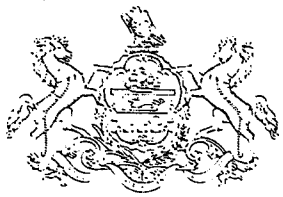
Environmental Hearing Board

Adjudications and Opinions



1992

Volume III

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COMMONWEALTH OF PENNSYLVANIA
Maxine Woelfling, *Chairman*

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

1992

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Member .....TERRANCE J. FITZPATRICK
(Resigned September 11, 1992)

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1992.

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

1992 DECISIONS

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOAF

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
v.	:	EHB Docket No. 91-575-CP-MR
HAROLD S. LANDIS	:	Issued: September 10, 1992

OPINION AND ORDER
SUR
MOTION FOR DEFAULT JUDGMENT OR
JUDGMENT BY ADMISSION

Robert D. Myers, Member

Synopsis

Judgment on the issue of liability is entered against a defendant who fails to file a timely and sufficient answer to a complaint for civil penalties. Judgment cannot be entered for the amount prayed for in the complaint because the Board can assess civil penalties only after a hearing.

OPINION

On December 19, 1991 the Department of Environmental Resources (DER) filed with the Board a Complaint for Assessment of Civil Penalties against Harold S. Landis (Defendant) of Willow Street, Lancaster County, for alleged violations of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* The complaint contained the prescribed Notice to Defend and a Certificate of Service, dated December 19, 1991, reflecting service of the Complaint on the Defendant by certified mail, postage pre-paid, and by first class mail, postage pre-paid.

On January 13, 1992 and January 22, 1992 Defendant filed Notices of Appeal with the Board. The first Notice of Appeal, docketed at 92-022-MR, made no reference to any DER action but stated as Defendant's objections: "chicken water flowing in the run. We have chicken house no more." The second Notice of Appeal apparently was filed in response to the Board's January 16 acknowledgment of appeal and request for additional information. This Notice of Appeal, also docketed at 92-022-MR, stated no objections to DER's action but did enclose a copy of the Complaint. On a photocopy of the Board's January 16 letter, which also was enclosed, there was the handwritten statement: "department didn't know the whole story."

Perceiving the Notices of Appeal to be Defendant's *pro se* attempt to answer the Complaint, the Board issued an Order on January 24, 1992 directing that the Notices of Appeal would be treated as Defendant's Answer to the Complaint at 91-575-CP-MR and that 92-022-MR would be marked closed.

On April 8, 1992 DER filed a Motion for Default Judgment or Judgment by Admission, to which Defendant has filed no response despite a Board letter giving him until April 28 to do so. Attached to the Motion, *inter alia*, was a Receipt for Certified Mail and a Domestic Return Receipt reflecting delivery of the mailed Complaint on December 20, 1991.

DER's Motion contends (1) that Defendant's Answer was filed with the Board more than 20 days after the date of service, (2) that Defendant's Answer was never served upon DER, and (3) that Defendant's Answer is legally insufficient. Therefore, DER requests that the facts alleged in the Complaint be deemed admitted and that a civil penalty of $10,000 be assessed as prayed for in the Complaint.

Our rules at 25 Pa. Code §21.66 contain requirements for Answers to Civil Penalty Complaints. Among other things, they must be filