Commisioners regarding the County's Solid Waste Management Plan. Representatives of the Fish Commission will be questioned regarding concerns the Commission raised in March of 1992 with regard to the permit application, and whether DEP resolved these concerns. The County Commissioners will testify concerning the need for a third landfill in the County, concerning the discussions with DEP about the County's Solid Waste Management Plan, and concerning why they believe the permit application should have been denied.

In response to subparagraph (b), Somerset states that DEP's Tony Orlando has not been deposed, nor have the representatives of the Fish Commission, but Somerset would expect these representatives of the Fish Commission to testify that the Commission's concerns raised in March of 1992 have not been resolved. The County Commissioners will testify that a third landfill is not needed and that the permit should have been denied, and that Tony Orlando advised them that the County's inclusion of the Mostoller Municipal Landfill in the County Solid Waste Plan would not affect whether the permit would be approved.

As to subparagraph (c), Somerset responds that the material Tony Orlando received is unknown; the material the Fish Commission received is unknown, except for a March 1992 letter to DEP expressing concerns about the permit application; and that the material received by the County Commissioners was the permit, and to some limited degree, the permit application.

Interrogatory 44

Interrogatory 44 seeks to have Somerset identify, for each preceding interrogatory, all individuals who furnished information upon which each response is based and all individuals with knowledge of the facts referred to in each interrogatory. Somerset responds in its Amended Answers with its counsel for appellant statement. In its Supplemental Answers, Somerset adds Melvyn Jerome Kopstein, Ph.D.

May the Board Issue Sanctions?

Pursuant to the Board's rules at 25 Pa. Code §21.124, the Board may impose sanctions on a party for failure to abide by a Board order. Such sanctions may include dismissal of the appeal or other sanctions permitted in similar situations, such as exclusion of evidence. See William Ramagosa, Sr., et al. v. DER, 1991 EHB 1427. These sanctions may also include the barring of a witness not disclosed in compliance with any order. See Rescue Wyoming, et al. v. DER, 1993 EHB 772; Nowakowski v. DER, 1990 EHB 244. In Magnum Minerals v. DER, 1984 EHB 627, we ruled, pursuant to 25 Pa. Code §21.124 and Pa. R.C.P. 4019, that where, upon a motion for sanctions brought by DER, the appellant in that matter had been ordered by the Board to furnish more complete answers to various DER interrogatories, and where the appellant's supplemental answers to these interrogatories were found by the Board to be deficient, sanctions against the appellant were appropriate. We pointed out in Magnum Minerals that the appellant there bore the burden of showing that its opponent had not been prejudiced by its unwillingness to comply with the discovery rules, even after the Board had issued its order directing that supplemental answers to the interrogatories were necessary.

The Board sees very few appeals where an appellant thwarts use of discovery techniques by its opponent to understand the underpinings of its appeal, such as has occurred here. The initial interrogatories propounded by Mostoller were not properly answered by Somerset. That resulted in Mostoller seeking an order from the Board to compel Somerset to answer these interrogatories in a fashion which disclosed substantive information about the nature of the forty-three objections to the permit's issuance contained in Somerset's lengthy notice of appeal (nine pages). On May 16, 1995, the Board specifically concluded that naming witnesses in a party's pre-hearing memorandum was not adequate, where the identity of all persons with knowledge of certain facts alleged by Somerset is what was sought. Our order mandated that Somerset identify these persons (with what constitutes identification being spelled out in Mostoller's interrogatories). Likewise, our order mandated that Somerset had to abandon any general identification of documents in answering interrogatories (such as saying the documents provided to it by DEP), and had to identify specific documents, or with regard to Mostoller's permit application, a specific module or study rather than merely directing Mostoller to the application, which is six volumes in size.

Our order also directed specificity, and rejected generality, in answers to interrogatories calling for Somerset to state facts supporting its allegations. The order stated Somerset ". . . may not respond by generally referencing Mostoller to the permit and application to permit." It is obvious from the general nature of the objections to the landfill permit in Somerset's notice of appeal that specifics in regard thereto could properly be sought by Mostoller. Unspecific objections invite discovery of the specifics. Examples of these unspecific objections are:

> 8. The Appellant believes that the Department has failed to comply with 25 Pa. Code §271.127 with respect to the inherent limitations

and imperfections in similar designs and materials employed at comparable facilities with respect to the liner set forth in the permit application and approved by the Department.

31. The Appellant believes, based on the information available to the Appellant at the time this Appeal was filed, that the application, taken as a whole, is deficient and incomplete with respect to information necessary to make relevant determinations required under Article I, §27 of the Pennsylvania Constitution, and Pennsylvania's environmental laws, that the disposal of residual wastes in this facility will not cause a potential for pollution, and endanger the public health, safety and welfare.

40. The application fails to demonstrate that sufficient information is set forth from which the Department could have concluded that steps necessary to protect the health, safety, welfare and the environment with respect to PCB containing waste, were set forth in the application, contrary to 25 Pa. Code §288.191.

We have outlined above on an interrogatory-by-interrogatory basis how Somerset has elected to respond to our order requiring it to file reanswers to Mostoller's interrogatories in a more specific fashion. The Board does not understand why Somerset has elected to pursue this course of conduct, having been given an opportunity to rectify the situation, especially since we can find neither case law interpreting the rules on discovery which supports Somerset's actions (and Somerset has cited us to none) nor, considering the possibility of sanctions spelled out in 25 Pa. Code §21.124 and the Pennsylvania Rules of Civil Procedure, any logical reason to pursue it. However, our job in light of Mostoller's Motion is to act in response thereto.

Factual Allegations in the Appeal

Somerset's Amended Answers to interrogatories 2-4, 8, 10-14, 16, 17, 26-32, 34, 35, 37, and 39 do not state the factual bases for Somerset's allegations in its appeal sought by those respective interrogatories. Somerset responds to each of these interrogatories with its lack of technical information and two-page statements, *supra*. Somerset's Supplemental Answers to each of these

interrogatories refers Mostoller to Somerset's pre-hearing memorandum. However, Somerset's pre-hearing memorandum does nothing more to furnish an adequate response to these interrogatories. It merely restates the allegations involved in this appeal without setting forth any factual bases therefor. Somerset's Amended Answers and its Supplemental Answers are not in compliance with the portion of our May 16, 1995 order which directed that Somerset, in its responses to these interrogatories, disclose, in summary form, the salient facts on which Somerset bases its factual contentions, and that Somerset may not respond by generally referencing the permit application and permit. Since Somerset cannot have been unaware that it was not being responsive to these interrogatories when it gave its standard response to each, it leaves us no choice but to grant this motion. In these circumstances, the sanction requested by Mostoller for Somerset's failure to comply with this portion of our order is appropriate.

Contents of Permit Application With Regard to Allegations in Appeal

With respect to interrogatories 3-17, 22-31, 34, 35, and 38-40, dealing with the contents of the permit application with regard to the allegations in Somerset's appeal, Somerset's responses to these interrogatories in its Amended Answers are inadequate. Its Amended Answers to interrogatories 3, 4, 8, 10-14, 17, 26-31, 34, 35, and 39 set forth the lack of technical information and the standardized two-page statement for each interrogatory. With respect to interrogatory 5(a), Somerset responds in its Amended Answers by simply saying all those government agencies and potentially affected persons identified in 25 Pa. Code §271.127 which are not identified in the permit application. In its Amended Answer to interrogatory 6, Somerset gives as an example leaks which it says developed at two other landfill liners, but it does not identify the problem with these liners. In its Amended Answer to interrogatory 7, 9, 15, 16, 22-23, and

25, Somerset asserts simply the lack of information (requested by the interrogatory) in the permit application or permit. Somerset's Amended Answer to interrogatory 24 merely refers to previous interrogatory answers 18 and 19, which were extremely general. In its Amended Answer to interrogatory 38, Somerset points to leaks which it says developed at the Mill Service Impoundment No. 6 and, it believes, at the RCC landfill in Somerset County. Somerset adds that it is unaware of any facility where liners of similar design did not leak or fail, and that it has requested information from DEP concerning instances of liners which have leaked or failed. Somerset's Amended Answer to interrogatory 40 responds that the landfill may adversely impact Kimberly Run, wetlands, the Mine Horizon aquifer, and the Upper Worthington Sandstone Aquifer, and that the permit application contains insufficient data concerning these issues. Its Supplemental Answers to interrogatories 3-4, 8, 10-14, 16-17, 26-31, 34, 35, and 39 refer Mostoller to Somerset's pre-hearing memorandum. To the extent that Somerset's pre-hearing memorandum is virtually a restatement of the objections in Somerset's notice of appeal, the purposes of discovery have not been met by those interrogatory responses which reference same. There is nothing responsive to these interrogatories in this regard in Somersets pre-hearing memorandum.

To comply with the directions in our May 16, 1995 order, Somerset had to state which items in the permit application and permit were inadequate and why these items were inadequate. To do so, Somerset should have pointed to specific forms, studies, maps, pages, or modules of the permit application or permit which provide support for each of Somerset's assertions of deficiency. Though the permit application is not yet "of record", Mostoller's pre-hearing memorandum attaches the application's table of contents, which shows the application to be comprised of six volumes and roughly 100 maps or drawings. This volume of

material by itself clearly precludes meaningful discovery responses where Somerset's responses reference the entire application. If the inadequacies were believed to be omissions, as Somerset in part suggests, then Somerset had to state that the permit application or permit is deficient because it does not address that specific item, and identify where in the permit application or permit Somerset felt that that information should have been addressed. Somerset never attempted such an effort. We therefore conclude that the sanctions against Somerset sought by Mostoller should be imposed.

Admission into Evidence of Documents Not Identified by Somerset

Pointing to Somerset's responses to interrogatories 3(b), 4(b), 5(c), 8(c), 9(b), 10(b), 11(b), 12(b), 13(b), 14(b), 15, 16(c), 17(b), 22(c), 23(b), 24(a), 25(b), 26(b), 28(a), 29(b), 30(a), 31(c), 34(c), 35(b), 39(a), and 40(c), Mostoller argues that Somerset does not identify with particularity the documents or portions of documents which support Somerset's allegations.[2] Somerset's Amended Answers to these interrogatories set forth its general absence of document statement. Somerset's Supplemental Answers to these interrogatories refer Mostoller to Somerset's pre-hearing memorandum; the Supplemental Answers to interrogatories 6, 7, 9, and 38 all state that the documents relating to the subject of these interrogatories were requested from DEP, but they were never provided to Somerset. Somerset's pre-hearing memorandum, in turn, refers to the permit application, the permit, and "all documents provided to Appellants by DE[P] and Mostoller Landfill, Inc."

Pursuant to our May 16, 1995 order, Somerset was under an obligation to identify with specificity the documents critical to its contentions. We required

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[2] Mostoller also points to Somerset's Amended Answer to interrogatory 27, but this interrogatory did not request an identification of any documents.

that Somerset must identify any specific document it believed was significant in this appeal. Somerset has failed to do so. It is an inadequate response for Somerset to state that it requested documents from DEP, but DEP failed to produce them. If Somerset was having difficulty obtaining information from DEP, it had to utilize the procedural means provided under our rules to compel DEP to provide documents in DEP's possession.[3] We thus find sanctions against Somerset to be appropriate, and Somerset will not be permitted to offer into evidence documents to support the following paragraphs of its notice of appeal: ¶5, ¶6, ¶7 (as to DEP's alleged failure to make any changes to the permit application to ensure integrity of the liner), ¶7 (as to DEP's alleged failure to comply with 25 Pa. Code §271.127 by considering its experience with engineering design, construction, and operational deviances at comparable facilities), ¶11, ¶9 (as to DEP's alleged failure to comply with relevant provisions of the Air Pollution Control Act by failing to require Mostoller to determine the nature and likelihood of fugitive emissions from the facility), ¶9 (as to DEP's alleged failure to comply with the relevant provisions of the Air Pollution Control Act by not requiring Mostoller to control fugitive emissions from the facility), ¶12, ¶13 (as to Mostoller's alleged failure to comply with 25 Pa. Code §287.132), ¶13 (as to DEP's alleged failure to require an analysis of the waste which Mostoller

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[3] Somerset did seek answers to its interrogatories from DEP. It received answers and objections. In response thereto, Somerset filed a motion to compel answers to interrogatories by DEP. Somerset's motion identified interrogatories which were unanswered or inadequately answered, but failed to point out what was wrong with each specific answer or objection, instead saying DEP's lawyer should know the meanings ascribed by Somerset to words and phrases used in its interrogatories to DEP because of counsel's experience. By order dated June 2, 1995, we denied this motion without prejudice to Somerset filing a motion which addressed any inadequacy in an answer or objection to its various sets of interrogatories on an interrogatory-by-interrogatory basis. Somerset never filed such a motion, nor did it file any motions with this Board to compel DER to produce any documentary information which Somerset had previously requested.

is likely to dispose), ¶14, ¶15, ¶21 (as to the allegation that the permit application failed to adequately identify all parties having an interest in Mostoller), ¶22, ¶23, ¶24, ¶25, ¶27, ¶30, ¶31 (as to the allegation that the permit application is deficient with respect to information necessary to make the relevant determinations that the disposal of residual waste at the facility will not cause a potential for pollution and endanger public health, safety and welfare), ¶32, ¶36, ¶37, ¶42, ¶43, or that DEP has failed to provide the documents requested in ¶¶7 and 41 of the notice of appeal.

Fact Testimony By Those Fact Witnesses Not Identified by Somerset

Where Mostoller's interrogatories 1(d), 3(c), 4(c), 5(d), 6(c), 8(d), 9(c), 10(c), 11(c), 12(c), 13(c), 14(c), 15(c), 16(d), 20(c), 22(d), 23(c), 24(b), 25(d), 26(c), 28(b), 29(c), 30(b), 31(d), 34(d), 35(c), 39(b), 40(d), and 44 request from Somerset an identification of all persons with knowledge of Somerset's allegations and/or facts, the Board's order dated May 16, 1995 directed Somerset to identify in its responses the persons who have knowledge of the "discoverable" matter. Somerset's Amended Answers fail to do so; they merely stated "counsel for appellant." This is inadequate as a response to the above interrogatories. Somerset's Supplemental Answers to these interrogatories refer Mostoller to Somerset's pre-hearing memorandum, or state that DEP has not provided Somerset with the information. This pre-hearing memorandum states that Somerset intends to call DEP's Tony Orlando, representatives of the Fish Commission, any and all persons identified in the pre-hearing memorandum of any and all parties to this action, and Somerset County Commissioners. It is also not responsive to our order, as it does not identify the individuals from the Fish Commission who will testify on behalf of Somerset, or narrow the fact witnesses who may be called by Somerset but are listed in any other parties' pre-

hearing memorandum. Likewise, Somerset's Amended Answer to interrogatory 43 states that no final decision on the matter of the fact witnesses it plans to call at the merits hearing has been reached, and it is not responsive to our order. As of this point in this appeal procedurally, it is an inadequate response for Somerset to state that it has not yet made a final decision as to who it will call as witnesses. The merits hearing in this appeal commences on October 23, 1995. At it, Somerset has the burden of proof under 25 Pa. Code §21.101(c)(3). Under these circumstances, Somerset may not fail to disclose all persons with knowledge and then also fail to identify its witnesses, too, so that it may ambush its opponents. Somerset may not hide witnesses, only to disclose them at the last minute. Midway Sewage Authority v. DER, 1990 EHB 1554. To the extent that the Supplemental Answer to interrogatory 43 lists DEP's Tony Orlando, unnamed representatives of the Fish Commission, and the Somerset County Commisioners, we treat this the same as Somerset's pre-hearing memorandum, *supra*.

Additionally, Somerset's Supplemental Answer to interrogatory 44, which identifies Melvyn J. Kopstein and counsel for Somerset as the individuals with the knowledge of the facts referred to in each interrogatory, makes no indication as to which interrogatories these individuals have knowledge. While Somerset contends that Mostoller should be aware of what Somerset intends to present and prove at the merits hearing, that is a contention wholly unsupported by Somerset's discovery performance. Somerset was under an obligation to disclose who it intends to call as a fact witness on its behalf at the merits hearing, just as it must identify, as to each specific interrogatory, the persons with knowledge of the facts supporting same.

Our review of Somerset's Amended Answers and Supplemental Answers thus leads us to conclude that Somerset has not complied with our order's direction

with regard to identification of persons with factual knowledge. As a result, sanctions are appropriate. Somerset is will be precluded at the merits hearing from offering any individuals as fact witnesses in its case-in-chief other than those explicitly named in its Amended and Supplemental Answers to Mostoller's interrogatories, i.e., DEP's Tony Orlando, Melvyn J. Kopstein, and Somerset County Commissioners. As to representatives of the Fish Commission, and "any and all persons identified in the pre-hearing memorandum of any and all parties to this action", our order will allow Somerset a five-day period from the date of this opinion and order's issuance, in which to specifically, by name, identify in writing each of these individuals to the Board and the other parties, or face the sanction of being precluded from calling any such individuals at the merits hearing to testify as part of Somerset's case-in-chief.

We accordingly conclude that sanctions must be imposed on Somerset for failing to comply with our May 16, 1995 order, and we enter the following order imposing such sanctions.

ORDER

AND NOW, this 11th day of September, 1995, it is ordered that as to Somerset's presentation of evidence in its case-in-chief:

1. Somerset, as a sanction for not responding appropriately to Mostoller's request that Somerset factually support the allegations in its appeal addressed by interrogatories 2-4, 8, 10-14, 16, 17, 26-32, 34, 35, 37, and 39, and as a sanction for Somerset's refusal to appropriately respond to Mostoller's request that Somerset factually support the allegations in its appeal addressed by interrogatories 3-17, 22-31, 34, 35, and 38-40, is precluded at the merits hearing from offering factual or documentary evidence to support the following allegations in its notice of appeal:

¶3. That the permit application and permit fail to show that the permittee and DEP complied with Article I, §27 of the Pennsylvania Constitution.

¶5. That in reviewing the permit application and issuing the permit, DEP failed to require, and the permittee failed to submit, an environmental assessment which contained all of the information required by 25 Pa. Code §271.127.

¶6. That the application does not show DEP consulted with the appropriate government agencies and potentially affected persons with respect to the environmental assessment.

¶7. That the permit application does not show that DEP has experienced severe and substantial construction problems with synthetic liners in the past.

¶7. That the permit application shows DEP failed to consider its past experiences with synthetic liners in issuing the permit or reviewing the permit application.

¶7. That there is nothing in the permit application or permit which would indicate that DEP has made any changes to the permit application which would be necessary to ensure liner integrity.

¶8. That DEP failed to comply with 25 Pa. Code §271.127, with respect to the liner in the permit application and approved by DEP, regarding inherent limitations and imperfections in similar designs and materials employed at comparable facilities.

¶9. That DEP has failed to comply with the relevant provisions of the Air Pollution Control Act by failing to require the permittee to take any steps to determine the nature and likelihood of fugitive emissions from the facility.

¶9. That DEP has failed to comply with the relevant provisions of the Air Pollution Control Act by failing to require the permittee to take any steps to control fugitive emissions from its site.

¶11. That the disposal of substances listed in ¶11 in a manner not controlled or regulated by the permit has the potential to cause fugitive emissions and health problems to residents of Somerset.

¶12. That the permit application fails to demonstrate that DEP has made a determination that the residual wastes which it will allow the permittee to dispose of in the landfill are compatible with the material used in the approved liner.

¶13. That DEP failed to find, and the permit application fails to demonstrate, that the permittee complied with 25 Pa. Code §287.132 with respect to chemical analysis of the waste.

¶14. That the permit application fails to demonstrate that the permittee has shown that it has complied with the requirements of 25 Pa. Code §287.133 with respect to inclusion of a copy of a source reduction strategy for each residual waste to be disposed of or processed at the facility.

¶15. That the permit application fails to demonstrate that the permittee complied with 25 Pa. Code §287.134 with respect to a waste analysis plan.

¶21. That the permit application fails to adequately identify all parties having an interest in the permittee.

¶22. That the permit application failed to properly provide a demonstration that the facility's proposed location is at least as suitable as alternative locations, giving consideration to environmental and economic factors.

¶23. That Somerset County has excess reserve capacity in its existing landfills, and has no demonstrable need for a third landfill.

¶24. That the permit application's geo-synthetics compatibility analysis fails to adequately address the waste streams which are likely to be disposed of at the facility and to come into contact with the liner.

¶25. That the compatibility analysis submitted with the permit application is speculative and provides an insufficient basis for DEP to rely on in issuing the permit.

¶26. That the permit application's compatibility analysis is inadequate to comply with Pennsylvania's environmental laws and regulations.

¶27. That the information submitted to DEP on Form 24 regarding the contents of the waste stream contains information which is inaccurate, inadequate, and contrary to the terms of the permit.

¶30. That the potential for contamination of the air, ground, and water resources of the Commonwealth from a residual waste landfill is substantially greater than that from a municipal waste landfill.

¶31. That the permit application in its entirety is deficient and is incomplete with respect to information necessary to make the determinations that the disposal of residual waste will not cause a potential for pollution and endanger public health, safety, and welfare.

¶32. That the site environmental conditions are not acceptable, and, therefore, the permit is not consistent with the Somerset County Official Plan.

¶33. That DEP failed to include permit terms and conditions necessary to carry out the provisions and purposes of the Solid Waste Management Act, the environmental protection acts, and regulations promulgated thereunder.

¶36. That the permit application is not complete and accurate, and, therefore, failed to comply with 25 Pa. Code §287.201.

¶37. That the residual waste management operations authorized by the permit cannot be feasibly accomplished pursuant to the DEP-approved application.

¶39. That the Operation Plan submitted by DEP fails to adequately demonstrate all of the elements required under 25 Pa. Code §288.132.

¶41. That DEP has experienced severe, substantial, and frequent leakage in liners installed pursuant to DEP's regulations.

¶42. That the application, as a whole, fails to demonstrate that there will be no adverse impact on public health.

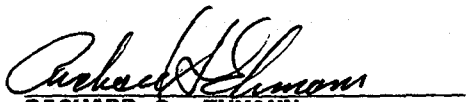
¶43. That the permit application fails to demonstrate that the facility will not have a potential impact on the regional aquifer and water supplying formations and lithologies upon which Somerset County relies for drinking water and other uses.

2. Somerset will not be permitted to offer into evidence any documents which its Amended Answers and/or Supplemental Answers state, with regard to interrogatories 6, 7, 9, and 38, Somerset requested but were not provided by DEP, as this is not an adequate identification of these documents in compliance with the Board's May 16, 1995 order.

3. Somerset is precluded from offering any individuals as fact witnesses at the merits hearing other than those explicitly named in its Amended and Supplemental Answers to Mostoller's interrogatories, i.e., DEP's Tony Orlando, Melvyn J. Kopstein, and Somerset County Commissioners. As to representatives of the Fish Commission, and "any and all persons identified in the pre-hearing memorandum of any and all parties to this action", within five days of the date of this order, Somerset shall specify, in writing, the name of each such

individual to the Board and the parties, or be precluded from calling any such individuals at the merits hearing to testify as part of Somerset's case-in-chief.

ENVIRONMENTAL HEARING BOARD



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: September 11, 1995

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:
v. : EHB Docket No. 94-247-E
:
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL PROTECTION :
and NEW ENTERPRISE STONE & LIME CO., :
INC., Permittee : Issued: September 18, 1995

OPINION AND ORDER
PERMITTEE'S MOTION TO DISMISS

By: Richard S. Ehmann, Member

Synopsis

The Board grants in part, and defers in part, the permittee's motion to dismiss this appeal for lack of standing on the part of appellant, who is an adjacent property owner to the quarry authorized by the challenged permit. The appellant's objection, raised in his response to the motion to dismiss, that the quarry will harm his residential use of water from Beaverdam Run, was not raised in his notice of appeal, and thus, is waived. The appellant's allegation, that he has standing because a decrease in his property value may result from pollution flowing from the quarry to his property, is beyond the scope of this appeal. The appellant's allegation that he is concerned for protecting the watershed also is insufficient to confer standing on him, as it is a general, abstract interest in seeing compliance with the environmental statutes and regulations, and is no different from the general interest of every citizen in enforcing the law.

The Board defers its ruling on standing, however, where there are inadequate facts before us from which we could determine whether potential pollution flowing from the quarry may harm appellant's withdrawal of water for

his water company, insofar as the relationship of downstream flow from the quarry to appellant's water withdrawal point has not been clearly established by undisputed facts.

OPINION

Joseph J. Krivonak, Jr. (Krivonak) commenced this appeal, *pro se* and as sole owner of the Cairnbrook Water Company, on September 19, 1994, challenging a noncoal mining permit issued by the Department of Environmental Resources (now the Department of Environmental Protection or DEP) to New Enterprise Stone and Lime, Inc. (New Enterprise) authorizing a mine site in Shade Township, Somerset County. In his amended appeal filed on October 14, 1994, Krivonak attached a copy of a letter dated August 15, 1994 from DEP to Krivonak, which informed him that DEP had issued Surface Mining Permit No. 56920302 to New Enterprise that same day authorizing New Enterprise to operate this quarry. As a follow-up to concerns expressed to DEP at an informal conference regarding the permit's potential impacts on the Central City Water supply intake on the Beaverdam Run watershed, DEP's letter informed Krivonak that DEP had evaluated the potential impacts of New Enterprise's operation on the water supply and concluded that the quarry would not affect Central City Water Authority's intake from the Beaverdam Run watershed. DEP's letter stated that all discharges and drainage from New Enterprise's quarry would be to Laurel Run, and not to the Beaverdam Run. DEP explained that the Central City intake on the Beaverdam Run watershed is upstream of the confluence of Beaverdam Run with Laurel Run, that the boundaries of the mining permit area were drawn to avoid wetlands on the headwaters of Beaverdam Run, and, further, that protection of the quality of Laurel Run had been taken into consideration by DEP in issuing the permit.

In his notice of appeal, Krivonak alleges that he is the sole owner of property (known as the Cairnbrook Water Company Dam site and the McNeal tract) which adjoins the Ishman tract (or the mine permit site) on its southern side. Krivonak objects to DER's issuance of the permit to New Enterprise on the basis that New Enterprise failed to inform DEP of the permit site's relationship to the Beaverdam Run. Krivonak claims that the Beaverdam Run watershed is the sole source of supply for the Central City Authority Reservoir, which he says is located a half mile "below" the permit site. Krivonak asserts that there is a stream which flows from the Ishman tract, known as Berkeybile Run, which supplies one-third of the water to the Central City Water Dam. Krivonak further claims that Berkeybile Run flows into Beaverdam Run on his property, and that the Cairnbrook Water Dam is "right above" this confluence of Berkeybile and Beaverdam Run. Krivonak also objects to DER's issuance of the permit on the basis that the quarry poses a serious threat to "this watershed area", as Berkeybile Run flows through "this wetland zone" and was not discussed in the permit application reviewed by DEP. Additionally, he raises as an objection that coal was found in testholes on the Ishman tract, and that this coal is a serious threat to "this watershed area." Krivonak further asserts that DER was not made aware that the permit site is located in the Beaverdam Run watershed, and, because of a familial relationship between a member of Central City Water Authority and the person who signed the maps for New Enterprise, Central City Water Authority is not appealing this permit's issuance.

New Enterprise filed a motion to dismiss this appeal for lack of jurisdiction based on timeliness of the appeal. We denied this motion by an opinion and order issued on June 1, 1995. Krivonak then filed a motion to vacate

the permit. We denied this motion in our Opinion and Order issued on July 20, 1995.

Before the Board is New Enterprise's Motion to Dismiss for Lack of Jurisdiction, filed with the Board on June 28, 1995, challenging Krivonak's standing in this appeal. On July 17, 1995 we received Krivonak's response to the motion. We received New Enterprise's unsolicited response to Krivonak's response to the motion on July 20, 1995.

As we explained in City of Scranton, et al. v. DER, et al. EHB Docket No. 94-060-W (Consolidated Docket)(Opinion issued January 25, 1995):

> At this stage in the proceedings, we treat motions to dismiss the same way we treat motions for judgment on the pleadings: we will dismiss the appeal only where there are no material factual disputes and the moving party is clearly entitled to judgment as a matter of law....

We must assess the motion to dismiss in a light most favorable to the non-moving party. Solar Fuel Company, Inc. v. DER, 1994 EHB 737.

Does Krivonak Have Standing?

In order to have standing to appeal an action of DEP, an appellant must be "aggrieved" by that action, meaning that he must have a direct, immediate, and substantial interest in the challenged action. William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975); Empire Sanitary Landfill, Inc. v. DER, et al., 1994 EHB 1365.

> A substantial interest in the outcome of a dispute is an interest which surpasses the common interest of all citizens in seeking obedience to the law. A party has a direct interest in a dispute if he or she was harmed by the challenged action or order. Further, a party's interest is immediate if there is a causal connection between the action or order complained of and the injury suffered by the party asserting standing.

Empire Coal Mining and Development, Inc. v. DER, 154 Pa. Cmwlth. 296, 623 A.2d 897 (1993), appeal denied, 535 Pa. 625, 629 A.2d 1384 (1993)(citations omitted).

While Krivonak was not obligated to establish his standing in his notice of appeal, once that standing was called into question, Krivonak, as the party asserting standing, must show facts establishing that he suffered a direct, substantial, and immediate injury. Id.; County Commissioners, Somerset County, et al. v. DEP, et al., EHB Docket No. 95-031-E (Opinion issued June 23, 1995)(reconsideration denied August 16, 1995).

In his response to New Enterprise's motion to dismiss, Krivonak contends that he has shown in his pre-hearing memorandum that his property is adjacent to the Ishman tract, from which the Berkeybile Run flows and joins Beaverdam Run "below" his water dam. He expresses his concern for protecting "this watershed", and his concern that his property value will be affected if the water in the stream is degraded. Krivonak further states,"[t]his Appellant is one of the few people living on Beaverdam Run that draws his water from this stream; he can activate the Cairnbrook Water Company into a going concern any time he chooses to do so[.]" He then asserts that the quarry may potentially affect a fault which he says runs through the permit area, and that there may be an affect on the water which is exposed to this fault.

To the extent that Krivonak's response to New Enterprise's motion can be read as raising as an allegation of standing regarding whether drainage and discharge from the quarry into Berkeybile Run may potentially affect his use of the water from Beaverdam Run at his residence, this issue was not specifically raised in his notice of appeal, and cannot be found to have been generally raised in his notice of appeal. Thus, this issue has been waived. See Newtown Land Limited v. Department of Environmental Resources, 660 A.2d 150 (Pa. Cmwlth 1995); Pennsylvania Game Commission v. Department of Environmental Resources, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd on other grounds, 521 Pa. 121, 555 A.2d

812 (1989); Croner, Inc. v. Department of Environmental Resources, 139 Pa. Cmwlth. 43, 589 A.2d 1183 (1991).

Likewise, the issue of the effect of the discharge from the quarry on Krivonak's property value was not raised in his notice of appeal, and, even if this issue had been raised, would be beyond the Board's jurisdiction. See South Fayette Township v. DER, 1991 EHB 900 (it is beyond Board's jurisdiction to determine whether mine will adversely affect property values in Township).

Appellant's allegation that he is concerned for protecting the watershed also is insufficient to confer standing on him, as it is a general, abstract interest in seeing compliance with the environmental statutes and regulations, and is no different from the general interest of every citizen in enforcing the law. See Larry D. Heasley, et al. v. DER, et al., 1991 EHB 772.

To the extent that Krivonak alleges that DEP was not provided adequate information from which it could evaluate the potential for pollution to Berkeybile Run, which the appellant says flows through his property, Krivonak's allegation, in his response to New Enterprise's motion, of the potential for direct, immediate, and substantial harm to him from the quarry's effects on Berkeybile Run, if established by undisputed facts, could be sufficient to defeat the motion at this point in the litigation. S.T.O.P., Inc. v. DER, et al., 1992 EHB 207; Throop Property Owners Association v. DER et al., 1988 EHB 391. New Enterprise's response to Krivonak's response speculates as to where Berkeybile Run flows into Beaverdam Run, and the relationship of this confluence to Krivonak's point of withdrawal of the water from Beaverdam Run, arguing that Krivonak must draw his water from a point upstream of the confluence. We find that the facts are not clear enough for us to determine whether Krivonak has met the threshold for standing as to harm to his downstream property by Berkeybile

Run. Estate of Charles Peters, et al. v. DER, et al., 1992 EHB 358 (1992). We point out, however, that standing is a jurisdictional matter which can be raised at any time. Del-Aware Unlimited, Inc. v. DER, et al., 1990 EHB 759. In order to prove that he has standing at the merits hearing, Krivonak will have to show the relationship of his property to the quarry site and how he is harmed by any contaminated downstream flow from Berkeybile Run originating at the quarry. Our determination on whether he has standing as to this issue is deferred until the merits hearing. Mary A. Sennett v. DER, et al., 1993 EHB 10.

We accordingly enter the following order granting New Enterprise's motion in part and deferring this motion in part.

ORDER

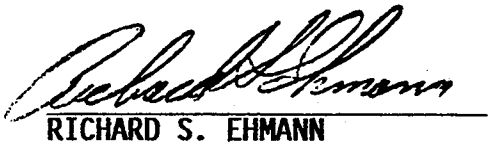
AND NOW, this 18th day of September, 1995, it is ordered that New Enterprise's motion to dismiss for lack of jurisdiction is granted, in part, to the extent that any objection by appellant that the quarry authorized by the challenged permit will harm his residential use of water from Beaverdam Run was not raised in his notice of appeal; the appellant's allegation that a decrease in his property value may result from pollution flowing from the quarry to his property is beyond the scope of this appeal; and appellant's allegation that he is concerned for protecting the watershed is no different from the general interest of every citizen in enforcing the law.

It is further ordered that insofar as the relationship of downstream flow from the quarry to appellant's water withdrawal point has not been clearly established by undisputed facts, the Board defers its ruling on standing until the merits hearing.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: September 18, 1995

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M. DIANE SMITH
SECRETARY TO THE BOA

JEFFERSON COUNTY COMMISSIONERS, et al. and PINECREEK TOWNSHIP	:	
v.	:	EHB Docket No. 95-097-E (Consolidated)
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and LEATHERWOOD, INC., Permittee	:	Issued: September 27, 1995

OPINION AND ORDER SUR MOTION TO DISMISS CERTAIN OBJECTIONS TO THE GRANT OF SOLID WASTE PERMIT NO. 101604 RAISED BY APPELLANTS IN THEIR NOTICE OF APPEAL

By: Richard S. Ehmann, Member

Synopsis

Construing Permittee's motion in the light most favorable to appellants, the motion to dismiss must be denied. In light of Section 502 of the Solid Waste, Act 35 P.S. §6018.502 a strong argument can be made that a landfill permit cannot be issued unless the application demonstrates compliance with the Air Pollution Control Act, and it appears this application may not have done so. If this is the situation, then DEP's decision to issue the permit despite this omission may be challenged and is ripe for review. The same is true as to DEP's decision to issue the permit without first determining if there is a potential for bird/airplane collisions based on the landfill's proximity to the Dubois/Jefferson County Airport, because DER may be obligated under 25 Pa. Code §271.127 to reach a conclusion on this issue based upon Leatherwood's environmental assessment (which is to address public safety, traffic, land use and wildlife concerns).

OPINION

On May 12, 1995, the Department of Environmental Resources (now known as the Department of Environmental Protection or DEP and referred to as such, hereafter) issued Solid Waste Management Permit No. 101604 to Leatherwood, Inc. ("Leatherwood") for a landfill to be located in Jefferson County. On June 8, 1995, the Board received the first Notice of Appeal from that decision filed on behalf of Jefferson County, the Jefferson County Solid Waste Authority, and the Clearfield-Jefferson Counties Regional Airport Authority. Thereafter, Pinecreek Township (appellants are collectively hereafter referred to as "Jefferson") also appealed this permit's issuance, and the two appeals were consolidated at the above docket number by Board Order dated July 27, 1995.

On July 31, 1995, Leatherwood filed the instant motion. The motion, with which Jefferson concurs as to the facts stated in paragraphs 1 through 9 thereof, states that DEP's permit contained conditions. Condition 6 required Leatherwood to complete forms G(A) and G(B) and return them to DEP within 90 days. These forms require Leatherwood to provide DEP the information necessary to determine whether the landfill can be operated in a manner which prevents emissions from the landfill from either causing air pollution or an exceedance of ambient air quality standards. The forms also require Leatherwood to show the proposed landfill dust prevention measures will comply with applicable operational standards and whether the landfill's emissions and controls will comply with applicable emission standards.

Condition 40 of the permit requires Leatherwood to submit to DEP its plan for how Leatherwood will mitigate any potential bird strike hazard the landfill presents for aircraft using the nearby Dubois/Jefferson County

Airport. Condition 40 prohibits Leatherwood from accepting waste at the landfill unless and until the bird strike mitigation plan is approved by DEP. The permit also provides for its revocation or suspension upon Leatherwood's failure to comply with its condition.

In the Notice of Appeal, many of the Objections to the permit contend DEP "erred in failing to require a bird analysis or consider various letters, testimony and studies which allege that the proposed landfill will create a bird hazard to air traffic in the vicinity of the Dubois/Jefferson County Airport" when it issued this permit. (Page 3 of Leatherwood's Motion) The specific paragraphs involving this bird issue are Objections 2, 3, 4, 5, 6, 7, 8, 9, 10, 14 and 15. Leatherwood also says Paragraphs 34, 35, and 36[1] of the Notice Of Appeal allege errors by DEP in issuing the landfill permit in terms of compliance with the Air Pollution Control Act.

As to these air pollution and bird strike issues, Leatherwood's Motion advances two arguments for why the Board should not consider them. First, as to the air pollution issues, Leatherwood claims DEP has yet to receive Leatherwood's information on its emissions and controls and it has not acted on air pollution and cannot act on them until that time. Leatherwood asserts this means DEP has not acted on air pollution issues in issuing this permit, so there is no DEP action appealable to this Board as a result. As to

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[1]These paragraphs are found at those numbers only in the appeal filed by Pinecreek Township. Similar paragraphs are found at Objections Nos. 31, 32, and 33, in the appeal on behalf of the remaining appellants. We assume Leatherwood intends this motion to apply to these objections by the remaining appellants, as well, and address them as such if they do. However, the Board cautions Leatherwood that if it wishes to aid this Board in resolving issues of this type, it should point out these differences, just as it should refrain from citing Board opinions solely by reference to a WestLaw citation instead of their "official" citation.

the bird issues, Leatherwood says DEP has rendered no decision yet, and Condition 40 not only prohibits waste disposal at the site until DEP approves Leatherwood's plan but also explicitly states that any such approval by DEP is appealable to this Board. Thus, Leatherwood advances a similar "no decision" argument as to the bird/air traffic argument.

Secondly, Leatherwood asserts that Jefferson's arguments are not ripe for review at this time because DEP has yet to make decisions on these issues. It asserts its ripeness arguments is based on the concept of that the Board should not interfere with DEP's decision-making process until a DEP decision can be formalized.

DER has advised the Board by letter dated August 4, 1995, that it will not be responding to Leatherwood's motion.

Jefferson, on the other hand, has responded in opposition thereto. Its Response To Permittee's Motion To Dismiss Certain Objections To The Grant Of Solid Waste Permit No. 101604 and Motion For Summary Judgement (First)[2] was received by this Board on August 18, 1995. In it, Jefferson contends permit issuance prior to a determination of compliance by Leatherwood with the Air Pollution Control Act, Act of January 8, 1960 (P.L. 2119, No. 787), as amended, 35 P.S. 4001 *et seq.* ("Air Act"), violates Section 502(d) of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, No. 97, as amended, 35 P.S. §6018.502(d) ("Solid Waste Act"). Jefferson also argues non-compliance with 25 Pa. Code §271.127 in that the permit application must mandatorily include an environmental assessment by the permit applicant which

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[2]This opinion addresses only Leatherwood's Motion and Jefferson's Response. It does not address the merits of either of Jefferson's two Motions For Summary Judgement which are now pending before us. Those two motions will be addressed in a separate opinion.

shows the impact of the landfill on environmental public health and public safety, including specifically air quality, and DEP must evaluate it to determine if the proposed operation has the potential to cause environmental harm.

As to bird strikes, Jefferson contends DER failed to determine whether or not a nuisance would be created by bird strikes or whether "[t]he bird strike potential would interfere with air traffic at the Dubois/Jefferson County Airport". Jefferson contends information on this issue is required prior to permit issuance to satisfy 25 Pa. Code §271.127 as to the facility's potential impact on public safety, traffic, wildlife and land use.

If the Board were to grant Leatherwood's Motion, that Motion's prayer for relief would have the Board dismiss the fourteen specific Jefferson objections enumerated above. As Leatherwood is not seeking summary judgment in its favor on the merits of these objections, but rather seeks to preclude the Board's consideration of their merits, this motion is most properly treated as a motion to dismiss.

In reviewing such motions, the standard for our review is clear. We review them in the light most favorable to the non-moving party. Pengrove Coal Co. v. DER, 1987 EHB 913; John and Sharon Klay v. DER, 1993 EHB 163; and Solar Fuel Company, Inc. v. DER, 1994 EHB 737.

Reviewing this motion in that light requires its denial.

As to the objections dealing with air pollution (Nos. 34, 35, and 36), it is clear that Leatherwood contends that DEP has made no decision on the landfill's ability to be operated in compliance with the Air Act. The parties agree that as of the date of the permit's issuance, DEP was still requesting the data from Leatherwood from which DEP could draw conclusions on

this issue. Thus, Leatherwood appears to be correct, up to the point of its conclusion, that there is no decision on air pollution. However, our inquiry does not stop there. The issues posed by Jefferson are not that DER decided the air pollution issues incorrectly but: whether in light of the requirements of Section 502(d) of the Solid Waste Act and 25 Pa. Code §271.127, DEP can lawfully issue this permit without addressing the air pollution issues during issuance. Leatherwood concedes in paragraphs 1 of its motion that the permit issued to it by DEP is a permit "authorizing the operation of a solid waste landfill." Since Section 502(d) says no permit may be approved unless the application provides for compliance with the statutes herein above enumerated" and the enumerated statutes include the Air Act, it is much less than clear that to the extent these objections raise this issue, they should be dismissed. DEP's decision to address air pollution in this bifurcated fashion, despite Section 502(d), appears to be ripe for review by this Board at this time.

The bird strike issue, while less clear, also is one before this Board now. Under 25 Pa. Code §271.126, Leatherwood had to prepare an environmental assessment. While there is no agreement of the parties as to whether this was done or not, we assume some environmental assessment was prepared and provided to DEP for its review. What is clear by implication from the agreed-upon-facts however, is that DEP had no information before it specific to this bird strike mitigation problem when it issued this permit to Leatherwood, but believed it was potentially a serious enough problem to

require Leatherwood to address it promptly.[3] If it lacked this information, the question fairly raised by Jefferson is: how could DEP evaluate the adequacy of Leatherwood's environmental assessment as to issues of safety, air traffic, land use and wildlife, if it lacked information on this issue? Absent this information, Jefferson argues that DER could not adequately evaluate the assessment and draw any conclusion as to this site's potential hazard to public safety from bird-airplane collisions. The testimony of Arthur Provost of DEP (attached to Jefferson's Response) suggests that he is not aware of any DEP determination of a potential hazard from birds. If DEP made no determination under Section 271.127(b), it would appear it did not fully to comply with the directive in this subsection of Section 271.127. Finally, Jefferson argues that absent compliance with this requirement, a permit's issuance by DEP is defective.

One argument against Jefferson's position may be that Condition 40 requires the bird strike mitigation plan's preparation by Leatherwood, so DEP must have concluded this potential problem exists. If it did make that decision, it follows it must have complied with Section 271.127. However, Leatherwood has not advanced this argument, and the above referenced portion of Mr. Provosts's deposition testimony suggests DEP did not draw this conclusion. Since the burden of proof as to the merit of the motion is on the movant, and we view these motions in a light favorable to Jefferson, we again conclude the DEP decision to issue this permit before receipt of this mitigation plan is the challenged decision, rather than the as yet unmade,

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[3]The objections suggests that by the time it issued this permit DEP had before it substantial information from which to conclude that there might be a problem for airplanes (including those of the commuter airline serving this airport) with birds attracted by operation of this landfill.

decision on the mitigation plan's adequacy. That DEP decision is challengable now and it is ripe for review because nothing will change as to that issue by virtue if the mitigation plan's completion and submission.

Accordingly, the Board enters the following order.

ORDER

AND NOW, this 27th day of September, 1995, Leatherwood's Motion To Dismiss Certain Objections To The Grant Of Solid Waste Permit No. 101604 raised by Appellants in their Notice of Appeal is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: September 27, 1995

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M. DIANE SMITH
SECRETARY TO THE BO

AH & RS COAL CORPORATION	:	
	:	
v.	:	EHB Docket No. 94-320-MR
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	Issued: October 6, 1995

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

By Robert D. Myers, Member

Synopsis:

The Board sustains DEP's forfeiture of a bond, posted pursuant to a consent decree of Commonwealth Court as a supplement to an existing bond which DEP had forfeited previously and which was pending before the Board at the time. A consent order and adjudication, entered into between Appellant and DEP after Commonwealth Court remanded to this Board bond forfeiture proceedings involving other mining sites, is not an impairment to the present forfeiture because it did not pertain to the same mining site or the same bond.

PROCEDURAL HISTORY

This proceeding was instituted on November 11, 1994 when AH & RS Coal Corporation (Appellant) filed a Notice of Appeal, seeking Board review of an October 3, 1994 letter of the Department of Environmental Resources, now known as the Department of Environmental Protection (DEP), declaring forfeit Collateral Bond No. U27449 for alleged violations connected

with a mining site in Perry Township, Clarion County.

Pursuant to a January 26, 1995 Order (based on a request of the parties), the parties filed a Stipulation with four exhibits on February 17, 1995, followed by Cross-Motions for Summary Judgment and supporting briefs a month later, and concluding with Responses to the Cross-Motions on April 17, 1995.

The record consists of the Notice of Appeal, the Stipulation (Stip.), the Cross-Motions and the Responses. After a full and complete review of the record, we make the following[1]:

FINDINGS OF FACT

1. On March 29, 1972, DEP issued Mine Drainage Permit (MDP) No. 3672SM1 to Appellant for a 28.4-acre site (Baker Site) in Perry Township, Clarion County. MDP No. 3672SM1 was amended on February 5, 1973 and February 25, 1976 to cover a total of 220 acres (Stip.; Appellant's Motion for Summary Judgment (A-MSJ ¶2);[2] Exhibit C to Stip.).

2. On July 17, 1975, DEP issued MDP No. 3075SM5 to Appellant for 195 acres in Allegheny and Parker Townships, Butler County (Exhibit C to Stip.).

3. Between 1974 and 1977, DEP issued to Appellant, *inter alia*, Mining Permit (MP) Nos. 847-1(A). 847-6 and 847-6(A) with respect to MDP No. 3672SM1, and MPs Nos. 847-8 and 847-8(A) with respect to MDP No. 3075SM5 (Exhibits C and D to Stip.).

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[1]Normally, we do not make detailed findings of fact when disposing of motions for summary judgment. We have done so here in the interest of precision and completeness.

[2]Averments in the Motion for Summary Judgment specifically admitted by the other party.

4. Appellant posted bonds, pursuant to Section 4(d) of the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4(d), in connection with the permits issued to it (A-MSJ ¶3; DEP's Motion for Summary Judgment (D-MSJ ¶2[See fn.2])).

5. Appellant operated surface coal mines as authorized by the permits issued to it (Stip.; Exhibit C to Stip.).

6. On November 27, 1979, DEP forfeited the bonds posted in Finding of Fact No. 4, claiming that required reclamation had not been performed by Appellant on the sites covered, *inter alia*, by MPs Nos. 847-1(A), 847-6, 847-6(A), 847-8 and 847-8(A) (A-MSJ ¶4; D-MSJ ¶3).

7. Appellant appealed the forfeiture to this Board at Docket No. 79-201 (A-MSJ ¶5; D-MSJ ¶4).

8. During the pendency of the litigation at Board Docket No. 79-201, the parties appeared before Commonwealth Court on at least three occasions in an attempt to resolve the dispute. On one of these occasions, the parties agreed to the entry of a Supplemental Consent Decree, dated July 22, 1981, pursuant to which Catch 40 Systems, Inc., a sub-contractor of Appellant, posted a reclamation bond (U27449) in the amount of $10,000 for the site covered by MP No. 847-1(A). The bond supplemented the existing bond, DEP's forfeiture of which was involved in the appeal at Board Docket No. 79-201 (Stip.; D-MSJ ¶5 and ¶7; Exhibits A and B to Stip.).

9. On April 27, 1990, this Board granted summary judgment to DEP in the appeal at Board Docket No. 79-201 (A-MSJ ¶5, D-MSJ ¶9).

10. Appellant appealed to Commonwealth Court (No. 1095 C.D. 1990) which, on

March 25, 1991, affirmed the grant of summary judgment with respect to the bonds covering MPs Nos. 847-1(A) and 847-6(A) and reversed the grant of summary judgment with respect to the bonds covering MPs Nos. 847-6, 847-8 and 847-8(A) (A-MSJ ¶6; D-MSJ ¶9, and ¶11; Exhibit D to Stip.).

11. Appellant's Petition for Allowance of Appeal to the Pennsylvania Supreme Court was initially granted. After argument, however, the Supreme Court, on November 1, 1993, dismissed the Petition as improvidently granted. The case was remanded to this Board for further proceedings with respect to the bonds covering MPs Nos. 847-6, 847-8 and 847-8(A) (A-MSJ ¶7; D-MSJ ¶12; Exhibit C to Stip.).

12. On May 18, 1994, Appellant and DEP entered into a Consent Order and Adjudication (CO&A) at Board Docket No. 79-201, desiring "to resolve the foregoing matters without resorting to further litigation...." The CO&A, *inter alia*,

(a) declared forfeit the bonds posted for MPs Nos. 847-6, 847-8 and 847-8(A);

(b) provided for DEP to waive collection on bonds covering portions of MPs Nos. 847-8 and 847-8(A);

(c) provided for DEP to waive one-half of the bond covering MP No. 847-6; and

(d) provided for each party to bear its own attorneys fees, expenses and other costs.

Appellant waived its right to appeal the CO&A to this Board. This Board approved the CO&A on May 18, 1994 (A-MSJ ¶8; D-MSJ ¶13; Exhibit C to Stip.).

13. On October 3, 1994, in a letter to Appellant, DEP declared forfeit Collateral Bond

No. U27449, posted originally in 1981 as a supplemental bond covering MP No. 847-1(A). See Finding of Fact No. 8. The bond was forfeited for numerous violations, including

(a) Failure to complete reclamation;

(b) Failure to comply with the Supplemental Consent Decree (see Finding of Fact No. 8); and

(c) Failure to show a willingness or intention to comply with the applicable laws and regulations.

A notice of intent to forfeit this bond had been sent to Appellant by DEP on June 28, 1994 (Stip.; A-MSJ ¶9 and Exhibit B; D-MSJ ¶14 and ¶15).

14. Appellant filed the present appeal from the forfeiture of Collateral Bond No. U27449, contending in its Notice of Appeal that the violations cited by DEP as grounds for forfeiting the bond were resolved through the CO&A (Stip.; A-MSJ ¶9 and Exhibit C; D-MSJ ¶16 and ¶17).

15. A reading of the CO&A shows that it deals with three entirely different bonds but is silent with respect to Collateral Bond No. U27449 (Stip.).

DISCUSSION

DEP has the burden of proof: *P.N.B.P. Coal Company v. DER*, 1991 EHB 412. To carry the burden, DEP must show by a preponderance of the evidence that its forfeiture of Collateral Bond No. U27449 was lawful and an appropriate exercise of DEP's discretion: 25 Pa.Code §21.101(a).

We can grant summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law: Pa.R.C.P. 1035(b). We must view the motion in the light most favorable to the non-moving party: *Robert C. Penoyer v. DER*, 1987 EHB 131. Since the parties have cross-filed, we will measure each motion separately against these standards, beginning with DEP's since DEP bears the burden of proof.

Section 4(h) of SMCRA, 52 P.S. §1396.4(h), provides, *inter alia*, that if the operator "fails or refuses to comply with the requirements of [SMCRA] in any respect for which liability has been charged on the bond, [DEP] shall declare such bond forfeited...." The regulations at 25 Pa.Code §86.181 state that DEP will forfeit a bond for any one of six specified reasons. Included are violating any terms or conditions of the bond, and failing to mine in accordance with the law, the regulations or terms of the permit.

DEP must show, therefore, that as of October 3, 1994, (1) Appellant failed to comply with terms and conditions of SMCRA or the regulations or of MP No. 847-1(A) or of Collateral Bond No. U27449, and that (2) Collateral Bond No. U27449 was posted to assure compliance with the terms and conditions violated. In its forfeiture letter, DEP cited three main reasons: failure to complete reclamation, failure to comply with the Supplemental Consent Decree, and failure to show a willingness or intention to comply with applicable laws and regulations.

The Board's entry of summary judgment in DEP's favor at Board Docket No. 79-201 established that as of November 27, 1979, reclamation had not been completed on the site covered by MP NO. 847-1(A). The Board's action was affirmed by Commonwealth Court, and became final and unappealable when the Supreme Court dismissed the Petition for Allowance of Appeal. While the site conditions on November 27, 1979 are, thus, beyond dispute, the site conditions on

October 3, 1994 control the forfeiture of Collateral Bond No. U27449. The record is silent about the precise state of the site but the parties have stipulated that DEP forfeited Collateral Bond No. U27449 because Appellant "continued to fail to correct the violations and reclaim" the site. This stipulation, coupled with Appellant's failure to raise any issue concerning site conditions, is enough to establish violations on the site covered by MP No. 847-1(A) as of October 3, 1994.

Collateral Bond No. U27449, which is attached to the Stipulation as Exhibit B, clearly on its face applies to MP No. 847-1(A). The condition of the obligation is based upon the operator's faithful performance of the requirements of SMCRA, the regulations and the permit. Liability is for the whole $10,000 amount. Unless there is some other legal impediment, we are satisfied that Collateral Bond No. U27449 was properly forfeited by DEP for violations at the site of MP No. 847-1(A). This conclusion is reinforced by the statement in the Supplemental Consent Decree (pursuant to which the bond was posted) that the bond is "to supplement the existing bonds..." at the site.

Appellant contends that the CO&A is the legal impediment to DEP's forfeiture, arguing that the CO&A resolved all matters pertaining to MDP No. 3672SM1 and MDP No. 3075SM5 and the mining permits (such as MP No. 847-1(A)) issued under them. Since the CO&A did not provide for forfeiture or partial collection of Collateral Bond No. U27449 (as it did for other bonds), DEP cannot take any action with respect to it. DEP counters that the CO&A did not involve MP No. 847-1(A) or any bonds posted in connection with it. Consequently, it could not have resolved any disputes related to it.

We must interpret the CO&A to give effect to the intentions of the parties--discernible by the language they employed. If the language is unambiguous, the intentions of the parties will be

determined on the basis of the clear wording of the contract: *Frickert v. Deiter Bros. Fuel Co., Inc.*, 464 Pa. 596, 347 A.2d 701 (1975).

The CO&A contains 27 paragraphs of Findings followed by 4 paragraphs of an Order. It should be noted, at the outset, that Collateral Bond No. U27449 is not mentioned or alluded to in the CO&A. The focus clearly is on MPs Nos. 847-6, 847-8 and 847-8(A). One or more of them are specifically mentioned in 18 paragraphs of Findings and 3 paragraphs of the Order. The issuance of these MPs is set forth, the bonds posted in connection with their issuance are identified and the conditions of these mining sites are described. That is not surprising; these three mining sites were the only ones still in dispute. Summary judgment had been granted by the Board with respect to the others (including MP No. 847-1(A)) and had been affirmed by Commonwealth Court. The reversal and remand applied only to MPs 847-6, 847-8 and 847-8(A).

The CO&A resolved the forfeiture of the bonds posted for these three mining permits by (1) specifically declaring the bonds for MPs 847-6, 847-8 and 847-8(A) forfeit and by (2) limiting the amount DEP could collect on the bonds for MPs 847-6, 847-8 and 847-8(A). Again, this is not surprising; the announced desire of the parties was "to resolve the foregoing matters without resorting to further litigation...." The only matters still open for further litigation were the bonds for MPs 847-6, 847-8 and 847-8(A).

MP 847-1(A) is mentioned twice in the CO&A--first in a listing of mining sites on which DEP sought summary judgment and second in a listing of mining sites on which Commonwealth Court affirmed the granting of summary judgment. Obviously, these were inserted only as part of the historical narrative and carry no further significance. The parties put nothing in the Order dealing with MP 847-1(A); and there is nothing there that even remotely could be considered as

resolving any dispute concerning MP 847-1(A). Again, this is not surprising; MP 847-1(A) was a closed issue.

Appellant argues, however, that the CO&A does resolve litigation concerning MDP No. 3672SM1 and that MP No. 847-1(A) involves a site covered by that MDP. All of this is true but irrelevant. MDP No. 3672SM1 is mentioned in the CO&A as part of the historical background and as the MDP covering the area encompassed under MP No. 847-6. As noted, MP 841-6 was one of the sites still in contention. The other two sites encompassed within MDP No. 3672SM1 (MPs 847-1(A) and 847-6(A)) were the subjects of summary judgments entered by the Board and affirmed by Commonwealth Court. The only remaining dispute to be resolved under MDP No. 3672SM1 pertained solely to MP 847-6. The Order paragraphs do not mention MDP No. 3672SM1, but they resolve the litigation on MP 847-6 by providing for DEP to collect only one-half of the bond amount.

Even viewing the CO&A in the light most favorable to Appellant, we still cannot conclude that it impairs DEP's power to forfeit Collateral Bond No. U27449. There are no genuine issues as to any material facts and DEP is entitled to judgment as a matter of law. Conversely, basing its claim on the provisions of the CO&A, Appellant is not entitled to judgment as a matter of law.

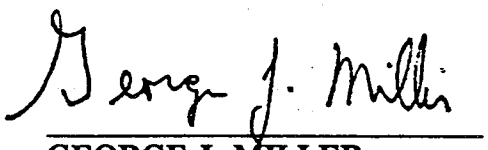
ORDER

AND NOW, this 6th day of October, 1995, it is ordered as follows:

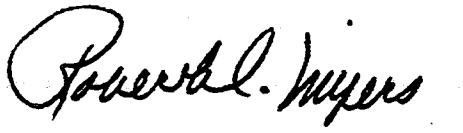
1. Appellant's Motion for Summary Judgment is denied.

2. DEP's Motion for Summary Judgment is granted and summary judgment is entered for DEP.

ENVIRONMENTAL HEARING BOARD

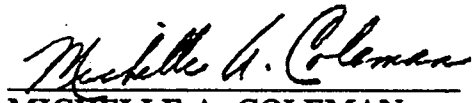


GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

Administrative Law Judge Richard S. Ehmann is recused from participating in this decision.

DATED: October 6, 1995

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SECRETARY TO THE BOAR

JOHN R. VAN METER	:	
	:	
v.	:	**EHB Docket No. 94-275-E**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 20, 1995**

ADJUDICATION

By Richard S. Ehmann, Member

Synopsis:

A storage tank installer's appeal from DEP's revocation of his installer's certification is denied where the evidence establishes prior certification suspensions and a pattern of willful violations of the Storage Tank Regulations found at 25 Pa.Code Chapter 245.

BACKGROUND

On September 14, 1994, the Department of Environmental Resources (now the Department of Environmental Protection and hereinafter "DEP") issued an administrative order to John Van Meter ("Van Meter") and John Van Meter Construction Company ("JVMCC") under and pursuant to the provisions of the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, as amended, 35 P.S.6021.101 to 6021.2105 ("Storage Tank Act"), which order revokes the installer certificates of Van Meter and JVMCC as issued under this statute. On October 15, 1994, the Board received an appeal of this order from Van Meter.

Subsequently, the Board issued its then standard Pre-Hearing Order No. 1, which provided

that Van Meter was to file his Pre-Hearing Memorandum with this Board on January 3, 1995. When this did not occur, on January 31, 1995 the Board issued Van Meter a Rule to Show Cause why sanctions should not be imposed on him for failing to file his Pre-Hearing Memorandum. It also provided that if he filed his Pre-Hearing Memorandum by the Rule's return date, this would cause a discharge of the Rule. Van Meter failed to respond to the Rule in any fashion so, on February 23, 1995, the Board issued an Order pursuant to 25 Pa.Code §21.124[1] imposing the sanction on him of a bar to his presentation of the evidence comprising his case-in-chief. Because DEP bears the burden of proof in appeals from its administrative orders under 25 Pa. Code §1021.101(b), a sanction of dismissal of the appeal was not imposed and DEP was directed to file its Pre-Hearing Memorandum.

After the filing of DEP's Pre-Hearing Memorandum and on April 21, 1995, a hearing on the merits of the appeal was held by the Board. Van Meter appeared *pro se*. He has represented himself throughout this appeal despite the urgings of the Board to retain legal counsel.

Upon receipt of the hearing's transcript, the parties were ordered by the Board to file their Post-Hearing Briefs. DEP's Brief was received by the Board on June 7, 1995. Van Meter filed no Post-Hearing Brief. As the Commonwealth Court made clear in Lucky Strike Coal Co. And Louis J. Beltrami v. Commonwealth, DER, 119 Pa.Cmwlth. 440, 547 A.2d 447 (1988) ("Lucky Strike"), issues not raised in such briefs are deemed waived.

After a complete review of the record in this appeal consisting of the parties' Joint Stipulation, the 163-page merits hearing transcript and the nine exhibits submitted by the parties as

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[1] In the Pennsylvania Bulletin dated September 9, 1995 this Board's regulations were amended, renumbered and relocated. The rule is now found at 25 Pa.Code §1021.124. See 25 Pa. Bull. 3823 through 3835. Within the remainder of this Adjudication, all rule references will be to rules as they now exist.

part of their Joint Stipulation, the Board makes the following findings of fact.

FINDINGS OF FACT

1. The DEP is the agency with the duty and authority to administer and enforce the Storage Tank Act, the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 ("Administrative Code"), and the rules and regulations promulgated by the Environmental Quality Board. (B-1)[2]

2. Van Meter is the individual who owns, operates and does business as John Van Meter Construction Company ("JVMCC") located at 2001 California Avenue, White Oak, Pennsylvania 15131. (B-1)

3. At various times relevant to this appeal, Van Meter was certified by DEP to install, modify or remove underground storage tanks ("certified installer"). His certification number was 2000. (B-1, JS-7)

4. At various times relevant to this appeal, JVMCC was a company which is certified by DEP to install, modify or remove underground storage tanks. Its certification number was 551. (B-1, JS-2)

5. Neither Van Meter nor JVMCC was certified by DEP to install, modify or remove aboveground storage tanks. (B-1)

6. On November 20, 1992, Van Meter and DEP entered into a Consent Order (Exhibit

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[2] A reference to B-1 is an indication these are facts stipulated to by the parties in the Joint Stipulation they filed with this Board and which is Board Exhibit No. 1. A reference to T-___ is a reference to a page in the merits hearing transcript, while a reference to JS-___ is a reference to one of the documents or groups of documents stipulated to by the parties as admissible and submitted to the Board with Board Exhibit No. 1.

JS-4) issued under the Storage Tank Act concerning violations of the Storage Tank Act and the regulations promulgated thereunder by Van Meter and JVMCC as to tank handling activities at (1) Gib Sharer's Auto Service in Saltsburg during June of 1992, (2) Amoco Service Station No. 60215 in Jeannette during July of 1992, and (3) Parkway Service Station in Pittsburgh during August of 1992. In the Consent Order, Van Meter consents to the findings of violations cited within the Consent Order. The Consent Order provides for a thirty day suspension of Van Meter's installer certification and the assessment of a $1750 civil penalty against him. (B-1, JS-4)

7. On December 30, 1992, DEP issued an administrative order (Exhibit JS-4) under the Storage Tank Act to Van Meter and JVMCC for violations of that act and the regulations promulgated thereunder at Celapino's Service in West Newton in October of 1992. DEP's Order suspended the certification of Van Meter for four months and the certification of JVMCC for ninety days. (B-1, JS-4)

8. Neither JVMCC nor Van Meter appealed DEP's December 30, 1992 Order to this Board. (JS-3)

9. On August 6, 1993, DEP representatives inspected a storage tank installation in progress at Goldman Amoco located at 6701 Frankstown Avenue, Pittsburgh, Pennsylvania ("Goldman Amoco"). Van Meter had been contracted to install the tanks at Goldman Amoco. As observed by DEP representatives, Van Meter and his employees were installing an underground vault to be used to contain aboveground storage tanks. (B-1)

10. Corey L. Giles ("Giles"), a DEP Water Quality Specialist, was one of the DEP staff conducting that inspection. He observed Van Meter operating the chute of cement trucks dumping cement in a twenty foot deep, forty foot square pit at Goldman's Amoco. (T-31, 33, 34)

11. Prior to this August inspection, Giles had met with Rick Goldman and told him Van Meter was not certified under the Storage Tank Act to perform tank handling activities as to aboveground tanks. (T-34, 57)

12. On October 5, 1993, Van Meter called Raymond S. Powers ("Powers") of DEP's central office staff in Harrisburg. (T-110-111) Powers is head of the Certification Unit of DEP's Storage Tank Division. (T-96) Van Meter called Powers because of his dispute with DEP's local staff about whether if an aboveground tank is installed in a below ground level, it is an aboveground or underground tank. (T-110-111) Powers informed Van Meter that such an installation was considered an aboveground tank and required an installer to be certified as to aboveground tanks. (T-110-111)

13. An aboveground tank includes the entire system of components to connect it, including the vault, electric conduits, gauges, leak detectors and piping. (T-54, 112)

14. An aboveground tank is built with legs or braces (supports) which support it and its contents, while an underground tank is supported by the fill material it rests on. (T-37)

15. An aboveground tank is a tank with 90% of its capacity maintained above ground. (T-106) A tank in a vault below ground or in a basement is still an aboveground tank if its exterior can be visually inspected, but where the area around it is backfilled so its exterior cannot be visually inspected it is no longer an aboveground tank. (T-107, 108)

16. On October 5, 1993, Giles revisited Goldman Amoco for DEP. Van Meter was there with his employees, who were working on installing the aboveground piping. (T-35, 72-74)

17. On October 9, 1993, Giles returned to the Goldman Amoco site and found that the pit which he had previously seen Van Meter pouring concrete for was a vault with concrete walls.

The vault was complete at that time except for its roof or lid. (T-37) The tanks to be placed in the vault were on site but had not been placed in the vault. (T-38)

18. In subsequent visits to the Goldman Amoco site, Giles found the tanks had been installed in the vault. (T-38)

19. On August 18, 1994, on DEP's behalf, Giles went to the Union Railroad's facility to investigate an anonymous complaint that tank handling activities were occurring at the site without the participation of certified personnel. Giles observed some four-inch piping and two-inch piping had been installed there. While the four-inch line connected to an underground tank, the two-inch line was to connect to two one-thousand gallon aboveground tanks of lubricating oil, with both the four-inch and two-inch lines to be used to service locomotives. At that time, he told the Union Railroad that it needed certified people to perform this work. (B-1, T-38-40)

20. Van Meter was hired by Union Railroad to connect this aboveground two-inch line to these tanks. (B-1, JS-6, JS-7, JS-8, and JS-9) The pipes in question were located ten feet above ground level on the side of a building. (T-94)

21. Van Meter, in order to conduct this job, hired four sub-contractors: Earle Nichols, Ken Argyros, Carlucci Construction Company and Lancey Plumbing to conduct aboveground storage tank handling activities. (B-1)

22. Neither Earle Nichols nor Ken Argyros was certified by the Department to install, modify or remove aboveground storage tanks, nor were their companies certified by DEP to install, modify or remove aboveground storage tanks. Carlucci Construction Company, a company certified by DEP to conduct aboveground tank handling activities, was not present during the aboveground tank handling activities. (B-1)

23. On August 23, 1994, Giles inspected the Union Railroad facility. He observed that the pipeline work, which had been 50% complete when he inspected the site previously, was now 90% complete. The work sign-in sheet shows that the people who were working on the site from August 19 until August 23, 1994 were Van Meter, Van Meter's employees, and a sub-contractor of JVMCC. None of these people was certified by DEP to install, modify or remove aboveground storage tanks. (B-1, T-41, 89)

24. After inspecting the Union Railroad site on August 23, 1994, Giles discussed this matter with his DEP supervisor. In part because Van Meter had promised not to continue installation without the proper type of certified installer present during installation in the November 20, 1992 Consent Order but was doing it again, they concluded that his certification should be revoked. (T-42)

25. Exhibit JS-1 is DEP's Order dated September 14, 1994, revoking the certifications of JVMCC and Van Meter. (JS-1)

26. JVMCC took no appeal from DEP's Order. (B-1)

DISCUSSION

The first issue in this adjudication which we must confront is: what is there left which we must adjudicate? The answer is very little. Because JVMCC did not file any appeal from DEP's Order to it and Van Meter, there are no factual disputes or legal issues before us as to that Order's application to JVMCC. Since the time within which to file a timely appeal from that Order under 25 Pa.Code §121.52 has expired, DEP's Order to JVMCC is final.

As to Van Meter personally, he filed a timely appeal. However, he then failed to respond to Pre-Hearing Order No. 1 and file his Pre-Hearing Memorandum. Van Meter then worsened his own

situation by failing to make any response to our Rule, which warned him he would have sanctions imposed on him if he failed to respond to it. The Board's Order barring presentation of his case-in-chief, which was to have been laid out factually and legally in his Pre-Hearing Memorandum, was an appropriate sanction in this situation and in accordance with our usual practice in these situations. Additionally, Van Meter filed no Post-Hearing Brief, though ordered to do so. According to Lucky Strike, this failure means that he has waived all his arguments as to DEP's Order as it applies to himself.

That conclusion does not end our consideration of this appeal however, because DEP bears the burden-of-proof here under 25 Pa.Code §1021.101(a) and (b) since it issued this Order to Van Meter. Accordingly, the issue we must address is whether DEP has presented sufficient evidence to support its order.

DEP has presented ample evidence to support its Order. When Van Meter first failed to comply with the Storage Tank Act, DEP and Van Meter agreed as to his violations thereof, a 30-day suspension of his certification, and a penalty to be paid by Van Meter. In that Consent Order, Van Meter agreed he had violated 25 Pa.Code §245.132(a)(4) by failing to notify DEP of suspected soil contamination. He also admitted that tank removal and tank installation ("tank handling activities") were conducted without his direct on-site supervision and control as the certified installer as required by both Section 501 of the Storage Tank Act, 35 P.S. §6021.501(c)(2), and 25 Pa.Code §§245.21, 245.108., and 245.132.

When problems with Van Meter's work appeared to DEP to continue, DEP did not initially revoke Van Meter's certification, but instead issued him a non-consensual administrative order giving him a more extended certification suspension. In that order, Van Meter was again charged

with violations of Section 501(c)(2) of the Storage Tank Act and 25 Pa.Code §§245.2, 245.21, 245.108 and 245.132. Van Meter filed no appeal to this Board from DEP's Order. As a result, it became final as to him and its findings and conclusions may not now be collaterally challenged. Commonwealth, DER v. Wheeling-Pittsburgh Steel Corp., 473 Pa. 432, 375 A.2d 320 (1977), and Commonwealth v. Derry Twp., 466 Pa. 31, 351 A.2d 606 (1976).

It is with this background before us that we turn to the testimony offered by DEP as to what occurred at the Union Railroad locomotive servicing facility and Goldman's Amoco. At Union Railroad, Van Meter was hired to install an aboveground two-inch service line running from the aboveground tanks to the location where the locomotives are serviced. Giles' unrebutted testimony showed these lines were located ten feet off the ground on the side of a Union Railroad building. Van Meter stipulated that he was not certified by DEP to do aboveground tank installation and that to do this job, he listed an employee of Carlucci Construction Company as the aboveground certified installer supervising this work, but that that person was not there during Union Railroad aboveground tank handling activities.

At Goldman's Amoco, Van Meter constructed the below-the-surface vault to hold the aboveground gasoline tanks. During installation, he got into a dispute with the local DEP staff (Mr. Giles) who opined that Van Meter's work was aboveground tank handling activities for which there had to be an aboveground certified tank installer to supervise and direct installation of the vault, tanks and piping. Because Van Meter disagreed with the local DEP staff, he called Powers on October 5th to get his opinion on this issue and got the same opinion from him as he had been given by DEP's local personnel. The applicable regulation, 25 Pa.Code §245.1, specifically includes within the definition of aboveground storage tank, "Tanks which can be visually inspected from the

exterior, in an underground area." Despite both opinions given him on DEP's behalf and his lack of certification for aboveground tank handling activity, Van Meter kept at his work at the Goldman Amoco location without an aboveground certified tank installer at the site because Giles observed Van Meter's men installing the pipes from the tanks when Giles reinspected the site on DEP's behalf. On subsequent inspections he observed the vault's completion and the installation of the tanks in it..

Under 25 Pa.Code §245.1 the definitions of "storage tank systems" and "tank handling activities" make it clear that installing or modifying piping, foundations and containment structure all fall within the concept of tank handling activities as to storage tank systems. The applicable regulation, 25 Pa.Code §245.2, also clearly prohibits installing or modifying any part of a storage tank system contrary to the Storage Tank Act or the regulations. Further, 25 Pa.Code §245.2(a) requires that tank handling activities be conducted by a certified installer, just as DEP's Consent Order and its administrative orders suggest. Thus, there can be no question that Van Meter repeatedly violated these regulations when conducting his work at Goldman's Amoco and Union Railroad.

DEP's authorization to revoke the appellant's certification is contained in 25 Pa.Code §245.109(a). It provides:

> (a) The Department may revoke the certification of a certified installer or certified inspector if the certified installer or certified inspector has done one or more of the following:
>
> (1) Demonstrated a willful disregard of, or willful or repeated violations of the act or regulations promulgated thereunder or this part.
>
> (2) Willfully submitted false information to the Department.
>
> (3) Committed an act requiring suspension under

§245.108 (relating to suspension of certification) after having certification suspended previously.

The Board is compelled to conclude DEP acted reasonably in revoking Van Meter's certification based on his willful and repeated violations of the applicable regulations.

Accordingly, we make the following conclusions of law and enter the appropriate order.

CONCLUSIONS OF LAW

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

2. Where DEP issues an administrative order revoking a certified installer's certification, and that order is appealed to this Board, DEP bears the burden of proof as to its action under 25 Pa.Code §1021.101(a) and (b).

3. Construction of piping connecting gasoline dispensers to tanks and the construction of vaults to hold these tanks are "tank handling activities" regulated under the Storage Tank Act and 25 Pa.Code Chapter 245.

4. If a storage tank's exterior may be visually inspected, it is still an aboveground storage tank under the Storage Tank Act and 25 Pa.Code Chapter 245, even if located in a vault below the surface.

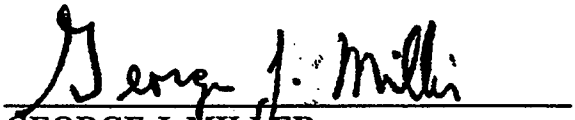
5. A tank installer certified by DEP as to the types of tanks being installed must be on site and conduct all tank handling activities in regard thereto which are regulated under the Storage Tank Act.

6. When a tank installer repeatedly violates provisions of the Storage Tank Act and 25 Pa.Code Chapter 245 in tank handling activities and has had his certification previously suspended by DEP, DEP may revoke that certification pursuant to 25 Pa.Code §245.109(a).

ORDER

AND NOW, this 20th day of October, 1995, it is ordered that Van Meter's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
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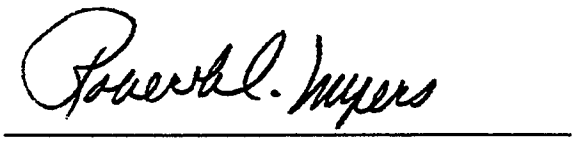
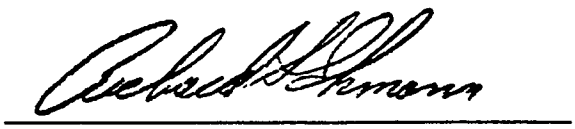
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: October 20, 1995

See following page for service list.

EHB Docket No. 94-275-E
Service List

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LEHIGH TOWNSHIP, LACKAWANNA COUNTY, et al.	:	
v.	:	**Docket No. 95-070-MG**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and LOBOLITO SERVICE CORPORATION, Permittee	:	**Issued: October 20, 1995**

OPINION AND ORDER ON PERMITTEE'S MOTION TO DISMISS

By: George J. Miller, Chairman

Syllabus

A motion to dismiss a portion of the appeal from issuance of an NPDES permit and an earlier approval of an Act 537 plan is granted in part and denied in part.

The DEP may be required to consider the necessity for a discharge from a sewage treatment plant to high quality waters subject to antidegradation requirements, as well as the social and economic justification for the discharge, in connection with the issuance of a NPDES permit even though the social and economic justification for the project was considered as part of the feasibility determination in Act 537 planning. The motion to dismiss the appeal as to other aspects of Act 537 planning and the facility design is granted because the appeal as to these issues is either too late or is premature.

OPINION

This appeal arises from the issuance by the Department of Environmental Resources (now the Department of Environmental Protection and referred to herein as the "DEP") of NPDES Permit No. PA-0063215 authorizing discharge to the Lehigh River of the effluent from a sewage treatment plant ("STP") within the limits and conditions set forth in that permit. The permit was issued to Lobolito Service Corporation ("Lobolito") of Gouldsboro, Pennsylvania, for a facility located in Lehigh Township, Wayne County, Pennsylvania. A notice of the issuance of the permit was published in the Pennsylvania Bulletin on March 11, 1995. The appeal also seeks review of the decision of the DEP to approve Act 537 plans[1] of Lehigh Township, Wayne County and Clifton Township in Lackawanna County. This approval was published in the Pennsylvania Bulletin on September 9, 1993, about a year and a half before the issuance of the NPDES permit involved in this appeal. Appellants[2] claim, among other things, that the STP is designed to be a regional treatment facility answering the present and future development needs of the areas governed by these municipalities for which required planning has not been performed.

The permittee, Lobolito, is a wholly owned subsidiary of Lobolito, Inc., which is the owner/developer of a tract of approximately 220 acres in Lehigh Township, Wayne County. Lobolito, Inc. proposes to subdivide and develop this tract into approximately 205 identical lots.

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[1]An "Act 537" plan is the official plan required of municipalities by the Sewage Facilities Act, Act of January 24, 1966, PL. 1535 (1965), as amended, 35 P.S. §750.1. This Act requires every municipality in Pennsylvania to have in place a current, comprehensive sewage facilities plan, and to implement the plan. The designation as the "Act 537" plan stems from the fact that the original Act was Act 537 of 1965.

[2]One of the appellants, Lehigh Township, Lackawanna County, is not to be confused with Lehigh Township, Wayne County, where the STP is to be constructed.

The STP is proposed to serve this development as well as a school project to be constructed on an 18 acre tract located within Clifton Township, Lackawanna County (Motion to Dismiss ¶¶ (1), (2) and (4)).

Lobolito filed a motion to dismiss the appeal in major part on June 15, 1995 with a supporting memorandum of law. This motion says, among other things, that most of the grounds set forth in the appeal either relate to the approval of Act 537 plan revisions of Lehigh Township, Wayne County and Clifton Township, so that the appeal comes too late, or to issues involving the construction of the STP, so that the appeal as to those issues is premature.

Background of Approval of Act 537 Plans[3]

In November 1992 and January 1993, Clifton Township and Lehigh Township, Wayne County, adopted and filed with the DEP official plan revisions providing that wastewater from the proposed subdivision and the school project would be treated by the STP to be constructed on property of Lobolito within Lehigh Township, Wayne County with discharge to the Lehigh River. The DEP initially denied planning approval with respect to these plan revisions by a deficiency letter dated March 11, 1993 listing numerous deficiencies in the planning documents. Lobolito filed a timely appeal from those determinations with this Board, and submitted to the DEP a number of documents designed to cure the deficiencies set forth in the DEP's deficiency letters. These documents consisted in part of the consistency of

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[3] This limited statement of the background of these approvals is based on the Lobolito motion to dismiss and the appellants' response to that motion. This summary is not in any way binding on any party in connection with future proceedings. A more expanded summary of the early background of this planning process may also be found in our opinion in Lobolito v. DER, 1993 EHB 477.

requirement narrative, a project narrative, as well as an alternative analysis on the development project and the school project. It also included an addendum to the social and economic justification report relating to traffic, local authorities, drinking water and fire and police protection. This led to an agreement of settlement and dismissal of the Lobolito appeal to this Board on August 9, 1993.

On August 17, 1993, the DEP issued a letter approving the Act 537 Plans based on the supplemental information submitted by Lobolito. The DEP said this approval is "conceptual in nature" in that it leaves open for a later date (1) the establishment of limitations necessary to satisfy special protection requirements and (2) the specific treatment technology. (See Exhibits E and F to Lobolito's Motion to Dismiss).

A notice of the approval of the Act 537 plans was published in the Pennsylvania Bulletin on September 4, 1993. Appellants filed no appeal from those approvals.

Procedural Background

On August 4, 1995, appellants filed an answer to Lobolito's motion to dismiss the appeal from the issuance of the NPDES permit admitting many of the basic facts but advancing a number of arguments and factual claims designed principally to justify the timeliness and the merits of the appeal relating to the approval of the Act 537 plans of the municipalities described above.

On August 7, 1995, the DEP filed an answer to the motion to dismiss with a supporting memorandum of law setting forth the DEP's position on issues raised by the appeal and the motion to dismiss. Finally, on August 24, 1995, Lobolito filed a reply memorandum of law in further support of its motion to dismiss.

The Motion To Dismiss

The position of the parties with respect to the issues raised by the motion to dismiss are categorized below as raised by the appeal and the motion. To the extent the notice of appeal is filed from the decision of the DEP to approve the Act 537 plans of Lehigh Township, Wayne County and Clifton Township, Lackawanna County, Lobolito has moved to dismiss this claim as being untimely because those Act 537 Planning Modules were approved on September 9, 1993, and this appeal was not filed within thirty days of that approval. The motion to dismiss also claims that specific paragraphs of the notice of appeal should be dismissed as detailed below:

Objection 1 of the Notice of Appeal

Appellants claim that Lehigh Township of Wayne County and Wayne County as well as Clifton Township, Lackawanna County consider the treatment plant a regional treatment facility answering their present and future development needs in the area. The appeal states there is no indication of present or future needs being serviced by the treatment plant other than the school and the Lobolito development project and that there are no studies as to how these needs can be met by a facility not involving a discharge into the Lehigh River.

The motion to dismiss says that none of the planning documents refer to the sewage treatment plant as a "regional treatment facility". In any event, the motion to dismiss

says that the evaluation of any such STP was properly considered by DEP during its review of proposed 537 plan revisions. Accordingly, Lobolito says that planning issues are not relevant and should not be considered by the Board at the permitting stage.

The DEP agrees with Lobolito that the DEP's evaluation of any regionalized treatment plan properly occurs at the planning stage because the method of treatment and the location of the treatment facilities, as well as the areas to be served, are generally planning issues. The DEP says that appellants waived their right to object at the Part I permitting stage with respect to the Lobolito project based on any concept of regionalized treatment by failing to appeal from the DEP's approval of the sewage facility's planning for the Lobolito project. Alternatively, the DEP says that if the Lobolito plant is used to lead to further development of the area and increased discharges to the Lehigh River, appellants' remedy is to appeal from the actions of the DEP in a revised plan approving that development within thirty days of the time they receive notice of those actions.

Objection 3 of the Notice of Appeal

Objection 3 of the notice of appeal states that the DEP failed to consider the economic impact on the people and communities downstream of the treatment plant who would not use the treatment plant and whose quality of life and income depend on recreation in the Upper Lehigh. Lobolito says that this claim should be dismissed as not being before the Board in the context of an appeal from the issuance of the NPDES permit. Lobolito claims that these issues relate solely to the DEP's consideration and approval of planning issues as part of the approval of Act 537 plan revisions.

The DEP takes the position that economic impact to downstream users could be

relevant in the issuance of the NPDES permit, and that issues of social and economic justification may not have become final at the planning stage, but also may have to be reviewed at the time of the issuance of the NPDES permit.

Objection 4 of the Notice of Appeal

The appeal claims that a major interceptor is being constructed by Clifton Township to go to the sewage treatment plant but there is no indication as to what this interceptor will service and when, or what impact this will have on the NPDES permit discharge into the Upper Lehigh River. Lobolito claims that this issue was raised prematurely and is untimely because any such construction in connection with the sewage treatment plant must be approved by the DEP in connection with the filing of a Water Quality Management Permit under the Clean Streams Law. The DEP takes the position that this issue is premature because how DEP will act on future applications in connection with such an interceptor line is not now ripe for adjudication.

Objection 5b and 5c of the Notice of Appeal

Objection 5b of the appeal says that the DEP failed to consider whether there is an actual need for the new sewage plant to discharge into the upper Lehigh River. The appeal states that the Upper Lehigh River is a high quality cold water fishery. Objection 5c suggests that the DEP failed to consider alternatives for the site of construction of the proposed new school that would not require discharge into the Lehigh River.

Lobolito says that these paragraphs should be dismissed because any failure of the DEP to consider alternative sites is not properly before the Board on appeal from an NPDES permit. According to Lobolito, alternative sites are exclusively planning issues to be reviewed

by the DEP in connection with the Act 537 plan approvals. In addition, Lobolito claims that these alternatives were considered by the DEP in connection with the approval of the Act 537 plan revisions.

The DEP supports appellants on most of these issues. With respect to objection 5b of the appeal, the DEP takes the position that this paragraph should not be dismissed because the issue of whether or not there is an actual need for the new discharge may go to the requirement of "necessary economic or social development" which may be considered in connection with the issuance of the NPDES permit. The DEP says that the issue of actual need may relate to alternative sites which may be pertinent at the NPDES permitting stage of a discharge to high-quality waters.

In the case of objection 5c, the DEP says that this ground for approval may not be subject to dismissal because the DEP's regulations under the Clean Streams Law may require alternative sites and non-discharge alternatives to be considered in permitting.

Objection 6a of the Notice of Appeal

Appellants state that the DEP failed to notify or obtain comments from Monroe County although the Lobolito development which will be serviced by the permitted treatment plant is partially in Monroe County. Lobolito's motion to dismiss says that this paragraph should be dismissed because it is relevant only to the planning stage and because no part of the service area is in Monroe County.

The DEP agrees that this is an issue which should have been raised in connection with the approval of the Act 537 plan or, to the extent appellants are concerned about possible future planning and permitting decisions, this ground for appeal is premature.

Objection 6b of the Notice of Appeal

This objection states as a technical difficulty that the application identifies 11,000 gallons of industrial waste to be treated but does not identify the type of the waste. Lobolito claims that this paragraph should be dismissed because there is no legal requirement that the application specify the origin of the waste to be treated. The DEP agrees that this paragraph should be dismissed, but not for the reasons advanced by Lobolito. It says that the authorized discharge under the permit is treated sewage and that neither the planning nor the permitting in the case contemplate an industrial waste discharge.

Objection 6d of the Notice of Appeal

Objection 6d of the appeal states as a "technical difficulty" that the application proposes the use of ultraviolet treatment, yet the suspended solid limits of 30mg/l are far greater than the 10mg/l limitations needed for ultraviolet discharges.

Lobolito says that this paragraph of the appeal should be dismissed because it relates to details concerning the construction of the sewage treatment plant which are to be considered by DEP in connection with the necessary water quality management permit, Part II, to be filed in connection with the plans, specifications and construction details. The DEP agrees with Lobolito and asserts that an appeal would be from any subsequent amendment in the Phase II consideration of the permit. Accordingly, the DEP says the challenge to ultraviolet treatment is now premature.

Objection 7 of the Notice of Appeal

Objection 7 of the appeal contains a specific objection to the Act 537 plan revisions. It objects that approval of these plans for the Lobolito discharge as improper because

the approval of these plans was conceptual in nature and failed to consider that the proposed treatment plant was not just for the treatment of waste from the development project and the new school. Appellants state that the treatment plant in fact is a regional system to service the needs of both Lehigh and Clifton Townships which have amended their 537 plans for their present and future needs. Appellants assert that these regional system requirements have not been reviewed by the DEP prior to its conceptual approval of the treatment plant.

Lobolito moves to dismiss this paragraph on the ground that it is not timely raised and should be dismissed because those approvals were made in September, 1993. The DEP agrees with Lobolito that this ground for appeal should be dismissed. The DEP says that this ground for appeal is too late in the sense that the DEP dealt with these issues in its September 4, 1993 approval of planning for the Lobolito projects, and that the time for appeal on this matter expired 30 days later. The contention that the treatment was really designed as a regional system to serve other areas, DEP says, comes too early in that any such plans on the part of the Township have not been submitted for the DEP's review. If the DEP approves any future plan revision that contemplates the use of the treatment plant to serve additional areas, the appellants may appeal from those actions.

Objection 8 of the Notice of Appeal

Objection 8 of the notice of appeal claims that the DEP failed to apply the recommended implementation methods recommended in the Special Protection Waters Implementation Handbook. Specifically, objection 8a claims that the DEP failed to apply the procedures set forth in the 1992 revision of this Handbook that would have given greater assurance of a thorough examination of the discharge into the Upper Lehigh River, a high quality

cold water fishery classified river, prior to issuing the approval of the Act 537 amendments and therefore the NPDES requirements to be applied to the treatment plant. Lobolito says that this objection of the Notice of Appeal should be dismissed because it relates to the planning rather than the permitting stage so that this claim is not timely filed. In addition, it says that the handbook was specifically not applicable at the time the plan revisions were submitted to the DEP for review.

The DEP says that the allegation that it should have used the Handbook at the Act 537 planning stages is too late. However, the DEP says that a failure to use the Handbook at the permitting stage is at least raised at the right time. Counsel for the DEP says that the Handbook is designed to implement the antidegradation requirements of federal and state law and that the policies expressed in this Handbook can be pertinent to appeals from the issuance of an NPDES permit even though the DEP may well successfully defend its decision not to use the Handbook for permitting in this case.

DISCUSSION

Paragraph 2 of the Notice of Appeal must be dismissed as being untimely. That paragraph states: "This appeal is also from the decision of the DEP to grant approval of Act 537 plans of Lehigh Township, Wayne County and Clifton Township, Lackawanna County." The appeal acknowledges that these approvals were made on September 9, 1993, by the DEP but no appeal was filed from those determinations. Since this appeal was not filed within 30 days from this action as required by law, this ground for appeal cannot be considered by the Board. Grimaud v. DER, 161 Pa. Cmwlth. 647, 638 A.2d 299 (1994).

Appellants' memorandum of law advances several arguments as to why the appeal is timely. They contend first that the DEP's approval of the Act 537 plan amendments is not a final action but only a conceptual approval of the plan that has since undergone significant revisions. Appellants argue that it is still necessary for the DEP to review the necessity for this discharge into the high quality cold water fishery stream throughout the NPDES process. Since the DEP acknowledges that the approval of the Act 537 plans does not prevent it from establishing effluent limitations necessary to satisfy special protection requirements and the Act 537 plan approval was conditioned to so provide, this is no justification for an untimely review of the DEP's approval of the Act 537 plans. Similarly, the claimed expansion of the scope of the STP project after approval of the Act 537 plan is not a ground for reviewing the approval of the Act 537 plans. If the DEP deems it appropriate, it can require the townships to adopt necessary amendments to the Act 537 plans to accommodate changed conditions. 25 Pa. Code §71.13(a). The Board, however, has no power to require the DEP to take any such action because it has no equity jurisdiction over the DEP's exercise of its authority. Louis Costanza v. DER, 146 Pa. Cmwlth. 588, 606 A.2d 645 (1992); Westtown Sewer Company v. DER, 1992 EHB 979.[4]

Appellants also argue that the Act 537 plans are deficient and that the township plans are significantly expanded. None of those allegations, however, are a valid basis for an untimely review of DEP's approval of the Act 537 plans. Any deficiency in the Act 537 plan should have been raised by a timely appeal from DEP's approval of the plan. 25 Pa. Code

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[4]Indeed, the absence of such a power led the United States Court of Appeals for the Third Circuit to hold that the Board is not a "court" for federal citizen suit purposes. Baughman v. Bradford Coal Co., 592 F.2d 215, 219 (3d Cir. 1979), cert. denied, 441 U.S. 961 (1979).

§71.13. If the Township's plans have expanded, the remedy for DEP requires the Township to adopt an amended plan or for appellants to request DEP to order a plan's amendment. 25 Pa. Code §71.14.

Finally, appellants appear to claim that there is a basis for an appeal nunc pro tunc because the project has been enlarged beyond what was approved in the Act 537 plans. There is no basis for this claim. The Environmental Hearing Board has jurisdiction only over issues raised in a timely appeal and an appeal can be made nunc pro tunc only in the case of fraud, a breakdown of the Environmental Hearing Board's operations, or other extreme circumstances. Game Commission v. DER, 97 Pa. Cmwlth. 78, 509 A.2d. 877 (1986), aff'd. on other grounds, 521 Pa. 121, 555 A.d. 812 (1989); Newtown Land Limited Partnership v. DER , ___ Pa. Cmwlth. ___, 660 A.2d. 150 (1995). Other circumstances, such as "non-negligent happenstance" combined with unique and compelling facts may also provide a basis for such an appeal. Guat Gnoh Ho v. Unemployment Compensation Board, 106 Pa. Cmwlth. 154, 525 A.2d 874 (1987); Petromax, Ltd. v. DER, 1992 EHB 507. None of these circumstances are alleged by appellants.

Objection 1 of the Notice of Appeal must also be dismissed for the same reasons. This objection is also untimely as an objection to the DEP's approval of the Act 537 plan revisions. The DEP correctly points out that if the Lobolito plant is used to expand development in the area and to increase discharges to the Lehigh River, revised Act 537 plans will be required and, if DEP approved the proposed plan revisions, appellants would then have a right of appeal. The DEP clearly may require that a revised Act 537 plan be submitted in accordance with 25 Pa. Code § 71.13(a) if it determines that the plan does not meet the requirements of the planning

regulation, the plan is inadequate to meet the needs of the municipality or because of newly discovered facts which make the plan inadequate.

Lobolito's motion to dismiss objection 3 of the Notice of Appeal is denied. The impact to downstream users may well be relevant in the issuance of the NPDES permit because issues of social and economic justification as they relate to water quality do not become final at the planning stage. These matters, as they relate to water quality, may be reviewed at the time of the issuance of the NPDES permit. Lobolito correctly points out that this Board has held that planning issues relating to the location of treatment facilities are to be addressed at the planning stage, Estate of Peters, et al. v. DER, et al., 1992 EHB 358. However, the location and nature of the discharge may not be solely planning issues but may also raise water quality issues which must be considered at the NPDES permitting stage. As the DEP points out, under section 5(a) of the Clean Streams Law, 35 P.S. § 691.5(a), the DEP must consider, among other things, the immediate and long range impact upon the Commonwealth and its citizens, in administering this Act. This includes the issuance of permits. In addition, under Section 95.1(b) of the DEP's regulations, the discharge of pollutants into waters designated as high quality must be "justified as a result of necessary economic or social development which is of significant public value." This requirement appears to relate to the discharge as it affects water quality and not solely to the location of the facility or the conceptual method of treatment involved in Act 537 planning. Accordingly, this objection will be heard to the extent that the claim is that the discharge permitted by the effluent limits in the NPDES permit can meet the special protection requirements contained in the applicable water quality regulations.

Lobolito's Reply Brief states that it will raise the validity of this portion of DEP's regulation on NPDES permitting if the Board permits consideration of "social and economic justification" issues in connection with permitting. While Lobolito may raise that issue in the course of the appeal, it is not clear that this provision of the DEP's regulation is invalid so as to entitle Lobolito to a dismissal of appellants' claim as a matter of law. Indeed, proof from the appellants that the discharge would have serious and deleterious effects on water quality in the Lehigh River may shift the burden of proof to Lobolito and the Department because of the special concerns in this area of the law of permitting. Marcon, Inc. v. DER, 76 Pa. Cmwlth. 56, 462 A.2d 969 (1983).

Finally, while approval of a plan revision must consider the "feasibility" of implementation of the selected alternative in relation to applicable administrative and institutional requirements under 25 Pa. Code § 71.61(d), this does not mean that plan approval must conclude that the project is 100% certain of implementation as a final matter never to be reconsidered under any circumstances. Instead, at the permit approval stage, the requirements of the permit program must be fully evaluated. See Montgomery Township, EHB Docket No. 93-091-W, (opinion issued April 12, 1995) at pages 37-40. What may have appeared at the planning stage to be generally feasible may appear at the permit stage not to be acceptable as a treatment method and location because the discharge from the facility will be so deleterious on the receiving stream that even with additional treatment beyond that considered in the planning stage the discharge would not be permissible. In the case of this ground for appeal, we are not persuaded that Lobolito is clearly entitled to judgment as a matter of law.

We must assess the motion to dismiss in a light most favorable to the non-moving party. Solar Fuel Co., Inc. v. DER, 1994 EHB 737. The Board treats motions to dismiss the same way as it treats motions for judgments on the pleadings; we will dismiss the appeal only where there are no material factual disputes and the law is clear so that the moving party is clearly entitled to judgment as a matter of law. City of Scranton, et al. v. DER, et al., EHB Docket No. 94-060-W (Consolidated Docket) (opinion issued January 25, 1995); Snyder Brothers, Inc. v. DER, 1994 EHB 1888.

Objection 4 of the Notice of Appeal must be dismissed as premature. The appeal claims that a major interceptor is being constructed by Clifton Township to go to the STP, but there is no indication as to what this interceptor will service or when or what impact it will have on the NPDES permitted discharge into the upper Lehigh River. This claim is not now ripe for adjudication because the connection of any such interceptor line with the STP will have to be ruled on by DEP in the future in connection with an amendment to the Act 537 plan and, perhaps to the NPDES permit.

Lobolito's motion to dismiss objections 5b and 5c of the Notice of Appeal is, at this stage of the proceeding, denied. Consideration of the alternative sites for the discharge and other reasonable alternatives are part of the Act 537 process as is demonstrated by the many authorities contained in Lobolito's Motion and Memoranda of Law. Nevertheless, the question of whether there is an actual need for the new discharge or whether there are no-discharge alternatives available to meet social and economic needs may also be part of the consideration of the issuance of the NPDES permit at least in the case of discharges to high quality waters. Section 95.1(b) of DEP's regulations under the Clean Streams Law require consideration of

nondischarge alternatives. This consideration is required even though, under the existing requirements of the DEP's sewage facilities regulations, 25 Pa. Code § 71.21(a)(5)(I), the alternatives for sewage treatment must be evaluated in Act 537 planning for consistency with, among other things, the anti-degradation requirements of Chapter 95 of DEP's regulations and the Federal Clean Water Act. 25 Pa. Code §71.21(a)(5)(I)(E). Accordingly, if appellants can show that there are no-discharge alternatives which were not considered at the planning stage, then DEP must consider those alternatives in connection with the issuance of the NPDES permit.

The issue of alternative sites may be pertinent at the NPDES permitting stage of a discharge into high quality waters. As pointed out by the Board's opinion in the Estate of Charles Peters v. DER, 1992 EHB 358 at 373, issues that are planning issues may also be water quality concerns to be considered in connection with the issuance of an NPDES permit. Lobolito's reply brief says that the DEP cannot have "two bites at the apple" by considering social and economic justification at both the planning and permit stages. Lobolito seems not to understand that the DEP is not involved in a contest and that its role is not simply as a litigant. Indeed, the DEP is an administrative agency charged with a duty under general principles of administrative law to consider alternatives to its proposed actions. Under Article 1, Section 27 of the Pennsylvania Constitution, the DEP must make reasonable efforts to reduce incursions to the environment to a minimum. Payne v. Kassab, 11 Pa. Cmwlth. 14, 312 A.2d 86 (1973), aff'd, 468 Pa. 26, 361 A.2d 263 (1976). Even in Bobbie L. Fuller, et al. v. DER and Paradise Township, 1990 EHB 1726, aff'd, 143 Pa. Cmwlth. 392, 599 A.d. 248 (1991), relied upon by Lobolito, the Board said in footnote 20 that the consideration of alternatives may be compelled under the Payne test where there is a likelihood of significant environmental harm, even though

alternatives were considered in the planning phase. Lobolito's reliance on Cesar Munoz, et al. v. DER, and Pleasant Valley School District, EHB Docket No. 93-373-MR (Opinion dated February 16, 1995) is similarly misplaced. In that case the Board held that the location of the spray irrigation fields were a matter for Act 537 planning. However, it held that the issue of whether the proposed project would overload the sewer system, a water quality matter, could well be a construction issue which was properly raised in the issuance of the sewage facilities construction permit, and rejected in the motion to dismiss. So in this case, the question of whether the discharge can meet the requirements of the high quality waters and the antidegradation requirements involved may well be a water quality matter for NPDES permitting.

Objection 6a of the appeal must be dismissed because it relates entirely to the Act 537 planning which was completed well before the appeal was filed. Any failure to notify or obtain comments of Monroe County or any other interested person on the Act 537 plans is not relevant to the issuance of the NPDES permit.

Lobolito's motion to dismiss objection 6b of the appeal will be denied at this time. Objection 6b states that the application identifies 11,000 gallons of industrial commercial waste to be treated, but does not identify the type of waste to be treated. The Act 537 planning on which the permit is based contemplates only treated sewage from the development project and the school. The DEP's brief says that there will be an additional discharge of treated sewage from a commercial facility that Lobolito will develop as part of its project. However, the permit itself contains no restriction on the nature of waste to be received by the STP. The motion to dismiss, accordingly, will be denied because of possible factual disputes as to the nature and

source of the waste to be treated which the Board cannot resolve on the motion to dismiss. Snyder Bros. v. DER, 1994 EHB 1888. Of course, if DEP is correct in stating that this waste will come from the Lobolito development project and is consistent with the approval of the Act 537 plans, this ground for appeal will have to be rejected at some later stage in this appeal.

The motion to dismiss objection 6d of the appeal will be granted. The ground for appeal on its face relates to the method of treatment by ultraviolet radiation. The method of treatment is a matter normally reserved for Part II of the permitting process. The DEP's brief says that ultraviolet radiation was used as a treatment technique in issuing the NPDES permit to avoid the need to set a discharge limit for residual chlorine in the NPDES permit. The DEP says that in the event Lobolito does not propose ultraviolet as a treatment method in its Part II permit application, it would then be appropriate for the DEP to set a limit for residual chlorine. Appellants do not appear to object to the DEP's failure to set a limit for residual chlorine at this point and, in any event, the method of treatment will be dealt with by DEP in Part II of the permitting process. Appellants will have the right to appeal from whatever determination DEP makes at that stage of the proceeding.

Objection 7 of the Notice of Appeal must also be dismissed. If the proposed treatment plan was for purposes other than those set forth in the Township's Act 537 plan, an appeal from DEP's approval of that plan should have been taken within 30 days of DEP's approval in August, 1993. Any future use of the facility for purposes other than for the development project or the school considered in the existing plan will have to be approved in a plan revision. Appellants may appeal from any approval by the DEP of such a plan revision.

To the extent that objection 8a of the appeal applies to the approval of the Act 537 amendments, this claim that the DEP failed to apply the procedures set forth in the 1992 revision of the Special Protection Implementation Handbook must be dismissed. As indicated above, this ground for appeal comes too late.

The motion to dismiss objection 8a of the appeal with respect to the use of this Handbook in evaluating NPDES requirements, however, will be denied. Lobolito's contention that the DEP's decision not to use its Handbook at permitting cannot be dismissed as a matter of law because of factual disputes as to the nature of the Handbook, what the Handbook was designed for and as to when it was to be made effective. See Appellants' Brief, pp. 32-42; Commonwealth's Answer to Lobolito Service Corporation's Motion to Dismiss and Memorandum of Law, p. 22. The Handbook itself states that it has been compiled because of the number and complexity of issues surrounding the antidegradation program. Commonwealth Exhibit C, p. I-4. That may well relate to the issuance of the NPDES permit.

ORDER

AND NOW, this 20th day of October, 1995, upon consideration of Lobolito's Motion to Dismiss, Appellants' Answer to the Motion, the Answer of DEP to the Motion and the supporting exhibits and memoranda of law filed by all parties, IT IS HEREBY ORDERED that Lobolito's Motion to Dismiss, In Part, Appellants' Notice of Appeal is granted with respect to:

1. The second paragraph of the Notice of Appeal relating to Act 537 approval, and

2. Specific objections to the issuance of the Permit numbered 1, 4 , 6a, 6d and 7 as well as 8a to the extent objection 8a relates to the DEP's Act 537 plan approvals.

Lobolito's motion to dismiss objections 3, 5b, 5c and 8a of the appeal to the extent that objection 8a applies to the issuance of the NPDES permit, is denied as requiring a resolution of factual and legal issues as to which Lobolito's right to a dismissal of these grounds for appeal is not clear.

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Administrative Law Judge
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DATED: October 20, 1995

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M. DIANE SMITH
SECRETARY TO THE BOARD

PLUMSTEAD TOWNSHIP CIVIC ASSOCIATION	:	
	:	
v.	:	**EHB Docket No. 94-155-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND MILLER AND SON PAVING, INC., INTERVENOR	:	**Issued: October 30, 1995**

OPINION AND ORDER SUR MOTION TO DISMISS

By Robert D. Myers, Member

Synopsis:

The Board dismisses an appeal from the decision of the Environmental Quality Board (EQB) denying Appellant's Petition to have certain lands in Plumstead Township, Bucks County, designated as unsuitable for noncoal surface mining under §315 of the Clean Streams Law (CSL), and from the recommendations of the Department of Environmental Resources (now known as the Department of Environmental Protection) (DEP) with respect to the Petition. In reaching its conclusion, the Board holds that unsuitability designations are legislative in nature and, therefore, within the exclusive jurisdiction of the EQB. Since the decision of the EQB is not adjudicatory in nature, there is no right of appeal to this Board. The recommendations of DEP are not considered to be appealable actions either because they do not represent final action on the Petition.

OPINION

This is the continuing saga of Plumstead Township Civic Association (Appellant) and its five-year old effort to have a 600-acre tract in Plumstead Township, Bucks County, designated as unsuitable for noncoal surface mining pursuant to §315(i) of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.315(i). When Appellant first filed its Petition with DEP on April 5, 1990, DEP rejected it on the grounds that CSL §315(i) did not apply to noncoal surface mining. This Board agreed (Docket No. 90-220-W) and granted summary judgment to DEP on December 10, 1990 (1990 EHB 1593). Commonwealth Court disagreed, however, and remanded the case for further proceedings (142 Pa. Cmwlth. 455, 597 A.2d 734 (1991)).

At DEP's request, Appellant refiled the Petition on June 29, 1992. It then filed appeals with this Board at Docket Nos. 93-320-W and 94-016-W from DEP letters (1) advising of DEP's intentions to recommend to the EQB that the Petition be denied, and (2) reporting on the EQB's deferral of a decision on the Petition. DEP's Motions to Dismiss these two appeals were granted by this Board on May 17, 1994 (1994 EHB 749) on the basis that the letters were not appealable actions. No appeals were taken to Commonwealth Court from these decisions.

On the same day as this Board dismissed the appeals at Docket Nos. 93-320-W and 94-016-W, the EQB voted not to grant Appellant's Petition. Appellant was informed of the EQB's decision by a letter dated May 26, 1994 which Appellant received on May 30, 1994. Appellant filed the present appeal with this Board on June 24, 1994, challenging EQB's decision and DEP's recommendations.

Appellant filed a simultaneous appeal with Commonwealth Court (No. 1601 C.D. 1994) on this matter, and the parties requested this Board to stay its proceedings pending resolution of that

appeal. The stay was entered on September 2, 1994 and was lifted after Commonwealth Court issued a Notice of Discontinuance on December 19, 1994, informing the parties that the appeal at No. 1601 C.D. 1994 had been withdrawn, discontinued and ended. On December 28, 1994, DEP filed a Motion to Dismiss with supporting legal memorandum. Appellant filed its Answer and New Matter together with a legal memorandum on January 24, 1995. DEP filed a Reply on January 30, 1995. Miller and Son Paving, Inc. (owner of the land in question), which was granted intervenor status on August 3, 1994, joined in DEP's Motion but filed no legal memorandum.

DEP contends that the appeal should be dismissed for two main reasons -- (1) DEP's May 17, 1994 recommendation to the EQB is not an appealable action, and (2) the EQB's May 17, 1994 refusal to grant Appellant's Petition is not reviewable by this Board. Appellant argues, in response, that the EQB had no statutory authority to make the final decision on the Petition. As a consequence, DEP's final recommendation to the EQB must be treated as an appealable action. Otherwise, Appellants will be deprived of the opportunity to show that their procedural due process rights were impaired.

CSL §315(h) through (o) deals with procedures for designating an area as unsuitable for surface mining. These provisions are virtually identical to those set forth in §4.5(a) through (h) of the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4e. This is not surprising; they were both adopted on the same date (October 10, 1980) and for the same purpose (securing primacy in the regulation of surface mining in Pennsylvania): *Plumstead Township Civic Association v. Department of Environmental Resources*, 142 Pa. Cmwlth. 455, 597 A.2d 734 (1991).

The procedures require either a petition from an interested person or DEP initiation. DEP must then study the matter, hold a public hearing in the locality of the affected area within ten months, and make a written decision within sixty days thereafter. These procedures are amplified and codified in the regulations at 25 Pa. Code §86.121 - §86.130. The scheme set up there makes the EQB the body to hold the public hearing and to make the final written decision "in the form of a regulation"... (§86.126(b)). DEP studies the matter and makes a recommendation to the EQB (§86.124).

DEP rejected Appellant's Petition and refused to process it under the established procedures because it dealt with noncoal surface mining. In DEP's view, the provisions of CSL §315(h) through (o), like the provisions of SMCRA §4.5(a) through (h), applied only to coal surface mining. When DEP's view was rejected by Commonwealth Court and the Petition was re-filed, DEP had to process it under CSL §315(h) through (o). The regulations at 25 Pa. Code §86.121 *et seq*. technically did not apply because they dealt solely with the surface mining of coal. Nonetheless, DEP borrowed this established procedure adopted for coal mining lands and used it for noncoal mining lands where no other specific procedure existed.

Appellant's Petition was not the only one handled in this manner. At least two others -- one involving a tract in Pequea Township, Lancaster County, and the other involving a tract in Haines Township, Centre County -- were treated the same way. All three petitions were received in June 1992, were advertised in August 1992, were scheduled for hearing in March 1993, and came before the EQB for action in November 1993. DEP recommended that the other two be approved and they were ultimately -- Lancaster County on September 30, 1994 and Centre County on June 9, 1995. DEP recommended that Appellant's Petition not be approved and the EQB agreed on May 17, 1994.

The record is silent on the question of whether Appellant ever objected to the jurisdiction of the EQB before filing the Notice of Appeal in the present case on June 24, 1994. It may be that Appellant was satisfied to have the EQB handle the Petition until the EQB denied it. Whatever the truth may be, we will consider whether the EQB had the power to act on it.

The EQB was established in 1971 by the Act of December 3, 1970, P.L. 834, which added §1920-A to the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, 71 P.S. §51 *et seq.* That section, found at 71 P.S. §510-20, was amended in 1980, 1981 and 1984. As last amended, the EQB had the power, *inter alia*, to "promulgate such rules and regulations as may be determined by the [EQB] for the proper performance of the work of [DEP]...," and the power to receive and consider petitions for the adoption or repeal of a rule or regulation. It was designed by the Legislature to perform the policy-making (legislative) function in the tripartite structure set up for environmental regulation: *East Pennsboro Township Authority v. Commonwealth, Department of Environmental Resources*, 18 Pa. Cmwlth. 58, 334 A.2d 798 (1975); *United States Steel Corporation v. Commonwealth, Department of Environmental Resources*, 65 Pa. Cmwlth. 103, 442 A.2d 7 (1982). It is, therefore, a "quasi-legislative, quasi-policymaking body" that performs no adjudicatory functions: *Concerned Citizens of Chestnuthill Township v. Department of Environmental Resources*, 158 Pa. Cmwlth. 248, 632 A.2d 1, 4 (1993), *allocatur denied*, ____ Pa. ____, 642 A.2d 488 (1994).

As noted above, the EQB has the power to receive and consider petitions for the adoption or repeal of a rule or regulation. Procedures for handling such petitions, adopted by the EQB in 1989, are found at 25 Pa. Code §23.1 *et seq.* These procedures apply to all petitions except those for which the EQB has adopted special procedures. Thus, special procedures for designating an area

unsuitable for mining are found in Chapter 86 and special procedures for the redesignation of streams under Chapter 93 are found in Appendix A to the general petition rules.

Clearly, the designation of areas unsuitable for mining and the redesignation of streams for water quality purposes have been deemed legislative in nature. In the *Concerned Citizens of Chestnuthill Township* case, *supra*, Commonwealth Court held that neither the "EQB order reclassifying the Creek nor the IRRC's 'deemed approval' of this order is an adjudication or judicial in nature" (632 A.2d 1, 4 (1993)). In *Machipongo Land and Coal Company, Inc. v. Commonwealth, Department of Environmental Resources*, 155 Pa. Cmwlth 72, 624 A.2d 742, 748 (1993), Commonwealth Court held that the process set up by the Legislature in SMCRA §4.5 for designating lands unsuitable for mining "is regulatory as opposed to adjudicatory...." (624 A.2d 742, 748 (1993)).[1]

As noted, the procedures in SMCRA §4.5(a) through (h), are virtually identical to those in CSL §315(h) through (o). Consequently, it must be concluded that the CSL procedures are also regulatory in nature. As such, the EQB was the proper body to process the Petition and make the final decision. That conclusion does no violence to the language of CSL §315(h) through (o) which employs the term "department." The definition of that term in CSL §1, 35 P.S. §691.1, includes DEP, the EQB and this Board "carrying out the provisions" of the Administrative Code of 1929, *supra*.[2] Since the Administrative Code makes the EQB the policy-making, legislative arm of DEP,

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[1]Commonwealth Court's decision was reversed by the Supreme Court (538 Pa. 361, 648 A.2d 767 (1994)) on another ground which will be discussed later.

[2]Admittedly, this definition, enacted on July 31, 1970, is somewhat dated. Legislation adopted later in that year designated both this Board and the EQB as department administrative boards within the Department of Environmental Resources, now the Department of

and since the designation of lands as unsuitable for mining (either under SMCRA or the CSL) is legislative in nature, the term "department" in CSL §315(h) through (o) must be interpreted to mean the EQB.

The relief sought by Appellant's Petition was the designation of lands as unsuitable for noncoal surface mining -- a change in the regulations. Clearly, the only body capable of granting that relief was the EQB.[3]

Our conclusion is not in conflict with §2 of Act No. 1992-183, approved December 18, 1992, effective immediately. That legislation, *inter alia*, added §1930-A to the Administrative Code of 1929, *supra* (71 P.S. §510-30) entitled "Powers of Environmental Quality Board," and reading as follows:

Environmental Protection: Act of December 3, 1970, P.L. 834, 71 P.S. §62. This Board is now an independent, quasi-judicial agency by virtue of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7511 *et seq*. The EQB's function and status have not changed, however. It still exists to promulgate rules and regulations for the "department" and "such rules and regulations, when made by the [EQB] shall become the rules and regulations of the department."

[3]Commonwealth Court in the *Machipongo* case, *supra*, decided to transfer the case to this Board, *inter alia*, because that appeared to be the original legislative intent in SMCRA §4.5(h) - an intent apparently sidetracked by the adoption of regulations placing the final decision in the EQB. If DEP had held the hearings rather than the EQB, the reasoning went, the landowners would have had a right to appeal directly to this Board (624 A.2d 742, 753). Since the Supreme Court reversed Commonwealth Court on this part of the decision, the reasoning has no precedential value. Aside from that, it cannot be reconciled with Commonwealth Court's statement earlier in the *Machipongo* opinion that the designation of lands as unsuitable for surface mining is regulatory and not adjudicatory. If that is so, this Board would not have had the power to hear a direct appeal even if the final regulatory action had been taken by DEP rather than the EQB. As pointed out in the Supreme Court's opinion in *Machipongo* (648 A.2d 767, 769-770), this Board has ancillary jurisdiction to pass on the validity of regulations only after DEP has undertaken specific enforcement action. Also see *Arsenal Coal Company v. Commonwealth, Department of Environmental Resources*, 505 Pa. 198, 477 A.2d 1333 (1984).

> The [EQB] shall have the power and its duty shall be to review any petition submitted to it to designate an area as unsuitable for surface mining as provided for in section 315(h) through (n) of the [CSL], and make designations pursuant thereto: Provided, however, that the [EQB] or [DEP] shall not make such designations for surface mining operations regulated by the act of December 19, 1984 (P.L. 1093, No. 219), known as the "Noncoal Surface Mining Conservation and Reclamation Act." This section shall not apply to any petition to designate an area as unsuitable for noncoal mining operations filed with [DEP] prior to July 30, 1992.

It is apparent from the legislative history (Legislative Journal - House, 1992, pages 2161-2162) that the intent was to erase the effect of Commonwealth Court's decision on Appellant's Petition when it was first filed in 1990 (142 Pa. Cmwlth. 455, 597 A.2d 734 (1991)), and make it clear that the EQB could not make noncoal designations under CSL §315. Saved from the noncoal ban, however, were petitions filed prior to July 30, 1992. That included Appellant's Petition and the two others that the EQB processed at that same time and ultimately granted -- one in Lancaster County and one in Centre County. Since Act No. 1992-183 does not apply to Appellant's Petition, the petition must be governed by the state of the law as it existed prior to December 18, 1992. That placed the final decision-making power in the EQB.

Having concluded that vesting the final decision on Appellant's Petition in the EQB was lawful and proper, it follows that an appeal from that decision cannot be entertained by this Board because it is regulatory and not adjudicatory (*Machipongo*, *supra*, 648 A.2d 767 (1994)). It also follows that DEP's recommendations to the EQB, even if considered "final" rather than "preliminary," are not "actions" from which an appeal can be taken to this Board. That was our holding on two earlier similar appeals (Docket Nos. 93-320-W and 94-016-W), 1994 EHB 749 (from

which Appellant took no further appeal), and is just as applicable here. Accordingly, the appeal must be dismissed.

We are sympathetic to Appellant's longstanding efforts to obtain favorable action on its Petition. However, we are a Board of limited jurisdiction (as stressed again by the Supreme Court in the *Machipongo* case, *supra*), and cannot assume powers we do not possess, even when our sense of equity tempts us to do so.

ORDER

AND NOW, this 30th day of October, 1995, it is ordered as follows:

1. DEP's Motion to Dismiss is granted.

2. The appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

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RICHARD S. EHMANN
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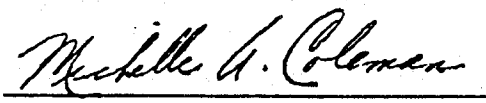

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: October 30, 1995

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M. DIANE SMITH
SECRETARY TO THE BOARD

EMPIRE COAL MINING & DEVELOPMENT, INC.	:	
v.	:	**EHB Docket No. 93-179-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 1, 1995**

ADJUDICATION

By Robert D. Myers, Member

Syllabus:

A mining operator's application to renew his license was denied by the Department of Environmental Resources, now known as the Department of Environmental Protection (DEP), because of the operator's failure to begin restoration of a mining site within 30 days after receipt of notice that DEP had denied his application for a surface coal mining permit - all as required by a consent order and agreement entered into between DEP and the operator. In upholding the denial of the license renewal, the Board concludes that the operator's failure to begin restoration was a violation of a consent order and agreement (also constituting an adjudicated proceeding) which, pursuant to SMCRA (52 P.S. §1396.3a(b)), bars the issuance or renewal of a license. The Board rejects the operator's arguments that Commonwealth Court's staying of a DEP action to compel restoration excused the violation, and that DEP's renewal of the license for two successive years after the violation occurred shows that the failure to restore was not considered a bar to license renewal.

PROCEDURAL HISTORY

Empire Coal Mining and Development, Inc. (Empire) filed a Notice of Appeal on July 9, 1993, seeking Board review of the June 11, 1993 action of the Department of Environmental Resources, now known as the Department of Environmental Protection, denying Empire's application for a Mine Operator's License (License).

A hearing was held in Harrisburg on April 19 and 20, 1994, before Administrative Law Judge Robert D. Myers, a Member of the Board, at which both parties were represented by legal counsel and presented evidence on behalf of their legal positions. Appellant filed its post-hearing brief on June 13, 1994; DEP filed its post-hearing brief on June 27, 1994. Issues not raised in post-hearing briefs are deemed waived: *Lucky Strike Coal Co. and Louis J. Beltrami v. Department of Environmental Resources*, 119 Pa. Cmwlth. 440, 547 A.2d 447(1988), allocatur denied, 521 A.2d 607 (1988). A decision in this appeal was postponed pending Board action on a related appeal at Docket No. 91-115-MR.

The record consists of the pleadings, a partial stipulation of facts (Stip.), a transcript of 357 pages and 41 exhibits. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. Empire is a closely held corporation organized under the laws of Pennsylvania with a registered address of 333 South Pine Street, Mount Carmel, PA 17857 and a business address of 230 South Vine Street, Mount Carmel, PA 17851 (Stip.).

2. DEP is an administrative department of the Commonwealth of Pennsylvania and has the duty to administer and enforce the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.*; the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; §1917-A of the Administrative

Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the rules and regulations promulgated under those statutes, including the regulations governing the surface mining of coal at 25 Pa. Code Chapters 86-88 (Stip.).

3. On July 28, 1989, DEP and Empire entered into a Consent Order and Agreement (CO&A) pertaining to a site in Mount Carmel Township, Northumberland County (Site)[1] (Stip.; Exhibit C-1).

4. Pursuant to Paragraph 2c of the CO&A, Empire submitted to DEP on December 29, 1989 an Application for Surface Mining Permit No. 49900102 (Application). Revisions to the Application were filed subsequently (Stip.; Exhibit C-1).

5. On February 15, 1991, Empire received a letter from DEP dated February 12, 1991, denying Empire's Application (Stip.; Exhibit C-2).

6. On March 15, 1991, Empire filed a Notice of Appeal with the Board at Docket No. 91-115-MR seeking review of DEP's denial of the Application (Stip.).

7. As of February 15, 1991, the portion of the Site that had been affected by Empire's surface coal mining operations, including an open pit excavated by Empire and adjacent to Empire's drag line, was unreclaimed (Stip.).

8. Empire has not taken any steps to backfill the pit or otherwise reclaim the Site. It remains in almost exactly the same condition as it was on February 15, 1991 (Stip.; Exhibits C-11B, 11C, 11D, C-29A, 29B and 29C).

9. DEP inspected the Site on March 19 and October 8, 1991; January 10, March 17,

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[1]Details of the Site and the circumstances under which Empire conducted coal surface mining operations there prior to the date of the CO&A are fully discussed in the Board's Adjudication in the related appeal at Docket No. 91-115-MR (August 29, 1995).

April 1, April 12, July 14, October 14 and November 17, 1992; January 26, March 10, May 28 and August 18, 1993. Inspection reports prepared on each occasion and either handed or mailed to Empire noted, *inter alia*, that (a) Empire was in violation of paragraph 2e of the CO&A because it had not begun backfilling and restoration, that (b) it was incurring a civil penalty of $750 per day under the provisions of the CO&A, and that (c) Empire should begin compliance immediately (Stip.; Exhibits C-5, C-7 to C-11, C-12 to C-18).

10. On February 6, 1992, DEP filed in the Commonwealth Court of Pennsylvania a Petition to Enforce Administrative Order (No. 45 Misc. Dkt. 1992), requesting Commonwealth Court, *inter alia*, to direct Empire to begin reclamation and to continue it until completion (Stip.; Exhibit A-2).

11. On April 13, 1992, Commonwealth Court (Lord, J.) entered an order (a) continuing generally DEP's Petition to Enforce Administrative Order pending Commonwealth Court's disposition of Empire's Petition for Review (No. 546 C.D. 1992) of this Board's dismissal of its appeal at Docket No. 91-115-MR challenging the denial of its Application (see Finding of Fact No. 6), and (b) authorizing DEP to request a hearing after the validity of the Application denial was decided by Commonwealth Court (Stip.; Exhibit A-3).

12. On August 19, 1992, a three-judge panel of Commonwealth Court (per Smith, J.) granted Empire's Petition for Review (No. 546 C.D. 1992) and remanded the case to this Board: 150 Pa. Cmwlth. 112, 615 A.2d 829 (1992). DEP's Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania on September 3, 1993 (Stip.).[2]

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[2]On August 29, 1995, the Board issued an Adjudication upholding DEP 's denial of the Application and dismissing Empire's appeal at Docket No. 91-115-MR.

13. DEP issued Surface Mining Operator's License No. 2-02624 to Empire on March 11, 1988. Because of the expiration date of Empire's public liability insurance policy, February 28th was set as the anniversary date for the operator's license (Stip.).

14. DEP renewed Empire's operator's license on March 26, 1991 and May 22, 1992, despite the fact that Empire was in violation of paragraph 2e of the CO&A at the time (Stip.; N.T. 96-97; Exhibits A-1, A-9 and A-10).

15. The individuals who process Surface Mining Operator's Licenses in DEP 's Bureau of Mining and Reclamation utilize a computerized record of outstanding enforcement actions to determine whether a license applicant has outstanding violations. The data for this record is generated in the Bureau's district offices, which are responsible for entering it into the record (N.T. 70-73, 84, 95).

16. The computerized record on March 22, 1991 and May 20, 1992 showed that Empire had entered into the CO&A and that its progress was satisfactory. Empire's license was renewed on March 26, 1991 and May 22, 1992, respectively, on the basis of this record (N.T. 82-84, 96-97; Exhibits A-9 and A-10).

17. The individual who inspected Empire's Site and filled out the inspection reports referred to in Finding of Fact No. 9 learned, after Empire's license had been reviewed on May 22, 1992, that Empire's violation of the CO&A was not reflected on the computerized record. He took steps to have the record corrected (N.T. 277-282).

18. On or about November 23, 1992, DEP mailed to Empire the application form for the renewal of its license which was set to expire on February 28, 1993. It is customary for DEP to send out these pre-printed forms 90 days prior to license expiration (Stip.; N.T. 312-314).

19. On December 4, 1992, DEP did a preliminary check of the computerized record of outstanding enforcement actions and found that Empire was no longer listed as being in satisfactory progress under the CO&A. Accordingly, DEP mailed a letter to Empire on December 7, 1992

(a) advising that, according to DEP records, Empire's operations may be in violation of applicable laws and regulations;

(b) notifying that DEP intended not to renew the license unless the violations were corrected;

(c) informing Empire of its right to request an informal conference with the Pottsville District Office before a final decision was made; and

(d) warning that the license application would be denied, as required by SMCRA, if Empire failed to demonstrate adequately its compliance with the laws and regulations

(Stip., N.T. 99-104; Exhibits A-4 and A-11).

20. Empire requested an informal conference and, on or about March 2, 1993, filed its application for license renewal (N.T. 32, 315).

21. An informal conference was held at the Pottsville District Office on March 11, 1993 attended by representatives of Empire and DEP, at which Empire's violation of the CO&A by failing to reclaim the Site was discussed. Empire was given full opportunity to present evidence and arguments on the point (Stip.; N.T. 335-336).

22. On March 22, 1993, Empire's license application, certificate of insurance and check for $300 (license fee) were returned because the application had been filed on an obsolete form instead of the pre-printed form mailed to Empire on November 23, 1992. Another pre-printed form was

enclosed and Empire was requested to complete it and submit it along with a "valid" certificate of insurance and another check (Stip.; N.T. 313-316; Exhibit C-24).

23. On March 30, 1993, DEP wrote to Empire, referencing a discussion during the March 11, 1993 informal conference concerning Empire's right to mine the Site, requesting copies of the documents on which Empire relied in establishing this right. These documents were requested because Empire officials seemed to place great reliance on them at the informal conference (Stip.; N.T. 106; Exhibit A-5).

24. On April 12, 1993, Empire responded to DEP's March 30, 1993 letter, declining to submit the documentation because it was irrelevant to Empire's license (Stip.; Exhibit A-6).

25. On April 16, 1993, DEP received Empire's license renewal application, submitted on the pre-printed form sent to it on March 22, 1993 (Stip.; N.T. 316-317; Exhibit C-25).

26. On May 17, 1993, DEP sent a "correction letter" to Empire regarding its license renewal application, requesting a proper certificate of insurance and threatening denial of the mining license if the documentation requested in the March 30, 1993 letter was not submitted (Stip.; Exhibit A-7).

27. Empire submitted a certificate of insurance (dated May 19, 1993) on or about June 1, 1993, which is deficient in several respects (Stip.; N.T. 319-322, 335; Exhibit C-27).

28. The computerized record of outstanding enforcement actions showed on June 10, 1993 that Empire still was not in satisfactory progress under the CO&A. As a result, DEP issued a letter on June 11, 1993 denying Empire's license renewal application because Empire was still in violation of the CO&A by not reclaiming the Site. Failure to submit the documentation referred to in DEP's March 30, 1993 letter was not a reason for the denial (Stip.; N.T. 113-116; Exhibits C-22 and A-8).

29. Empire filed a Notice of Appeal with this Board on July 9, 1993 seeking review of DEP's denial of its license renewal application (Stip.).

30. On or about October 4, 1993, DEP filed a Status Report in Commonwealth Court (No. 45 Misc. Dkt. 1992) advising, *inter alia*,

(a) that the validity of DEP's denial of Empire's Application had not yet been resolved because the proceedings had been remanded to this Board;

(b) that DEP had denied Empire's license renewal application because it was in violation of the CO&A by not reclaiming the Site; and

(c) that Empire had appealed that denial to this Board, where the question whether Empire was in violation of the CO&A would be adjudicated; and recommending that the Court continue the enforcement proceedings pending resolution of the present appeal by this Board (Exhibit C-33).

31. On October 6, 1993 Commonwealth Court (Rodgers, J.) Entered an Order (No. 45 Misc. Dkt. 1992) directing DEP 's legal counsel to notify the Court within 30 days after this Board disposes of the present appeal (Exhibit C-34).

DISCUSSION

Empire bears the burden of proof: 25 Pa. Code §21.101(c)(1).[3] To satisfy the burden, Empire had to show, by a preponderance of the evidence, that DEP's denial of Empire's license renewal application was unlawful or an abuse of discretion: 25 Pa. Code §21.101(a).[4]

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[3]This rule is now found at 25 Pa. Code §1021.101(c)(1).

[4]This rule is now found at 25 Pa. Code §1021.101(a).

Despite the contentions made in its Notice of Appeal and pre-hearing memorandum, Empire's post-hearing brief raises only two issues. The first questions whether the inspection reports, which merely stated that Empire was in violation of the CO&A and which did not contain DEP's standard appeal language, were final adjudications or actions that could be appealed to this Board. The second questions whether DEP must renew Empire's license where there has been no legally determined adjudication that Empire is in violation of the CO&A and where there has been no final enforcement action or order against Empire for such violation.

The first issue, as noted in DEP's post-hearing brief, is a non-issue. DEP has not contended that the inspection reports are appealable or that Empire is somehow foreclosed from challenging their contents because of the failure to appeal them. It was Empire that introduced the inspection reports and questioned its own witnesses about their contents, ignoring in the process the language printed on the back of the forms stating that the reports are not appealable. It was DEP that sought to defuse the non-issue by introducing this language into the record (Exhibit C-35). Why Empire continues to argue the point is a mystery. In any event, the reports were not final adjudications or actions appealable to this Board. That disposes of the first issue.

The second issue involves §3.1(b) of SMCRA, 52 P.S. §1396.3a(b), which reads as follows:

> [DEP] shall not issue any surface mining operator's license or renew or amend any license if it finds, after investigation, and an opportunity for an informal hearing that a person, partner, associate, officer, parent corporation or subsidiary corporation has failed and continues to fail to comply or has shown a lack of ability or intention to comply with an adjudicated proceeding, cessation order, consent order and agreement or decree, or as indicated by a written notice from [DEP] of a declaration of forfeiture of a person's bonds.

The regulations contain a nearly identical provision at 25 Pa. Code §87.17(a)(1).

It is clear from the language used that DEP must refuse to issue or renew a license where the applicant fails to comply with any one of the following:

(a) adjudicated proceeding,[5]
(b) cessation order,
(c) consent order and agreement,
(d) decree, or
(e) bond forfeiture declaration.

The violation on which DEP based its denial was the failure to restore the Site. That obligation arose out of the CO&A. By signing that document, Empire agreed to pay a civil penalty for its past violations and to bring its mining operations into compliance by seeking a surface mining permit and posting bonds to cover the pre-permit acreage. The civil penalty was to be paid within 5 days, the bonds were to be submitted within 30 days, and a permit application was to be filed within 120 days, after the date of the CO&A. Paragraph 2e provided as follows:

> Neither the items and terms set forth in this [CO&A] nor [DEP's] willingness to enter into it shall be construed as a commitment to or indication on the part of [DEP] to approve any permit application submitted by Empire. To the extent a permit is issued to Empire, the bonds posted pursuant to this [CO&A] shall be applied to Empire's reclamation responsibilities at the Site. In the event that Empire's application for a permit is denied, Empire shall immediately cease and desist the extraction of coal and initiate restoration of the Site within thirty (30) days of receipt of notice of the application denial.

Empire agreed that the CO&A constituted an order of DEP and that failure to comply with its terms would subject Empire to all sanctions provided by statute for violating an order of DEP (Paragraph 1). Empire also agreed that a failure to comply "in a timely manner" with any term of

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[5] "Adjudicated proceeding" is defined in §87.17(e), for the purposes of §87.17, as a "final unappealed order of [DEP] or a final order of the EHB or other court of competent juridiction."

the CO&A would be a violation of the CO&A subjecting Empire, *inter alia*, to a $750 per day civil penalty "due automatically and without notice" (Paragraph 5).

There can be no doubt that Empire's failure to reclaim the Site was a violation of a "consent order and agreement" and of a final unappealed[6] order of DEP constituting an "adjudicated proceeding." Because of the language of the CO&A, it was unnecessary for DEP to issue another order directing Empire to reclaim the Site. That obligation flowed automatically from DEP's denial of the permit application. DEP made this clear in the denial letter (Exhibit C-2), quoting from Paragraph 2e of the CO&A and continuing with the following language:

> This letter constitutes "notice of the application denial" under paragraph 2.e. Therefore, under the terms of the [CO&A], Empire must cease extracting coal from the site immediately, and must initiate restoration of the site within thirty days after receiving this letter. Failure to do so will constitute a violation and a material breach of the [CO&A], and will subject Empire to a civil penalty of $750.00 per day for each violation under Paragraph 5 of the [CO&A]. (Emphasis in original)

It is difficult to conjure up language that would be clearer. Empire obviously understood its meaning, because it ceased immediately the extraction of coal when notified of the permit denial. Mr. Molesevich, Empire's president, acknowledged that Empire stopped mining because of the language of Paragraph 2e and of the denial letter (N.T. 47-49). He also acknowledged that he was aware of, and understood, the requirement to begin restoration within 30 days (N.T. 49-51). While Empire never precisely stated why it did not begin restoration, we can infer from Molesevich's

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[6]In the concluding paragraph of the CO&A, Empire "knowingly waives its right to appeal this [CO&A] and the foregoing Findings, which rights may be available under the Environmental Hearing Board Act..., the Administrative Agency Law...or any other provision of law."

testimony about the quantity and value of the coal exposed in the pit that it was an economic decision. Empire had expended funds to uncover this coal and it was not willing to cover it up again until the validity of DEP's denial of the permit application was finally resolved.

Empire's motives, understandable as they may be, do not change the fact that failure to begin restoration was a violation of the CO&A - a violation that was repeatedly brought to its attention in the inspection reports. The language differed somewhat from report to report but always stated that (1) Empire was in violation of the CO&A because it failed to begin reclamation, (2) Empire was accruing a $750 per day civil penalty because of the violation, and (3) Empire should comply immediately with the requirements of the CO&A.

Empire's insistence that it was waiting for DEP to issue an appealable order to begin restoration is disingeneous. We have already ruled that the order to begin restoration was the CO&A - a DEP final order from which Empire waived its right to appeal. No further order was necessary - a conclusion supported by Empire's immediate cessation of mining without a further order. Finally, there is no evidence that Empire would have begun restoration if another order had been given. Very likely, it would have resisted the order (by appeal to this Board and a request for a supersedeas) just as it resisted DEP's enforcement action in Commonwealth Court (No. 45 Misc. Dkt. 1992). Empire says as much on page 15 of its post-hearing brief.

That action was begun on February 6, 1992, nearly a year after the Application was denied. During that year, Empire had filed an appeal with this Board (Docket No. 91-115-MR), this Board had entered summary judgment in favor of DEP, and Empire had filed a Petition for Review with Commonwealth Court (No. 546 C.D. 1992). Judge Lord stayed the enforcement action pending the Court's disposition of the Petition for Review. That occurred on August 19, 1992 when a three-

judge panel of the Court granted the Petition for Review and remanded the case to this Board. DEP's Petition for Allowance of Appeal to the Supreme Court was denied a year later, on September 3, 1993.

During that year, DEP had denied Empire's application for license renewal and Empire had filed the instant appeal with the Board. This was reported to Commonwealth Court by DEP on October 4, 1993 along with the recommendation that, since the validity of the permit denial had not yet been determined (but was pending before this Board) and since the instant appeal would determine whether the failure to restore was a violation of the CO&A, the enforcement proceedings should be stayed further. The Court approved this recommendation on October 6, 1993.

Empire contends that Commonwealth Court's stay of the enforcement action relieved Empire of any restoration obligations until the validity of the permit denial was finally resolved. If those obligations constituted a violation of the CO&A (which Empire disputes), then they were excused by the Court's stay and could not serve as a basis for DEP's denial of license renewal more than a year after the stay was entered. DEP argues, however, that the stay simply put the enforcement action on hold while this Board reached final decisions on the permit denial and the license denial. The Court did not dismiss the enforcement action and did not make any findings that Empire is not in violation of the CO&A.

Judge Lord's April 13, 1992 order is just a little over one page long and, accordingly, offers only the briefest explanation of the reasons behind it. It appears clear that the judge wanted to withhold enforcement of the restoration obligation until the validity of the permit denial was resolved by Commonwealth Court. He expected the stay to be short-lived, because he also directed

that the Petition for Review (permit denial) be listed for expedited argument. Whether he contemplated an appeal or a remand (both of which occurred) is uncertain.

Judge Rodgers was in charge of the enforcement action when DEP filed its Status Report on October 4, 1993. He simply entered a five-line order directing the filing of another status report within 30 days after this Board disposes of the present appeal. Presumably, he was influenced by DEP's suggestion that this Board should be the first tribunal to determine whether Empire violated the CO&A.

Certainly, Commonwealth Court is the best authority on the meaning of its orders. We attempt to interpret them only to reach a final decision in the present appeal. It appears to us that Judge Lord, impressed by equities favoring Empire, decided to hold up DEP's enforcement action for the short time necessary for Commonwealth Court to act on the permit denial case. If that case were resolved finally in favor of Empire, there would be no enforceable restoration obligation. If it were resolved finally in favor of DEP, the restoration obligation would be clear and enforceable. Staying the enforcement action was intended to maintain the status quo only long enough to enable the Court to decide the permit denial question. It was not intended as, and cannot be taken to be, an expression (one way or the other) on the merits; otherwise, Judge Lord would either have granted the petition to enforce or denied it. He did neither.

Unfortunately, the permit denial question was not finally resolved as quickly as Judge Lord expected. It was returned to this Board for a hearing on the merits and an adjudication. Since by then the present appeal was also before this board, Judge Rogers' order continuing the stay in the enforcement action also cannot be considered an expression on the merits. Again, it simply

maintained the status quo, giving this Board the first shot at deciding whether Empire's failure to restore was a violation of the CO&A.

According to our interpretation of the Commonwealth Court orders, Empire's obligation to restore was not excused; DEP's attempts to enforce that obligation in Commonwealth Court were merely deferred. Accordingly, the violation of the CO&A was ongoing at the time DEP denied the application for license renewal, and DEP was required by law to deny the renewal for that reason.

Empire mentions the fact that DEP renewed the license twice, despite the violation, before denying renewal in 1993. While Empire does not argue estoppel, it suggests that the two renewals reinforced Empire's belief that the failure to reclaim did not violate the CO&A. It also raises the spectre of conspiracy in DEP's refusal to renew the third time. We concede that the renewals in 1991 and 1992 may, indeed, have confused the situation; but they were not enough to override the clear, unmistakable language of the CO&A, the denial letter and the inspection reports. Certainly, if Empire had any doubt about its violation of the CO&A, it could easily have requested clarification.

The conspiracy theory arises from DEP's explanation for the 1991 and 1992 renewals. According to this evidence, the individuals who process license applications check computerized data for information on the operator's compliance status. The data is entered into the computer at the district offices and is based primarily on the information in the inspection reports. Even though the inspection reports of Empire's operations at the Site showed violations of the CO&A, the data was not entered into the computer. Accordingly, when the compliance checks were made in 1991 and 1992 prior to renewal of the license, the computerized data reflected satisfactory

compliance. As a result, the license was renewed. The inspector became aware of this after the 1992 renewal and saw to it that the record was corrected. When the compliance check was made for the 1993 renewal, the violation was noted. Empire was informed of this late in 1992 and was given an opportunity (at an informal conference) to persuade DEP that the violation was not sufficient to justify denial of the license renewal. When it failed to do so, DEP denied the application.

Empire questions how a "lowly" inspector can be endowed with the power to ignore two license renewals and Commonwealth Court's stay of the enforcement action and create a violation where none existed. Of course, we have already rejected Empire's arguments on the effect of these actions and have affirmed our earlier conclusion that the failure to restore was a violation of the CO&A. The inspector's correction of the record, therefore, was proper. That it became an impediment to Empire's 1993 license renewal was the result of SMCRA.

Finally, Empire contends that the 1993 license renewal was denied because Empire refused to submit the chain of title documents applicable to Empire's appeal of the permit denial. There is absolutely no evidence to support the contention. The chain of title documents were mentioned by Molesevich at the informal conference held before denial of the license renewal. When DEP later sent a "correction letter" on the application, these documents were requested. Empire declined on the basis that they were irrelevant to license renewal. DEP repeated the request in a later letter, cautioning Empire that failure to submit the documents could result in denial of license renewal.

DEP's witness testified that, after reflecting on the matter, he realized that the documents were irrelevant. Accordingly, they played no part in DEP's decision not to renew. While Empire

questions the credibility of this witness, it has not come forth with any evidence to counter it. Moreover, the best evidence of the reasons for the denial (and the only reasons we have considered in this Adjudication) are set forth in the denial letter (Exhibit A-8). That letter made clear that the denial was based on specific violations "identified in inspection reports and notices of violation...which have been previously delivered to you." The inspection reports, as noted frequently in this Adjudication, notified Empire that its failure to restore was a violation of the CO&A. That violation was the only stated basis for DEP's action and there is no evidence to the contrary.

DEP introduced evidence at the hearing in an effort to show that the insurance certificate submitted by Empire as part of its application for license renewal was deficient. Since this deficiency was not stated in the denial letter (Exhibit A-8), we have refused to discuss it. We allowed the evidence to be introduced so that, if we decided this appeal in favor of Empire, we would remand it to DEP rather than simply ordering the license to be issued. Since we are dismissing the appeal, the issue is moot.

In its post-hearing brief, DEP renewed its motion for directed adjudication, made initially at the conclusion of Empire's case-in-chief and denied at that time by the presiding Judge. In view of our disposition of the appeal, the motion is moot and will not be discussed.

CONCLUSIONS OF LAW

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

2. Empire has the burden of proving by a preponderance of the evidence that DEP acted unlawfully or abused its discretion in denying Empire's application for license renewal.

3. The inspection reports were not appealable to this Board.

4. Under SMCRA and 25 Pa. Code §87.17, DEP must refuse to issue or renew a license where the applicant fails to comply with an adjudicated proceeding, a cessation order, a consent order and agreement, a decree, or a bond forfeiture declaration.

5. The CO&A constituted an adjudicated proceeding (defined in §87.17) because it was an unappealed order of DEP.

6. The terms of the CO&A required Empire, upon receipt of notice that the Application had been denied, to cease mining immediately and to begin restoration within 30 days.

7. Empire's failure to begin restoration within 30 days after it received notice of the denial of the Application was a violation of the CO&A, an adjudicated proceeding.

8. DEP gave adequate notice to Empire of its violation of the CO&A by its failure to begin restoration. Empire was aware of the obligation.

9. Commonwealth Court's stay of DEP's action seeking to compel Empire to begin restoration did not excuse the violation.

10. DEP's renewal of Empire's license in 1991 and 1992 did not override the clear language of the CO&A, the denial letter and the inspection reports.

11. The inspector acted properly in correcting the computerized record to show that Empire was not in satisfactory compliance with the CO&A.

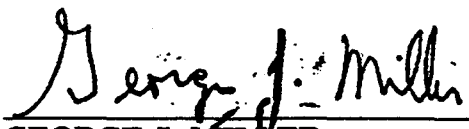
12. Renewal of the license was denied in 1993 solely because of Empire's failure to begin restoration.

13. DEP was required by SMCRA and 25 Pa. Code §87.17 to deny Empire's application to renew its license while violations of the CO&A were still occurring.

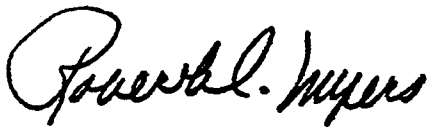
ORDER

AND NOW, this 1st day of November, 1995, it is ordered that the appeal is dismissed.

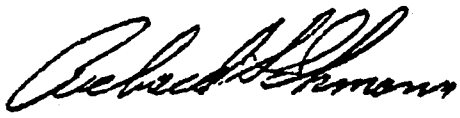
ENVIRONMENTAL HEARING BOARD



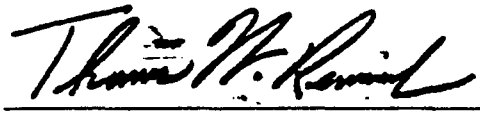
GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: November 1, 1995

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MRS. PEGGY ANN GARDNER, MRS. BARBARA JUDGE and MRS. MARY JANE ECKERT :

v. : EHB Docket No. 93-381-E

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: November 2, 1995

OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT

By: Richard S. Ehmann, Member

Synopsis

On remand from the Commonwealth Court, the Board grants summary judgment in favor of appellants, finding that there is no genuine issue of material fact or law that the appellant/landowners' coal and mining rights have been "taken" under both the second categorical type of "takings" set forth in the analysis used in Lucas v. South Carolina Coastal Council, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), and, also under the traditional takings analysis used in Mock v. Department of Environmental Resources, 154 Pa. Cmwlth. 380, 623 A.2d 940 (1993). The statutory scheme and DER's denial of a variance to the appellants from that scheme in order to permit them to gain access to their coal, in combination, unquestionably denies all economically beneficial or productive use of the appellants' property. Further, the challenged statutory scheme, in combination with DER's variance denial challenged here, is unduly oppressive on the Gardners in that they have been deprived of any reasonable use of their surface mineable coal and surface mining rights without just compensation.

OPINION

The instant appeal was filed with this Board on December 23, 1993 by Mrs. Peggy Ann Gardner, Mrs. Barbara Judge, and Mrs. Mary Jane Eckert (collectively Gardners). The Gardners challenge the Department of Environmental Resources' (DER)[1] determination that they are not entitled to compensation for their coal reserves on the C.W. House Tract in Brady Township, Butler County, and their mining rights to these coal reserves, objecting, *inter alia*, that this violates their constitutional guarantees under the Fifth Amendment to the United States Constitution and under Article 1, Section 10 of the Pennsylvania Constitution.[2] The matter is now before the Board on remand from the Commonwealth Court, with directions for us to proceed in accordance with the Court's April 25, 1995 Opinion. See Gardner v. Commonwealth, DER, 658 A.2d 440 (Pa. Cmwlth. 1995)

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[1] Effective July 1, 1995, DER's functions were split between the Department of Environmental Protection (DEP) and the Department of Conservation and Natural Resources (DCNR). By an order issued July 13, 1995, we directed the parties to submit briefs addressing the matter of the Board's jurisdiction over this appeal in light of the division of DER into DEP and DCNR, and whether DCNR is a party to this appeal.

Both parties agree that the Board has jurisdiction over the Gardners' appeal and that the DCNR is not presently a party to this appeal. While DEP's position on remand is that DCNR "ought to be given an opportunity to intervene as the landowner whose interests will be directly affected by this appeal," we have not received any petition to intervene on behalf of DCNR.

In an order issued July 13, 1995, we directed current counsel for DER to advise the Board in writing as to whether there are any ethical constraints to her continuing to serve as legal counsel in this matter with regard to DEP or both DEP and DCNR. In a letter dated July 19, 1995, Terry R. Bossert, Chief Counsel for DEP, and William W. Shakely, Assistant Counsel in Charge of DCNR, informed the Board that both of these Department's officials are well acquainted with the facts surrounding this appeal and are comfortable with Ms. Davison's continuing representation.

For continuity's sake we continue to refer to the appellee as DER rather than DEP.

[2] The Commonwealth Court has instructed in Mock v. Department of Environmental Resources, 154 Pa. Cmwlth. 380, ___, 623 A.2d 940, 947 (1993), that the courts of this Commonwealth have interpreted the takings clause using the same framework as the federal courts.

(Gardner II). After we received the record from the Commonwealth Court, we ordered the parties to submit briefs on both the "takings" issue, as defined by the Commonwealth Court's opinion in Gardner II, and the issue of whether this Board must consider evidence on whether the appellants' coal can be mined from an economic standpoint in determining whether a taking has occurred. The Gardners filed their Brief of Appellants in Support of Appeal on Remand on June 29, 1995. DER filed its Brief on the Scope of the Remand on July 11, 1995.

Presently before the Board for decision is the appellants' motion for summary judgment, which was filed on April 29, 1994 (as supplemented on May 16, 1994), and DER's response in opposition to the appellants' motion. We may grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035(b). We view the motion in the light most favorable to DER, as the non-moving party. William Pickelner v. DER, EHB Docket No. 93-363-MR (Opinion issued March 21, 1995).

We have before us the parties' stipulation to certain facts relevant to the Board's decision regarding jurisdiction (Stip.), filed on March 24, 1994; the parties' joint pre-hearing stipulation (Pre-Hearing Stip.), filed on May 23, 1994; and the parties' joint stipulation of facts for proceedings on remand (Stip. on Remand) filed on June 21, 1995. From these documents, it is clear that the facts to which there is no dispute are as follows.

Gardners are the daughters and heirs of C.W. House. (Stip. on Remand) Mr. House was the owner in fee of a farm in Brady Township, Butler County consisting of 189.325 acres (the "C.W. House Tract"). (Stip. on Remand) On January 18, 1967, the Commonwealth of Pennsylvania, Department of Forests and Waters (the

predecessor to the DER) filed a declaration of taking in the Court of Common Pleas of Butler County condemning in fee and taking the entire C.W. House Tract to include the tract in Moraine State Park. (Stip. on Remand) On April 26, 1967, the Department of Forests and Waters filed a Declaration of Relinquishment in the Court of Common Pleas of Butler County, by which the Department clarified that, in its eminent domain proceeding, it did not intend to take, affect or disturb any rights of anyone pertaining to strip coal or surface mining of coal, and revested any strip or surface coal mining rights in the prior owners as of the date of filing, January 18, 1967. (Stip. on Remand) By letter dated June 1, 1967, Maurice K. Goddard, then Secretary of the Department of Forests and Waters, advised Mr. House that the coal underlying the C.W. House Tract was not required for the Department's project (Moraine State Park) and advised Mr. House that the Department had no objection to "removal of the coal . . . by stripping or by other standard recovery techniques." (Stip. on Remand)

Gardners are the current owners of the rights pertaining to strip coal or surface mining of coal which were relinquished on April 26, 1967. (Stip. on Remand) When the Gardners first inherited their rights to the coal on the C.W. House Tract, they attempted to have local coal companies mine the coal but they were not successful in their efforts. (Pre-Hearing Stip.) Any rights pertaining to surface mineable coal which Gardners own on the C.W. House Tract, and which were relinquished in the relinquishment of April 26, 1967, are located inside the boundaries of Moraine State Park. (Stip. on Remand)

In 1971, the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §§1396.1 *et seq.*, was amended to prohibit mining within 300 feet of a public park, except by variance based on special circumstances. Section 4.2(c) of SMCRA, 52 P.S. §1396.4b(c), provides:

> no operator shall conduct surface mining operations ... within three hundred feet of any public building, public park, school ... . The secretary may grant operators variances to the distance requirements herein established where he is satisfied that special circumstances warrant such exceptions and that the interest of the public and landowners affected thereby will be adequately protected .... (Emphasis added.)

In 1988, Gardners filed a Petition for Appointment of Viewers pursuant to Section 502(e) of the Eminent Domain Code, Act of June 22, 1964, Special Sess., P.L. 84, as amended, 26 P.S. §1-502(e), in the Common Pleas Court of Butler County seeking compensation for their right to surface mine coal on the C.W. House Tract. The Common Pleas Court sustained DER's preliminary objections on the basis that the Gardners' claim of a "de facto" taking was not ripe because an administrative remedy, in the form of their applying for a variance pursuant to Section 4.2(c) of SMCRA, 52 P.S. §1396.4b(c), for permission to mine coal under the previously condemned land in Moraine State Park had not yet been exhausted. Upon appeal of this decision to the Commonwealth Court, the Court affirmed the Common Pleas Court's decision. Gardner v. Commonwealth, DER, 145 Pa. Cmwlth. 345, 603 A.2d 279 (1992) (Gardner I).

Gardners then asked DER to make a determination on whether the tract qualified for such a variance. DER responded that it would require a full and complete surface mining permit application and an application for a variance pursuant to 25 Pa. Code §86.102(4). Exhibits A, B, and C attached to the notice of appeal are copies of the letters from DER setting forth these requirements. Gardners appealed these DER letters to the Board at two separate appeals (Docket Nos. 92-508-E and 92-514-E) which were consolidated at Docket No. 92-508-E. On March 17, 1993, the Board approved a Consent Adjudication in the appeals by the Gardners consolidated at EHB Docket No. 92-508-E. (Stip. on Remand) In the Consent Adjudication, DER and the appellants agreed that the information

available to DER at the time was sufficient for DER to rule upon a variance to conduct surface coal mining activity in Moraine State Park, and DER denied the variance. (Stip. on Remand) In the Consent Adjudication, DER also agreed to undertake a program of geophysical testing and drilling on the C.W. House Tract and to provide the Gardners with information derived from the testing and drilling. (Stip. on Remand)

DER conducted the testing and drilling provided for in the Consent Adjudication. (Stip. on Remand) DER's analysis of the geology at the C.W. House Tract included the taking of resistivity soundings, and then the development of a prognosis for drill intercepts undertaken by DER employees and a consultant for DER, Bill Edmunds, which was concurred with by Jack Foreman, who was a consultant on behalf of Gardners. (Stip.) DER drilled holes in various locations on the C.W. House Tract. (Stip. on Remand) Drilling supervised by DER employees and Mr. Foreman was done to confirm and describe the stratigraphy. (Stip.) These same people, along with Bill Edmunds, selected coal for analysis. (Stip.) When the test results were analyzed by the DER employees and Bill Edmunds, their recommendation was that the coal could not economically be mined because of its depth, quantity, and quality, and the difficulty and expense of mining in conformance with law. (Stip.) (Their analytical data is attached to the Stip.)

DER's drilling information and coal analyses data were submitted to the Gardners' consultant in late August or early September, 1993. (Stip. on Remand) As was stated in our September 7, 1994 opinion and is undisputed by DER, based on the drilling and testing results provided them by DER, Gardners' consultant prepared a mineable coal reserve estimate which was presented to DER on November 5, 1993, along with their estimates of the value of just compensation for their surface mineable coal and mining rights. There is coal on the C.W. House Tract

which could be removed by stripping or other standard recovery techniques. (Stip. on Remand) Based on information presently available, the parties are not aware of any reason why the C.W. House Tract could not be permitted from an environmental standpoint. (Pre-Hearing Stip.) DER's then Deputy Secretary James Grace, on the recommendation of the DER employees and Bill Edmunds, made the determination that DER would not offer the Gardners any money for the coal (Stip.). That determination was communicated to the Gardners' counsel by DER's counsel by telephone on December 7, 1993. (Stip.)

After the Gardners filed the instant appeal from DER's telephone communication, DER filed a motion to dismiss this appeal in which it asserted that the Board lacked jurisdiction because the Gardners had not shown that DER's challenged determination was an "adjudication" or "action" of DER.[3] DER also argued that we lacked jurisdiction because we did not have jurisdiction to order DER to monetarily compensate the Gardners for any "taking" of its property by DER. Board Member Ehmann denied DER's motion to dismiss the appeal for lack of jurisdiction, see 1994 EHB 529, but, on reconsideration of that opinion by the Board *en banc*, the Board granted DER's motion and dismissed the appeal, with Board Member Ehmann filing a dissenting opinion. See 1994 EHB 1250. The majority of the Board indicated in its opinion on reconsideration that it appeared that DER's denial of a variance "unquestioningly" deprived the Gardners of any reasonable use of the property, and that had we believed we had

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[3] While the Board previously has held that normally, oral communications by DER are not appealable because that department usually communicates its decisions in writing, what has occurred here is the exception which proves the rule. When DER elects to communicate its final decisions orally, it is clear that they must be able to be challenged through a timely appeal to this Board. An appellant would be ill-served if it were to wait until after receiving oral notice for a written communication from DER, since it would run the risk of having DER seek dismissal of such an appeal as untimely.

jurisdiction, we probably would have ruled that the regulation challenged by the Gardners was an unconstitutional exercise of the police power as to the Gardners. See 1994 EHB 1250, 1258.

Upon a petition for review of our reconsideration opinion to the Commonwealth Court, the Gardners successfully challenged the Board's dismissal of their appeal.[4] See Gardner v. Commonwealth, DER, 658 A.2d 440 (Pa. Cmwlth. 1995), cited earlier as Gardner II. The Commonwealth Court, in Gardner II, ruled that the underlying claim in this matter is that the legislative scheme denies the Gardners any use of their coal mining rights, but, because the legislative prohibition provides the possibility of a variance, it is DER's denial of a variance and the statutory scheme, in combination, that must be established for a finding of a taking. The Gardner II Court held that we have jurisdiction, and that this matter should have followed Mock v. Department of Environmental Resources, 154 Pa. Cmwlth. 380, 623 A.2d 940 (1993). The Commonwealth Court remanded this matter for the Board to determine whether DER's action in denying the variance has effected a taking without just compensation. The Commonwealth Court stated, "[a]lthough we realize a remand is rather redundant due to the EHB's statement that it would find a taking, we must remand because it held that

[4] While the appeal before us was pending, the Gardners had simultaneously filed a Petition for Appointment of Viewers with the Common Pleas Court of Butler County; the Common Pleas Court appointed a Board of Viewers to determine just compensation. DER's appeal of this Common Pleas Court decision to the Commonwealth Court was consolidated with the Gardners' appeal to the Commonwealth Court challenging our September 7, 1994 opinion.

it did not have jurisdiction to make such a determination." Gardner II, *supra*, __Pa. Cmwlth. at ___, 658 A.2d at 449.[5]

Has a Taking Occurred?

As the Commonwealth Court has indicated in Gardner II that this matter should have followed the course of Mock, *supra*, we turn to a discussion of the takings analysis used by the Commonwealth Court in Mock. Mock involved an appeal by landowners to the Commonwealth Court of a decision by this Board affirming DER's denial of a permit for them to fill wetlands on their property to construct an auto repair shop, and ruling that DER's denial did not effect an unconstitutional taking of the Mock's property. The sole issue before the Court was whether DER's permit denial accomplished a taking, under the U.S. and Pennsylvania Constitutions, for which the Mocks must be compensated.

In Mock, the Commonwealth Court first turned to the U.S. Supreme Court's decision in Lucas v. South Carolina Coastal Council, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), and the takings analysis used in that case. The Mock Court explained that Justice Scalia, in Lucas, outlined the two categories of regulatory actions which would be compensable without the "case-specific inquiry into the public interest advanced in support of the restraint" that would normally be required in a traditional takings analysis.

> The first type involves regulations which compel a property owner to allow a physical invasion of his property. "The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land."

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[5] The Commonwealth Court in Gardner II also vacated the Common Pleas Court's order on the finding that that court lacked jurisdiction to determine that a taking had occurred or to appoint a Board of Viewers prior to the EHB determining that a taking had occurred.

Mock, *supra* at ___, 623 A.2d at 945 (citations omitted). The Mock Court quoted Justice Scalia's opinion in Lucas for the distinction between government regulation that diminishes property values and the "extraordinary circumstance when *no* productive or economically beneficial use of land is permitted," recognizing that under the Supreme Court's decision in Lucas, compensation is required where "the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle." Mock at ___, 623 A.2d at 946 (*quoting* Lucas at ___, 112 S.Ct. at 2895) (emphasis in original). In Lucas, the Supreme Court accepted the trial court's finding that Mr. Lucas' beachfront property was rendered valueless by the South Carolina Beachfront Management Act of 1988, S.C. Code §§48-39-250-290 (Supp. 1990), which was enacted after Lucas purchased the property, and which prohibited Lucas from developing any permanent habitable structure on his land with no exceptions. The Supreme Court in Lucas found the second type of categorical taking was present, but remanded the matter to the South Carolina Supreme Court because the question of whether Lucas could have been prohibited from developing his land under existing nuisance law had not been addressed by the court below.

In Mock, the Commonwealth Court rejected the argument that there was a categorical taking of the Mocks' property akin to that in Lucas, reasoning that DER's denial of the Mock's permit did not foreclose other uses of the property, and that the property need not remain undeveloped and devoid of value in the future because of DER's environmental regulations. With this ruling, the Mock Court did not proceed to consider whether the Mock's project would have already been prohibited under existing nuisance or property law.

The Mock Court then proceeded to conduct a "traditional takings" analysis, noting that the act and DER regulations in question were exercises of the state's police power to enact and enforce laws for the promotion of the public welfare. The Mock Court cited the three-prong test articulated in Lawton v. Steele, 154 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894), for the validity of a state's actions under its police power: 1) whether the public interest requires such interference; 2) whether the means chosen are reasonably necessary for the accomplishment of the purpose; and 3) whether the means chosen are unduly oppressive upon the individuals. The Mock Court addressed only the third prong of the Lawton test, as the Mocks were not challenging the first two prongs. Citing Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), the Mock Court looked to the following three factors in determining whether a regulatory taking had occurred: the type of governmental interference; the diminution of property values; and the extent to which the regulation interferes with the reasonable, distinct, investment-backed expectations. Finding none of these factors to be satisfied for purposes of a taking, the Mock Court affirmed this Board's decision.

The Gardners, in their brief in support of remand, assert that a taking of the appellants' coal and surface mining rights has occurred under the second categorical takings rule in Lucas (as discussed in Mock). Addressing whether the second categorical takings situation outlined in Lucas is met here, in accordance with the Commonwealth Court's direction in Gardner II, we look to whether DER's denial of a variance and the statutory scheme, in combination, denies all economically beneficial or productive use of the Gardners' land, as the Gardners argue. We find that this is the type of "extraordinary circumstance" contemplated by the Supreme Court in Lucas "when *no* productive or economically

beneficial use of land is permitted." "The right to coal consists in the right to mine it." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414, 43 S.Ct. 158, 160, 67 L.Ed. 322, ___ (1922). Unlike the situation in Mock, there are no other uses of their property available to the Gardners. Further, the nuisance exception to this categorical takings rule discussed in Lucas is not applicable here, as the parties have stipulated that from an environmental standpoint, there is no reason why a permit for surface mining on the C.W. House Tract should not be issued. This is a circumstance where the Gardners, as owners of real property, have been called upon by the statutory scheme and variance denial to sacrifice *all* economically beneficial uses of their property in the name of the common good, and to leave their property economically idle. Thus, we find compensation is required under Lucas, *supra*.

Even if we had not reached this conclusion under the second categorical takings rule of Lucas, we likewise would reach this conclusion using the traditional takings analysis. In evaluating prong 3) of the Lawton test, we must consider the specific impact of the statutory scheme and variance denial, in combination, upon the Gardners, and they must be deprived of any reasonable use of their property for us to find that the Commonwealth's exercise of its police powers is unduly oppressive as to them. "If it does not go that far, the regulation is constitutional even though it prevents the most profitable use of the property: Andrus v. Allard, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979), or results in a significant reduction in value: Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). See Gardner, *supra*, 1994 EHB at 1258. The Gardners contend that it is unduly oppressive on them for the Commonwealth to deny them any reasonable use of their surface mineable coal and surface mining rights without just compensation.

The Gardners do not assert that the first Penn Central factor discussed in Mock is present here, stating that in this matter, as in Mock, the police power does not involve a physical intrusion on the Gardners' property. They correctly assert that a constitutional taking can be found in the absence of a physical intrusion where the government action denies the owner all economically viable use of his land, citing Agins v. City of Tiburon, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). Under the second and third factors from Penn Central which the Commonwealth Court outlined in Mock, (specifically, diminution in the value of the property and the extent to which the regulation interferes with reasonable, distinct, investment-backed expectations), the Gardners argue the only value their surface mineable coal had was the right to mine it, and that right has been totally destroyed and rendered valueless. Moreover, they assert that there are no other uses of their property available to them, as their property interests are limited to the surface mineable coal and the right to mine it, and those interests have been destroyed by DER's denial of the variance. On this basis, the Gardners contend that all reasonable future uses of their property have been destroyed, and that a taking should be found under the traditional takings analysis.

DER, on the other hand, argues that in order for us to make such a determination, we must inquire as to whether the variance denial was the event which changed the value of the Gardners' property. DER asserts that this inquiry involves two parts: what was the value of the Gardners' property before the event which allegedly effected a taking, and whether that event diminished the property's value. DER argues that to make this determination, we will have to look at the mineability information, because "what makes the right to mine coal valuable is that it can be exercised with profit, " (citing Pennsylvania Coal

Co., *supra*), and the Gardners will have to prove to the Board that they could either mine the coal at a profit themselves or could have obtained a royalty from someone who would have mined it at a profit had the variance been approved. DER also urges that the Board has to hear evidence concerning the Gardners' acquisition of the property before we can determine whether the Gardners' reasonable, distinct, investment-backed expectations were disappointed by DER's variance denial. DER then suggests that if we find a taking occurred, DER can rescind the variance denial[6] or condemn the subject property.

The Gardners urge that it is not necessary for the Board to consider the economic mineability of the coal in determining whether a taking has occurred. Citing Beltrami Enterprises, Inc. v. Commonwealth, Department of Environmental Resources, 159 Pa. Cmwlth. 72, 632 A.2d 989 (1993), the Gardners argue that economic mineability of the coal goes to the matter of the value of the coal to its owners, which would be a factor for the Common Pleas Court to consider in determining the amount of damages to the Gardners as a result of the taking they allege. They assert that we should find a taking exists under McClimans v. Board of Supervisors of Shenango Twp., 107 Pa. Cmwlth. 542, 529 A.2d 562 (1987) (McClimans I), in that DER's variance denial "conclusively prevents" the Gardners

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[6] DER is not at liberty to act contrary to its own regulations, according to Mil-Toon Development Group v. DER, 1991 EHB 209. Surface mining activities within a state park is absolutely prohibited under 25 Pa. Code §86.102(4) with two exceptions. The first is where DER finds that significant land and water conservation benefits will result when remining of previously mined lands is proposed. The second exception to this prohibition is when the miner had valid existing rights as of August 3, 1977, i.e., held a permit for the proposed mine site as of that date or had a complete permit application for the site pending before DER at that time. Since, as part of its settlement of the prior proceeding before this Board via a Board approved Consent Adjudication, DER agreed it had enough information to act on Gardner's request for a variance from Section 86.102(4)'s prohibition and denied the variance, this means it concluded neither exception applied. Accordingly, we are unsure how DER can come to this conclusion that it can rescind the variance denial.

from surface mining their property. Further, the Gardners urge that economic mineability is not part of the takings analysis of the McClimans I line of cases, and, thus, should not be considered here.

In McClimans v. Board of Supervisors of Shenango Twp., 107 Pa. Cmwlth. 542, 529 A.2d 562 (1987), cited earlier as McClimans I, the appellants (which included a coal mine operator and landowners who had leased their property to the miner to conduct coal mining by the surface mining method thereon), had requested a curative amendment of portions of the township's zoning ordinance which prevented mining on the appellants' property, so that mining would be allowable. The township determined the ordinance was valid, refusing to grant the curative amendment, and that decision was upheld by the common pleas court. On appeal to the Commonwealth Court, the appellants argued, *inter alia*, that the township's failure to grant their requested relief constituted an unreasonable restriction and unconstitutional taking without compensation in violation of the Pennsylvania and United States Constitutions. Quoting Keystone Bituminous Coal Ass'n v. De Benedictis, 480 U.S. 470, ___, 107 S.Ct. 1232, 1242, 94 L.Ed. 2d 472 (1987), the McClimans I Court stated,

> Our analysis, then, must be two-pronged. As the United States Supreme Court recently said: "[w]e have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests, . . . *or* denies an owner economically viable use of his land.'"

The McClimans I Court held that in order to be a "taking" of the coal estate, the extraction of the coal must be conclusively prevented by the zoning ordinance, and, if the appellants could prove such, the ordinance would be rendered invalid because it effects a taking without provisions for just compensation. The Commonwealth Court did not state that evidence as to the profitability of gaining

access to the appellants' coal must be shown. The Commonwealth Court then remanded the matter for the taking of additional evidence as to the issue of whether the challenged ordinance so conclusively prevented the appellants from gaining access to their subsurface property. After the common pleas court took this additional evidence on remand, it held that the ordinance conclusively prevented the appellant/landowners from gaining access to their coal, and held that the ordinance effected a taking without just compensation. The township appealed the trial court's decision to the Commonwealth Court, Board of Supervisors of Shenango Township v. McClimans, ___ Pa. Cmwlth. ___, 597 A.2d 738 (1991)(McClimans II), and the Commonwealth Court affirmed the trial court's decision.

We agree with the Gardners that economic mineability is not part of the traditional takings analysis used by the courts. Moreover, we reject DER's contention that we must hear evidence concerning the Gardners' acquisition of the property before we can determine whether the Gardners' reasonable, distinct, investment-backed expectations were disappointed by DER's variance denial. The Gardners have asserted throughout these prolonged proceedings that they inherited their coal and mining rights and that they have sought to mine their property; DER does not dispute these facts. Any further evidentiary proceedings in this matter are unnecessary to our determination that the Gardners' expectation of mining their coal was reasonable.

We accordingly find that the statutory scheme, in combination with DER's variance denial challenged here, is unduly oppressive on the Gardners in that

they have been deprived of any reasonable use of their surface mineable coal and surface mining rights without just compensation therefor.[7]

ORDER

AND NOW, this 2nd day of November, 1995, it is ordered that the Gardners' motion for summary judgment is granted.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

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[7] The Commonwealth Court directed, citing Beltrami Enterprises, Inc. v. Commonwealth, Department of Environmental Resources, 159 Pa. Cmwlth. 72, 632 A.2d 989 (1993), that if, on remand, we find a taking to have occurred, the determination of the amount of damages must then be made by the Common Pleas Court. Gardner II, ___ Pa. Cmwlth. at ___, 658 A.2d at 449.

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: November 2, 1995

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Bureau of Legal Services
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M. DIANE SMITH
SECRETARY TO THE BOARD

EASTERN CONSOLIDATION AND DISTRIBUTION SERVICES, INC., HUGO'S SERVICE, INC., EASTERN REPAIR CENTER, INC., AND BARON ENTERPRISES, et al.	:	
v.	:	**EHB Docket No. 94-200-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASTE MANAGEMENT OF PENNSYLVANIA, INC., Permittee	:	**(Consolidated Docket)**
	:	**Issued: November 14, 1995**

OPINION AND ORDER
SUR COMMONWEALTH'S REQUEST FOR STAY

By Michelle A. Coleman, Member

Synopsis:

The Department of Environmental Protection's (Department) letter request for an indefinite stay in this appeal from the Department's issuance of a solid waste disposal and/or processing facility (a transfer station) permit to Waste Management of Central Pennsylvania, Inc. is denied. Where a party submits a written request for an extension of time or continuance, that request is a procedural motion and subject to the rules and regulations set forth at 25 Pa.Code Chapter 1021, specifically §§1021.71 (d) and (e) requiring the letter to indicate the consent of all parties and a specific date for the extension or continuance.

OPINION

By Board Order dated September 29, 1995, this matter was scheduled for hearing on November 13-16 and November 20 and 21, 1995. At the request of the parties, a short extension was granted on October 30, 1995 for filing of the Joint Stipulation and Joint Exhibits.

On November 6, 1995, one week prior to the start of the hearing, the Department filed a letter with the Board requesting a postponement of the scheduled hearing for an additional three weeks so that the Department might address an issue in the appeal involving a letter from the Department of Transportation (DOT) which had not been addressed previously. The letter stated that the Appellants did not concur with the request. After conference calls on November 6 and 7, during which the parties discussed continuing the entire hearing and possible bifurcation of the problem issue, the Board issued an Order on November 7, 1995 denying the request for continuance and/or bifurcation.

On November 9, 1995, the last work day before the hearing, the parties initiated yet another conference call. During this conference call the parties requested cancellation of the scheduled hearing and the Department requested a stay of the appeal because the Department intended to suspend the permit which is the subject of the appeal. The Board granted the joint request to cancel the hearing by Order dated November 9, 1995. However, during the conference call the Department was given until November 13 to submit the request for a stay in writing.

The Department submitted a letter that afternoon, requesting an indefinite stay to allow the Department time to address the DOT letter which was not considered before the issuance of the permit. Although the Department's letter attached the DOT letter as well as two additional letters, it failed to state whether the permit was suspended (or even to reference the permit

suspension discussed during the conference call), whether opposing counsel agreed to the request, and the length of time of the requested stay. In fact, except for the failure to state opposing counsel's position on the request and the length of the stay, this was the same request made on November 6 and denied on November 7, 1995. Counsel for the Appellants and Permittee were copied on the letter but have not filed a response.

In Pre-Hearing Order No. 1, issued on July 22, 1994, the Board informed all parties that requests for continuances or extensions of time shall be made by formal motion pursuant to 25 Pa.Code §21.17.[1] The Board's Rules under 25 Pa.Code §1021.71(a) specifically list a stay of proceedings as a procedural motion and subsequent subsections provide for the filing of such motions:

> ... (d) If all parties consent to the relief requested, the request may be embodied in a letter, provided the letter indicates the consent of the other parties.
>
> (e) Requests for extensions or continuances, whether in letter or motion form, shall contain a specific date for the extension or continuance.

The Department's letter request fails to comply with this rule.

In addition, the Board believes that the parties requested a conference call on November 9 to inform the Board of actions which had occurred in this matter which made proceeding with the hearing unnecessary or inappropriate at this time. However, no party has brought proper evidence of these actions to the Board's attention. Attached to the Department's letter are two additional, unexplained letters with no information to properly connect these letters

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[1] New rules superseded these rules on September 9, 1995 at 25 Pa.Code §1021.71.

to the matter pending before the Board. "Evidence is relevant if it tends to make a fact at issue more or less probable." Martin v. Soblotney, 502 Pa. 418, 466 A.2d 1022 (1983). Since there is no fact at issue to which to apply this evidence it is irrelevant, and the Board will not guess at its purpose or take any action with respect to it.

Accordingly, the following Order is entered.[2]

ORDER

AND NOW, this 14th day of November, it is ordered that the Department's Request for a Stay of Proceedings is denied, the Board's Order of November 9, 1995 is rescinded and the hearing is rescheduled for November 16-17, at which time testimony will be taken on the suspension or possible suspension of the permit and related issues such as mootness of the appeal.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: November 14, 1995

See following page for service list.

[2] Having reached this conclusion on the motion for a stay of proceedings, it is not necessary to address the issue of suspension of the permit raised during the conference call on November 9 in this Order.

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M. DIANE SMITH
SECRETARY TO THE BOARD

JEFFERSON COUNTY COMMISSIONERS, et al. :
PINECREEK TOWNSHIP :
:
v. : EHB Docket No. 95-097-E
: (Consolidated)
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL PROTECTION and:
LEATHERWOOD, INC., Permittee : Issued: November 27, 1995

OPINION AND ORDER SUR
MOTION FOR PROTECTIVE ORDER

By: Richard S. Ehmann, Member

Synopsis

A Motion For Protective Order filed on behalf of Jefferson County Commissioners, et al. and Pinecreek Township (collectively "Jefferson") is denied. In discovery a party's representative testifying on a party's behalf in a deposition is allowed to correct errors in the deposition's transcript providing those corrections are timely made pursuant to Pa.R.C.P. 4017(c). However, such "correctives" do not include adding "testimony" as to events occurring subsequent to the deposition's completion. When a deposition's execution does not occur in timely fashion, Pa.R.C.P. 4017(c) sets forth the procedure which the court reporter is to follow. When that procedure is not followed, the Board may not grant the relief sought in the Motion.

OPINION

On August 14, 1995, Jefferson took the deposition of Arthur Provost ("Provost"), the designated employee/representative of the Department of Environmental Protection ("DEP"). DEP's Response to Jefferson's Motion admits that on August 17, 1995, or August 18, 1995, DEP received that deposition's

transcript. DEP further admits that Provost failed to inspect, read, and sign the deposition within thirty days as mandated by Pa.R.C.P. 4017(c) and that the deposition was not signed until September 21, 1995.

When Provost signed this deposition and returned it to the court reporter who "took" the deposition, he returned it to the court reporter with a series of changes thereto. While most of these changes are insignificant, certain of these "corrections" go far beyond insignificancy, as explained below.

On November 2, 1995, Jefferson filed a Motion For Protective Order And Objections To Transcript. In it, Jefferson complains not just that Provost has changed negative answers to its counsel's questions into positive answers but has attempted to supplement the answers with information as to DEP actions taken subsequent to the deposition. Jefferson asserts its Motion For Summary Judgment is based on Provost's unredacted statements contained in the initial transcript and claims not merely a technical violation of the Rules of Civil Procedure which apply to discovery in proceedings before us pursuant to 25 Pa. Code §1021.111 but that these modifications should be barred.

In response to this Motion, DEP admits Provost's inspection, reading, and execution of this deposition was untimely by several days. No excuse for this lateness is offered. Rather, DEP alleges its counsel attempted to secure an agreement from Jefferson to an extension of the thirty day deadline in Rule 4017(c) by calling Jefferson's counsel but was unable to reach counsel because he was out of his office.[1] DEP then alleges no prejudice to any party by this delay and compliance by DEP with Pa.R.C.P. 4017(c) in submission of Provost's modifications. After responding in a paragraph-by-paragraph fashion to

[1]Pursuant to Pa.R.C.P. 4002, the parties could have modified this thirty day time period if they all had agreed thereto but neither Pa.R.C.P. 4002 nor Pa.R.C.P. 4017(c) permit its unilateral modification.

Jefferson's Motion, DEP inserts three pages titled "Argument" in its Response to Jefferson's Motion.[2] In it, DEP asserts that Pa.R.C.P. 4017(c) authorizes changes in substance to deposition testimony and such changes can include corrections based upon DEP actions occurring subsequent to the deposition's completion but before execution of the deposition by the deponent. DEP also asserts that allowing another deposition of Provost at DEP's expense - an option to granting Jefferson's Motion suggested by Jefferson - is unwarranted because Jefferson already had a second deposition of Provost (although its transcript is also as yet unsigned by Provost) after Provost's corrections of his first deposition were sent to Jefferson. DEP also claims that had Provost failed to make these changes Jefferson could claim surprise when he testified as to DEP actions occurring after the deposition.[3]

DEP's conduct with regard to this deposition can only be described as outrageous. DEP not only failed to comply with the thirty day time limit for filing "corrections" to this deposition, it has failed to offer any reason for Provost's failure to comply with this time limitation. DEP then compounds this negligence by boldfacedly asserting a right to supplement sworn deposition testimony at the deposition's "corrections" stage with additional statements concerning DEP's actions after the deposition's conclusion. Thus, DEP is arguing from the position that Pa.R.C.P. 4017(c)'s time limits do not apply to it and that it can add statements as to post-deposition conduct when it finally does submit its corrections. Under this DEP rational, it appears that parties may

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[2]This incorporation of "Argument" in DEP's Response is in violation of 25 Pa. Code §1021.72. This rule authorizes the filing of responses to discovery motions and allows the filing of separate supporting memorandum of law. It does not authorize the filing of a single document containing both.

[3]Permittee has taken no position on this dispute.

submit corrections at any time and may modify the deposition in any fashion elected, changing a "yes" to a "no" or making the existing "yes" or "no" meaningless based upon acts of the deponent or others occurring long after the deposition's conclusion. This DEP interpretation of a party's rights as to "deposition" renders a deposition of virtually no value to those taking it as to either the deponent or the party for whom the deponent testifies. If this conduct were approved, how could a Motion For Summary Judgment be based upon such a deposition and of what value would depositions be in trial preparation? The answer is that depositions would become useless because the deponent and the party could always "revise past history" to make it comport with their current view.

This Board can not tolerate that result. In drawing this conclusion, we expressly reject the DEP assertion that, absent allowance of Provost's corrections based upon DEP's post-deposition activities, an opponent may successfully claim surprise if these activities are raised at a merits hearing. No surprise may be claimed as to a deponent's failure to reveal events which have yet to occur. Nothing in our Ruled or the Rules of Civil Procedure requires that deponents foretell the future in their depositions.

We also reject the alternative relief proposed by Jefferson, to wit, another deposition of Provost at DEP's expense. In doing so, however, we reject DEP's assertion that Jefferson has articulated no basis for this option. DEP's conduct, as articulated by Jefferson, is ample justification for such an order and such an order would be helpful because this result would help to place these new "facts" before us. The Board would grant this request, but Pa.R.C.P. 4019(j) bars the Board's imposition of such a sanction on the Commonwealth, (although DEP's "argument" failed to point this out). The Board is also unwilling to

impose the costs of such a deposition directly on DEP's counsel in this appeal, but this is because the Board had not been faced with this issue before, so it is possible, that DEP's counsel was unaware of how incorrect and improper DEP's actions were. That will not be the case if this conduct is repeated in other proceedings before us.

When a deponent fails to execute his deposition within thirty days, Pa.R.C.P. 4017(c) directs that the court reporter is to sign the deposition transcript and state on the record "the fact of the waiver ... or the refusal to sign", together with the reason, if any, given therefor. As this has not occurred here we will not grant this Motion but will deny it without prejudice to it being refiled with the appropriate documentation from the court reporter. The parties are advised that the Board intends to grant this Motion if it should be so resubmitted by Jefferson, and we will then allow the unredacted deposition's use before us. Brock v. Owen, et al., 367 Pa. Super. 324, 532 A.2d 1168 (1987). The Board will do so reluctantly in terms of any impact thereof on permittee but presently concludes a greater wrong would occur if DEP's conduct were rewarded by the denial of any resubmitted motion.

OPINION

AND NOW, this 27th day of November, 1995, it is ordered that Jefferson's Motion is denied without prejudice.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: November 27, 1995

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M. DIANE SMITH
SECRETARY TO THE BOARD

AL HAMILTON CONTRACTING COMPANY	:	
	:	
v.	:	EHB Docket No. 93-072-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: November 29, 1995

ADJUDICATION

By: The Board

Synopsis:

The coal miner's appeal from a DER administrative order to collect and treat an off-site discharge of acid mine drainage is denied. DER has met its burden of proof, showing both the spring's contamination and the hydrogeologic link between the spring and the mine site by a clear preponderance of the evidence.

Where an appellant indicates it will call no expert witnesses on its behalf in its pre-hearing memorandum, a subsequent Motion to call three such experts is properly denied when it is not filed until after the presentation of all of the direct testimony of the DER final witness in its case-in-chief on the issues on which Appellants' proposed witnesses would testify. Appellant's offer of evidence of results of a drilling program on its mine site through its final witness was properly denied by the presiding Board Member on objection thereto by DER, since the testimony thereon had to include "expert" testimony, and Appellant had failed to disclose this evidence's existence to DER or this Board although it had existed for approximately two months.

The analysis results of samples collected by DER's mine inspectors are admissible under the business records exception to the hearsay rule of evidence pursuant to Al Hamilton Contracting Co. v. DER, 1993 EHB 1651. Samples analyzed by DER's EPA-certified lab using EPA-approved methodologies or methodologies in the source book for standard analysis methods and practices do not run afoul of the test in Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923) as applicable in Pennsylvania.

Background

On March 24, 1993, the Department of Environmental Resources ("DER")[1] issued Al Hamilton Contracting Company ("Hamilton") Compliance Order No. 934033 concerning its "Sandturn" Surface Mine located in Decatur Township, Clearfield County. The order directs Hamilton to treat an off-site discharge of acid mine drainage occurring at monitoring point SGS-11. On March 30, 1993, the Board received Hamilton's Notice Of Appeal with regard to this administrative order.

Thereafter, the parties filed their respective Pre-Hearing Memoranda and, on September 27, 1993, the Board issued Pre-Hearing Order No. 2, which scheduled the merits hearing to commence on November 22, 1993. Subsequently, DER and Hamilton amended their respective Pre-Hearing Memoranda, and the parties filed their Joint Stipulation with us on November 17, 1993.

On November 18, 1993, DER filed a Motion which sought to preclude Hamilton from offering expert testimony. DER's Motion asserted that Hamilton had failed to list expert witnesses in its initial Pre-Hearing Memorandum and Hamilton had advised the presiding Board Member that Hamilton did not intend to offer expert witnesses, so Hamilton's designation of three expert witnesses only a week before

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[1]This year, legislation was enacted splitting the old DER into two separate departments: The Department of Environmental Protection, and the Department of Conservation and Natural Resources. This appeal was tried and its issues briefed by the parties before this occurred, so the Board will refer in this adjudication to DER rather than its successor.

the hearing and after the discovery period had closed was improper and should be barred. After a telephonic conference with the attorneys, the presiding Board Member sustained DER's Motion. This motion was then further discussed on the record at the first day of the merits hearings (see T-4-5),[2] and again sustained.

On December 20, 1993, after three days of the merits hearing had been held in November, Hamilton filed a Motion To Allow Testimony Of Expert Witnesses, which sought the Board's authorization of testimony from these same expert witnesses on its behalf to be presented at further scheduled days of hearings in this appeal. DER responded in opposition to this motion, and, by order dated January 11, 1994, Hamilton's Motion was denied.

Thereafter, four further days of hearings were held before former Board Member Joseph N. Mack, and the parties duly filed their Post-Hearing Briefs, with the last of them being filed with us on August 22, 1994.

Board Member Mack, who presided over this appeal, resigned from this Board just prior to the submission of this last Brief, and thus prepared no adjudication in this appeal prior to his resignation. However, this Board is empowered to adjudicate the merits of this appeal in this circumstance. Lucky Strike Coal, Co., et al. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988) ("Lucky Strike"). In preparing this adjudication we consider only those arguments raised in either party's Post-Hearing Brief. Lucky Strike.

Our record in this appeal consists of a transcript of 1,280 pages and numerous exhibits consisting of reports, maps, aerial photographs, photographs, and written correspondence, in addition to other materials. After a complete

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[2] T-__, is a reference to a page of the transcript from the merits hearing's transcript.

review of this record, we make the following findings of fact.

FINDINGS OF FACT

1. The DER is the agency with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P. L. 1198, *as amended*, 52 P.S. §1396.1 *et seq.* ("Surface Mining Act"); the Coal Refuse Disposal Control Act, Act of September 24, 1968, P.L. 1040, *as amended*, 52 P.S. §30.51 *et seq.* ("Coal Refuse Disposal Act"); The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.* ("Clean Streams Law"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder. (JS)[3]

2. Hamilton is a Pennsylvania corporation with a business address of R.D. 1, Box 87, Woodland, Pennsylvania, 16881, whose business includes the mining of bituminous coal in the Commonwealth by the surface mining method. (JS)

The Original Permit

3. On November 4, 1981, DER issued Swistock Associates Coal Corp. ("Swistock") Mine Drainage Permit No. 17800141 for Swistock's Sandturn Surface mine located in Decatur Township, Clearfield County. (C-16; T-414)

4. In 1980-1981 Scott Jones ("Jones") was the hydrogeologist at DER's Hawk Run office, who reviewed Swistock's application for this permit. (T-406, 409-410)

5. In the course of reviewing Swistock's application for the mining permit, Jones began to believe two or three private water supplies lying

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[3]References to JS are references to the parties' Joint Stipulation, which was filed with this Board on November 17, 1993 and contains specific factual stipulations. A-__, references exhibits offered and admitted on behalf of Al Hamilton. C-__, reference exhibits offered and admitted on DER's behalf.

northeast of the proposed mine site could be adversely impacted if mining were allowed. (T-408) These water supplies include those now labeled as monitoring points SGS-10 and SGS-11. (T-408-409)

6. As a result of his concerns, Jones wrote to Swistock on behalf of DER, telling Swistock either to delete the recharge area for the water supply springs at SGS-10 and SGS-11 as described in its application or replace these water supplies prior to mining. (T-409-410)

7. If Swistock had deleted this recharge area from its application, it would remove 9 to 10 acres of area from the minable permit area, and that is a significant part of this mine site's coal reserves. (T-411)

8. Such a possible deletion was not satisfactory to Swistock, so it asked DER if DER would insert a condition in the permit to allow mining of the recharge area after the water supplies were replaced. (T-411-412) Swistock asked for this condition because it was considering the option of drilling deeper wells at these properties. (T-412)

9. Before adopting this option, however, Swistock switched hydrogeologists and hired Milena F. Bucek, Ph.D. ("Dr. Bucek") and then, with her advice, elected to pursue an alternative to drilling deeper wells at these sites. (T-412)

10. The discussion between Swistock and DER on Swistock's application and the danger to these private water supplies concerned mining the Lower Kittanning ("LK") seam of coal, which in this area splits into an upper split seam, middle split seam, and lower split seam. This discussion produced agreement between DER and Swistock to allow mining of the Middle Kittanning coal seam ("MK") in this area while deleting the splits of the LK. (T-413-414)

11. When the permit was issued by DER to Swistock, its Condition 51 restricted mining as agreed. Mining of the LK coal in Phases C and E of Sandturn was specifically barred by Condition 51 until replacement water supplies were approved by DER. Permit Condition 52 also required preservation of any significant thickness of the clays underlying the MK coal, whenever the clay was encountered during mining. This was done to help prevent the downward migration of groundwater. (C-16; T-416)

12. On the mine site map which is Exhibit C-2, the area outlined in red pen at the northeast corner of the mine site is the area restricted by Condition 51. (C-2; T-417-418) SGS-11 is represented as a green dot on Exhibit C-2, which dot is located east or east-northeast of the area outlined in red. (C-2; T-409)

13. After permit issuance, Swistock initially commenced mining the western side of the Sandturn site and mined toward the east. Thereafter, Swistock also began mining at the southern end of the site and mined toward the north, so it simultaneously mined south to north and west to east. (T-418-420)

14. On Swistock's behalf, Dr. Bucek located a spring about 1,000 feet east of the homes whose private supplies are SGS-10 and SGS-11, which new spring is located on the other side of a significant geological fault from the Sandturn mine. Its use as an alternative water supply required piping and a stream crossing but based on its use, Swistock proposed it as a replacement supply for these homes. (T-421-422)

15. Based on this proposal and the actual replacement of these springs with this new water source in late 1984, Condition 51's prohibition on mining was rescinded by DER and replaced with new Condition No. 6, warning the Permittee that it would be liable for treatment of these springs if their quality turned

poor and requiring liming of the areas in Phases C and E where LK is mined. (T-422-423)

16. While the actual replacement of these private water supplies was occurring and in 1984, Swistock transferred the Sandturn permit to Hamilton. (T-422; JS)

17. In January of 1988, Hamilton sought DER's approval of an amendment of its permit to allow Hamilton to auger mine the LK seam of coal beneath a portion of the area just south of the restricted area on Sandturn. (T-21) The area to be augered is the yellow square shown on the map which is Exhibit C-21A. (T-23) It was to be augered from a 600' x 100' pit along the southern edge of the yellow square, which pit is shown in blue on Exhibit C-21A. (T-28-29)

18. Exhibit C-19 is the revised conditions in the Sandturn permit as transferred to Hamilton, and Exhibit C-18 is Hamilton's signed acceptance of the modified permit condition. (C-18-19; T-425-429)

The Sandturn Mine

19. The Sandturn mine is located along a ridge top which runs in a north/south direction. It is located in an area extensively deep mined and surface mined for both coal and clay. (C-17; T-474-476)

20. The northern boundary of the Sandturn mine is separated by a row of trees from the Fahr Coal Company's ("Fahr Coal") Fahr No. 1 mine ("Fahr") permitted under Mine Drainage Permit No. 4474SM19. (A-2; C-4; C-21A)

21. At a time prior to the permitting of Sandturn by DER or mining of Sandturn and Fahr, there had been limited mining on areas covered by both the Fahr and Sandturn permit applications by persons other than the applicants for the Sandturn and Fahr permits according to the mine maps, and this was confirmed to Jones by DER Inspector Bill Anderson. (T-650) The old "pre-Act" mining on the

Sandturn site which Hamilton reaffected by mining produces four discharges of AMD to Coal Run's unnamed tributary. (A-46; C-4, C-21A; T-850-851)

22. As initially permitted by DER, the Sandturn mine's eastern boundary was a public road identified as LR 17049. (C-21A) Except in the center and the southwestern corner of the Sandturn mine site, its western boundary is Township Road identified as T-659. At the center of the mine its western boundary lies to the east of T-659, while at the southeastern corner the mine's western boundary crosses to the west of T-659. The Sandturn mine's outline could be described as that of an overstuffed figure eight which leans slightly to the west. (A-4-5, A-46; C-2, C-21A)

23. Fahr is also bounded to the east by LR 17049. To the south its bounded by Sandturn, to the west by T-659 and to the north by a public road designated LR 17050 (which intersects LR 17049 at Fahr's northeast corner). Fahr is rectangular in shape and smaller than Sandturn in size. (C-2, C-21A) Fahr is also underlain by Harbison-Walker's inactive deep clay mine (which mined the Mercer clay). This mine was called the Passmore No. 1 mine, and the Mercer clay is deeper than the coal seams mined by Fahr or Hamilton. Harbison-Walker's Passmore No. 1 mine does not extend underneath Hamilton's mine site, however. (T-464-465)

<u>The Private Water Supplies</u>

24. SGS-10 is a spring which served the Ernest Lansberry residence as its private water supply. (C-2) The spring and residence are located east of LR 17049. When SGS-10 was sampled by Fahr Coal, it was designated as FF-15. (T-380-381). Results of all samples of FF-15 or SGS-10 are compiled on Exhibit C-10. (T-381)

25. SGS-11 is located to the south of SGS-10 and was the spring which provided water to the Harold Smeal residence. (T-197; Stip.) It and the residence are also east of LR 17049. (C-2, C-21A) When SGS-11 was sampled by Fahr Coal it was designated FF-16. (T-380-381) Results of the analysis of samples collected at FF-16 and SGS-11 are compiled on Exhibit C-11. SGS-11 is a stone spring with a cistern-like reservoir or containment area which is thirty feet from the Smeal residence. (T-201)

26. SGS-9 is a water monitoring point again located on the eastern side of LR 17049 across from a point just north of the boundary tree line between Fahr and Sandturn. (C-2) It is north of both SGS-10 and SGS-11. On some occasions persons allegedly collecting a sample at this sample point have identified it as the Ervin Henschal spring and at others as a flowing body of water. (T-374) FF-14, which should correspond to SGS-9, has also been identified as the Probeck water supply, the Lupton spring, and a natural drainage course. (T-398) A spring identified as SGS-9 has been filled in and eliminated. (T-397) Samples of SGS-9 as a flowing water are at a different point than those of the now filled-in spring. (T-397-398)

The Sandturn Mine's Surface And Geology

27. On Sandturn's eastern side between the area of coal extraction and LR 17049 is a railroad right-of-way. The mine maps submitted to DER by Hamilton with its permit applications, which are identified as Exhibits C-3 and C-21A show the cropline (where the coal outcrops on the surface) of coal seams identified as MK and LK in the center of the eastern boundary of the mine site to be west of the railroad right-of-way, but none of the maps admitted as exhibits clearly delineates the croplines of these seams in the northeast area of Sandturn or on Fahr. (C-3, C-21A)

28. Sandturn's surface elevation is above LR 17049 along its eastern boundary, and on its eastern side, its surface slopes toward this road. (C-2; T-475-476)

29. Exhibit C-20 is a photocopy of the lower half (T-499) of the Geological Map of the northern half of Houtzdale Quadrangle Pennsylvania prepared by William E. Edmunds, and has the approximate boundaries of Sandturn inked in on it in red. According to this map, Upper Kittanning coal, MK and LK coal were all present at Sandturn at one time. (C-20; T-441-444)

30. The dip of the northeastern portion of geological structure of the Sandturn site including the MK and LK coal is toward the east/northeast. (T-436-437) The structural dip of this portion of the Sandturn site is consistent with the regional dip plotted by the Pennsylvania Geological Survey on Exhibit C-20, which is east/northeast. However, at the 1,900 feet elevation on the ridge at the Sandturn mine (above these coal seams on Sandturn) the dip is northwest to southeast). (C-20; T-437-441, 458)

31. A three-point problem is a method used by a geologist to calculate the dip of a geological structure. The geologist with the known elevation of a specific coal seam at three locations can use trigonometry to find the highest, lowest, and middle elevations of these points and then determine the strike and dip of that strata. (T-453)

32. Dr. Bucek used the three-point method to determine the dip of the MK coal in preparing a report for Swistock ten years before the hearing and determined it was a five degree dip to the east/northeast. (C-36; T-340-343, T-345-347) She then used drill hole data to make a contour map, which confirmed her first measurement and showed a sway or roll in the coal bed. (T-348-350) Such rolls are highs and lows in the pit floor which are also called swales. (T-

349-350) A roll in the coal will also channel groundwater flow just as any low point will channel surface water. If there is a roll to the northeast here, it will concentrate groundwater flow in that direction. (T-487-488) The drill hole data for this area suggests a roll in the coal just west of the Smeal residence. (T-488) Dr. Bucek believes her calculation of the dip is consistent with that of the state's Geological Survey. (T-358)

33. Dr. Bucek's report for Swistock is Exhibit C-36, it is dated May 25, 1983. It concludes the surface and strata dip in the same direction and the area on the Sandturn site where DER initially barred mining (the restricted area) is the recharge area for SGS-11, which spring is 300 feet from the eastern edge of the restricted area in the northeast corner of the Sandturn mine. The report also states the SGS-11 spring drains an aquifer perched on the shale and clay underlying the MK seams. (C-36)

34. Jones used data from three test holes on Sandturn to calculate the dip of the MK seam there. (T-432-435) Jones visited the Sandturn site and personally confirmed this dip. (T-437) Jones prepared a structure contour map of Sandturn only to confirm whether there was a roll in the coal helping to channel water toward SGS-10 and SGS-11, but without the roll he found in this coal, he would still have concluded the Sandturn site is responsible for the contamination of the SGS-11 spring. (920-921)

35. In calculating the strike and dip of a coal seam, the strike is always perpendicular to the dip because it is the horizontal plane connecting lines of equal elevation. Based upon Jones' three-point problem calculations, the decreasing elevations trend west to east to Sandturn. (T-7169)

36. The steepness of the northeastern corner of Sandturn and its post mining regrading increases surface water runoff from the site, but surface water

infiltrating water into the site rather than running off will be strongly influenced by the site's dip. On Sandturn the geologic structure's dip overrides topographic influences, so the groundwater mimics surface water drainage which flows perpendicularly to contours of equal height. Thus, since the surface is graded to the east/northeast and the dip is in this direction, too, surface and groundwater will flow in more or less the same direction. (T-475-476)

37. Post-mining surface water infiltrating Sandturn will move to bedrock which is less permeable than mine spoil above it and then travel along it, following the dip. (T-478)

38. On one occasion when Dr. Bucek visited the Sandturn site and was in the mine pit, then open, on it near the LR 17049 she observed water flowing from the pit's highwall into the pit. (T-352-353) This pit was slightly south of the area on Sandturn which was upgradient from SGS-11. (T-360)

39. The two main geologic faults in this area trend northwest to southeast and Sandturn lies between them. (C-20; T-460)

Fahr's Geology and Surface

40. While SGS-11 is about 300 feet from mining activity at Hamilton's site, it is approximately 500 feet from Sediment Pond B in the southeast corner of Fahr. (C-4, C-8; T-202)

41. Sedimentation Pond B on the Fahr site is depicted on the maps which are Exhibits C-4 and C-8. This pond is filled with growing cattails, and, as constructed, is not well defined as sedimentation pond. (T-190, 204)

42. On its eastern side, Fahr is flat on top and then slopes steeply toward LR 17049; however, after this slope, it levels out again at approximately the same height as LR 17049 for the last 150 feet before reaching the edge of this road. (T-203)

43. Using data from drill holes in Fahr's permit and the three-point method, Jones calculated that the dip of the MK seam of the Fahr site did not conform to the regional structure and instead dipped to the north by several degrees, although there is an eastern component to Fahr's dip as well. (T-455-456, 459)

44. Jones' opinion of dip on Fahr is confirmed by inspection reports of DER's mine inspectors, which say that the Fahr site was mined with its pits running south to north to allow Fahr to drain any water in its pits to the lower and northern ends thereof. (T-456-457) If the pits were lower in the north, this means the coal was higher at the southern end of Fahr, and thus that coal seam dips to the north. (T-457)

45. MK coal on Fahr outcropped north of LR 17050 but near it. (T-734-735, 738)

46. Where LR 17049 and LR 17050 intersect north of the Fahr permit, the MK seam is below the elevations of these two roads. The Fahr pit was 70-80 feet deep near this intersection. (T-771, 774) The MK coal outcrops at nearly the same elevation as LR 17049 at the southeast corner of Fahr site, but the coal dips below the road by the time one reaches the northern edge of Fahr. (T-775-776) Jones' visit to Fahr with Dr. Bucek in 1982 confirmed the MK elevations at the southeast corner of Fahr. (T-455-456)

47. In 1981, David Lindahl, a geologist for Fahr noted a small fault in the floor of a pit near the southeast corner of Fahr which ran southeast to northwest. He was concerned that the sandy shale at about 1,840 feet in elevation, on Fahr might be the source of water for the SGS-10 and SGS-11 springs and was concerned about the potential for impact on nearby water supplies from drainage from Fahr; however, Jones disagrees with this geologist. In visits to

the site, neither Jones nor Dr. Bucek saw any evidence of faults. The site's drill hole data shows no evidence of a fault. Further, the DER mine inspectors did not report any displacements in the pits. (T-464, 910-911) Moreover, with the clay mine beneath the Fahr site, any faulting would have been reported by the Pennsylvania Geologic Survey. (T-464-465) Finally, field observations at Fahr and Sandturn showed no evidence of a splay or other fault coming off the main fault and no displacements in the pits which should be visible if there is a fault there. (T-465-469) Jones talked with him and asked him for data to support his concern but Lindahl did not produce any. (T-664-668)

48. Fahr's groundwater will flow north or northeast, (T-484); however, the Passmore mine located beneath Fahr mine has a large discharge of several hundred gallons per minute, and also picks up a component of Fahr's groundwater. (T-480, 485-486, 918-919)

49. Swistock's consultant reported some dewatering of Fahr by the deep mine beneath it. The clay mined by deep mining is estimated to be about 100 feet beneath the upper split of the LK coal. (T-788, 793)

50. Surface runoff from the eastern side of both the Fahr and Sandturn mines drains to an unnamed tributary of Coal Run. (C-21A, A-46)

Sandturn Discharges

51. Bernie Robb ("Robb") is a mining engineer for DER but who, from January of 1985 to June of 1989, was the Mine Conservation Inspector that conducted monthly inspection of this Sandturn site. (T-19-20) He also inspected the site on February 4, 1988, in regard to Hamilton's application to auger mine. (T-21)

52. During that February 4, 1988, inspection Robb observed a small accumulation of water in the northeast corner of the floor of the pit from which

augering was to occur. On Exhibit C-21A this location is represented by a pink dot. (T-29) Robb also observed that the LK seam was visible in the pit's wall, sloped to the east/northeast, and that the seam was underlain with clay. (T-30)

53. Robb used the standard DER sampling procedure to collect the pit water sample. (T-37) Robb collected a sample of this water. (T-31)

54. An analysis of the sample of water in Hamilton's auger pit collected by Robb on February 4, 1988 is Exhibit C-31. The water has the characteristics of acid mine drainage. Its pH is 3.3, acidity exceeds alkalinity (there is no alkalinity in the sample), iron in the sample is 28,200 ug/l, manganese in the sample is 14,900 ug/l and sulfate is 498 mg/l. (C-31)

55. To Robb, the location of the ponded water in the pit also indicated the dip of the coal to the northeast. (T-38, 49, 87-88) When Robb observed the accumulation of auger pit water, Hamilton was in the process of filling its auger holes with baghouse lime, and Robb believes they continued to do this. (T-53) This was required to be done in the mine's permit to help prevent formation of acid mine drainage. (T-55)

56. According to Robb's observations, the seam which Hamilton subsequently augered was the lowest seam Hamilton mined. (T-51)

57. Robb concluded that the seam he observed in the pit wall was the LK seam because that is what the company told him it was permitted to auger. (T-50) While he did not measure the amount of the seam's dip, the existence of the dip was visually obvious to Robb. He saw that the coal dipped to the east/northeast, and it appeared that Hamilton was augering perpendicular to the coal dip. (T-48-49, 51)

58. George Loomis ("Loomis") took over DER inspection duties on DER's behalf from Robb in May or June 1989. (T-39, 97) When Loomis took over

inspection, the pits had all been filled and 95% of all backfilling was done. At that time, the company was rough backfilling the auger pit. (T-39, 98)

59. Prior to being solely responsible for inspecting Sandturn on DER's behalf, Loomis had accompanied Robb on several inspections. Prior to working for DER, Loomis worked for Benjamin Coal, where he was its environmental coordinator responsible for coordinating Benjamin Coal's environmental efforts with DER, permit preparation and water quality monitoring. (T-97)

60. When Loomis was DER's inspector, no area east of LR 17049 was part of Hamilton's permit, but the small portion of land east of the road now shown on Hamilton's Exhibit 9 map was added subsequently. (Exhibit A-46; T-103) This is not unusual because these maps are frequently revised. (T-120)

61. While inspecting Sandturn on May 22, 1990, Loomis sampled a spring located just upslope of the location of Sedimentation Pond E-3 in the northeastern corner of Sandturn. Exhibit C-30 is the analysis of that sample. (T-100) This spring's location is marked with a blue dot on the map which is Exhibit C-2. (T-102) On Exhibit C-2, SGS-10 is just slightly north of directly east from this blue mark.

62. The spring sampled by Loomis was located on the upper left hand corner of Sandturn Sedimentation Pond E-3 near the inside edge of this pond, when one stands on the eastern edge of the pond looking west. (T-103-104, 109) The spring's discharge flows east. (T-124) This spring is 200 feet south of the boundary between Sandturn and Fahr, and 250 feet from Sandturn's eastern boundary. This sedimentation pond on whose rim the spring is located had been excavated from solid rock, and the spring emanated from an area where mine spoil had been pushed down over this solid rock from the reclaimed mine which was directly above the spring. (T-105-106, 124)

63. In collecting this sample, Loomis did not wash the bottle before sampling because it was sealed in sterile condition when he received it, but he did rinse it twice in the spring's flow before collecting the sample. (T-135)

64. The spring's water flowed into the pond, but neither it nor the other three sedimentation ponds on Sandturn's eastern side was ever observed by Loomis to discharge. (T-105-106)[4]

65. The record of the analysis of Loomis' sample of the spring is Exhibit C-30. It shows the sample is acid mine drainage. (T-522) The sample's pH is 3.3, acidity is 368 mg/l, and it has no alkalinity. In the sample, iron is 2,260 ug/l, manganese is 81,100 ug/l, and sulfate is 3,223 mg/l. (C-30) Loomis used standard sampling protocol to collect this sample. (T-135, 522)

66. SGS-19 is a sampling point at the eastern end of a road culvert beneath LR 17049 where the road is the eastern boundary of Sandturn. The water collected at this point first surfaces as seepage on the western edge of the ditch, which is located between Sandturn and LR 17049, so it comes from the Sandturn side of this ditch. It is collected only after flowing through the culvert because there is no place to collect a sample until the water travels through the culvert. On May 22, 1990, Loomis measured this discharge's pH as 3.9. (C-30; T-137-141)

67. James Fetterman ("Fetterman") is a mine inspector for DER. Originally, he was hired by DER as an inspector trainee, and before working for DER, he was mine site foreman and equipment operator for Valley Coal. (T-174-175)

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[4]Loomis also saw water seeping from backfilled material into a pond marked by green "x" and black dot on Exhibit C-2, which pond is located on eastern side of Sandturn, but there was never enough flow there to collect a sample. (T-112-113)

68. Fetterman became DER's inspector for Sandturn in February of 1993. (T-176-177) Prior to beginning to inspect the site, Fetterman reviewed site conditions with Loomis, (T-114, 177) and, using a map of Sandturn, reviewed with Loomis where Loomis had found the road side culvert discharge and the spring discharge at Sedimentation Pond E-3. (T-114, 177)

69. Loomis never went to Sandturn with Fetterman but Fetterman agrees that where Loomis marked the spring discharge by Pond E-3 on Exhibit C-2 is where Fetterman also observed the discharge in April of 1993. (T-177, 180) At that time, a field pH of this discharge was measured using a Colormetric Kit, and it showed a pH of the water to be between 4 and 5, but there was insufficient flow to allow Fetterman to collect a sample. (T-178) Fetterman estimated this flow at 1 to 2 gallons per minute ("gpm"). (T-178)

70. Fetterman also observed the culvert discharge or seepage at Sandturn next to LR 17049 as identified by Loomis. It emanates in an area affected by mining. (T-182-183)

71. C-32 is Fetterman's sample from April 5, 1993, of this Sandturn culvert discharge just below Sandturn's Sedimentation Pond E-5. The seepage surfaces on the pond's outslope about five feet from LR 17049. This area has four separate locations which are seeping and combine to flow at what Fetterman estimates to be 25 gpm. At the time of this sampling of the discharge, Sediment Pond E-5 was empty, and there was no other flow in the ditch between the point where these seeps begin and the point at which they enter the road culvert. (183-185)

72. Fetterman's sample was analyzed to have a pH of 4.3, sulfate of 2,961 mg/l, iron of 300 ug/l, manganese of 102,000 ug/l, and acidity exceeded alkalinity. (C-32) It is acid mine drainage. (T-515)

73. The samples collected by Fetterman were collected using the standard sampling procedure he was trained in by DER. (T-186, 198, 213-214, 217)

74. As shown on the map which is Exhibit C-3, Sediment Pond E-5 is located on the eastern boundary of Sandturn adjacent to LR 17049 at a point slightly east of south from SGS-11. (C-3)

75. C-33 is the analysis of a sampling from April 2, 1993 of the discharge from Sediment Pond B at the southeastern corner of Fahr. At the time of the sampling, the discharge flowed at an estimate of 2 to 3 gpm. (C-33; T-191-192) The analysis results show the pH of this sample is 6.5, alkalinity of 17 mg/l exceeds acidity of zero, sulfate is 20 mg/l, manganese is 50 ug/l and iron is 378 ug/l. Fahr's Sediment Pond B's water shows little impact from mining. (T-519)

76. Exhibit C-34 is DER's administrative order to Hamilton to treat the water at monitoring point SGS-11 as appealed in this proceeding. (C-34) Attached to DER's order is a copy of the analysis results of a sample from SGS-11 collected by Fetterman on March 5, 1993. According to the laboratory analysis, the sample's pH was 4.2. Fetterman's field pH measurement at the time of collection showed a pH of 4.5. (T-197) The DER lab's analysis also shows the spring's acidity exceeds its alkalinity, its sulfates are 2,365 mg/l, and its iron and manganese are 300 ug/l and 45,500 ug/l, respectively. (C-34)

DER's Sample Collecting Procedure

77. Fetterman, Loomis and Robb all collect water samples in the same basic way. (T-33-36, 59-60, 61-65, 71, 108, 130-135, 141-142, 170, 186-187, 212-214, 217-219)

78. Robb collects a sample using 4 separate bottles of 125 m/l size. (T-33) He rinses each bottle twice and fills it without taking in any scum or floating matter. (T-33) He also tries to avoid taking in sediment when filling

each bottle. (T-34) Each bottle is then labeled with a gum tape label showing the sample's I.D. number, sample number, collection date and location. (T-34) One bottle of the four is acidified with nitric acid. (T-34) The bottles are then placed in an ice filled cooler kept in his locked vehicle. (T-34) Ice preserves the sample. (T-71) After the samples are collected, the inspector also fills out sample analysis report forms, which provide the same information as the gum label, and places them in a box in the cooler with the samples. (T-34) The cooler with samples is then returned to a DER office and placed in the courier pick up location, from which it is collected by the courier and transported to the DER laboratory for analysis. (T-34, 72)

79. Robb's identification number as a DER sample collector is 4427. (T-35) Exhibit C-31 bears number 4427101 which is Robb's sampler number and the successive number of that specific sample, i.e., Sample 101. (T-36) Exhibit C-31 bears code number 425, which is DER's standard code showing that Robb seeks to have a sample analyzed for mine drainage. (T-35)

80. Where the water sampled by DER is clear, only three sample bottles are used because there is no need to analyze for suspended solids. (T-59) Thus, as to Exhibit C-31 where the water was clear, only 3 bottles were filled. (T-59)

81. Robb was trained in this sampling procedure by two of DER's Inspector Supervisors named Varner and Anderson. (T-63, 65) He does not know if this sampling procedure is written down anywhere. (T-60, 65)

82. A representative sample collected by Robb varies with the circumstances of what is being sampled. When a stream is sampled, Robb tries to sample from the middle of the stream where there is good mixing. (T-66) In a lake, he takes a sample in the middle, not an eddy, because it is deeper and he is less likely to pick up sediment. (T-67)

83. DER's inspectors acidify samples they collect to prevent metals from precipitating out of a sample before it is analyzed. (T-61) Acidification is accomplished by adding at least 15 drops of nitric acid to the sampled liquid. (T-62) DER provides the nitric acid to its inspectors for this purpose. (T-64)

DER's Laboratory Analysis Procedure

84. Samuel Harvey ("Harvey") is the chief of the division of DER's Bureau of Laboratories which analyzes inorganic samples. (T-238)

85. Harvey has been chief of this division since 1991 (T-239), and has worked in DER's laboratories since 1973. Prior to going to work for DER in 1973, he had 5 years experience in the Harrisburg police crime lab, 3 years experience as analytic chemist with Standard Steel, and had 4 years experience as a chemist with a company called TRW. (T-239-240)

86. Harvey's division analyzes a water sample for inorganic analytes such as pH, alkalinity, acidity, sulfates, and metals to see if it is mine drainage. (T-241) This division analyzes an average of about 200 mine drainage samples each day. (T-241).

87. At Harvey's lab on each weekday at about 7:00 a.m., the courier service delivers the new samples. The samples are delivered in coolers with their enclosed sample analysis request forms. The number of invoices for coolers and coolers are compared to be sure all are present. The coolers are then unpacked, with the ice discarded and the samples sorted by sample collector's number. Next, lab personnel check for the sample analysis request forms and an equal number of samples. (T-243-245) The lab has four persons who staff its sample receiving area. (T-262-263)

88. Samples are not delivered on Saturday except in emergencies. (T-266) Harvey has no idea what happens to samples collected on Friday between Friday and Monday. (T-267)

89. After unpacking, a new number is stamped on each sample. The new numbers are sequential. This is the laboratory sample number and is assigned for purposes of tracking the specific sample through the lab during the sample analysis process. (T-245)

90. The chemist at the lab's "sample receiving area" decides if there is a problem with a sample as received. (T-268) When a sample arrives at the lab in less than satisfactory condition, such as if it has leaked inside the cooler or is in an improper container, or lacks identification, it is marked as void on the Laboratory Report. (T-267-268)

91. After the lab number is assigned, the information in the analysis request form, sample collector's number, sample numbers, and lab numbers are entered into the lab's computer, which then creates a work list to show the analyst doing the analysis by lab number for each sample to be analyzed in that fashion, i.e., a computer print out of all the samples to be analyzed for pH. (T-246-247)

92. Each separate analysis of a sample requested by an inspector is usually run by a different lab staff member, but that staff member will run all of that specific type of analysis that day. (T-250)

93. Volume of the sampled material to be analyzed varies with the types of analysis sought and how low the detection limits are for which analysis is sought from the lab. (T-283)

94. If a particular analysis is not run the day the sample is unpacked, the sample is refrigerated overnight. (T-292-293)

95. After an analysis is conducted, the analyst makes a record of it in the computer and, subsequently, a lab chemist will review the reported results on the computer as to typographical errors or illogical results. (T-247-248, 300-301)

96. If an illogical result is found, the verifying chemist reruns the analysis. (T-248, 301)

97. When all of the analyses requested are performed and the results are entered in the computer, it generates the analyses results, which are printed out as a Laboratory Report directly in the sample collector's field office. (T-248-249)

98. If a problem is encountered with a sample which prevents the conducting of a specific analysis sought by the inspector, which problem cannot be corrected, the computer prints a code on the laboratory report identifying the specific problem encountered. (T-251)

99. Quality Control is maintained at the lab by properly calibrating the analytical equipment at the beginning of each day. In addition, periodically throughout the day, standard samples of known analytical value are reanalyzed by the analytical equipment to check that the equipment produces the predicted result and, thus, is analyzing properly. (T-252)

100. DER's lab also participates in inter-laboratory tests with labs of the United States Environmental Protection Agency (EPA), United States Geological Survey, and one or two other agencies in which DER does analysis to demonstrate the lab's analytical proficiency. (T-252-253)

101. On the Laboratory Report provided to the sample's collector are printed the date the lab receives the sample, the lab number, the date the lab furnishes its report, its analysis results, the sampler's number, his sample number, and the sample collection date. (T-253-254)

102. When an inspector collects a sample and requests its analysis pursuant to analysis code 420, that tells the lab to analyze the sample for nine parameters: pH, total alkalinity, residue, sodium, total sulfate, iron, manganese, aluminum, and total acidity. (C-30; T-254-255)

103. The "G" on a printed Laboratory Report indicates that the lab found no reason to suspect its analysis. (T-256) The reports also indicate the initials of the lab staff member who verified the accuracy of the report analysis results. (T-256)

104. The invoices which are left at the lab with the coolers by the courier service indicate each cooler's point of origin. (T-262)

105. Harvey does not routinely watch the lab's sample receiving operation. (T-266)

106. Samples are iced to slow down any chemical or biological reactions occurring therein. This is an EPA-recommended procedure followed by DER's lab. (T-269) A sample is not improper just because it is not iced, because icing is not mandatory. (T-272)

107. Harvey does not know whether or not the sample, the analytical results of which are reported in Exhibit C-35, was still iced on Monday after its collection on the prior Friday. Harvey also does not know whether or not the sample was kept chilled by courier service then under contract with DER. Harvey doubts there was any sample degradation, however, because degradation could not begin until all the ice melted and the sample became warm. He says since C-35 was a sample collected in March and is of mine drainage, it should not be impacted. (T-272-274)

108. There is a manual created by DER setting forth the analysis methods lab personnel are to use. It is available for reference by the lab staff. (T-283-284)

109. DER's lab is currently certified by EPA (T-285), but DER does not always follow EPA's recommended practices and procedures and will instead use more accurate methods or more modern equipment. (T-284-285)

110. To the extent of Harvey's recollection, he knows that DER's lab uses analysis methods which are the same as the methods specified in Standard Methods For The Examination Of Waste and Wastewater, as published by the American Public Health Association, American Water Works Association, and Water Environment Federation. (T-285-287)

111. In normal circumstances, the lab has no knowledge about whether a sample's analysis results will be used in litigation or not. (T-290)

112. From reading DER's Laboratory Reports, one cannot tell which piece of equipment was used to conduct a specific analysis, but only one machine to analyze metals in mine drainage samples existed in the lab in 1988 to 1991, and, while the lab now has two such machines, even now, on a routine day, only one is used, with the second being a backup for overloads. (T-297-299)

113. Where DER's lab determines a sample analysis' result is not valid, the lab reports an NG on the Laboratory Report rather than the invalid analysis result, so that the result will not be used. (T-308-309)

114. In preparing by dilution the nitric acid for use by DER's sample-gatherers to acidify samples, the lab uses a reagent grey nitric acid meeting ACS standards. (T-313)

115. While Harvey has no personal knowledge of each daily recalibration of each analytical machine, he is aware that such recalibration is the lab's

standard practice. However, if a machine were not recalibrated, an analysis results on one of daily standardized samples run through the machines to check their accuracy would produce erroneous results. (T-315)

116. Harvey has no personal knowledge that the standard samples were analyzed on any given date, but it is the lab's standard procedure to do so, and a log of calibrations for each machine and a log of the standard samples analyzed is maintained by the lab. (T-316-317) Further, if a standard sample's analysis does not produce the predicted result, the machine is recalibrated, and all samples analyzed since the last valid analysis of a standard sample are reanalyzed. (T-317)

117. DER creates its own standard samples by diluting standard samples purchased from chemical companies and it checks them by exchanging samples with EPA and the USGS. (T-322)

118. All analytical machines operate within a range of standard deviation which Harvey believes is 20%. (T-320-321)

119. Using 15 drops of nitric acid verses 20 drops to acidify a sample will have no impact on the analytical result. (T-327-328)

120. If too much nitric acid were added to a sample, it could dilute the sample but this would produce lower metal results during the metals' analysis. (T-328)

DER's Hydrogeologic Analysis

121. In the area in which the Sandturn Mine is located, surface water unaffected by mining generally has low levels of sulfates and metals, and a low buffering capacity. This is generally true throughout the Phillipsburg/Bigler area. (T-501)

122. Generally speaking, water exiting the LK seam is high in sulfates and the acidity and metals are increased, while water from the MK seam varies as to acidity with its overburden and may be acid or alkaline. (T-504)

123. Acid mine drainage is produced when water comes in contact with iron, sulfides and oxygen producing acid mine drainage. pH is one form of indicator for acidity versus alkalinity. (T-502, 822)

124. DER's current rule of thumb for prohibiting mining in areas where there is potential for acid mine drainage formation is that the acid potential of the overburden and the coal must be .5 sulfates or less for DER to approve mining. Here, analysis of some of the overburden samples shows greater sulfates than .5 and, thus, the potential to produce AMD. (C-21; T-509)

125. The only information DER had on iron sulfides at the site was Hamilton's overburden analysis, which was of the upper LK split and the strata just above and below it. (T-823-824)

126. On Exhibit C-21 the upper split of the LK coal has sulfur of 1.33, 1.13 and 1.02 sulfur. (C-21; T-511) Robb's sample of the pit water is consistent with these sulfate readings. (T-515)

127. Jones did not review Hamilton's request to auger mine the LK seam at Sandturn. This application was approved by DER's David Bisco, and Jones does not know what caused Bisco to approve it. (T-823, 826-827)

128. John S. Berry ("Berry") is a hydrogeologist at DER's district mining office who conducted an investigation of the degradation of SGS-10 and SGS-11 for DER in 1991. (T-363-367)

129. As part of his investigation, Berry compiled water quality analysis data on various locations around Fahr and Sandturn to determine whether, over time, there had been degradation of water quality at those points. (T-366-367)

130. Berry concluded, based on a review of the compiled data, that the water quality at points SGS-10 and SGS-11 was degraded. (T-367)

131. Exhibits C-10 and C-11 are compilations of the data for monitoring points for SGS-10 (including Fahr data for point FF-15) and SGS-11, as corrected, (including Fahr data for FF-16). (C-10-11; T-370-371, T-380-381, 386-394)

132. Exhibit C-12 is a compilation of data on monitoring the unnamed tributary of Coal Run east of both Fahr and Sandturn, at a point downstream of where surface drainage from both Fahr and Sandturn reach it. The data shows the impact of post-mining acid mine drainage on this stream. (C-12; T-524-525)

133. Exhibit C-13 is a compilation of sample data at monitoring point FF-9 on an unnamed tributary to Coal Run which is north and upstream of both Fahr and Sandturn. The data of FF-9, as interpreted by Jones, shows the stream's quality sags during mining of the Fahr site when Fahr water was discharged to it at a point upstream of FF-9, but the tributary's partial recovery by 1988 as the Fahr site is reclaimed. (T-527-534)

134. Jones reads the data on Exhibit C-10 as showing the Lansberry spring's degradation (SGS-10) beginning in 1987. (T-542-545)

135. As Jones interprets the compiled data on Exhibit C-11 as to the quality of the Smeal Spring (SGS-11), it begins degradation in March of 1986. (T-546-548) To him, this suggests that since SGS-11 is south of SGS-10, there is a plume of AMD moving beneath the ground, moving from south to north. (T-547-550)

136. In Jones' expert opinion, Sandturn has and will continue to produce AMD which has degraded SGS-11, but Fahr is not connected with SGS-11's degradation. (T-559-563, 569)

137. SGS-9 as a spring dried up and was taken out of service before Hamilton auger mined LK coal in the restricted area. (T-588-590, 595) This spring was only 60 to 100 feet from Fahr permit's boundary. (T-595-596)

138. Reports from DER's inspector of Fahr indicate that Pond B in the southeast corner of the Fahr site was built in an area which was not mined. This was confirmed by Jones' observations. (T-597-598, 879-881) Elsewhere on Fahr's eastern boundary Fahr mined within the normal 100 foot road barrier. (T-598)

139. Jones believes that the Fahr mining operation did dewater SGS-9 to some degree, but he sees no hydrogeologic connection between SGS-9 and Pond B on Fahr. (T-602)

140. Jones recollects that there are reports in DER's file of adverse impacts on water supplies located north of Fahr from the Fahr mine's operation, but he does not recollect any orders to Fahr directing it to rectify the situation and believes the water supplies' quality returned to normal. (T-646-648)

141. The Fahr site was actively mined for the MK seam. Fahr could have mined any MK rider seam, too, without the permit saying so, but to have mined any lower seams the permit would have had to be amended. (T-649)

142. Jones believes that SGS-11 water source is associated with clays and shales beneath what is identified on Sandturn as the MK coal, but the seam's name is not crucial whereas its relative elevation is. (T-710-711, 713)

143. Geologically speaking, a joint is a non-systematic fracture of generally vertical orientation. Joints are visible in all highwalls and were visible on Fahr and Sandturn. (T-778-779)

144. No significant faults were observed by Jones or Dr. Bucek at either mine site. Further, no faults were reported as observed by DER's inspectors at

Sandturn or Fahr, although they observed insignificant fractures. A fault is different from a joint or a fracture and is larger. (T-776-779)

145. A joint may be a conveyance for groundwater flow. (T-170) Joints are common on mine sites and exist in the geologic units on Sandturn. While jointing increases a strata's permeability, such joints do not impact on the groundwater flow at Sandturn because there groundwater moves from areas of high pressure to low pressure. (T-912)

146. The data from drill holes for Sandturn shows variations in elevation of coal seams on Sandturn's site which is consistent with Dr. Bucek's conclusion as to rolls in the coal bed. (T-690)

147. Jones did not observe any rolls in the MK coal at Sandturn but Dr. Bucek did. Jones understands these rolls in the MK coal seam were observed in the MK pit south of the pit in which Hamilton did its LK coal augering. (T-801-803)

148. A structure map plots equal elevations of a geologic unit or seam to establish the concept of its overall structure in map form. These maps can help confirm anecdotal information as to the existence of a roll in a seam. (T-811-812)

149. In deciding which of the seams or splits belonged to which seam of coal, Jones relied on the data in Hamilton's application for the Sandturn permit, the drill hole data and the Pennsylvania Geologic Survey's information. (T-807-808)

150. In approving a permit application, DER does not conduct in-the-field validations of all factual information in the permit application, but relies on the information in the application, provided by the applicants. (T-909)

151. Rolls in the LK coal were also noted on Sandturn by the DER inspectors. (T-808) One inspector identified a roll in this coal near LR 17049 which plunges to the northeast, and pointed it out to Jones. (T-809) Rolls generally follow the coal's dip and are perpendicular to the strike. (T-810)

152. Using data collected from drill holes located on Fahr and Sandturn, Jones prepared a structure contour map. (T-499, 811-816) This map only shows the structure contour in the northeast corner of Sandturn, where Hamilton removed coal. (A-1; T-818-820)

153. Jones has observed Sedimentation Pond B at Fahr and linear depressions running to it which could be drainage ditches. He saw it discharge on one day. He cannot say if mud in the bottom of the pond is sediment washed into it or is part of a possible clay liner. (T-839-842)

154. Surface runoff from Sandturn, if it were poor quality, would impact on water quality measured at monitoring point SGS-13, (which is opposite the southeastern corner of Sandturn on the unnamed tributary) but not at SGS-9, SGS-10, or SGS-11. (C-2; T-846)

155. The spring which is at monitoring point SGS-11 discharges water which makes up a portion of the stream flow of the unnamed tributary at monitoring point SGS-13. (T-914)

156. Fahr does not have any major effect on the shallow groundwater near SGS-13, since Fahr's groundwater drains north and northeast, but surface runoff from Fahr would be found at this point in the tributary, which is located in the surface drainage basin for the eastern part of Fahr at a point before it flows south past the eastern side of Sandturn. (C-2; T-873, 875)

157. Groundwater flow directions are influenced by topography, but the greatest influence is the difference in head pressure. On Fahr and Sandturn,

this difference puts less pressure north from higher pressure on Sandturn, but Sandturn's flow in that direction is blocked by a solid (unmined) coal barrier fifty feet wide between it and Fahr; so, groundwater from its eastern side will tend to flow east, while the west side's groundwater flows to the west. This barrier does not prevent all water passing through it, but the groundwater will flow to other areas more easily than it will pass through this solid barrier. (T-876-878, 891)

158. The 50 foot barrier is visible at the mine site because of the row of trees growing on it, some if which are large. (A-6; T-922)

159. The concept of a solid fifty foot barrier of coal between Sandturn and Fahr applies only to the depth of the MK coal seam because below that point, Fahr is all solid since at the LK seam's depth Fahr did not conduct any mining. (T-922)

160. Unlike the Sandturn site, on the southeastern portion of the Fahr site the solid coal barrier is to the south (the boundary with Sandturn) and east (beneath LR 17049), so this will influence its groundwater flow direction and Fahr's groundwater will tend to flow north. (T-879)

161. As the mine pits on Sandturn fill with water after mining (in the voids around the backfill), they create a hydraulic gradient, placing high water pressure on the end of the pit where the elevation is the lowest. This pressure forces water through the pit's floor and walls. (T-891-893) Lowest elevation is the head pressure which pushes water to an area of lower pressure, i.e., the springs at SGS-10 and SGS-11. (T-893-894)

162. Jones' initial conclusion that jointing will have minimal impact on the groundwater flow pattern because this pattern is controlled by head pressure, was based in part on an assumption that the auger mining pit is sufficiently

filled with water to create this head pressure. Jones confirmed this assumption by observing static water levels in uncased Hamilton drill holes on Sandturn on January 26, 1994. (T-931-933, 941)

163. Hamilton drilled eight drill holes in the restricted area of Sandturn in January of 1994. These holes were left open for thirty days so they could fill with ground water. Only test holes Nos. 1 and 3 got water in them. Test hole No. 1 was drilled to a depth of 60' or below the auger pit's floor, while test hole No. 3 was only 37.2' deep. Test hole No.3 was found to have eight inches or less water in it when checked by Jones. (T-1173-1175)

164. When Hamilton's staff was at Sandturn, there was too little water in test hole No. 3 to collect a sample. (T-1202)

165. Jones could not say positively that the drill hole near Sandturn Sedimentation Pond 3 reached the auger pit's floor, but the hole showed a static water level in a 37 foot hole to a depth of 34½ feet below the surface. (T-936-937, 941-942)

166. The water level in drill hole No. 3 had a level which was 30 to 40 feet above the elevation of SGS-11. (T-942) The pH of this hole's water measured by Jones was less than 4.0, and its specific conductance was too high for it to be surface water. (T-947)

167. Jones authored the DER manual which dates from 1986 to 1987 on how to preserve a sample, but cannot recollect if it covers filtering samples. This manual was compiled from many sources. (T-964-965)

168. Michael Smith ("Smith") is DER's District Mining Manager in charge of its Hawk Run office. (T-969) Prior to assuming this role, he worked as a hydrogeologist at DER for 10 years. (T-969)

169. Smith became aware of problems at the Sandturn site in 1991 as a result of a site inspection there by the federal Office of Surface Mining ("OSM"). OSM found unacceptable water quality at SGS-11 and concluded it came from the Sandturn site based on Jones' evaluation of the site on behalf of DER. Based on this data, OSM concluded DER's mining regulation program was deficient because DER had yet to take action against Hamilton as to SGS-11. (T-970-971)

170. Smith met with Hamilton's president and Kenneth Maney ("Maney"), the man who handles environmental compliance for Hamilton, on July 17, 1992 about the contamination of SGS-11. (T-972-974) At the meeting Hamilton did not deny responsibility for the spring's contamination and agreed to submit to DER a treatment plan for it, but Hamilton was having difficulty treating SGS-11's water because SGS-11 was not on property Hamilton owned or leased, and thus Hamilton did not have ready access to it. (T-972-975)

171. Exhibit C-26 is the treatment proposal for SGS-11 which Hamilton submitted to DER. (C-26; T-976)

172. When Hamilton failed to implement its proposal and denied responsibility for polluting this water, DER issued Hamilton the administrative order which is Exhibit C-34 (the order under appeal here). (C-34; T-981-983)

173. Maney has been environmental compliance specialist for Hamilton for six years, but he held other jobs at Hamilton since joining it in 1976. (T-994-997)

174. Maney is familiar with Sandturn, having visited the site many times since 1983. He is familiar with Fahr also. (T-996-997)

175. Exhibits A-4, A-5, and A-6 are aerial photographs of Sandturn. (T-999-1009)

176. As shown in Hamilton's aerial photographs, Fahr's pits were oriented on that site to run in a north/south direction. (T-1031)

177. Maney "would say" the aerial photo which is Exhibit A-6, and was taken in November of 1984, shows two levels of mining at Fahr. (T-1009, 1031-1032)

178. Exhibit A-5 is an aerial photo taken for Hamilton on March 31, 1986. (T-1022-1034) It shows coal extraction has been completed around the restricted area in the northeast corner of Sandturn, there are no open pits there, and reclamation is in process. (T-1034-1036)

179. The augering pit was the last coal extraction on Sandturn. The open augering pit is shown on Hamilton's aerial photograph which is Exhibit A-4, and was taken in April of 1987. (T-1008, 1037-1038)

180. Maney only saw water in the pits at Sandturn on one occasion. That water was in the augering pit and Hamilton had difficulty keeping its augering work out of water accumulating in this pit. (T-1086-1087)

181. In the central southern portion of Sandturn, mining operations moved from west to east, so the highwall observed by Bucek would have been on the LR 17049 side of the pit. (T-1044-1045)

182. Maney has observed multiple seams of coal in Sandturn and seen the seams pinch out; he has seen jointing in the Sandturn pits' highwalls but not where coal seams pinched out. (T-1051-1055)

183. Hamilton mined UK, MK and LK at Sandturn, and Maney observed four split seams of LK at Sandturn. (T-1055)

184. In the restricted area Maney says Hamilton mined only MK coal, and the next lower seam would then be the upper split of LK coal, but there may have been a MK rider seam there, too. (T-1056, 1058)

185. On Sandturn, the railroad right-of-way lay between the coal removal pits and LR 17049. Hamilton mined to within sixty feet of the right-of-way, to the point where the MK outcropped. (T-1057-1058)

186. In the auger pit, which Hamilton augered from west to east, Maney observed joints in the highwall but not the pit floor. (T-1059, 1061) Hamilton did do blasting during the auger mining; it blasted whenever the overburden exceeded 30 feet. (T-1062)

187. Maney's diary records no rolls in the coal at Sandturn and he says he would normally record the existence of rolls if they were of any significance. (T-1061)

188. According to Maney, Hamilton's Sedimentation Pond E-3 was 100' x 40' x 9' and was in good part excavated from solid earth. (T-1065)

189. The surface elevation rises as one leaves the southeast corner of Fahr and move onto the Sandturn. (T-1070)

190. When Fahr was mined, the mining removed the railroad right-of-way and the Fahr site was mined up to the edge of LR 17050. (T-1070)

191. While Maney asserts that on Fahr there was mining up to LR 17049 in the southeast corner of Fahr (T-1072), Hamilton's aerial photos do not show mining in the southeast corner of Fahr.

192. Maney opines that Fahr mined two seams of coal based on his review of Hamilton's aerial photographs. (T-1033)

193. Based on the elevations on Sandturn of the croplines of coal seams and depths of the pits on Fahr, Maney believes Fahr must have mined MK and LK split coal. (T-1075)

194. Jones says Fahr would be able to mine MK and a MK rider under its permit. (T-649)

195. Exhibit A-27 is an inspection report from DER's file showing that Fahr mined the MK coal and an MK rider seam. (A-27) Test hole data from DER's permit file for Fahr shows there was an 18" thick MK rider seam on Fahr. (C-8a)

196. Maney observed water in both of the Fahr pits shown on Exhibit A-4. (T-1074)

197. Tomasz Kulakowski ("Kulakowski") is a senior hydrogeologist with Hess & Fisher. (T-1095-1096)

198. DER's files on Fahr indicate to Kulakowski that water supply degradations occurred north and west of Fahr. They also show Kulakowski that the spring at SGS-9 became degraded, and it is east of Fahr. (T-1104)

199. Exhibits A-16, A-17, and A-18 are Kulakowski's plots of the analytical results of acidity, sulfate, and manganese analysis from samples of water at sampling point FF-9, located north of Fahr. They show the quality of the water there varies, having turned bad in 1985, but having recovered significantly but not completely through 1991. (A-16, A-17, A-18; T-1120-1123)

200. Exhibits A-2 and A-3 are reports showing acid mine drainage in the pits at Fahr in 1981 and 1982. (A-2, A-3; T-1143-1144)

201. Kulakowski's review of aerial photos of Sandturn show no evidence of significant volumes of water accumulating in Hamilton's pits, and this is confirmed by DER inspection reports. (T-1145-1151)

202. In auger mining Sandturn, Hamilton's permit was conditioned to require it to clean its pit floors and lime the auger holes. (A-35; T-1151-1152)

203. When using lime on Sandturn, Hamilton was not concerned with its neutralizing potential, so Hamilton used a waste-type lime. (T-1088-1089)

204. Kulakowski has sampled a seep near Hamilton Sedimentation Pond E-5 which is several hundred feet south of the location of SGS-11. He says it is not acid mine drainage. (T-1153-1160)

205. On the map which is Exhibit C-3, Pond E-5 is located in the southern half of Sandturn near the western edge of LR 17049. This point is slightly east of straight south from SGS-11. (C-3)

206. Exhibit A-46 is a copy of the Sandturn map with line A-A^1 located on it by Kulakowski based on Hamilton's January 1994 drill hole data. Exhibit A-47 is Kulakowski's drawing of what is found on this A-A^1 line at various elevations. (A-47)

207. When A-A^1 on Exhibit A-46 (T-1205) is compared with the map which is Exhibit A-2, it shows A-A^1 is located off the restricted area rather than on it as shown in A-46.

208. Line B-B^1 also appears on Exhibit A-46, and a drawing of it is Exhibit A-48. Kulakowski concluded a seam beneath the MK seam was mined on Fahr based on depth of the MK seam on Sandturn and his understanding of the depth of pits on Fahr. (T-1219-1220) The Geologic Survey identifies this lower seam as the LK seam and says it would be 25 to 30 beneath the MK seam. (T-1219-1222, 1224)

209. Kulakowski shows point B of the B-B^1 line elevation on A-48 to be 1940 feet above sea level, but Hamilton's map, which is Exhibit A-46, shows the elevation at this point to be only between 1860 to 1870 feet. (T-1273-1275)

210. Kulakowski disagrees with the Geologic Survey, saying this seam is 50 to 60 feet below the MK seam. (T-1220-1222)

211. Kulakowski says the LK coal outcrops at the height of SGS-10 and SGS-11. (T-1225)

212. The southeast corner of Fahr is topographically higher than SGS-10 and SGS-11, as is the northeast corner of Sandturn. (A-49; T-1223, 1229)

213. Exhibit A-46 shows that a southwestern portion of Fahr slopes toward Morgan Run, contrary to Kulakowski's testimony that none of Fahr's surface drains to that stream. (A-46)

214. In addressing the quality of Morgan Run, which is west of Fahr and Sandturn, as shown by samples at points WA-269 and WA-272 (as located on Exhibit A-46), Kulakowski admits that mines other than Sandturn and Fahr, but east of Morgan Run, like Sandturn drain to Morgan Run between these points. (T-1252-1253)

215. The Geologic Survey says the primary joints in this area trend northwest to southeast or from Fahr toward SGS-10 and SGS-11, but any secondary joints would be perpendicular to the primary joints, so they would trend from the southwest to the northeast or from Sandturn to SGS-10 and SGS-11. (T-1243, 1275-1278)

216. Sandturn is the source of the AMD at SGS-11. (T-489, 559-563)

DISCUSSION

Burden of Proof

Because this appeal arises from DER's issuance of its Order to Hamilton on March 24, 1993, there is no question as to which party bears the burden of proof. As pointed out in Hamilton's brief, the burden of proof falls on DER under 25 Pa. Code §21.101(b)(3).[5] Al Hamilton Contracting Co. v. DER, 1993 EHB 1651. DER must meet this burden by demonstrating the merit of its order by a preponderance of the evidence. Martin L. Bearer, t/d/b/a North Cambria Fuel Company v. DER, 1993 EHB 1028.

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[5]The Board's rules have recently been amended, renumbered and relocated within the Pennsylvania Code. See 25 Pa. Code §1021.101(b)(3) for this rule's current location.

DER's order concerns pollution of groundwater which surfaces at the spring designated as sampling point SGS-11, but that spring is not located within the boundary of Hamilton's permit for Sandturn. As a result, to prevail DER must establish the existence of a hydrogeologic link between the mine site and the contaminated off-site spring. Penn-Maryland Coals, Inc. v. DER, 1992 EHB 12. DER's evidence demonstrating this connection must preponderate and be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario in which this connection exists. Midway Sewerage Authority v. DER, 1991 EHB 1445. In making this demonstration, DER may use evidence gathered after its administrative order was issued to Hamilton and this appeal was underway. Al Hamilton Contracting Co., *supra*.

Reconsideration of the Order of January 11, 1994

Because Hamilton has challenged the propriety of the presiding Board Member's Order of January 11, 1994 in this appeal, and that Order addresses the scope of the evidence before us, we must consider that argument next. Hamilton's Post-Hearing Brief asserts that where former Board Member Mack denied Hamilton's Motion To Allow Testimony Of Expert Witnesses, he erred.

We disagree and conclude the Order of January 11, 1994 was sound.

The issue addressed by Board Member Mack's order had its start prior to the merits hearing. When presiding Board Member Mack issued Pre-Hearing Order No.1 on April 2, 1993, it specified that Hamilton would file a Pre-Hearing Memorandum by June 16, 1993 which would list all expert witnesses Hamilton would call and would summarize their testimony. Hamilton's Pre-Hearing Memorandum, which the Board received on June 21, 1993, listed no expert witnesses and provided no summary of expert testimony. It listed three fact witnesses and "reserved" the right to file amendments thereto. DER filed its responding Pre-Hearing

Memorandum on August 25, 1993. In it, DER identified expert witnesses and provided a brief summary of their testimony.

On September 27, 1993, there was a telephonic conference between the parties' attorneys and the presiding Board Member, during which a three day merits hearing was scheduled to be held on November 22 through 24, 1993. In that conference, counsel for Hamilton indicated that there would be no expert testimony offered on behalf of Hamilton. (T-12). On the basis of that conference, the Board issued Pre-Hearing Order No. 2, dated September 27, 1993, setting the dates for the merits hearing. On November 18, 1993, a mere four days prior to the merits hearing's commencement, Hamilton filed an Amended Pre-Hearing Memorandum in which it listed Pamela Wills, Wilson Fisher and Tomasz Kulakowski as expert witnesses on its behalf. In response, DER filed a Motion To Preclude Expert Testimony from these witnesses, and the presiding Board Member granted the Motion. (T-13)

When the merits hearing was not concluded after the three days of hearings in November, further days of hearings were scheduled for February 1994. On December 20, 1993, Hamilton filed a Motion To Allow Testimony of Expert Witnesses, which sought to have the Board allow these three previously identified persons testify as experts on Hamilton's behalf. DER filed a response in opposition thereto, and, by Order dated January 11, 1994, Hamilton's motion was denied.

Hamilton's Post-Hearing Brief argues for reversal of that Order for the reasons set forth in the Brief accompanying its December 20, 1993 Motion. Our first problem with this request is that Hamilton filed no such Brief with this Board. Its motion was filed without an accompanying Brief, and thus there are no arguments therein for us to use to reevaluate that order.

Hamilton's motion states that there was ample time between the two groups of hearings for DER to depose Hamilton's proposed experts and prepare rebuttal testimony. From this conclusion, Hamilton argues there was no ambush of DER and no prejudice to it.

The record before us shows that by the hearing on November 24, 1993 (the last day of the three days of hearings in November) DER had finished the direct testimony of its final expert witness.[6] At that time, Hamilton asked to wait to cross-examine this witness until the February hearing, and the Board allowed the request, adjourning that day's hearing at noon with the end of the direct examination. (T-570-571, 580) Thus, Hamilton's Motion came after the presentation of the fact and expert portion of DER's case-in-chief which is specific to this site. The motion's timing in that regard presents the first reason the Board sustains the Order of January 11, 1994. We have long held that trial by ambush through expert testimony is prohibited. See Midway Sewerage Authority v. DER, 1991 EHB 1445, and Keith Small v. DER, 1993 EHB 611. Yet, that is precisely what would have occurred here if Judge Mack had granted Hamilton's Motion. Not only did DER prepare and present its case knowing from Hamilton that there was not to be expert testimony on behalf of Hamilton, but Hamilton sought the right to call three experts in addition to having the three month hiatus between direct and cross-examination of DER's expert. The offer of a chance to depose Hamilton's proposed experts and call rebuttal witnesses would not offset the prejudice of granting this Motion in this circumstance, especially since what

[6]Mike Smith, the man in charge of DER's mining program did subsequently testify after nearly two days of cross-examination of DER's hydrogeologic expert. His brief testimony (See T-968-985), while it indicated his agreement with Jones' conclusions as to a link between the site and SGS-11, was centered on OSM's concern over DER's failure to act, and DER's subsequent issuance of this order and negotiations between DER and Hamilton.

can be offered as evidence via rebuttal is so much narrower than what can be offered as part of a case-in-chief.

Finally, again as pointed out by DER, we will not here eviscerate this Board's procedural methodologies by second guessing the presiding Board Member. Hamilton's Motion fails to explain why it should be allowed to offer this testimony after representing to this Board and DER that it would call no experts, after failing to timely disclose its experts in its Pre-Hearing Memorandum, and after DER's Motion to preclude the expert testimony was granted. We have adopted rules of procedure and use a standardized Pre-Order No. 1 requiring the filing of Pre-Hearing Memoranda to make sure there is a timely decision by parties as to experts. We refuse to signal these parties or others, by modification of the January 11, 1994 Order, that they may disregard these mandates at their whim. Reconsideration of interlocutory orders of this Board occurs only where exceptional circumstance are shown. Cambria Coal Co. v. DER, 1991 EHB 361, City of Harrisburg v. DER, et al., 1993 EHB 220. Hamilton has made no such showing here.

Admissibility of Testimony on New Drill Hole Data

At this same portion of its Post-Hearing Brief, Hamilton raises a claim that the presiding Board Member erred in barring testimony from Tomasz Kulakowski regarding a drilling program conducted in January of 1994 which was not disclosed to DER or the Board until DER had rested on the presentation of its case-in-chief and virtually all of Hamilton's evidence had been presented. On the seventh and final day of the merits hearing in this appeal, Hamilton's counsel disclosed this drilling program through questions of the last witness called on Hamilton's behalf. When DER objected thereto, the presiding Board Member refused admission of this evidence. Hamilton argues the testimony regarding the results of this

drilling program and a Kulakowski-prepared "plan view" should be admissible because it would have assisted the Board in its fact finding role.

Hamilton's brief says the "plan view" contained only a summary of facts already in evidence. Assuming this is true, Hamilton is not prejudiced by the Board's decision to deny testimony on it. If it summarizes facts of record in this appeal, as Hamilton suggests, those facts are still of record, and Hamilton could use them in its brief to support its arguments.[7] To the extent it does not merely summarize such facts but contains Kulakowski's opinion as to what the facts mean or why they are significant, Kulakowski is a senior hydrogeologist for Hamilton's consultant (T-1095), so his opinions would be expert opinions, and we have already sustained the presiding Board Member's decision to bar expert testimony by Hamilton's experts.

What is true as to the "plan view" is also true as to the drilling program with regard to results of any drilling program carried out by Hamilton after DER had completed its last witness on the connection between SGS-11 and Sandturn and completed his direct testimony. Kulakowski's interpretation of the drilling program's results are expert opinions, and their expression was prohibited.[8] We sustained that prohibition above. Moreover, we agree with presiding Board Member, who indicated that disclosure of this information in the eleventh hour

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[7]Even if this presiding Board Member's ruling was in error, the exclusion of this evidence is harmless because this evidence was cumulated. Soda v. Baird, 411 Pa.Super. 80, 600 A.2d 1274 (1991).

[8]The transcript discloses numerous other incidents where testimony on behalf of Hamilton crossed the line from fact testimony to expert opinion, despite the ruling barring such testimony on Hamilton's behalf. Where DER failed to specifically object thereto, we have considered this evidence in preparing this adjudication. Since there are also objections in the transcript in regard thereto by DER which were not sustained by the presiding Board Member, we have also considered that "objected to" evidence in writing this adjudication. DER did not raise the propriety of Judge Mack's rulings on these objections in its Post-Hearing Brief, and so we need not reconsider them. See Lucky Strike, *supra*.

of the merits hearing is improper when it is clear that at least most of this data was available before the conclusion of DER's case-in-chief, but was not disclosed to DER then, as was required. (T-1238-1241) The standard for reversal of a ruling by a presiding judge is the same before this Board as it is in a Court of Common Pleas. The test is whether the trial judge, in ruling on the admissibility of evidence, used or abused his sound discretion. Hamill-Quinlan, Inc. v. Fisher, et al., 404 Pa.Super. 482, 591 A.2d 309 (1991). In turn, as pointed out in Section 108.1 of Packel and Poulin's Pennsylvania Evidence, the Supreme Court defines abuse of discretion in Commonwealth v. Lane, 492 Pa. 544, at 549, 424 A.2d 1325, at 1328 (1981) as:

> ...more than just an error of judgment and, on appeal, a trial court will not be found to have abused its discretion unless the record discloses that "the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will."

We can find no manifest abuse of discretion here and so do not reverse that ruling.

Proof of a Hydrogeologic Connection

Having disposed of these preliminary issues we turn to the central question of whether DER has met its burden of proof as to evidence to support issuance of its order.

The history of mining on Sandturn and the adjacent Fahr site predates either site being known by those names, let alone the issuance of permits by DER for the two mining operations which are at the center of this controversy. As was evident from the testimony from both sides and from the aerial photographs offered by Hamilton, there was some "Pre-Act" surface coal mining along the top of the ridge which runs through both sites. (See Exhibit A-6) This was apparently for Upper Kittanning coal, the highest seam on at least the Sandturn

site. In addition, Hamilton's maps of this area show openings for deep, as opposed to surface, coal mines on properties near these two mine sites. (See Exhibit C-2) Moreover, there was substantial testimony concerning Harbison-Walker's deep clay mine (known as the Passmore No. 1 Mine) which underlies much of the Fahr site, though not Sandturn. Finally, there was testimony on cross-examination of Hamilton's Kulakowski concerning other present day surface mines located to the west of Sandturn and Fahr, from which surface runoff would drain to the Morgan Run Watershed, which lies to the west of the two mines at issue here. (T-1253-1254)

The Sandturn mine site's history began not under Hamilton but under Swistock. DER reviewed Swistock's permit application in the period of 1980 to 1981. When this application was under review, DER became convinced that mining Sandturn's northeastern corner would adversely affect two or three private water supplies lying immediately northeast of the mine site. This included the water supply springs referred to here as monitoring points SGS-10 and SGS-11. As a result of DER's concerns, Jones wrote to Swistock telling it to delete the recharge area[9] for these springs from the area to be mined or find water supplies to replace them. Jones felt that deletion of nine or ten acres in this area of Sandturn was sufficient if deletion was elected, but Swistock was unhappy with the idea of deletion because of the impact on minable coal reserves. In the course of discussions with DER of alternatives to deletion, Swistock replaced its then current hydrogeologist with Dr. Bucek, and, instead of drilling on-site

[9]A recharge area is definable as: "A land area on which water reaches to the zone of saturation (aquifer) from surface infiltration, e.g., an area where rainwater soaks through the earth to reach an aquifer." C.C. Lee, Environmental Engineering Dictionary, 432.

wells for these private homes, developed another option for replacing these supplies.

In the interim, Swistock began mining Sandturn from the western side of the mine site toward the east and from the southern end of the mine site toward the north--in essence mining this site toward its northeastern corner. To accommodate mining, since the DER/Swistock discussions concerning water loss or contamination of SGS-10 and SGS-11 arose from the idea of mining the various splits of the LK seam of coal, the parties agreed Swistock could mine the MK coal in the recharge area, but the LK seam was deleted and a condition was placed on Swistock's permit (Condition 52), requiring that wherever, in mining the MK, the MK seam's underclay was encountered, it would be preserved to prevent the downward migration of groundwater.

While Swistock's mining was progressing, Dr. Bucek located a replacement water supply spring for these two homes approximately 1,000 feet east of the homes and thus east and northeast of Sandturn. Based on the actual replacement of these springs with this new source in 1984, permit Condition 51 prohibiting the LK seam's mining in the restricted area (the red outlined area sown on Exhibit C-2) was deleted from the permit, but the permittee was warned by a new permit condition 6 that even though these springs were no longer water supplies, if the springs' quality turned bad, the miner would be liable for their treatment. The condition also required liming (the addition of lime as an acid neutralizer) in the Sandturn mine's phases C and E (in the northeast corner of the site) where there would be mining of the LK seam.

It was while this replacement water supply source was being procured by Swistock that the Sandturn permit was transferred from Swistock to Hamilton.

During permit transfer Hamilton accepted the modified permit, including the new condition 6.

SGS-10 and SGS-11 are located east of LR 17049, which road thus separates them from the eastern boundary of the Sandturn and Fahr mine sites. SGS-10 is located to the north of SGS-11, but both are east of the Sandturn mine site. Sandturn's northern boundary is shown as a row of trees on photographs of the site. This row of trees marks the boundary between the northern boundary of Sandturn and the southern boundary of Fahr. The trees sit on top of a 50 foot wide barrier of coal which was not mined by either miner. Based on relative surface elevations, surface run-off from the eastern side of Sandturn and Fahr both travels east into the watershed of an unnamed tributary of Coal Run. The western side of Sandturn and the southwestern portion of Fahr drain westward toward Morgan Run. The surface of the northern portion of Fahr drains to the north. Fahr's northern boundary is LR 17050 which intersects LR 17049 at Fahr's northeastern corner.

In January of 1988, Hamilton sought to amend its permit for Sandturn to allow it to auger mine the LK seam in the area just south of the restricted area on Sandturn. DER agreed thereto. The area to be auger mined is shown as a yellow square, on the map which is Exhibit C-2(a). Augering was to occur from an existing 600 x 100 foot pit on the southern edge of this yellow square which is shown in blue on that Exhibit.[10] The augered LK seam was the lowest seam Hamilton mined and was underlain with clay. Looking at the highwall of the pit, it was visually clear to DER's mine inspector that this coal dipped to the east, northeast. DER's inspector Robb inspected Sandturn for DER during the time of

[10]Auger mining is a spiral boring process for additional recovery of a coal seam exposed in a highwall. C.C. Lee Environmental Engineering Dictionary, 38.

the auger mining of the LK seam. On one occasion in this period, he observed water standing in this auger pit's northeastern corner. For inspector Robb and this Board, that is an indication of the dip in the strata toward this area because water runs downhill. The location of this ponded water on Exhibit C-21A is shown by a pink dot. The analysis of a sample of this water collected on February 4, 1988 shows its characteristics to be like that of acid mine drainage. Its pH was 3.3, acidity exceeded alkalinity, there was no alkaline material in the sample, the iron and manganese were elevated,and sulfates were shown to be 498 mg/l.

The Pennsylvania Geological Survey's plot of the overall regional geology's dip in the area shows the geologic structure in this area at the depth of the MK and LK coals dips to the east/northeast. Thus, the Sandturn mine site's dip observed by Robb is consistent with the more general regional dip. Using what is known by geologists as "a three-point problem", a geologist, with known elevations of a specific coal seam at three locations, can find the highest lowest and middle elevations of these points and, through use of trigonometry, determine the strike and dip of the coal. Using such a methodology, Jones calculated that Sandturn's MK dip was to the northeast. Dr. Bucek also used this method on behalf of Swistock, and, in her report (made ten years before the hearing), she concluded that there was a 5° dip to the east/northeast in the MK seam. Dr. Bucek also did a second three-point problem which confirmed the first and showed a sway or roll in that coal seam. As she testified, she finds her calculation consistent with that of the Geological Survey.

It should also be pointed out that Dr. Bucek's 1983 report of her evaluation of this site concludes the restricted area on Sandturn is the recharge area for the SGS-11 spring, which is only 300 feet from the eastern edge of the

restricted area. Moreover, Bucek reports that on a visit to Sandturn she observed water flowing into a Sandturn Pit from the highwall of a pit located on the east side of Sandturn (but south of the restricted area).

Jones has also undertaken a three-point problem's calculation of the geological dip of the Fahr site. His results show Fahr's MK dip is predominantly to the north. This is confirmed by the reports of DER's inspectors. The inspectors' reports show the Fahr site's pits ran generally south to north, as the site was mined from west to east. Fahr was mined in this fashion because this mining plan allowed any water accumulating in the pit to drain by gravity to the low point of the mine (at its northern boundary). In turn, this means the MK seam had to be higher to the south near the boundary with Sandturn than it was in the north.

On Fahr, the coal company was only authorized to mine the MK coal, but that authorization would allow it to mine any rider seam that occurred there. One DER inspection report of that site shows the inspector observed the MK rider seam's existence above the MK seam. Data from a drill hole on Fahr shows the rider is eighteen inches thick at the point the drill pierced it. If it exists as reported, it could be the second seam which Kulakowski opined to have been mined on Fahr based on his interpretation of pit depths shown in Hamilton's aerial photographs. As this appears to be the case, it rebuts Hamilton's suggestion of possible mining on Fahr at a depth greater than the MK seam (and that this mining is a possible source of contamination of these springs).

The Fahr site's topography is flat on top. To its east it then slopes steeply toward LR 17049, but levels out for about 150 feet before reaching the edge of LR 17049. Hamilton's topographic maps also confirm that the surface slopes on Fahr from the level portion near its boundary with Sandturn toward the

northern Fahr boundary. The evidence is also clear that the MK seam outcrops north of Fahr's permit boundary and LR 17050. Indeed, near the intersection of LR 17049 and LR 17050, Fahr's MK pits were reported to be 70-80 feet below these roads, thus further confirming the geologic dip to the north.

Jones never visually observed rolls in the MK coal on Sandturn as observed and reported by Dr. Bucek, but rolls in the LK seam on Sandturn were reported by DER's inspectors. One such LK seam roll was pointed out to Jones by a DER inspector near LR 17049, which roll "plunges" to the northeast. Such rolls usually follow a seams's dip. Rolls in coal can channel groundwater in a specific direction. Such a roll in the LK coal would help channel water toward SGS-10 and SGS-11.

The Geological Survey says the primary faults in the geologic structure of the area containing Sandturn and Fahr tend to run in northwest/southeast trends. Thus, they would not run toward SGS-10 and SGS-11 from Sandturn, but from Fahr toward these springs. If primary faults run in this direction, however, any secondary faults run perpendicularly to primary faults, so they would run from Sandturn to the east/northeast or toward SGS-10 and SGS-11. While a geologist for Fahr (David Lindahl) reported to DER that he observed a fault in a pit in the southeastern corner of the Fahr site, no such fault was observed by Dr. Bucek or Jones in visits to Fahr. Further, data from drill holes showed no evidence of faults, and the DER mine inspectors inspecting Fahr recorded no observations of faults there. Moreover, as Jones points out, no faults are reported in the Passmore No. 1 mine beneath Fahr by the state's Geological Survey. Additionally, Jones indicates no reports of splays or other faults coming off the main fault and no material displacements in Fahr's pits, which should be visible if there were a fault. Finally, when Jones asked Lindahl for more data on Lindahl's

assertion that it was possible that Fahr might contribute water to these springs, Lindahl did not respond.

A joint in geologic structure is a non-systemic fracture of generally vertical orientation; and faults are larger than joints. Joints are visible on all highwalls and were visible on the Sandturn and Fahr highwalls. Insignificant fractures were observed at both mines, but no faults were observed on either site. Jointing does increase a solid strata's permeability; however, on Sandturn, they are not the controlling force in the groundwater flow pattern. On Sandturn, the controlling force is hydraulic or head pressure. However, we do also note that on cross-examination of Hamilton's Ken Maney, he admitted that he observed joints in the highwall of Hamilton's LK seam auger pit (he also admitted Hamilton did conduct blasting in this pit where the overburden above the LK coal exceeded 30 feet in depth).

Monitoring point SGS-9 was monitored by Fahr as to its mine site with a designation of FF-14. Initially SGS-9 or FF-14 was identified as the spring which served as a water supply for the Ervin Henschal residence. Mistakes as to what this monitoring point was are evident in the Fahr, DER and Sandturn records; as a result, this Board must disregard changes to the water quality there in deciding the groundwater flow patterns and whether Sandturn is the source of contamination of SGS-11. SGS-9 was at times sampled with the identity of a spring, and, at others, as a flowing body of water (as in a stream). At times, it was also identified as the Probeck water supply, the Lupton spring and a natural drainage channel. There is no evidence to suggest it could be all of these points simultaneously, so samples showing it to be Henschel spring's quality cannot be compared to samples of a flowing body of water to show water quality changes.

A second problem with use of the data on SGS-9 is that that spring went dry before augering was begun by Hamilton. Hamilton's testimony attempted to suggest that Fahr may have put in a french drain near the spring to cause it to dry up, because the surface area near the spring had been cleared and revegetated. However, this conclusion was based solely on observations of the surface in the area, and there was no proof this was done as opposed to clearing this area for other reasons. Moreover, on behalf of DER, Jones concedes that in mining the extreme eastern portion of Fahr, some dewatering of SGS-9 could have occurred. However, even if there is a french drain there, we still lack sample data from the spring to prove or disprove Hamilton's defense. Accordingly, we conclude that we cannot use SGS-9 data to reach conclusions in this appeal.

We do, however, note that of SGS-9, SGS-10 and SGS-11, SGS-9 is the most northern of the three springs, which are arranged in an almost straight north/south line, with SGS-11 being the most southerly of the three.[11]

As to the Fahr site itself, the evidence also establishes that the extreme southeastern corner of Fahr nearest SGS-10 and SGS-11 (which lie southeast of Fahr) was not mined. At that location, Fahr constructed one of its sedimentation ponds (Sedimentation Pond B) to control surface water runoff, and the remains of that pond still exist at that location today. This is significant because SGS-11 is only about 300 feet from where Hamilton conducted mining activity on Sandturn, whereas it is 500 feet to Sedimentation Pond B on Fahr, and, thus, even further to the point where one reaches Fahr's nearest coal removal pit. Thus, the southeastern corner of Fahr is not a more permeable reclaimed strip mine, and the geological units beneath the ground there remain solid. Such solidity in the

[11]SGS-10 was designated FF-15 when sampled by Fahr and was the Ernest Lansberry spring, while SGS-11 was the residential water supply for the Harold Smeal home and Fahr sampled it as FF-16.

geologic units there would retard groundwater flow to the southeast and, with both a geologic dip and less solid materials in another direction (north and east), direct groundwater on Fahr away from SGS-10 and SGS-11.

When one determines the dip of a geologic unit, he or she also calculates its strike. The strike is perpendicular to the dip because it is the horizontal plane connecting lines of equal elevation. Jones' three-point calculation indicates decreasing elevations west to east; he also believes that the strike and dip calculations discussed above are consistent with Dr. Bucek's conclusion as to rolls in the coal running toward SGS-11. If such rolls exist, they would aid in funnelling groundwater down the dip the way any surface low spot acts in similar fashion as to surface waters.

According to the only hydrogeologic expert testimony in the record, the existence of rolls in this coal is not essential to a determination of hydrogeologic connection between SGS-11 and Sandturn. In dealing with this issue, we keep in mind that this connection is determined on a three dimensional level. Of course, the geologic dip of the various seams of rock and coal influences groundwater flow. While surface water runoff from Sandturn's eastern flank would run down slope perpendicularly from contours of equal elevation, there is no suggestion that water would not also infiltrate the reclaimed mine site and travel through the reclaimed soils and the backfilled mine spoil in the pits until it reached the solid pit floor. There, it will follow the pit floor's dip and based on the evidence before us, that is indisputably to the east/northeast. Clearly, the Sandturn water in MK pits also cannot travel directly north from Sandturn because it will be obstructed by the 50 foot solid barrier between it and Fahr. So, if there is a path of less resistance around it, and a dip to the east/northeast, it will pursue that path. (Of course, from

the western side of Sandturn, a portion of the water also flows west.) According to the record as to the still deeper LK coal pits, there are no similar pits on Fahr, so the solid coal barrier exists except where removed by auger mining for the remaining length of any unmined LK coal on Sandturn, plus the 50 foot barrier area and all of the Fahr site's LK coal. Moreover, there is no suggestion as to this seam that Hamilton mined to the outcrop of the LK seam on the surface to allow groundwater to emerge in that fashion.

However, as the Sandturn pits slowly fill with infiltrating water, that water creates a hydraulic gradient[12] which builds head pressure on the lowest point in the pit (at Sandturn, this is again the northeastern corner) forcing water from this area through pit floors and walls to lower pressure areas, i.e, springs.

On cross-examination, Jones admitted his theory of the groundwater flow pattern here, as stated above, was in part initially based upon an assumption that the auger pit would sufficiently fill with water to create that head pressure. In January of 1994, Jones observed static water level in a 37 foot Hamilton drill hole near its Sandturn Pond 3 at a depth of 34 1/2 feet below the surface. This water level would be thirty to forty feet higher in elevation than SGS-11, and it confirmed his assumption for him.

Jones' position is also confirmed for us in another fashion. There was no evidence of discharging springs located on the southeastern quarter of Fahr. If groundwater flowed in that direction, as Hamilton would have us conclude despite the geological dip, there should be evidence of that fact. There is none. As

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[12]C.C. Lee's Environmental Engineering Dictionary defines this term on page 272 as: "The slope of the water table or the change in water level (static head) per unit of distance along the direction of the flow. (EPA 3/87 and Course 165.7)"

Hamilton pointed out, there is plenty of evidence of bad quality water as to the Fahr site, but it is predominately to the west, and north. To the extent it is also to the east, that is only in the northern portion of the site. Moreover, while DER's inspectors have not found massive discharges of AMD from Sandturn, there are the seeps and springs of AMD which have been collected and analyzed along the northeastern quarter of Sandturn and on its eastern flank, at points on the mine site between the easternmost Sandturn pits and the western edge of LR 17049.

Water in the area in which these mines are located which is unaffected by mining generally has low levels of sulfates and metals and a low buffering capacity.[13] Generally in this area, water flowing off the LK coal is high in sulfates with increased acidity, iron, and manganese, while MK seam water quality varies with the seam's overburden quality and, thus, may be acid or alkaline.

When Loomis succeeded Robb as DER's inspector of the Sandturn Mine, the auger pits were filled, so he did not see any of the pit water observed by Robb, although Hamilton's Ken Maney admitted seeing water accumulated in the auger pit on one occasion. Moreover, the water in the pit as sampled by Robb had the characteristics of acid mine drainage. Its pH was 3.3, acidity exceeded alkalinity (there was no alkalinity in the sample), sulfates were recorded at 489 mg/l while iron and manganese were 28,200 ug/l and 14,900 ug/l, respectively.

Loomis, who formerly worked for Benjamin Coal, also sampled a spring on the upper side of Al Hamilton's Sediment Pond 3.

This spring and pond are located on the eastern side of the restricted area, 200 feet south of Sandturn's northern border with Fahr. (The spring being the light blue dot on the map which is Exhibit C-2.) Loomis describes this

[13]The water is mildly basic and resists changes in acidity.

spring's water as emanating from the backfilled area. SGS-10 is located just slightly north of straight east of this point by about 250 feet. The analysis of this sample shows it also has the characteristics of acid mine drainage. Its pH is 3.3, acidity exceeds alkalinity (again, there is no alkalinity in the sample), iron and manganese analyzed at 2,266 ug/l and 81,100 ug/l respectively, while sulfates were 3,223 mg/l. Loomis and Maney also observed a small seep of water near Sandturn Pond E-5 (adjacent to LR 17049 but near the site's mid-point along LR 17049, i.e., on Sandturn's eastern flank). It was too small a flow to sample.

Finally, Loomis also observed a discharge from Sandturn so close to LR 17049 that there was no good on-site sample collection point prior to the flows entering a culvert beneath LR 17049, so it is sampled as it flows out the eastern end of this road culvert. In 1990, Loomis measured its pH at 3.9.

Fetterman is Loomis' successor as DER's Sandturn inspector. He has sampled this culvert discharge as recently as April 5, 1993. This discharge is a series of four seeps with a flow he estimates to be 25 gpm. Analysis of the combined flow of these seeps (he testified that they cannot be sampled separately) shows the discharge is acid mine drainage. The analysis of this sample shows a pH of 4.3, iron and manganese of 300 ug/l and 102,000 ug/l respectively, acidity exceeding alkalinity and sulfates of 2,961 mg/l.

Interestingly, the discharge of Sedimentation Pond B on Fahr was sampled by DER only three days earlier than Fetterman' sample referenced above. On April 2, 1993, its pH was 6.5, alkalinity of 17 mg/l exceeded acidity of zero, sulfates were 20 mg/l. Iron and manganese in that sample analyzed at 378 ug/l and 50 ug/l, respectively. Thus there is little evidence of a mining impact in it.

Meanwhile, the quality of SGS-11 as of analysis of a March 5, 1993 sample was poor. Its pH was 4.2, acidity exceeded alkalinity, and its sulfates were 2,365 mg/l, analysis for iron and manganese showed 300 ug/l and 45,500 ug/l, respectively. Moreover, as shown on Exhibits C-10 and C-11, which are the compilations of the analyses of samples of the Lansberry (SGS-10) and Smeal (SGS-11) springs, the degradation thereof started back in the 1986/1987 era and was not a recent, sudden occurrence.

Thus, two hydrogeologists, only one of whom was a DER hydrogeologist, have evaluated this situation and drawn a link between SGS-11 and Sandturn, and no expert testimony exists to rebut this hydrologic conclusion.

Hamilton does, however, challenge the DER sample collection and analysis procedure, and objects to the admission of these analyses results based thereon. While we are not convinced we even need these results to concur in the conclusion reached by DER as to the hydrologic link between Sandturn and SGS-11, we will address this issue.

In prior litigation before this Board, current counsel for Hamilton has raised similar challenges to those now asserted. Here and in Al Hamilton *supra.*, ("Hamilton"), DER sought admission of its samples under the business record exception to the hearsay rule. There, after extensive analysis, the Board agreed they could be so admitted. In an unpublished opinion sustaining that 1993 decision by this Board, the Commonwealth Court agreed. (Al Hamilton Contracting Company v. Department of Environmental Resources, No. 3053 C.D. 1993, Opinion issued January 6, 1995). Over fifteen pages of our Adjudication in Hamilton (see pages 1686-1702) is focused upon admission of DER water sample analysis results as an exception to the hearsay rule under the Uniform Business Records as Evidence Act, 42 Pa.C.S. §6108. We will not repeat here all that was said there,

but affirm that absent a specific argument or a problem with a specific sample, these results are admissible under this statute.

Hamilton's attacks on sample collection are: (1) on the use of a standard sampling protocol by the inspector where none of them knew of a written document reflecting it; (2) a different technique used by one inspector to acidify his samples; (3) a lack of sufficient knowledge in the inspectors as to how the samples get to the analyzing lab; (4) a failure by DER to establish Fetterman's sample collection pursuant to a regular inspection; and (5) failure by DER to show Jones' sample was not collected solely for litigation.

As to Jones' sample, we make no findings of fact with regard to its quality, so there is no harm to Hamilton thereby.

The evidence does show that samples are to be acidified with fifteen drops of nitric acid to "fix" the metals in suspension until analysis, and that Loomis acidified his sample with twenty drops of nitric acid. Loomis did not use good judgment in deviating from apparent normal procedure on the amount of nitric acid to use. However, the Chief of the analytical unit in the DER laboratory (Harvey) indicated on cross-examination that the amount of Loomis' overuse of nitric acid here (5 drops) would not adversely impact the analysis' reliability, and this testimony is not rebutted. Moreover, if more acid is used than needed, Harvey says it dilutes the sample, and such dilution would work in Hamilton's favor rather than that of DER.

As to the inspectors' failure to be aware of the written DER manual on how to sample, we again do not condone this lack of knowledge if it exists. However, inspector Robb said he was trained to do the sampling and could not recollect whether there was a written document or procedure or not. Loomis, who again was trained in sampling techniques, never answered any questions as to such a written

sample procedure or sampling manual because of objections. Only Fetterman indicated he was unaware of whether there is a manual, but his sampling technique matched that of both Robb and Loomis, not to mention that laid out in Hamilton. Moreover, Fetterman made it clear that his sampling procedure was the same as that he had been trained in both a DER and an Office of Surface Mining course. Hamilton's objection, therefore, not only misconstrues the record in this regard but fails to offer more than "carping". The objection lacks merit as to the sampling procedure's validity without more.[14]

Hamilton's objection as to the inspectors' knowledge of sample transportation procedures (how they get to the lab) is similarly meritless. Robb's testimony was that he brings his samples to DER's offices, where they are left in an iced cooler, in a locked area, for pickup by the courier service, for delivery to DER's lab. He was not sure what happened after the sample was picked up at the end of the business day by the courier, but noted that the empty cooler is returned the next day. Loomis testified similarly, as did Fetterman, who had a record of the time his bottles were picked up, but who did not know what occurred in the event the courier damaged the samples in transit (but he was also unaware of any such incidents occurring). The questions asked on Hamilton's behalf did not probe their knowledge beyond this point; but questions of Harvey revealed the lab's procedures for receipt of samples, their analysis and details about how the analysis results for samples are returned in printed form to the inspectors. In his testimony, Harvey even covered the issue of damaged samples received by the lab and how they are not analyzed if damaged. Moreover, Hamilton

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[14]In saying this, we do not disagree with Hamilton's underlying impression that a better job could have been done by DER in presenting its sampler/inspector evidence. A reading of the transcripts in this appeal and the opinion in Hamilton make that clear but we have the job of judging the validity of the evidence and its trustworthiness only.

never offered evidence to show any reason to be concerned about sample viability from this perspective, but offered a concern about the inspectors' lack of knowledge about matters they do not participate in, without evidence to support a reason for concern in either their lack of knowledge or problems in transmittal of samples to the lab for analysis. As we quoted approvingly in Hamilton:

> There is no requirement that the Commonwealth establish the sanctity of its exhibits beyond a moral certainty. Every hypothetical possibility of tampering need not be eliminated; it is sufficient that the evidence, direct or circumstantial, establishes a reasonable inference that the identity and condition of the exhibit remained unimpaired until it was surrendered to the trial court. Commonwealth v. Hudson, 489 Pa. 620, ___, 414 A.2d 1381, 1387 (1980)("Hudson").

1993 EHB at 1692.

The last of Hamilton's serial, one-sentence attacks on the sampling process concerns the alleged DER failure to establish that Fetterman's sample was collected in a regular inspection. Hamilton does not offer any clue as to what it means here, or evidence to suggest the sample was not collected in this fashion. Moreover, Fetterman testified he conducts monthly partial inspections of the site, and quarterly, he inspects the entire site. We also know from Hamilton:

> Under the Federal Surface Mining Control and Reclamation Act, the Act of August 3, 1977, P.L. 95-87, 30 U.S.C. §1201 *et seq.* (Federal SMCRA), the Department was required to conduct quarterly inspections of the mine site. See, 30 U.S.C. §1267(c); 30 CFR §840.11(b). These quarterly inspections had to include water sampling to ensure Hamilton's compliance with the effluent limits in its permit and 25 Pa. Code §87.102. See, 30 CFR §840.11(b). Furthermore, while Hamilton was actively engaged in mining or reclamation, the Department was required to conduct at least 12 partial inspections of the mine site each year and could conduct more as necessary to ensure effective enforcement of its regulations. See, 30 CFR §840.11(a). A partial inspection could include water quality sampling to

determine whether Hamilton was complying with applicable effluent limitations.

1993 EHB at 1700.

Further, we also know from Exhibit C-11's compilation of samples of SGS-11 that three samples were collected in March of 1993 (one each on March 3, 4, and 5). These sample results all show that SGS-11 is contaminated by AMD, so any one of them is adequate as the regular monthly partial inspection's sample to sustain DER's order even if we were to disregard the remaining pair.

Hamilton also attacks the laboratory and analysis testimony by Harvey on DER's behalf. Hamilton challenges it on the basis of not meeting the requirements of Frye v. US, 293 F. 1013 (D.C. Cir. 1923) ("Frye") and Hamilton. However, this is just not correct! On pages 285 to 287 of the hearing's transcript, the following exchanges took place (with objections and rulings by the Board omitted) between Hamilton's counsel and DER's Harvey.

Q. Is your laboratory certified?
A. It is.
Q. By whom?
A. By EPA.
Q. Is it current?
A. Yes.
Q. Well, are you familiar with Standard Methods for the examination of waste and wastewater?
A. Yes.
Q. By the American Public Health Association, American Water Works Association, Water Environment Federation?
A. Yes.
Q. That is more or less a source document for standard methods and practices?
The Witness: I don't recall from Standard Methods how they're doing their metals. I believe that the other analyses are the same as the methods in Standard Methods.
Q. That your laboratory is employing?
A. That we do, yes. I'm not sure if they inductively coupled plasma for the metals or not.
Q. What would you not be doing that following the Standard Methods?
The Witness: Right now the procedures that we're using

> for the mine drainage, to the best of my knowledge, do meet either the EPA requirements or are the same as or similar to the methods in Standard Methods.

We are satisfied, in light of Attorney Kirk's quoted admission to the effect that this is the source document for standard methods and Harvey's testimony, that we have no Frye problem here, but wonder why Hamilton would raise such an argument after this exchange.

Next, Hamilton raises concerns over possible analysis error which might go unreported. However, the evidence does not support that concern. Harvey testified the lab's analytical machines are calibrated daily. Hamilton says a chemist could err in machine calibration, and records of error notations are not kept. As a result, Hamilton asserts analysis technicians need to be trusted not to somehow miss analyzing all samples. Of course, we have no offer of evidence of the untrustworthiness of DER's staff or even a calibration error by DER from Hamilton. Moreover, we have Harvey's testimony that the sample analysis results are verified, and, where a result looks wrong, the sample is reanalyzed (just as reanalysis occurs if a problem is encountered during analysis). Moreover, as Harvey told us, DER's analytical process uses analysis of a "standard samples" to be sure readings are accurate. Thus, if a machine is producing incorrect readings, the result of the standard sample's analysis would be incorrect as well, and DER records and maintains records of the analysis results for its standard samples for at least three years.[15] Moreover, Harvey explained that where a standard sample's analysis does not produce the predicted result, the machine is recalibrated, and all samples, back to where the last standard

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[15]This is also in addition to the cross-checking of sample analysis procedures constantly carried on between DER's lab and the labs of EPA and the United States Geological Survey, through the exchange of samples which each analyzes.

sample's analysis produced the proper result, are reanalyzed. Finally, Harvey testified that notations of such situations are supposed to be logged by lab staff, although he could not swear it was always done. Under these circumstances, we find no reason to question these sample results. Although we agree that Hamilton is correct that there is always a potential for something to go wrong, unlike Hamilton, we find the evidence in this appeal shows that possibility is too remote to provide a basis for a challenge to DER's action here based on analytical methodologies.

Hamilton's next argument goes to the written sample analysis reports themselves and where DER keeps them. According to Harvey, after DER's lab analyzes a sample and the analysis result is verified, that result is entered into the laboratory's computer. Then, when each separate analysis for a particular sample is completed, the computer generates a printed report on the printer in the DER office to which the sampling inspector is assigned and separate written report is not also mailed to that office from the lab. Hamilton asserts this fails to show where the sample reports are kept when returned to DER (apparently from the lab so the lab's record keeping process and its regularity are not involved in this challenge.) Hamilton is correct that the record does not state that these reports then reside in a specific file cabinet at X location, but, under Hudson and Hamilton, we are satisfied that this is not a ground to reject these analyses results. Obviously, inspectors need their sample analysis results to be able to perform their jobs as to AMD issues. The reports are sent to them from Harvey's lab. We believe this evidence is adequate to make these results trustworthy, even if it is not within "a moral certainty", and the DER file drawer where DER's individual file for a specific mine site, is kept, remains unidentified.

Next, Hamilton says DER's failure to prove its lab records are made in the regular course of business, rather than for litigation, makes them inadmissible. Obviously DER's lab has only one business, and that is the analysis of samples and the reporting of the analysis results to the sample collector. As Harvey stated, the analysts do not even know if a sample is headed to litigation or not or which miner's water is being analyzed. Thus, the reports cannot be prepared for litigation versus preparation not for litigation, i.e., in the normal course of some other business of DER. Sample analyses reports by DER's lab can only be prepared as reports. Further, as stated in Hamilton, the mere fact a sample proves a violation of standards for water discharged from the mine does not mean that it was collected and analyzed in anticipation of litigation, when DER's duties under the statutes regulating mining are considered. Finally, in finding Neuman v. Pittsburgh Railways Company, 392 Pa. 640, 141 A.2d 581 (1958), as cited by Hamilton, to be inapplicable, we note that in mining regulation (which is DER's "business" as pertains to mining) some regulated mines are going to violate this statute and regulations, and some of those violators are going to end up before us or a court, so sample analyses by DER's lab has within its function a component of analyses for compliance which may occur through litigation. As a result, lab report preparation routinely includes the possibility that a sample may "end up in court".

Hamilton's next one-sentence objection to this data is that DER failed to prove Fetterman's and Jones' samples were not collected in anticipation of litigation. We have not made findings based on analysis of Jones' sample, so this argument is meritless on it. There is no evidence on Fetterman's sample to show the purpose of its collection, but the compilation of SGS-11 samples (Exhibit C-11), to which there were not such objections by Hamilton, shows

twenty-one samples in the period from 1990 to 1993. In these samples, their pH is never better than 4.54, acidity always is exceeding alkalinity, manganese is never lower than 1,720 ug/l and sulfates are never lower than 1,046 mg/l. Comparing these samples results, it is clear that this is AMD. Moreover, there is no suggestion, as a result, that if we ignore any one Fetterman sample our conclusion could be any different, or evidence that these samples were not collected as part of the normal inspection work of DER.

Finally, as to Exhibits 30 and 32, Hamilton asserts:

> [T]he Commonwealth's Exhibits 30 and 32 are inadmissible since they contain other sampling evidence which was not submitted as evidence and as such are incomplete and are also inadmissible for that reason.

This objection is incomprehensible, and we refuse to hazard guess as to what is meant here, since such guesses always contain the possibility that we would guess incorrectly, and it is Hamilton which has the burden of stating its arguments coherently. We do observe, however, that when Exhibits C-30 and C-32 were offered into the record, Hamilton did not raise any objection that "they contain other sampling evidence which was not submitted as evidence and as such are incomplete." The only objection as to these documents, at that time, are those addressed above as to admission of DER sampling data as a business record exception to the hearsay rule. Hamilton's Post-Hearing Brief is not the stage of the proceedings, the time and place, to raise these new objections. It is too late. Lastly, as to Exhibits C-30 and C-32, we reject this objection to the extent it argues that they are incomplete. C-30 is a two page document. Its first page is Loomis' sample analysis report showing his collection of two samples on May 22, 1990. It describes where they were collected. Sample 4456221 is the spring "directly upslope from Sedimentation Pond E-3 in the Northeast corner of site". It shows a flow estimate of less than one gallon per minute.

Attached to the first page is the analysis of this sample. No sample analysis is attached for the other sample collected. However, this is not surprising because DER did not offer testimony or documentary evidence as to that other sample, and we interpret DER's offer of Exhibit C-30 and this document's admission as covering it only as it pertains to the sample of the spring. Exhibit C-32 is the same type of document pertaining to Fetterman's sample collected on April 5, 1993 which bears number 4454496. Its analyses results page is also the second of two pages. Fetterman's other three samples collected that day are noted as to location, but not their analysis results, and those results are also not attached. So, we again interpret the offer and its admission, after review of the record, as seeking Exhibit C-32's admission only as to this one sample's collection and analysis.

Finally, we turn to the testimony of Thomas W. Kulakowski, and Kenneth Maney on Hamilton's behalf. This testimony was supposed to be limited to fact testimony because of the presiding Board Member's ruling on expert testimony, which we have affirmed above. Despite that ruling, counsel for Hamilton attempted to offer substantial testimony through its witnesses which was not observable fact, but required expert knowledge and training clearly beyond that of the fact-observing layman. Kenneth Maney was allowed to testify at length as to his interpretation of aerial photographs taken on Hamilton's behalf of Sandturn (and, therefore, also of Fahr because of its proximity to Sandturn). Where his interpretation of what is shown in these photographs is given, for example, we have considered it, but we assigned it less weight in writing this opinion than that from DER's witnesses because of the ruling barring expert testimony on Hamilton's behalf.

Similarly, when Kulakowski testified concerning his plot of the elevations of the coal on Sandturn and Fahr and groundwater patterns as shown on A-48, and drew the cross sections of A-A^1 and B-B^1 on Exhibit A-46, his plot of the groundwater flow information and the relative altitudes of various seams and surface slopes again strayed beyond the realm of pure fact testimony into expert opinion testimony. The same is true as to his opinion as to which seams Fahr mined. Where this has occurred, we again considered it but we assigned it less weight. Of course, we also assigned this specific testimony less weight because, as pointed out on cross-examination, Exhibit A-48 shows the height of point B of the B-B^1 on the surface to be at 1,940, while the topographic portions of Hamilton's own site maps including Exhibit A-46, all show the elevation of this point is between 1,860 and 1,870 feet, thus bringing all of this testimony into question.

We also found unexplained inconsistencies in this Hamilton evidence. For example, Kulakowski's A-A^1 line plotted on Exhibit A-46 and A-48 is inexplicably south of and outside the restricted area in the northeastern corner of Sandturn, as shown on Exhibit C-2. If it is plotted accurately as to location, it fails to show the conditions in that crucial area. If it is inaccurately located, then it throws Hamilton's evidence on this issue into further question. As another example, Kulakowski testified that very little Fahr surface drainage from Fahr flowed to the Morgan Run watershed, yet a review of Hamilton's own Exhibit A-46 map shows much of the southwestern portion of Fahr drains in exactly that direction.

Our review of the extensive record in this appeal leads to the final conclusion that the source of the contaminated groundwater in the spring at monitoring point SGS-11 is Hamilton's Sandturn site. As such, it follows we must

sustain DER's issuance of its order to Hamilton in regard thereto. To the extent Hamilton's evidence has attempted to suggest Fahr is the source of this acid mine drainage, we remain unconvinced that this is so. However, even if Fahr could be a source for some small portion thereof, that does not change the conclusion that Hamilton is also a source of this water and, thus, that DER's order must be sustained. Hawk Contracting, Inc., et al. v. DER, 1981 EHB 150; Thompson and Phillips Clay Co. v. Department of Environmental Resources, 136 Pa. Cmwlth. 300, 582 A.2d 1162 (1990); Commonwealth v. Barnes and Tucker Co., 472 Pa. 115, 371 A.2d 461 (1977).

Based on this discussion, we make the following Conclusions of Law and enter the appropriate order.

Conclusions Of Law

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

2. Because this appeal arises from an order issued by DER, it is DER which bears the burden of proof in this appeal under 25 Pa. Code §21.101(b)(3).

3. Because the issue before this Board is Hamilton's liability for contamination of an off-site spring, in order for DER to prevail, it must prove both the spring's contamination and the hydrogeologic link between the spring and the mine site.

4. The presiding Board Member's order of January 11, 1994, denying Hamilton the right to present testimony of expert witnesses on its behalf, was properly entered, where Hamilton had previously advised this Board and DER that it intended to offer no expert evidence on its behalf and did not file this motion until after conclusion of the presentation of the direct testimony of DER's final witness in its case-in-chief.

5. The presiding Board Member could properly reject evidence from a drilling program by Hamilton, which evidence was not disclosed to this Board or DER until the seventh and final day of the hearings through Hamilton's final witness, especially since Hamilton represented that this evidence was a summary of evidence already of record in the proceeding.

6. Based on Hamilton and the record made on the collection and analysis of sample by DER's staff, DER's sample and analysis results are admissible in this proceeding under the Uniform Business Records As Evidence Act, 42 Pa.C.S. §6108.

7. Where DER's laboratory follows analysis methodologies for AMD samples set forth either in EPA requirements or similar to Standard Methods For The Examination Of Waste and Wastewater and is EPA certified, based upon the evidence before us, its analysis methodologies conform to the requirements of Frye.

8. Where the evidence shows that the Sandturn mine is the source of the acid mine drainage now found at SGS-11, DER is justified in ordering the miner to treat this off-site discharge.

ORDER

AND NOW, this 29th day of November 1995, it is ordered that the appeal of Hamilton is dismissed.

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: November 29, 1995

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DENZIL BAILEY :
:
v. : EHB Docket No. 94-327-R
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL PROTECTION : Issued: December 1, 1995

OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT

By: Thomas W. Renwand, Member

Synopsis

The Environmental Hearing Board grants the Department of Environmental Protection's ("Department") Motion for Summary Judgment. After receiving permission from the Department to bring a small number of tires onto his property to construct a border for a go-cart track, appellant brought several thousand tires onto the property and never constructed a border for the go-cart track. Such used tires constitute solid waste under the Solid Waste Management Act. Moreover, since the tires were not used in accordance with the Department's instructions, appellant is operating a solid waste disposal site in violation of the provisions of the Solid Waste Management Act and regulations of the Department of Environmental Protection.

OPINION

This action stems from Denzil Bailey's ("Bailey") appeal from an order of the Department. Presently before the Environmental Hearing Board ("Board") is the Department's Motion for Summary Judgment.

Background

In June of 1992, Bailey contacted the Department advising it that he was going to construct a go-cart track on 94 acres of property owned by his mother in Carmichaels, Greene County, Pennsylvania. He inquired about obtaining a permit so he could employ used tires as a border or wall for the track. The Department responded to Bailey's request by letter dated June 10, 1992. (Bailey Deposition Exhibit 3). The Department indicated to Bailey that the "limited use of a small number of tires as a border for a cart track would be acceptable" (emphasis in original). The Department further advised Bailey not to accumulate large numbers of tires on the property in anticipation of using them for the go-cart track.

Despite this instruction, Bailey, by his own estimate, accumulated approximately 5,200 tires on the property but never constructed the go-cart track. Bailey also failed to follow the Department's regulations regarding the disposal of tires. Section 501 of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* ("Solid Waste Management Act"), provides that it is unlawful for any person to use his or her land as a solid waste processing, storage, treatment, or disposal area without first obtaining a permit as required under the provisions of the Act. Section 271.101 of the regulations, 25 Pa. Code §271.101, prohibits the ownership or operation of a municipal waste or solid waste disposal facility without a permit. A permit is not required for the beneficial use of municipal waste where the person has requested and received prior written approval from the Department. 25 Pa. Code §271.101(b)(2); §271.232(b).

On November 17, 1993, the Department issued a Notice of Violation to Bailey for the unpermitted disposal of solid waste, in the form of waste

tires, on the property of his mother, Ruth Minerd ("Minerd"). The Notice of Violation advised Bailey to immediately cease all disposal activities, remove all waste tires from the property, dispose of the tires in an approved disposal facility, and provide the Department with receipts showing proper disposal. When this was not done, the Department, on October 18, 1994, issued a Compliance Order directed to both Bailey and his mother ordering them to remove and properly dispose of the waste tires and to submit receipts to the Department showing proper removal.

Bailey appealed the October 18, 1994 Compliance Order, which appeal is the subject of this opinion. Minerd did not appeal this Order.

In his appeal, Bailey, who appears *pro se*, contends that the placement of the tires on the property does not constitute solid waste disposal. He states that he intends to build a border and a private road base and, therefore, this plan is a beneficial reuse of used tires. He claims he is treating the tires to remove the potential for insects breeding in water pools in the tires.

Following a period of discovery, the Department filed a Motion for Summary Judgment. The Department alleges it is entitled to judgment as a matter of law because the tires on the Minerd property are solid waste and Bailey has violated the Solid Waste Management Act by not using the waste tires in accordance with the terms and conditions set forth in the June 10, 1992 letter. The Department sets forth in its Motion numerous alleged violations of the Act and its regulations. Attached to the Department's Motion is the deposition transcript of Bailey, and other exhibits, including the affidavit of Glen Campbell, the Department's Bureau of Waste Management Chief of Operations assigned to the Pittsburgh regional office.

Bailey filed no affidavits or memorandum of law in opposition to the Motion. He filed an "Objection to Motion for Summary Judgment" in which he sets forth the following:

> 1) Mr. Campbell allegedly told Bailey in February 1994 that he did not need a permit.
>
> 2) Tires are not being disposed of but are being beneficially used.
>
> 3) The tires on the Minerd property are not solid waste as set forth in the Department's letter of June 10, 1992 if used as a border for a go-cart track.
>
> 4) There are several genuine issues concerning material facts and the undisputed facts are much fewer than those listed in the motion.
>
> 5) The fact that tires have remained on the property for over one year stems from his difficulty in following the Department's directions despite his best efforts.

Issues

Bailey fails to specifically identify any genuine issues of material fact. The issues, therefore, are whether the 5,200 tires brought onto the property and remaining for more than a year constitute a solid waste, whether they are being beneficially used, and whether the Department was justified in ordering Bailey to properly remove and dispose of the tires. We resolve all three issues in favor of the Department.

Discussion

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions, together with any affidavits show there is no genuine issue as to any material facts so as to entitle the moving party to judgment as a matter of law. Envyrobale v. DER, 1994 EHB 1714, 1715; Pa. R.C.P. 1035(b). Summary judgment may be entered only in cases "where the right is clear and free from doubt." Hayward v. Medical

Center of Beaver County, 530 Pa. 320, 608 A.2d 1040, at 1042 (1992). Moreover, the Board must view the record in the light most favorable to the nonmoving party. Marks v. Tasman, 527 Pa. 132, 589 A.2d 205 (1991); New Castle Township Board of Supervisors v. DER and Reading Anthracite Company, 1993 EHB 1541. "A fact is material if it directly affects the disposition of a case." Fulmer v. White Oak Borough, 146 Pa. Cmwlth. 473, 606 A.2d 589, 590 (1992).

The General Assembly has established a comprehensive framework for the regulation of solid waste. *See* Solid Waste Management Act, *supra*. A long line of Board decisions have held that discarded tires constitute "waste" within the meaning of the Solid Waste Management Act. *See* Max L. Starr v. DER, 1991 EHB 494, *aff'd*. 147 Pa. Cmwlth. 196, 607 A.2d 321 (1992); Gerald E. Booher v. DER, 1991 EHB 987, *aff'd*. 149 Pa. Cmwlth. 48, 612 A.2d 1098 (1992); Envyrobale Corporation v. DER, *supra*. Thus, it is uncontroverted that the tires on the Minerd property constitute "waste" within the meaning of the Solid Waste Management Act. The important question then becomes whether there is a material issue of fact as to whether the tires are being beneficially used or whether they are disposed. "Beneficial use" is defined under the Solid Waste Management Act as:

> [the] use or reuse of residual waste or residual material derived from residual waste for commercial, industrial or governmental purposes, where the use does not harm or threaten public health, safety, welfare or the environment, or the use or reuse of processed municipal waste for any purpose, where the use does not harm or threaten public health, safety, welfare or the environment.

35 P.S. §6018.103.

"Disposal" is defined as:

> The incineration, deposition, injection, dumping, spilling, leaking, or placing of solid waste into or on the land or

> water in a manner that the solid waste or a constituent of the solid waste enters the environment, is emitted into the air or is discharged to the waters of the Commonwealth.

Id.

Moreover, the Solid Waste Management Act presumes that the waste is disposed if it is stored on the property for more than one year. *Id.*

It is undisputed that Bailey brought approximately 5,200 tires onto the Minerd property. (Bailey Deposition at p. 24 and Campbell Affidavit). He first brought tires onto the property in 1992. (Bailey Deposition at p. 19). Bailey received, at a minimum, between $.25 and $.75 per used passenger car tire and more money for used heavy equipment tires. (Bailey Deposition at pp. 77-78). The majority of the used tires were received from commercial tire dealers. (Bailey Deposition at p. 155). Bailey has not received a permit to operate a solid waste disposal facility. (Campbell Affidavit) Nor has he maintained records as required under the Department's regulations for beneficial use which would show basic information including the number of tires on the property and their uses. (Bailey Deposition at pp. 87-88 and Campbell Affidavit).

Bailey never constructed the go-cart track and border which "is in a holding process at this point." (Bailey Deposition at p. 28). Nevertheless, and despite the clear instruction contained in the Department's letter of June 10, 1992, Bailey brought thousands of used tires onto the Minerd property. Since 1993, Bailey purportedly has been studying and experimenting with using the tires to construct a road base matrix. (Bailey Deposition at pp. 135-138). However, he has submitted no engineering materials, affidavits, or documentation of any kind, which would provide this Board with even a scintilla of evidence to raise a genuine question of material fact that this

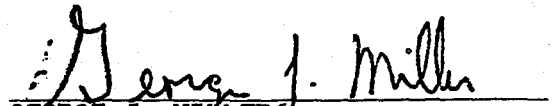
was a viable beneficial use for the tires. Instead, he attempts to blame the Department for his predicament by arguing that because the Department has prohibited him from bringing more tires onto the Minerd property it has prevented him from obtaining the necessary funds to develop the technology to feasibly use the tires in a road base. To state the argument is to expose the faulty reasoning supporting it. As such, the argument collapses under its own weight. Since Bailey's storage of the tires amounts to disposal the Department's order is justified.

Bailey admits that the storage of tires is an "ugly problem." (Bailey Deposition at p.19). However, Bailey advances nothing but bald assertions that he is beneficially using the tires (or rather hopes to beneficially use them in the future). In doing so, he does not raise any material questions of fact by which to defeat the Department's motion. The record shows that the Department provided him with ample opportunity to beneficially use the tires but Bailey chose to ignore the Department's instructions. In conclusion, we find that there are no material facts in dispute and that the Department's Compliance Order of October 18, 1994 was a reasonable and proper exercise of its authority and discretion. Consequently, we enter the following order dismissing the appeal.

ORDER

AND NOW, this 1st day of December, 1995, it is ordered that the Department's motion for summary judgment is granted, and Bailey's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



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Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
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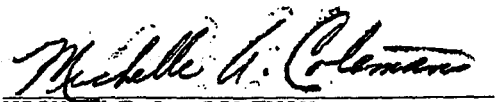
THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: December 1, 1995

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

PICKELNER FUEL OIL, INC.	:	
	:	
v.	:	**EHB Docket No. 94-238-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 5, 1995**

OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

By: George J. Miller, Chairman

Synopsis

A Partial Summary Judgment is granted against appellant for failure to file a timely site assessment report sufficient to determine the vertical and horizontal extent of soil and water contamination at appellant's facility.

OPINION

This appeal arises from a civil penalty assessment issued on August 5, 1994 by the Department of Environmental Resources, now the Department of Environmental Protection (referred to herein as the "DEP"), to appellant for failure to comply with a DEP compliance order dated November 10, 1993 (the "Order"). The order charged

Appellant, Pickelner Fuel Oil, Inc. ("Pickelner") with cleanup responsibility for a release of gasoline from underground storage tanks on a property owned and operated by Pickelner at the corner of Walnut and High Streets in the City of Williamsport, Lycoming County. In an appeal from that Order, the Board granted the DEP's motion for summary judgment against Pickelner as to the validity of the Order and dismissed the appeal. *William Pickelner v. DER*, EHB Docket No. 93-363-MR, issued March 21, 1995. No appeal was taken from the Board's opinion and order.

This appeal is from the August 5, 1994 issuance by the DEP of an Assessment of Civil Penalty in the amount of $33,800 against Pickelner for failure to comply with that part of the DEP Order that required Pickelner to submit an acceptable site characterization report within sixty days as required by paragraphs one through three of the November 10, 1993 Order. The penalty assessment was made under the authority of section 1307 of the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P. L. 169, No. 32, as amended, 35 P.S. Sec. 6021.1307(a). DEP is authorized under that Act to assess a penalty for a violation of its Order in an amount not to exceed $10,000 per day for each violation.

The DEP filed a motion for partial summary judgment which states, among other things, that Pickelner filed no site characterization report responsive to the Order until 110 days after the deadline for the site characterization report set in the Order. In addition, the motion states that this May 3, 1994 report, prepared by Storb

Environmental, Inc., and filed on May 9, 1994, does not meet the requirements of the Order because it does not (l) address in any manner the vertical and horizontal extent of soil and groundwater contamination, and (2) does not present any information on which a determination of the soil, geologic, hydrogeologic and aquifer characteristics might be based. The motion is supported by the affidavit of Curt White, a DEP employee having personal knowledge of the facts set forth in the DEP's motion for summary judgment. This affidavit attaches the May 3, 1994 report as well as a notice of violation issued by the DEP on June 21, 1994, which states in detail why DEP believes that the report does not satisfy the requirements of the Order.

Pickelner's "Objections" to the motion acknowledges that the May 3, 1994 report was not submitted to the DEP until May 9, 1994, but claims on the basis of an answer to the motion that all of the documents submitted by Pickelner to the DEP were "submitted to the Department in an attempt to comply with the Department's request for a property (sic.) site-characterization" and that its reports "in toto, previously presented to the Department, satisfied the mandates of law." These objections are supported only by a verification of Pickelner's counsel "to the best of my knowledge, information and belief." These objections fail to present any document on which the Board might determine whether the requirements of the Order were met other than the May 3, 1994 report.[1]

We can grant summary judgment if the pleadings, depositions, answers to

---

[1]On July 18, 1995, DEP also filed a reply to Pickelner's Objections.

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law: Pa. R.C.P. 1035(b). We must view the motion in the light most favorable to the non-moving party, the appellant in this case. *Robert C. Pennoyer v. DER*, 1987 EHB 131. Where the motion is made on the basis of affidavits based on personal knowledge, the adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits based on personal knowledge, or as otherwise provided in Rule 1035 of the Pennsylvania Rules of Civil Procedure, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. Pa. R.C.P. 1035 (d); *William Pickelner v. DER*, EHB Docket No. 93-363-MR, issued March 21, 1995.

Because appellant's response to the motion is not sufficient to raise an issue of material fact, the motion must be granted if it appears from the DEP's motion and supporting materials that summary judgment is appropriate. A partial summary judgment is clearly appropriate at this point of the proceedings. We previously have upheld the validity of the DEP Order requiring the filing of a site characterization report within 60 days. The motion and supporting affidavits are sufficient to establish that Pickelner failed to file the required report within the time required by the Order. Further, the Board's examination of the May 3, 1994 report leads it to find that the report is insufficient to

meet the requirement of the Order that appellant define the vertical and horizontal extent of soil contamination as required by paragraph 1 of the Order . The report contains no information as to the extent of soil contamination.

While the report contains significant information as to groundwater at the site, it fails to define the vertical and horizontal extent of groundwater contamination as the Order requires. The DEP notice of violation attached to the motion for summary judgment details why the report is deficient in this respect and the affidavit of Curt White, filed in support of the motion, supports the conclusion that the report was not sufficient to meet the requirements of the Order.

ORDER

AND NOW, this 5th day of 0 December, 1995, it is hereby ordered that summary judgment as to liability is entered in favor of DEP and against appellant for:

1. Appellant's failure to file the site characterization report required by the Order within the required sixty days, and
2. Appellant's failure to file the site characterization report required by the Order assessing the vertical and horizontal extent of soil and water contamination at, and emanating from, the site.

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Member

Thomas W. Renwand
Administrative Law Judge
Member

DATED: December 5, 1995

c: **DEP, Bureau of Litigation Library**
Attn: Brenda Houck
For the Commonwealth, DEP:
Geoffrey J. Ayers, Esq.
North Central Region
For the Appellant:
Gregory Barton Abeln, Esq.
Carlisle, PA

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UNITED REFINING COMPANY	:	
	:	
v.	:	EHB Docket No. 95-153-E
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	Issued December 5, 1995

OPINION AND ORDER SUR REQUEST FOR A DETERMINATION WITH REGARD TO BURDEN OF PROOF AND MOTION FOR REVISION OF PRE-HEARING ORDER NO. 1

By: Richard S. Ehmann, Member

Synopsis

As the parties agree that each of them bears the burden of proof as to the issues on which it asserts the affirmative, it follows that where the Department of Environmental Protection ("DEP") places a party in its Compliance Docket for alleged Air Pollution Control Act violations, the burden of proof is on DEP in regard thereto just as United Refining Company ("United") bears the burden of proof as to its affirmative defenses thereto. Since one cannot offer defenses to violations until they are shown to exist, it follows that DEP must prove the violations exist before affirmative defense evidence comes in.

United's Motion For Revision of Pre-Hearing Order No. 1, seeking to have DEP file its Pre-Hearing Memorandum first, is denied. This appeal is most akin to the circumstance where DEP issues an order to a party to take specific actions and in such cases, the Board routinely requires that the Appellant files its Pre-Hearing Memorandum first. DEP's letter to United, notifying it that DEP is placing two violations by United in the DEP's Compliance Docket, adequately sets

forth the basis for its actions for purposes of "notice" to United of DEP's position. As a result United is not prejudiced by filing the first Pre-Hearing Memorandum.

OPINION

United filed this appeal with this Board on July 20, 1995. In it, United is challenging DEP's letter of June 19, 1995, in which DEP advised United that pursuant to Section 7.1(a) of the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §4007.1 ("Air Act"), DEP is placing two violations by United in DEP's Compliance Docket. The DEP letter also explains that the impact of this DEP action will be a permit bar.

In response to this appeal the Board issued its standard Pre-Hearing Order No. 1, which mandated that United filed its Pre-Hearing Memorandum by October 11, 1995 (since postponed at the parties' request to December 13, 1995).

Presently before this Board is United's Request For A Determination With Regard To Burden Of Proof and its Motion For Revision Of Pre-Hearing Order No. 1. In this filing, United seeks a ruling that DEP has the burden of proof and also an Order modifying Pre-Hearing Order No. 1 so that DEP files the first Pre-Hearing Memorandum. DEP has responded in opposition thereto.

After a telephonic conference with counsel on November 28, 1995, it is obvious that only a portion of this pre-hearing dispute is still before us. The parties agree that DEP is asserting the affirmative as to the violations' existence and that it bears the burden of proof with regard thereto. They also agree that United bears the burden of proof as to its affirmative defenses to DEP's actions.

The Board is always happy to see counsel resolve disputes between the parties before the Board can render its decision and here this resolution

comports with the Board's interpretation of 25 Pa. Code §1021.101. While a DEP Notice of Violation is generally not considered an appealable action, the legislature has decreed in Section 7.1 of the Air Act that this type of Notice, that violations are being placed in DEP's Compliance Docket, is appealable. Such legislation ends any question on this issue but, since this type of issue is not explicitly covered in Section 1021.101, leaves open who has what burden. That question is answered correctly here by the parties' agreement on that issue. As to the question of who must go first, it is clear affirmative defenses to violations need not be proven by the defending party until the violations themselves are established. Accordingly, at any merits hearing DEP has the burden of going forward with its evidence of violations at the hearing's commencement. It is followed by United's proof of no violation and any affirmative defense evidence United elects to offer. Finally, to the extent it is not already of record, DEP may then offer rebuttal evidence as these affirmative defenses.

As to United's Motion, United bears the burden of convincing us that its Motion has merit because it is the movant. It has not met this burden and so we deny this Motion. United's Motion is, in part, premised on the idea that, where DEP acts affirmatively, its actions are like filing a complaint so it is the moving party and therefore it should file the first Pre-hearing Memorandum.[1] While we require DEP to file the first Pre-Hearing Memorandum in the few Board

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[1]To the extent United's arguments are premised on the idea that DEP's actions are like filing a complaint and therefore the pleadings concept in the Pennsylvania Rules of Civil Procedure applies before us, United has misunderstood the rules governing appeals to this Board. The rules for appeals before this Board are found in 25 Pa. Code Chapter 1021 and 1 Pa. Code Chapter 31, *et seq.* We are not a Rules of Civil Procedure venue. For example, while pleadings may be liberally amended under the Rules of Civil Procedure, that is not the case as to Notices Of Appeal here. See Newtown Land, Ltd. v. Department of Environmental Resources, 660 A.2d 150 (Pa. Cmwlth. 1995).

proceedings when it files a Complaint before us, we do not require this in other situations where DEP acts affirmatively. This is because DEP acts affirmatively every time it issues an administrative order or unilaterally imposes obligations on another entity. (such as by adding unsolicited conditions to a permit as in Monessen, Inc. v. DER , 1990 EHB 554). In such appeals this Board's standard practice requires that the appellant file its Pre-Hearing Memorandum first regardless of how detailed DEP's order is (and our experience shows that the detail of DEP's Orders varies greatly). Thus, under the Board's procedures, the fact that DEP has the burden of proof and burden of proceeding does not mean DEP must file its Pre-hearing Memorandum first.

United's Motion is also faulty to the extent it is based on the concept that DEP must file first because United is entitled to "notice" of DEP's position and that United will not have "notice" unless DEP files first. United says its due process rights include such notice. DEP's letter, from which United is appealing, is not a single paragraph, single page document. The letter (attached to United's Notice of Appeal) is nearly three and a half pages in length and outlines a series of letters between the parties, Notices of Violation from DEP to United, and meetings occurring over a nearly one year period. It suggests to this Board that the issues in the violations have been discussed by the parties. In addition, United has now had over four months in which to conduct discovery as to DEP's actions leading up to this decision and the basis for this decision itself. Finally the Commonwealth Court has held that an appellant's due process rights (which rights include notice of DEP's actions) are adequately protected through appeals to this Board. Commonwealth of Pennsylvania v. Derry Township, 10 Pa. Cmwlth. 619, 314 A.2d 874 (1973). Accordingly, United has adequate notice on which to files its Pre-Hearing Memorandum.

Finally, United asserts it is at DEP's mercy because DEP can withdraw this notification or never be satisfied with United's proposals as to a permit application, so fairness requires DEP to file first. The Board disagrees. This appeal will test whether these alleged violations exist and on them DEP has the burden of proceeding and proof. If it fails to meet this burden United prevails and it is no longer at DEP's mercy. Moreover, it United believes its application for permit is complete (one alleged violation is an incomplete application for permit), United need not continue to submit further information to DEP and it can compel DEP to act on its permit application as it now exists via an action in mandamus. (Of course, in addition it can also appeal a DEP denial of that permit application to this Board). See Bethlehem Steel Corporation v. DER, 1994 EHB 1371. Thus, there is no fundamental fairness reason to grant United's motion either.

ORDER

AND NOW, this 5th day of December, 1995, it is ordered:

1. United's Motion For Revision Of Pre-Hearing Order No. 1 is denied.

2. DEP shall have the burden of proceeding and the burden of proof as to the existence of the alleged violations of the Air Act by United which are listed in DEP's Compliance Docket.

3. United shall have the burdens of proceeding and proof as to all affirmative defenses it offers as to DEP's action of listing these violations in its Compliance Docket; and

4. DEP shall present its case-in-chief on these violations before United offers its case on its affirmative defenses.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: December 5, 1995

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M. DIANE SMITH
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BETHENERGY MINES, INC.	:	
	:	
v.	:	**EHB Docket No. 90-050-MR**
	:	**(Consolidated Docket)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 7, 1995**

OPINION AND ORDER SUR MOTION TO DISMISS

By Robert D. Myers, Member

Synopsis:

The Board denies a Motion to Dismiss a Petition seeking an award of legal fees and costs pursuant to §4(b) of the Surface Mining Act (SMCRA) and §5(g) of the Bituminous Mine Subsidence Act (BMSLCA), ruling that Petitioner had not waived its right to seek such an award. The Petition could not be entertained under §4(b) of SMCRA because the underlying litigation did not involve SMCRA. The Petition could be entertained under §5(g) of BMSLCA because DEP relied on, and cited, §5(e) of BMSLCA in the Order involved in the underlying litigation. It was, therefore, a proceeding pursuant to §5 of BMSLCA although it was, by nature, an enforcement action under §9 of BMSLCA.

OPINION

Bethenergy Mines, Inc. (Petitioner) owns and operates an underground bituminous coal mine (Cambria Mine #33) under Coal Mining Activities Permit (CMAP) No. 11841301 issued by the Department of Environmental Resources, now known as the Department of Environmental Protection (DEP). On December 27, 1989, DEP issued an Order charging Petitioner with adversely affecting the Roaring Run watershed, the Howells Run watershed and the North Branch Little Conemaugh River watershed and directing Petitioner to take remedial action. Petitioner appealed this Order to this Board at Docket No. 90-050. Subsequent appeals from modifications to this Order were filed at Board Docket Nos. 90-058, 90-059, 90-114, 91-018, 91-150 and 91-426. The first three of these were consolidated at Docket No. 90-050 in March 1990. The last three were consolidated at Docket No. 91-018 and stayed pending disposition of the earlier appeals. On July 11, 1994, this Board (with one member dissenting) rendered an Adjudication (1994 EHB 925) sustaining the appeals consolidated at Docket No. 90-050.

On September 9, 1994, Petitioner filed a Petition for Payment of Costs and Attorney's Fees pursuant to §4(b) of the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4(b), and §5(g) of the Bituminous Mine Subsidence and Land Conservation Act (BMSLCA), Act of April 27, 1966, Sp. Sess., P.L. 31, as amended, 52 P.S. §1406.5(g). DEP filed a Response on October 13, 1994, parts of which this Board elected to treat as a motion. Subsequently, on November 17, 1994, DEP filed its Motion to Dismiss and supporting legal memorandum. Petitioner's Response to DEP's Motion, accompanied by exhibits, affidavits and a legal memorandum, was filed on

December 23, 1994. DEP filed a Reply on January 25, 1995 and Petitioner answered on February 3, 1995.[1]

DEP contends in its Motion to Dismiss that Petitioner is not entitled to pursue its claim for attorneys' fees and costs, because (1) it has waived its right to do so, and (2) neither SMCRA nor BMSLCA authorize awards in proceedings of this sort. The alleged waiver is based on paragraph 11 of a Consent Order and Adjudication (CO&A) approved by this Board on September 27, 1994 at Board Docket No. 94-067-E, wherein Petitioner agreed to bear its own attorneys fees, expenses and other costs incurred "in the prosecution or defense of this matter or any related matters, except [Petitioner's] pending fee petition at EHB Docket No. 87-300-MR, arising prior to execution of this [CO&A]." Resolving this issue requires consideration of the issues involved in prior litigation between Petitioner and DEP.

CMAP No. 11841301 was issued to Petitioner on June 26, 1987. Petitioner appealed this issuance at Board Docket No. 87-300 raising issues pertaining to so-called "standard conditions" and issues pertaining to discharge effluent limitations and bonding. Because of the "standard conditions," the appeal at Docket No. 87-300 was consolidated with a host of other appeals raising this issue at *Rushton Mining Company v. DER*, Board Docket No. 85-213. On January 22, 1990, this Board granted summary judgment to Petitioner and the other appellants at Docket No. 85-213 on the "standard conditions" issue, declaring them invalid (1990 EHB 50). This ruling was affirmed by Commonwealth Court (139 Pa. Cmwlth. 648, 591 A.2d 1168 (1991)) and DEP's

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[1]The appeals consolidated at Docket No. 91-018 were dismissed as moot early in 1995. Fee Petitions were also filed with respect to these appeals and were consolidated at Docket No. 90-050. DEP's Motion to Dismiss covers the Petitions at all seven docket numbers.

Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania.

On June 4, 1993, a number of the appeals consolidated at Board Docket No. 85-213 were unconsolidated and dismissed as moot. On July 6, 1993 a Petition for Payment of Fees and Costs incurred in the "standard conditions" litigation was filed in connection with the appeals dismissed as moot and ultimately consolidated at Board Docket No. 87-131. Petitioner's appeal at Docket No. 87-300 was not dismissed as moot until June 10, 1994 after DEP had issued a renewed CMAP No. 11841301 on March 1, 1994. Petitioner filed an appeal from this reissuance on March 28, 1994 at Board Docket No. 94-067. It also filed a Petition for Payment of Fees and Costs at Docket No. 87-300 on June 17, 1994, which was consolidated on July 14, 1994 with the other petitions pending at Docket No. 87-131.

In the appeal at Docket No. 94-067 from the reissued CMAP, Petitioner objected, *inter alia*, to discharge effluent limits, certain monitoring frequencies, and Condition E.6 (requiring Petitioner to continue monitoring surface and groundwater points approved in conjunction with DEP's December 27, 1989 Order and subsequent revisions.) The Notice of Appeal incorporated as objections to Condition E.6 the objections set forth in the appeals consolidated at Docket No. 90-050. The CO&A of September 27, 1994, which resolved the appeal at Docket No. 94-067 and ended that litigation, provided, *inter alia*, for DEP to issue a permit modification within thirty days deleting Condition E.6. That apparently happened.

Certainly, the issues at Docket No. 90-050 are related, at least in part, to the issues at Docket No. 94-067. On the surface then, it would appear that paragraph 11 of the CO&A deals with fees and costs incurred in Docket No. 90-050 (arising prior to September 27, 1994 and filed with the Board on September 9, 1994). The affidavits of Stanley R. Geary, Esquire, and

Jay L. Hasbrouck, Jr. dispute this, however, averring that the subject of attorneys fees and costs at Docket No. 90-050 was never discussed by the parties and was never intended to be covered by paragraph 11 of the CO&A at Docket No. 94-067. DEP does not counter these averments but, instead, relies on what it claims is the clear, unambiguous language of paragraph 11.

"Any related matters," in our judgment, is not a precise enough term to eliminate doubts about the intention of the parties. In *Brown v. City of Pittsburgh*, 409 PA. 357, 186 A.2d 399 (1962), our Supreme Court ruled as follows:

> A waiver in law is the act of *intentionally* relinquishing or abandoning some known right, claim or privilege....To constitute a waiver of legal right, there must be a clear, unequivocal and decisive act of the party with knowledge of such right and an evident purpose to surrender it....Waiver is essentially a matter of intention.
> (186 A.2d 399 at 401) (Emphasis in original)

Measured against this standard, we cannot conclude that the language of paragraph 11 of the CO&A constitutes a waiver of Petitioner's claim.

We turn then to the question of whether SMCRA or BMSLCA authorize awards of fees and costs in proceedings of this sort. DEP points out that the December 27, 1989 Order was issued pursuant to provisions of BMSLCA; the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §611.1 *et seq.*; and the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §51 *et seq.*; but not SMCRA. Accordingly, SMCRA cannot be used to claim fees and costs. Petitioner argues that, while the Order was not issued pursuant to SMCRA, it could have been. Since the Order had a significant impact on Petitioner's mining activities authorized by a permit issued pursuant to SMCRA, we should ignore the form of the Order and look to its substance. If we do, Petitioner maintains, we will conclude

that SMCRA was deeply involved and that an award of fees and costs can be made under SMCRA.

We disagree with Petitioner. The validity of DER's December 27, 1989 Order was measured solely by the statutory provisions under which it was issued (1994 EHB 925 - no mention or discussion of SMCRA appears in the Adjudication). It would be highly improper to use that measure to award fees and costs under a completely different statute that was not involved in the underlying litigation.

Besides, we fail to see any reason why DEP should have invoked SMCRA in its December 27, 1989 Order. The Order accuses Petitioner of carrying out underground mining activities beneath certain watersheds in a manner that brought about the conversion of Roaring Run from a perennial to an intermittent stream, the significant diminution of flow in Howells Run and similar threats to the North Branch of the Little Conemaugh River. These adverse impacts on surface features constitute a failure on Petitioner's part to "maintain the value and reasonable foreseeable use of such surface land...." (§5(e) BMSLCA, 52 P.S. §1406.5(e)), and the "value and reasonably foreseeable uses of perennial streams...." (25 Pa. Code §89.143(d)).

It is true that the regulation at §89.143(d) is part of Chapter 89 (Underground Mining of Coal) which was adopted pursuant, *inter alia*, to SMCRA. But that Chapter also was issued under BMSLCA, the CSL, the Administrative Code and the Coal Refuse Disposal Control Act, Act of September 24, 1968, P.L. 1040, as amended, 52 P.S. §30.51 *et seq*. Since the December 27, 1989 Order deals specifically with the surface effects of underground mining, it was more appropriate for DEP to proceed under BMSLCA than under SMCRA.

Section 5(g) of BMSLCA provides that this Board "may in its discretion order the

payment of costs and attorney's fees it determines have been reasonably incurred by such party in proceedings pursuant to this section." This language is identical to that in §4(b) of SMCRA, 52 P.S. §1396.4(b). The two provisions were enacted on the same date (October 10, 1980) as part of Pennsylvania's efforts to obtain "primacy" - the right to regulate coal mining operations in Pennsylvania. We presume, therefore, that the Legislature intended the two provisions to have similar meaning.

We held in *Big B Mining Co. v. DER*, 1990 EHB 248, *reversed on other grounds*, 142 Pa. Cmwlth. 215, 597 A.2d 202 (1991), *allocatur denied*, 529 Pa. 652, 602 A.2d 862 (1992), that the language "proceedings pursuant to this section" in §4(b) of SMCRA meant proceedings arising under all of §4 of SMCRA and not just those in subsection 4(b). This interpretation was also adopted by Commonwealth Court in *McDonald Land & Mining Company and SkyHaven Coal Company, Inc. v. Department of Environmental Resources*, Nos. 231 and 356 C.D. 1995, Opinion issued August 3, 1995. Following this precedent, we hold that "proceedings pursuant to this section" in §5(g) of BMSLCA means proceedings arising under all of §5.

That section deals with permit applications, bonds, compliance history and public notice. Petitioner contends that it is entitled to proceed with its claim for fees and costs because DEP's December 27, 1989 Order was issued, *inter alia*, pursuant to §5(e) of BMSLCA and is, therefore, a proceeding arising under §5. Section 5(e) reads as follows:

> An operator of a coal mine subject to the provisions of this act shall adopt measures and shall describe to the department in his permit application measures that he will adopt to prevent subsidence causing material damage to the extent technologically and economically feasible, to maximize mine stability, and to maintain the value and reasonable foreseeable use of such surface land: Provided, however, That nothing in this subsection shall be

> construed to prohibit planned subsidence in a predictable and controlled manner or the standard method of room and pillar mining.

DEP claimed in the Order that the adverse impact on the surface watersheds violated §5(e) of BMSLCA. Certainly, DEP interpreted the provision as imposing on Petitioner a continuing obligation to adopt measures to prevent subsidence, to maximize mine stability, and to maintain the value and reasonable foreseeable use of surface land. The Order directed Petitioner to stop mining beneath the watersheds or to adhere to certain specified mining methods and to submit a "revised subsidence control plan," including a description of the "measures to be taken, if necessary, for restoring the pre-mining value and reasonably foreseeable uses of [the watersheds]." Because of DEP's interpretation of §5(e), we conclude that the Order constituted "proceedings pursuant to this section" as used in §5(g).

We are aware that the December 27, 1989 Order was an enforcement action of DEP taken also under §9 of BMSLCA, authorizing such orders. On the strength of this Board's decision and Commonwealth Court's affirmance in the *McDonald* case, *supra*, we would hold that enforcement actions are not "proceedings pursuant to this section" under §5(g) of BMSLCA were it not for DEP's reliance on and use of §5(e) of BMSLCA. Since DEP has discretion in determining the statutory provision it elects to invoke, a discretion we refuse to disturb: *Ralph Edney v. DER*, 1989 EHB 1356, it is not for this Board to disregard that election when considering eligibility for awards of fees and costs. Having treated §5(e) of BMSLCA as authorizing its enforcement action, DEP must now live with that choice.

Petitioner is bound by it also. It must show that the costs and attorneys fees claimed fall within the scope of §5(e) of BMSLCA.

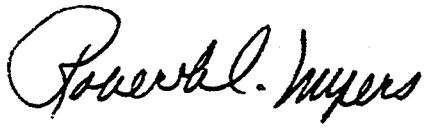
ORDER

AND NOW, this 7th day of December, 1995, it is ordered as follows:

1. DEP's Motion to Dismiss is denied.

2. On or before January 8, 1996, the parties shall submit proposed amendments to the joint case management schedule approved by the Board's Order of October 25, 1994.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: December 7, 1995

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M. DIANE SMITH
SECRETARY TO THE BOARD

ADAMS SANITATION COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 90-375-E**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	
	:	**Issued: December 8, 1995**

OPINION AND ORDER
SUR MOTION TO RECONSIDER ORDER OF OCTOBER 23, 1995

By: Richard S. Ehmann, Member

Synopsis:

A motion for reconsideration of an order approving a Settlement Agreement submitted by the parties for our approval is granted where as part of their Agreement the parties specified that the Board's order approving same was to specify a final judgment in favor of the Department of Environmental Protection ("DEP") and against the appellant but the standardized Board order approving the Agreement failed to do so. 25 Pa. Code §1021.122 allows reconsideration of a final Board Order for purposes of correcting an omission therein created by the Board's actions so that it fully reflects the terms of the parties' Agreement.

OPINION

The salient facts underlying this appeal are not in dispute. The appeal arose in 1990 after DER[1] wrote to Adams Sanitation Company, Inc. ("Adams") advising Adams that it was responsible for contamination of the adjacent Strine residence's spring. That appeal was consolidated with Adams' appeal of a DEP order to Adams to develop and implement a groundwater abatement plan. Thereafter, this Board issued an Opinion and Order Sur Motion for Summary Judgment on April 5, 1994, which granted DEP summary judgment on three issues and denied it on all remaining issues. See 1994 EHB 502. Subsequently on November 1, 1994, the Board issued a second opinion in this appeal denying DEP's Motion For Reconsideration of our opinion on summary judgment. See 1994 EHB 1482. As pointed out in that opinion, the decision on partial summary judgment was interlocutory in nature.

With former Chairman Woelfling's resignation from this Board earlier this year, the consolidated appeal was reassigned to Board Member Ehmann who scheduled a merits hearing on the remaining issues. Prior to the hearing's occurrence, the parties entered into an Agreement for resolution of the outstanding issues. The Agreement provided that (1) Adams would request the hearing's cancellation and withdraw from the EHB's consideration the issue remaining for adjudication; (2) the parties jointly request that the EHB issue a final order substantially in the form attached to the Agreement which gave a final judgment in favor of DEP and against Adams; and (3) if DEP determines further actions are necessary at Adams' site beyond those already

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[1]DER has been legislatively transmuted into DEP since the appeal's commencement in 1990 and we will hereafter refer to it as DEP.

approved by DEP, it will issue an order to Adams to undertake same. The Agreement is signed by both parties' representatives. The proposed Order attached to the Agreement provides for the hearing's cancellation, the issue's withdrawal and entry of final judgment against Adams and in favor of DEP.

In response to this Agreement, the Board issued its standard Notice of Cancellation of Hearing and its standard Order approving this Agreement which states in relevant part:

> 2. The above-captioned appeal is dismissed, subject to reinstatement if an appeal of the settlement is timely filed in accordance with the provisions of 25 Pa. Code §1021.120.

The Board did not issue the Order agreed to by the parties.

It is this pair of actions which has caused Adams to file its Motion For Reconsideration on October 30, 1995. As it explains therein, Adams could not previously have appealed from the Board's prior Opinion and Order as to summary judgment because that Order was of an interlocutory nature. After it had given DEP satisfactory proposals as to a water supply replacement and contaminated ground water abatement plan, the only issue remaining for litigation was the constitutional issue. Adams decided it could forego litigation on that issue if it could get a final order entered in this appeal which would then allow it to challenge the Board's partial summary judgment. As a result, Adams then negotiated not only the terms of its Agreement with DEP (including the Orders) but also the language of the notice thereof which DEP prepared and transmitted to this Board for use in publication of the Agreement in the *Pennsylvania Bulletin*. In a conference telephone call with this Board on October 27, 1995 concerning the Board's Order,

Adams revealed its position on this issue and, in response to the Board's direction filed the instant motion.

On November 7, 1995, DEP filed its response to Adams' Motion. In it DEP contends this Agreement was a settlement of all issues as explicitly provided in the first paragraph of the Agreement. It also asserts the Board's failure to use the form Order of the parties "is of no import" because the Board's Order accomplishes substantially what the parties requested and DEP had no intent to shift this litigation from one forum to another. Further, DEP says submission of the Agreement to the Board for approval suggests the Board's Order was appropriate.

DEP also asserts that reconsideration does not lie here under 25 Pa. Code §1021.122 because Adams asserts no compelling and persuasive reason for the Board to grant it. DEP also argues Adams cannot use its motion to attack the Agreement's terms. Finally DEP asserts Adam's motion violates 25 Pa. Code §1021.74 because it was not accompanied by the mandatory memorandum of law supporting it.

On November 13, 1995, Adams filed a Brief in Support of its Motion with the Board supporting its motion, and this Board entered an Order staying our approval of the parties' Agreement while the Board considers the merits of the issues raised by these filings.

We believe Adams' motion has merit and for the reasons discussed below we grant it:

Compliance with 25 Pa. Code §1021.74

As stated in 25 Pa. Code §1021.122 when a party seeks reconsideration it is by "application". This rule does not mandate that such a party file this application as a motion and

this Board has received applications which were titled as a Petition or an Application in addition to those captioned as a motion. See, for example, Harman Township, et al. v. DER, et al., 1994 EHB 296 and Boyertown Auto Body Works v. DER, 1992 EHB 71. Moreover, in speaking of miscellaneous motions, 25 Pa. Code §1021.74 refers to motions to strike, in limine and for recusal, all of which are motions filed prior to entry of a final order by the Board as is the case in this matter. Based upon these two observations we conclude that vicarious application of 25 Pa. Code §1021.74(d) to bar consideration of Adams' motion is unwarranted and elevates form over substance. Moreover, we conclude that 25 Pa. Code §1021.74 is not intended to address requests for reconsideration under 25 Pa. Code §1021.122 (regardless of their titles). Finally, we note receipt of Adams' brief in support of its motion on November 13, 1995. This clearly lays this issue to rest.

Adams' Attack on the Agreement

DEP's contention that Adams is attacking the Agreement has some initial attractiveness since Adams is the movant but close analysis of what is occurring suggests the opposite is true. Adams' motion does not attack the Agreement; rather, it asserts the Agreement remains sound. However, we read Adams' motion as asserting that the Board's Order approving the Agreement was not what was bargained for and agreed to by the parties as part of its settlement. Thus, Adams wants the Agreement to remain in force and unchanged. Clearly the Agreement was negotiated between the parties and after it was satisfactory to each party, that party had its representatives affix their signatures to it. It is also undisputed that the language in the notice of the Agreement provided by DEP to the Board for use in the *Pennsylvania Bulletin* was negotiated between the parties and specifies that the Order is to grant a final judgment in favor

of DEP and against Adams. Thus, both the Agreement and the Notice suggest the final judgment language was negotiated and agreed to as part of the basic bargain in reaching the Agreement. Accordingly, since Adams seeks to have the Order spell out what was agreed to in the Agreement, Adams cannot be said to be attacking it.

The fact that the Agreement's first paragraph states the Agreement settles the outstanding issues does not change this conclusion. The outstanding issues are those not resolved by our partial summary judgment Opinion and Order of April 5, 1995 and the proposals submitted to DEP by Adams and approved by DEP. Nothing in the Agreement waives Adams' right to appeal that summary judgment decision and nothing therein states it is a final settlement of all issues in the appeal. Thus, we do not see the Agreement or its first sentence as a waiver of Adams' right to pursue the appeal it suggests was behind its bargaining for the language in the proposed Order.

Compelling Reasons For Reconsideration

Our rule on reconsideration of final orders indicates we may grant reconsideration for compelling and persuasive reasons. Here the reason we find compelling and persuasive is a Board error. The parties gave the Board a proposed form order which they wanted us to use and we should have used to end this appeal. Through a mistake by the Board (rather than an exercise of our discretion) we sent out, not the Order the parties both proposed to us, but our standardized form order approving the Agreement. Were we not to hold this is a compelling and persuasive reason to rectify what occurred here we would be saying by inference that the Board's mistakes or omissions are not grounds for reconsideration. Moreover, with such a conclusion this opinion could then be said to infer the Board could unilaterally modify the terms of the parties' Agreement. We refuse to adopt such a position. In so doing, we recognize that while we may accept or reject proposed

agreements settling appeals before us, we may not unilaterally modify them, especially unintentionally. Further, since as in the past, we have reconsidered past opinions and orders where we have made mistakes (see James E. Fulkroad d/b/a Fulkroad Disposal v. DER, 1993 EHB 1630 and Carl Oerman v. DER, 1991 EHB 1993), we are not plowing new ground by reconsidering our order here. Finally, one need only review §1021.122 to realize it envisions its use when the Board does err. Section 1021.122(a)(2) specifically addresses reconsideration where the "facts" stated in an opinion do not comport with what the facts are (illogically occasionally referred to as the "true facts").

Import of the Order's Form

As it is undisputed that Adams negotiated for use of the form of the order agreed to by the parties, the Board is at a loss to see how DEP can assert the form of the order used is of no import. If it were of no import DEP would not be opposing reconsideration just as Adams would not be pressing for it. The fact of the contest proves the import of the form, just as the parties' negotiations as the form do. In this regard, DEP also asserts that it did not negotiate this settlement with the intent to transfer litigation from one forum to another. [2] We do not doubt that that was not DEP's intent but every party approaches both negotiation and litigation with the desire to accomplish specific goals, and it is not necessary for parties to have identical goals or even for each of them to realize all of their respective goals in order that an agreement can be said to have been reached.

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[2]Since DEP agreed to the Agreement's terms, it, rather than Adams,is in the position of attacking the Agreement when it contends we should not treat the Order as part of the agreed-upon package. DEP's attack on the Agreement, insofar as it allegedly transfers litigation from one forum to another, is an attack on the legal impact of the settlement. That is beyond our powers to adjudicate. See Westtown Sewer Co. v. DER, 1992 EHB 1697.

More importantly, ultimately DEP cannot prevent Adams from having the opportunity to appeal the Board's decision reflected in our opinion on summary judgment. If DEP refused to agree to Adams' settlement proposal, the Board would had a merits hearing on the remaining issues in early October as scheduled. If DEP had prevailed at that hearing, then Adams would have had a final judgment against it on all issues. But even if Adams had prevailed on that remaining issue, it would still have had a final judgment against it on the remainder of the issues it raised because the Board's partial summary judgment order would then cease to be interlocutory in nature. Thus, DEP could not prevent Adams from reaching the Commonwealth Court for a review of that Board's opinion but at most could postpone that day.

Finally, DEP also suggests at this point that the form of the order is of no import because the Board's order issued to approve the parties' Agreement accomplishes substantially all that the order the parties negotiated for would have. If this assertion were DEP's concurrence that that order was final, in favor of DEP and against Adams, all of the remainder of DEP's response would be surplusage. It is precisely because it is not all of DEP's response and the remainder of DEP's response opposes Adams' motion that we cannot accept this statement on its face. We reject this assertion because one of the points successfully bargained for by Adams and agreed to by DEP is not included in our Order. If our Order had not included a term sought by DEP and the shoe were on the other foot, we cannot believe DEP would be asserting that this Board's error was not serious because DEP was getting 75% of the terms it and Adams had agreed to.

In short, our error having been made manifest, there is only one course open to us. We must correct it. Accordingly, we enter the following Order:

ORDER

AND NOW, this 8th day of December, 1995, it is ordered that:

(1) Adams' Motion For Reconsideration is granted;

(2) The stay of the Board's Order of October 23, 1995 imposed by our Order dated November 13, 1995 is lifted; and

(3) The Order dated October 23, 1995 is amended to provide:

ORDER

AND NOW, this 23rd day of October, 1995, upon consideration of the Settlement Agreement between the parties and with the consent of the parties, it is hereby ordered as follows:

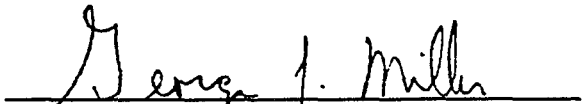
1. The Agreement is approved by the Board.

2. Petitioner is deemed to have withdrawn the issue reserved for hearing by the Board's April 4, 1994, Opinion and Order granting in part and denying in part the Department's Motion for Summary Judgment.

3. Final judgment is hereby entered in favor of Respondent, the Department of Environmental Protection and against Petitioner, Adams Sanitation Company, Inc.

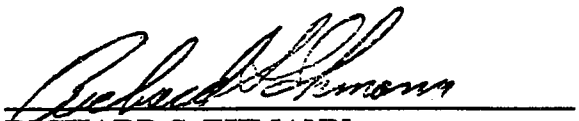
4. The above-captioned appeal is dismissed, subject to reinstatement if an appeal of the Agreement is timely filed in accordance with the provisions of 25 Pa. Code §1021.120.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: **December 8, 1995**

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M. DIANE SMITH
SECRETARY TO THE BOARD

WILLIAM FIORE	:	
	:	
v.	:	EHB Docket No. 91-063-MG
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	Issued: December 8, 1995

OPINION AND ORDER
ON DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

By: George J. Miller, Chairman

Synopsis

Water quality permits were properly revoked by the Department of Environmental Resources (now known as the Department of Environmental Protection and referred to herein as the "Department") under the Clean Streams Law based on appellant's violation of the Clean Streams Law and Solid Waste Management Act. Appellant was not entitled to a hearing prior to the revocation of these permits because the order was based on appellant's long history of violations as established in litigation before this Board and the Courts., and appellant's rights are protected by his right of appeal to this Board.

OPINION

This appeal arises from the issuance on January 25, 1991 of a Notice of Permit Denial and Revocation in which the Department denied the renewal of appellant's NPDES permit and revoked appellant's water quality permits. The basis for the notice was appellant's

continuing violations of laws and regulations and, in the case of the revocation of the water quality permits, because appellant no longer had an NPDES permit.

On February 2, 1994, we granted summary judgment to the Department with respect to the NPDES permit, but denied summary judgment with respect to the revocation of the water quality permits because the Department's motion referred only to the NPDES permit. Fiore v. DER, 1994 EHB 90. The principal reason for the grant of the motion for summary judgment was that no material facts remained at issue in light of the previous determinations by the Board, the Allegheny County Court of Common Pleas, the Commonwealth Court and the Pennsylvania Supreme Court that Fiore had violated relevant laws and regulations applicable to the facility involved in the appeal and that revocation of the NPDES permit was proper under sections 5 and 609 of the Clean Streams Law. 35 P.S. §§691.5 and 691.609. The background facts demonstrating that these tribunals had determined that Fiore violated relevant laws and regulations at his facility are set forth fully in our opinion at 1994 EHB 90 and in the opinion of the Commonwealth Court affirming our judgment in that case. Fiore v. DER, __ Pa. Cmwlth. ____, 655 A.2d 1081 (1995). Those facts need not be repeated here.

As to Fiore's contention that the Department was not entitled to judgment as a matter of law because it had failed to conduct an investigation and accord Fiore the opportunity of an informal hearing before it denied his NPDES permit, we held that the Department could deny the permit without any investigation and hearing mentioned in section 609 of the Clean Streams Law beyond the prior decisions, judgments and convictions of the Board, the Allegheny County Court of Common Pleas, the Commonwealth Court, and the Pennsylvania Supreme Court. 1994 EHB at 97-98. On appeal, the Commonwealth Court affirmed our judgment. Fiore

v. DER, __ Pa. Cmwlth. __, 655 A.2d 1081 (1995). In that opinion, the Commonwealth Court rejected the appellant's contention as follows:

> Fiore asserts that, prior to DER's denial of his renewal application for a NPDES permit, DER was required to conduct an investigation and determine Fiore's compliance with the Law. We conclude that DER did investigate Fiore and that his noncompliance with the Law was established through collateral estoppel. In denying Fiore's renewal application for a NPDES permit, DER based its decision upon a review of Fiore's prior violation of environmental laws with respect to the operation of his solid waste disposal facility. See Original Record, Notice of Permit Denial and Revocation dated January 25, 1991. Such review constituted the necessary investigation of Fiore's compliance with the Law.

Following our decision of the motion for summary judgment as to the NPDES permit, the Department then filed a motion for summary judgment relating to the revocation of the two water quality permits on substantially the same grounds. The Department argued that there were no material facts at issue as a result of the operation of the doctrine of collateral estoppel. However, we determined that the Department was not clearly entitled to judgment as a matter of law because the Department's motion made no mention of sections 5 or 610 of the Clean Streams Law which was the legal basis for the revocation of the water quality permits, and made no attempt to relate its action to the issues raised in Fiore's notice of appeal. Accordingly, we denied the motion because the Department had not demonstrated that it was clearly entitled to judgment as a matter of law. Fiore v. DER, 1994 EHB 1629.

The Department's third motion for summary judgment, filed on May 22, 1995, specifically addresses Fiore's water quality permits and sections 5 and 610 of the Clean Streams

Law, 35 P.S. §§691.5 and 691.610. That motion recites the facts relating to the previous decisions of this Board, the Court of Common Pleas, the Commonwealth Court and the Supreme Court of Pennsylvania demonstrating that Fiore was in noncompliance with the Clean Streams Law and the Solid Waste Management Act, 35 P.S. §§6018.101 to 6018.1002, as established through collateral estoppel by the parties' 1983 consent order and agreement, Fiore's criminal convictions and previous judicial decisions of which we take judicial notice.

With respect to the legal basis of the notice for revocation, the Department says that it is entitled to judgment as a matter of law because:

1. The Department has made an investigation as required by section 609 of the Clean Streams Law based on the record of Fiore's noncompliance with the Clean Streams Law and the Solid Waste Management Act which has been established by collateral estoppel;
2. Fiore has been afforded the opportunity for an informal hearing as required by section 609 of the Clean Streams Law by virtue of Fiore's opportunity to appeal the Department's action to the Environmental Hearing Board;
3. Fiore waived any argument on the subject of the Department's authority to revoke the water quality permits under sections 5 and 610 of the Clean Streams Law; and
4. The Department properly revoked the water quality permits under sections 5 and 610 of the Clean Streams Law in light of Fiore's noncompliance with the Clean Streams Law and the Solid Waste Management Act and

applicable regulations and orders of the Department, as established through collateral estoppel. (Motion for Summary Judgment, ¶¶15-18).

Fiore's objections to the third motion for summary judgment acknowledge that the only issue properly before the Board is whether the Department's actions were inconsistent with section 609 of the Clean Streams Law in that no investigation or formal hearing was held. That contention has been rejected by both our previous decision relating to his NPDES permit and by the Commonwealth Court in Fiore's appeal of our previous decision. Any other contention with respect to the power of the Department to revoke the permit has been waived.

Because of Fiore's acknowledged violations of the Clean Streams Law and the Solid Waste Management Act, as well as the Department's order, the Department properly revoked the water quality permits. Section 610 of the Clean Streams Law, 35 P.S. §691.610, authorizes the Department to revoke permits if the Department finds that the permittee "is in violation of any relevant provisions of this Act, or of any relevant rule, regulation or order of the Department...."

Fiore contends, however, that the Department is barred by the Board's previous decisions from justifying its revocation of the water quality permits under the doctrines of collateral estoppel and res judicata. He argues that by failing to address the water quality permit issue in the prior motions for summary judgment, the Department waived its right to file a further motion for summary judgment because it has had a full and fair opportunity to litigate the question in the prior proceeding.

This position is based on a misunderstanding of the principles of collateral estoppel and res judicata. Those doctrines apply only in the case of a final judgment. The

Board's previous rejections of the Department's motions for summary judgment in connection with water quality permits are not final judgments but only a refusal to grant a motion for summary judgment. Following a refusal to grant summary judgment, a party is still entitled to go to a hearing on the merits of its claim or file a subsequent motion for summary judgment by curing the deficiencies in the motion found by the tribunal which rejected the previous motion for summary judgment. This principle was fully explained in our opinion in William Fiore v. DER, EHB Docket No. 94- 341-M, issued May 2, 1995. There we pointed out that Fiore erroneously presumes that our denial of summary judgment to the Department on the matter of the revocation of the water quality management permits amounts to a final judgment in favor of Fiore on that issue. The correct legal status is quite different from Fiore's presumption. Our denial of the Department's motion for summary judgment did not confer any advantage against Fiore, the non-moving party. It simply left the issue to be resolved by a hearing or other device leading to a final decision. Bensalem Township School District v. Commonwealth, 518 Pa. 581, 544 A.2d 1318 (1988); Sidkoff, Pincus, Greenberg & Green, P.C. v. Pennsylvania National Mutual Casualty Insurance Co., 521 Pa. 462, 555 A.2d 1284 (1989).

The Department's motion for summary judgment now properly addresses the Department's authority for revocation of the water quality permits under sections 5 and 610 of the Clean Streams Law. Section 5 of the Clean Streams Law specifically grants the Department the power to "issue, modify, suspend, limit, renew or revoke permits pursuant to this act and to the rules and regulations of the Department." 35 P.S. 691.5(b)(5). Section 610 of the Clean Streams Law, 35 P.S. §691.610, relating to enforcement orders, grants the Department the power to issue such orders as are necessary to aid in the enforcement of the act and specifically states

that such orders shall include orders "suspending or revoking permits" if the Department finds that the permittee is "in violation of any relevant provision of this Act or of any relevant rule, regulation or order" of the Department. The Commonwealth Court has specifically held that the Department may exercise its enforcement authority under section 610 of the Clean Streams Law by issuing its orders without first conducting an informal hearing. As to Fiore's permits, the Commonwealth Court has held that a review of Fiore's past record was a sufficient basis for the cancellation of the NPDES permit. Fiore v. DER, ___ Pa. Cmwlth. __, 655 A.2d 1081 (1995). In that appeal, the Commonwealth Court held that the right of the person enforced against to appeal the Department's order to this Board is adequate to protect his due process rights. Accordingly, Fiore's position that he was entitled to a hearing before the issuance of the notice revoking the water quality permits is without merit.

The Department is entitled to summary judgment based on its motion because it has been established beyond all doubt in the previous litigation described in our opinion at 1994 EHB 90 that (1) Fiore had violated the relevant laws and regulations as the Department contends, (2) the Department's review of this record of violations was a sufficient investigation for the issuance of the order, and (3) Fiore has had ample opportunity to contest those violations before the courts and this Board. Fiore v. DER, __ Pa. Cmwlth. ___, 655 A.2d 1081 (1995); Fiore v. DER, 1994 EHB 90. Since the violation on which the order was based has been resolved by final judgments in the decisions referred to in our previous decision at 1994 EHB 90, Fiore may not now deny that those violations occurred.

ORDER

AND NOW this 8th day of December 1995, it is hereby ordered that the motion of the Department of Environmental Protection for summary judgment with respect to the revocation of the water quality permits is hereby granted, and judgment is entered against the appellant and in favor of the Department.

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DATED: December 8, 1995

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c: **DEP, Bureau of Litigation Library**
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WILLIAM FIORE	:	
	:	
v.	:	Docket No. 94-341-MG
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION :	:	Issued: December 8, 1995

OPINION AND ORDER ON DEPARTMENT'S
MOTION FOR SUMMARY JUDGMENT

By: George J. Miller, Chairman

Synopsis

The Department properly declared a forfeiture of bonds posted in connection with the issuance of permits issued under the Solid Waste Management Act conditioned on appellant's faithful performance of the requirements of that Act, the Clean Streams Law and applicable rules, promulgations and permits issued thereunder based on appellant's many violations of those conditions, acts, regulations, orders and permits as to the specific facilities for which the bonds were posted as established by the affidavits attached to the Department's motion for summary judgment.

OPINION

This appeal arises from the issuance by the Department of Environmental Resources (now the Department of Environmental Protection and referred to herein as "the Department") of a Bond Forfeiture Declaration Letter dated November 18, 1994 based on

appellant's ("Fiore") failures to comply with a Department order, failure to comply with a civil contempt order of the Commonwealth Court, Department permit suspension and revocation orders, closure orders and permit application denials as well as violations of permit conditions and regulations relating to the operation of the Municipal and Industrial Disposal Company ("MIDC") located in Elizabeth Township, Allegheny County.

The background facts relating to Fiore's violations of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et. seq., and the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, No. 97, as amended, the Department's regulations thereunder, and an order of the Department are set forth fully in our opinion involving Fiore's NPDES permit at 1994 EHB 90 and in the opinion of the Commonwealth Court affirming our judgment. Fiore v. DER, __ Pa. Cmwlth. __, 655 A.2d 1081 (1995). Those facts need not be recited here in detail.

In connection with the issuance to Fiore of permits under the Solid Waste Management Act, 35 P.S. §§6018.1002, Fiore posted as collateral bond a certificate of deposit in the amount of $10,000 relating to the disposal of waste at MIDC Site B Phase I Pit and a collateral bond in the amount of $21,000 relating to disposal of waste at MIDC Site C. Both bonds were conditioned on Fiore's faithful performance of the requirements of the Solid Waste Management Act and the Clean Streams Law, the applicable rules, promulgations and permit conditions issued thereunder.

The Department's Bond Forfeiture Declaration Letters set forth detailed reasons for the forfeiture of the bonds. These include the following reasons: (1) failure to comply with the 1993 consent order and agreement in six separate respects including the failure to submit

required permit applications, failure to remove and properly dispose of solid waste in the temporary storage pits, a failure to submit a revised closure plan, an unauthorized expansion of the Phase I industrial waste pit, and a failure to pay stipulated civil penalties as required by the order; (2) a failure to comply with a civil contempt order from the Commonwealth Court dated October 28, 1983 including a requirement that civil penalties be paid; (3) the Department's suspension of solid waste and water permits; (4) violations of permit conditions and regulations relating to the disposition of hazardous waste for the Phase I pit, Site "B"; (5) the necessity for the Environmental Protection Agency to conduct an emergency enforcement action at the hazardous waste disposal site relating to a temporary remediation but leaving hazardous waste at the site without a proper closure at the site by Fiore; and (6) violations of permit conditions and regulations relating to site "C".

Fiore's appeal from the Bond Forfeiture Declaration Letter claims that the issuance of this letter was a manifest abuse of the Department's powers and a "purely arbitrary execution of agency duties or functions" by the issuance of the forfeiture letter based on the Consent Order and Agreement which has previously been adjudicated by this Board and by an appeal to the Commonwealth Court. Secondly, the appellant apparently claims that the Department is collaterally estopped from issuing the bond forfeiture letter because this Board once denied the Department's motion for summary judgment relating to his water quality permits at EHB Docket No. 91-063[1]. Thirdly, the notice of appeal states that "agency must incorporate into its adjudication all findings necessary to resolve relevant issues presented by the

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[1]We are today issuing an opinion and order in that appeal granting summary judgment to the Department.

adjudication." As a fourth ground for appeal, the appellant says that an adjudicatory action cannot be taken by any tribunal except following a hearing at which the appellant is given an opportunity to know of the claims of his opponent, to hear the evidence introduced against him, to cross examine witnesses, to introduce evidence on his own behalf and to make argument which opportunity has not been afforded to the appellant. Finally, the appeal states that the appellant reserves the right to amend and file additional issues upon a decision made by the tribunal after formal adversarial hearings.

The Department's motion for summary judgment provides affidavit and documentary support for grounds set forth in the Bond Forfeiture Declaration Letter for the Department's action. (Motion for Summary Judgment, ¶¶9-31)

Appellant's response to the motion for summary judgment challenges none of the facts set forth in the motion and supporting affidavits and documents. Instead, his objections make only the following three points:

(1) it was Greg E. Robertson, of DER, who invoked the bond forfeiture against Fiore for alleged violations not the individuals who filed affidavits in support of the Department's motion for summary judgment;

(2) the exhibits filed in support of the motion for summary judgment are the same affidavits filed in support of the Department's position at the time this Board denied Fiore's motion for summary judgment because the water quality permits were still at issue in Fiore's appeal at EHB Docket number 91-063-W; and

(3) Fiore has not been afforded a hearing at which he can have an opportunity

to know the claims of his opponent, to hear evidence imposed against him, to cross-examine witnesses, to introduce evidence on his own behalf and to make argument.

DISCUSSION

The Department's motion for summary judgment presents overwhelming evidence that its issuance of the notice of bond forfeiture was lawful. The Department clearly has the power to declare the bonds forfeited based on violations of the Department's orders, the Solid Waste Management Act, the Clean Streams Law and the regulations and permit conditions issued thereunder.

Section 505(d) of the Solid Waste Management Act, 35 P.S. §6018.505(d), provides in part:

> "If the permittee fails or refuses to comply with the requirements of this Act in any respect for which liability has been charged on the bond, the secretary shall declare the bond forfeited . . . ."

Both bonds, certificate of deposit no. 373046 and letter of credit no. A-302532 condition the obligation of the bonds on the permittee's faithful performance of all the requirements of the Solid Waste Management Act and the Clean Streams Law as well as the applicable rules and promulgations thereunder and the provisions and conditions of the permits issued thereunder.[2]

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[2]Both bonds, certificate of deposit no. 373046 and letter of credit no. A-302532, stated as follows:

> Now the condition of this obligation is such that if the Permittee shall faithfully perform all of the requirements of (1) the Solid Waste Act, (2) "The Clean Streams Law", Act of June 22, 1937, P.L. 1978, No. 394, as amended, (3) the "Air Pollution Control

The Department's Motion for Summary Judgment shows quite clearly that Fiore has a long history of violations of the Department's orders and those acts and regulations as well as the condition of permits issued thereunder. As to the Department's Bond Forfeiture Declaration Letter relating to certificate of deposit no. 373046 in regard to the MIDC Site B Phase I Pit, Fiore has admitted to his violations of the Department's consent order as described in ¶¶9-11 of the motion for summary judgment. In addition, the affidavits and documents submitted with the motion for summary judgment attests to Fiore's violations relating to the MIDC Site "B" Phase I pit described in paragraphs 21(a) through (g), (i), (j), and (l) through (q) of the motion for summary judgment.

As to the Department's Bond Forfeiture Declaration for Letter of Credit No. A-302532 in regard to MIDC Site C, the affidavits and documents attached to the motion for

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> Act", Act of January 8, 1960, P.L. 2119, as amended, (4) the applicable rules and promulgations thereunder, and 95) the provisions and conditions of the permits issued thereunder and designated in this bond (all of which are hereinafter referred to as the "law"), then this obligation shall be null and void, otherwise to be and remain in full force and effect.

and

> Upon the happening of any default of the provisions, conditions and obligations assumed under this Bond and the declaration of a forfeiture by the Secretary, or his designee, the period for appeal provided by law having expired, the Permittee hereby authorizes and empowers the State Treasurer to liquidate the said collateral and deposit the proceeds to the account of the Department as provided by law.

Department's Exhibit D, pp. 2 and 5 (of the bond); Department's Exhibit F, pp. 2 and 4 (of the bond).

summary judgment attest to Fiore's violations described in paragraph 22 of the motion for summary judgment relating to MIDC Site "C".

The Department is entitled to summary judgment because Fiore has not presented any material fact that would have to be adjudicated in a hearing. While the notice of appeal claims that Department abused its administrative discretion by basing the bond forfeiture declaration on the parties' consent order, this order is properly cited by the Department as part of the basis for its bond forfeiture notice because Fiore's admitted violations of that order are part of the demonstration of Fiore's violations of the Solid Waste Management Act and the Clean Streams Law at the MIDC Site B Phase I Pit and MIDC Site C. No appeal was taken from that order so that Fiore's admitted violations of those laws are a proper basis for the bond forfeiture notice. The fact that the Declaration was issued by a person other than the persons who made the affidavits supporting the motion for summary judgment is not material. The letter was issued by an authorized employee of the Department for reasons which clearly justified the forfeiture.

Fiore's contentions that the Department did not properly advise him of the allegations against him and that the bond forfeiture letter does not conform to the requirements for an adjudication are similarly without merit. As indicated above, the Declaration of Forfeiture Letter is detailed in its findings of Fiore's violations. That was more than sufficient to give Fiore reasonable notice of those violations because section 505(d) of the Solid Waste Management Act only requires the Secretary to declare the bond forfeit, requires no hearing prior to the issuance of the declaration, and does not require that the notice meet the standards of an adjudication as appellant appears to say is required. There is also no basis for Fiore's contention that he must be afforded a hearing. Fiore's due process rights with respect to the declaration are

protected by virtue of his rights to appeal to this Board. Fiore v. Department of Environmental Resources, __ Pa. Cmwlth. __, 655 A.2d 1081 (1995). No hearing is required in this proceeding because Fiore has failed to present any issue of material fact for such a hearing in opposition to the Department's motion for summary judgment.

Fiore's contention in this appeal that the Department is estopped from proceeding because of a prior denial of the Department's motion for summary judgment in Fiore's appeal at EHB Docket No. 91-063 relating to his water quality permits has no merit. We have now granted the Department's third motion for summary judgment in that proceeding by an opinion and order issued today. Even if we had not so acted, the previous denial of its motion for summary judgment does not bar the Department from pursuing a further motion for summary judgment in this proceeding. Appellant does not appear to understand the function of a motion for summary judgment. Our rules and Rule 1035 of the Pennsylvania Rules of Civil Procedure provide for the entry of a summary judgment in place of an evidentiary hearing where there is no material issue of fact to be adjudicated in an evidentiary proceeding under these rules. We can grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035(b). Fiore v. DER, __ Pa. Cmwlth. __, 655 A.2d 1081, 1085 (1995).

A denial of a motion for summary judgment is not a final judgment but merely permits a party to pursue a full hearing or another motion for summary judgment to obtain the requested relief. See our opinion in Fiore's appeal from the revocation of his water quality permits filed today. However, our grant of the Department's motion for summary judgment in

this appeal is a final judgment determining that Fiore has no right to an adjudicatory hearing because it is clear that he has no claim that the Department's action could be found to be an abuse of discretion or unlawful in any respect.

ORDER

AND NOW, this 8th day of December, 1995, it is hereby ordered that the motion of the Department of Environmental Protection for summary judgment is hereby granted and judgment is granted in favor of the Department of Environmental Protection and against the appellant. It is further ordered that this appeal is dismissed.

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Administrative Law Judge
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Dated: December 8, 1995

c: **DEP, Bureau of Litigation Library**
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P.A.S.S., INC. :
:
v. : EHB Docket No. 95-106-E
:
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL PROTECTION and :
WHEELABRATOR CLEAN WATER SYSTEMS, INC., :
Permittee : Issued: December 27, 1995

OPINION AND ORDER SUR
PERMITTEE'S (SECOND) MOTION TO DISMISS

By: Richard S. Ehmann, Member

Synopsis

Permittee's Motion to Dismiss this appeal is granted. Where the only modification of the permit is an added condition stating the permit is issued subject to the terms of this Board's adjudication as to the merits of this permit, the appeal from that condition may not challenge the underlying permit's validity which had been sustained in the Board's adjudication. DEP's deletion of a second new permit condition (Condition 37) through a second permit modification renders this appeal moot as to that condition. Since the two permit modifications result in only adding this "referencing" condition, the condition did not modify appellant's rights as to the adjudicated permit and, as such, this appeal is also taken from a non-appealable DEP action. Moreover, allegations of the need to clarify that adjudication or to challenge its validity, based on alleged new evidence, must be timely raised at the original permit's previously adjudicated appeal rather than in the instant appeal of the permit modification.

Opinion

On May 17, 1995, the Department of Environmental Resources (now the Department of Environmental Protection and hereinafter "DEP") wrote a letter to Wheelabrator Clean Water Systems, Inc. ("Wheelabrator") making two changes in a permit for the land application of sludge. The letter transmitted new pages reflecting a change in the permittee's name on a permit for the agricultural utilization of sewage sludge. This letter went on and provided:

> Please note that we are sending only the replacement pages for you to insert into your permit. This consists of page 1 for the Curll site permit and J.C. Enterprises permit modification consists of the page 1 name change with additional changes to pages 3 and 11 to reflect the Commonwealth of Pennsylvania Environmental Hearing Board's December 22, 1994, adjudication requiring the verification of slopes by field survey at the J.C. Enterprises site before application of sewage sludge.

The additional pages referenced were enclosed with DEP's letter. As changed these pages reflect the conditioning of Wheelabrator's permit pursuant to the referenced Adjudication by adding language on page three as Condition 1.L stating:

> 1.L Environmental Hearing Board Docket Number 94-012-MR Adjudication dated December 22, 1994, in the appeal of P.A.S.S., Inc. versus the Commonwealth of Pennsylvania.

On page 11 Condition 37 was also added. It provides:

> Prior to the staking required by Permit Condition #17, the permittee will conduct a topographical field survey of each permitted field to verify slopes. Any area with slope exceeding 20% will be excluded from the approved application area. Areas with slopes between 15 and 20% will also be verified by field survey. Permit Application Figure 2 permit Boundry [sic] drawings P0276-E402 dated October 8, 1993, P0276C-E403 dated November 11, 1993, and P0276C-E404 dated October 25, 1993, and Figure 3 Slope Delineation Drawings P0276-C-E405 dated November 11, 1993.

P0276C-E406 dated November 11, 1993, and P0276C-E407 dated November 11, 1993, shall be corrected as necessary..

Sludge application to approve areas with slopes between 15 and 20% will comply with the restrictions in §275. 312(4)(i) and Permit Condition #18.

Importantly, no other change was made in Wheelabrator's permits.

On June 16, 1995, P.A.S.S., Inc. filed an appeal from this permit change. In response, Wheelabrator moved to dismiss this appeal. By order dated August 21, 1995, that motion was denied. In an Opinion and Order dated August 25, 1995, the Board also denied the Petition To Intervene in this appeal filed on behalf of David L. Johns ("Johns").

On September 26, 1995, Wheelabrator filed a second Motion To Dismiss the instant appeal. In it Wheelabrator recited that on September 13, 1995, DEP further revised Wheelabrator's permit deleting permit Condition 37 (set forth above). On the basis of this deletion Wheelabrator contends that the reason for this Board's prior denial of its original Motion To Dismiss has been eliminated and that this appeal should now be dismissed. Wheelabrator's Motion argues the appeal is now moot and alternatively it is an appeal from a nonappealable action.

On October 10, 1995, the Board received a letter from DEP's counsel indicating DEP joins in this motion.

On October 23, 1995, PASS filed its response to this second Motion To Dismiss. In response to this Motion, PASS asserts that this Board's Adjudication in PASS's initial appeal at Board Docket No. 94-012-MR (reported beginning at 1994 EHB 1875) requires clarification. It also asserts that PASS has new evidence to support the position it took in the appeal at Docket No. 94-012-MR, i.e., this permit should not have been issued. PASS also raises concerns about the sludge being radioactive and DEP's failure to state how it will interpret the

second paragraph of our Order accompanying the Adjudication. Finally PASS also asserts there continues to be a case or controversy by virtue of the need to clarify the meaning of the adjudication, so mootness does not bar this appeal.[1]

On November 13, 1995, Wheelabrator filed its Reply to the PASS Response. In December of 1994, this Board adjudicated the merits of PASS's challenge to the DEP's issuance of these permits to Wheelabrator's predecessor. After a hearing on the merits of PASS's contentions and the briefing of all issues by the parties, the Board considered the matter and unanimously entered its Adjudication. As reflected in that Adjudication, PASS's challenge to that permit was dismissed in all regards save one. The Board agreed with PASS that the permit was silent as to the requirement that the permittee apply sludge only on slopes within the limits set forth in 25 Pa. Code §275.312(4). To make sure that this regulation was adhered to, Paragraph No. 2 of the Order attached to the Adjudication provided:

> The Permit is conditioned on verification by field survey that the slopes are in compliance with 25 Pa. Code §275.312(4) before application of sewage sludge on any of the sites. ("Order Paragraph 2")

No appeal was taken from that Adjudication and none of the parties petitioned for any reconsideration thereof pursuant to 25 Pa. Code §21.122.[2]

DEP's initial modification of Wheelabrator's permit not only inserted a reference to Order Paragraph 2 in Condition 1.L, it added Condition No. 37. These two conditions can be seen by comparison with Order Paragraph 2, not to be word-for-word identical with Order Paragraph 2. The existence of new Condition

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[1]Wheelabrator has also filed a Motion For Summary Judgment and Motion in Limine in this appeal in which DEP joins. These motions are not addressed herein.

[2]Since that time, our rules have been amended and that rule, though unamended, is relocated and may now be found at 25 Pa. Code §1021.122.

Nos. 1.L and 37, caused the Board to issue its Order of August 25, 1995 denying the initial Motion To Dismiss which provided in relevant part:

> When this Board issued its adjudication in P.A.S.S., Inc. v. DER, et al., 1994 EHB 1875, Paragraph 2 of the Order of that date was a condition added to the permit which...DEP...issued BIO-GRO Systems, Inc. (now Wheelabrator). Our order did not direct any action by DEP in the form of its further conditioning this permit but served as the condition itself. According to Wheelabrator's Motion, despite this fact, DEP acted to modify Wheelabrator's permit at Condition Nos. 1 and 37. DEP has thus acted in a fashion which is appealable to this Board because its actions have gone beyond the Board's imposed condition. Accordingly, this pair of DEP acts may further affect and modify PASS's rights as they existed when our Adjudication was issued. From this reasoning flows the conclusion that these acts are adjudicatory in nature and hence appealable rather than ministerial. In so ruling, the Board is not sustaining PASS's challenges to the modifications or even stating they have merit; it is only finding that in this scenario they facially withstand this motion.
>
> To the extent PASS successfully appealed as to the slope issue when DER first issued this permit, as evidenced by the Board's prior adjudication, this appeal represents a follow-up challenging this [DEP] reaction thereto. Because this is true, the Board has no trouble concluding PASS has standing to challenge these two conditions. In so ruling, the Board is not concluding that issues beyond these two conditions are before us, but only that these conditions are before us and PASS may challenge them.
>
> Based upon the reasoning briefly outlined above, it is also clear *res judicata*, collateral estoppel and the doctrine of administrative finality do not preclude this appeal. This appeal does not challenge the condition included in the Board's order but the two [DEP] modification conditions, so administrative finality is not applicable. Since the same conditions did not exist previously, they could not have been litigated in the appeal adjudicated in 1994. Even though a similar issue was then adjudicated, the Board is not willing to say it is completely identical. The Board is compelled to this conclusion because of the variance between [DEP's] conditions and that in the Board's Order in the earlier adjudication.

Obviously, in response to these quoted portions of that Order, DEP issued its second modification of Wheelabrator's permit on September 13, 1995. That revision deleted recently imposed Condition No. 37 so that the only remaining

change to the permit was in Condition 1.L. Our records show no timely appeal of this second modification by PASS so under 25 Pa. Code §1021.52(a), Condition No. 37's deletion is final as to PASS and may not now be challenged. Based on this deletion, the issue presented by this Motion is whether we must dismiss PASS's appeal from the remaining Condition 1.L. We conclude this Motion has merit and that we must grant it.

By virtue of its second permit modification all DEP has added to the permit is notice within the permit that Wheelabrator's permit is conditioned by the terms of our prior Adjudication. As a result of these two modifications this appeal is now moot as Wheelabrator asserts. With Condition No. 37's removal there is no longer any impact on PASS by the language in Condition 1.L. Condition No. 1.L is merely a reference to Order Paragraph 2. Standing alone it adds nothing new to the permittee's obligations and duties.

This DEP action is not appealable to this Board by PASS. As Wheelabrator points out, adding Condition 1.L to Wheelabrator's permit in no way modifies or changes PASS's rights *vis à vis* the permit. Elephant Septic Tank Service and Louis J. Costanza v. Commonwealth, DER, 1993 EHB 590. PASS's rights with Condition 1.L's inclusion are identical to those it had after the Adjudication's issuance and before DEP issued the modifications. As a result, this Board can grant no meaningful relief to PASS. Were we to sustain an appeal of its inclusion in Wheelabrator's permit, such an action would not change Wheelabrator's obligations under this permit because the new obligation is imposed by virtue of our Adjudication, not the reference to it. Accordingly, even if we ordered Condition 1.L struck from the permit that obligation remains. Moreover, since this is the only change to the permit, which permit's issuance

was sustained in our Adjudication, it could not produce a change in the decision reached in that Adjudication.

An appeal is moot as to Condition 37 and may be dismissed. Where DEP withdraws a challenged action we routinely find this moots that action's appeal. See Pequea Township, et al. v. DER, 1994 EHB 755 and the cases cited therein.

The appeal has also become moot as to Condition 1.L because as pointed out above, even if we hold Condition 1.L unlawful the underlying validity of the Adjudication is unaffected thereby. Finally, while this may leave PASS and DEP still at odds, as Wheelabrator's Reply points out that does not prevent this mootness doctrine's application. Roy Magarigal, Jr., v. DER, 1992 EHB 455.

The only way the matter before us could not be deemed to be both moot and an appeal from a non-appealable action, is if we somehow were to conclude that PASS is able to challenge the validity of the underlying permit in this appeal despite our sustaining its validity in PASS's initial appeal. An appeal of that permit's issuance today is untimely and we lack jurisdiction over it. Joseph Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). We also lack jurisdiction over an appeal today from that permit which attempts to raise new grounds for appeal from that permit's issuance which were not raised in PASS's original appeal. Newtown Land Limited Partnership v. Department of Environmental Resources, 660 A.2d 150 (Pa. Cmwlth., 1995) ("Newtown"). Moreover, the doctrines of *res judicata* and collateral estoppel preclude relitigation of the permit's validity. See Dunkard Creek Coal, Inc. v. DER, 1993 EHB 536 and the cases cites therein as to both doctrines.

PASS argues the law reflected in the cases cited above does not apply when clarification of the Board's prior order is needed or when new evidence exists which will undermine the facts supporting that order. As to the need for

clarification of Order Paragraph 2, PASS asserts Condition 1.L adds ambiguity to the permit. PASS asserts that there are two slope limitations in 25 Pa. Code §275.312(4) as referred to in Order Paragraph 2. PASS says the two limitations are a general rule prohibiting disposal on slopes of more than 15% and an exception allowing disposal on slopes of up to 20%, so the parties do not know which slope limitation applies.[3] In making this argument PASS fails to address in any fashion its failure to raise this ambiguity argument in a more timely fashion and in the prior proceeding.

Where a party believes reconsideration of one of our orders is necessary to clarify what is said, it may seek its reconsideration as provided in this Board's rules at 25 Pa. Code §1021.122(a). Croner, Inc. v. DER, 1991 EHB 2019. However, such a reconsideration applicant must seek same within twenty days of the Adjudication as specified in this rule. City of Harrisburg v. DER, et al., 1994 EHB 1706 ("City of Harrisburg"). Any conceivable ambiguity, was created not when Condition 1.L referencing it was added to the permit but when we decided this matter back in 1994. PASS has never applied to this Board for reconsideration of our Adjudication on this issue at the Adjudication's docket number, let alone timely filed such an application. Moreover, PASS offers no explanation for its untimely making of this argument to the extent it may inferentially be asserting a right to raise it here and now. Strongosky v. DER, 1993 EHB 758. As a result we must reject this Notice Of Appeal to the extent it is argued to be a nonstandard request for reconsideration. Were we to hold otherwise we would be approving the filing of an application for reconsideration

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[3]Actually, 25 Pa. Code §275.312(4) contains the 15% general limitation and a 20% slope exception plus a further 25% slope exception where sludge is injected beneath the surface. As this further exemption is not raised by PASS, we assume it believes this second exception is inapplicable to this permit.

six months after the Adjudication and contrary to our rules. City of Harrisburg. Decisions by this Board must have a point at which they become final. Spang & Company . DER. 1992 EHB 459. That point was reached when the time for an appeal to the Commonwealth Court from our adjudication expired (which is later than the expiration of the period for seeking reconsideration spelled out in Section 1021.122(a)).

Moreover, were we not to so conclude we would still reject this argument because the filing of a new Notice Of Appeal as to Condition 1.L is not the same thing as applying for reconsideration at the same docket number as the Adjudication. Here, only Condition 1.L can be challenged while there the whole permit was before us. Moreover, we do not find any ambiguity in Order Paragraph 2, because, we do not find the regulation ambiguous. When DEP issues a permit the 15% slope general rule in 25 Pa. Code §275.312(4) applies unless DEP has granted Wheelabrator a variance therefrom under 25 Pa. Code §275.312(4)(i). The regulation is simply not ambiguous so neither Order Paragraph 2 nor Condition 1.L can be ambiguous.[4]

As pointed out in Wheelabrator's Reply, the suggestion that DEP has not spelled out how it will interpret Order Paragraph 2, carries with it the inference that DEP has some duty to do so. PASS cites us to no regulation or statute where such an obligation exists and this Board is aware of no such obligation. Moreover, DEP cannot say how it will interpret this Paragraph in a factual void or for every conceivable assumed set of facts, just as it cannot say

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[4]The Board did not conclude in its August 21, 1995 order that Condition 1.L could be appealed as PASS's Memorandum of Law in response to the Motion suggests. In that Order the Board concluded that read together Conditions 1.L and 37 facially withstood Wheelabrator's initial motion to dismiss only because they could be read to exceed the language in Order Paragraph 2. Had only Condition 1.L been in the initial DEP permit modification, the initial Motion To Dismiss would have been granted.

what the impact of that interpretation will be without a context to place it in. However, if PASS makes this point because it wants to challenge how DEP decides to enforce it, we point out that this Board lacks jurisdiction over appeals challenging the exercise of DEP's discretion. Margaret C. and Larry H. Gabriel, M.D. v. DER, 1990 EHB 526; Raymark Industries, Inc., et al. v. DER, 1990 EHB 1181 and North Pocono Taxpayers Assoc., et al. v. DER, 1993 EHB 449.

PASS also argues it now has available new evidence on what degree of slope is needed to protect the environment and this evidence demonstrates the inadequacy of both the permit and the regulations. PASS alleges it procured its new evidence on May 30, 1995 from DEP and it consists of DEP records from 1992. This evidence's existence is not set forth in PASS's Notice Of Appeal. The earliest its existence can be even inferred to have been raised is in Johns' unsuccessful Petition To Intervene filed with this Board on August 10, 1995. PASS made no such allegation until August 14, 1995, when it filed its response to the initial Motion To Dismiss. The Board must reject PASS's argument because PASS has never attempted to seek to reopen the record to place this evidence before the Board at the docket number of the appeal at which we rendered our Adjudication, i.e., Docket No. 94-012-MR. Rather, inherent in PASS's position is an assertion that it can appeal anew and raise this issue in this new appeal proceeding.[5] We reject this concept because the most that PASS could accomplish in this appeal if we went through a merits hearing, is to successfully challenge Condition 1.L. PASS cannot at this docket number overturn the entire permit or the regulations on which it is based. That would have to be accomplished by

[5]Even if we held this "new" evidence is raisable now as occurred in Arthur Richards, Jr., V.M.D., et al. v. DER, et al., 1990 EHB 382, there had to be a second appealable action by DER which would allow an appeal to be filed. As is stated above, the addition of Condition 1.L is not such an action.

reopening the record in the adjudicated appeal and PASS then convincing us to modify the Adjudication entered in 1994.

What is set forth immediately above as to PASS's challenge to the permit based on its new evidence, is also true as to PASS's allegations as to radioactivity. Moreover, as to these latter allegations PASS's allegations regarding same run afoul of the Commonwealth Court's opinions in Newtown and Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986) *aff'd on other grounds*, 521 Pa. 121, 555 A.2d 812 (1989), ("Game Commission"), because even giving PASS's Notice Of Appeal in this appeal a generous reading requires this Board to conclude a radioactivity issue is not set forth therein. As a result, it is an untimely allegation which we are precluded from considering.[6]

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[6]The grounds for appeal in PASS's Notice Of Appeal are:

> PASS, Inc. objects to the issuance of permit number 603340 to Wheelabrator Clean Water Systems, Inc. as modified by A. Patrick Boyle of the PA Department of Environmental Resources on May 17, 1995. This modification requires that all slopes greater than 20 degrees be excluded from the application of sewage sludge and slopes between 15 and 20 degrees be verified by survey prior to any sludge being applied. This modification was required as per order of the Environmental Hearing Board in EHB Docket Number 94-012-MR issued December 22, 1994. This modification does not protect the health, safety and well being of the Timblin and Ringgold citizens nor is it consistent with the Pennsylvania code, Paragraph 275.412, section 1. Sworn testimony by state registered geologist, Peter Briggs, clearly indicates that the permit in Ringgold and Timblin will cause erosion and offsite runoff. This testimony when combined with our analysis of the events in Curllsville and other identical permits further substantiates Peter Briggs' testimony and leads PASS, Inc. to the conclusion that permit number 603340 will negatively impact the Ringgold and Timblin communities and citizens and must be immediately revoked.

Accordingly, we can come to only one conclusion in this appeal and that is to grant this Motion. In accordance therewith, we enter the following order.

ORDER

AND NOW, this 27th day of December, 1995, it is ordered that Wheelabrator's Motion To Dismiss is granted and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: December 27, 1995

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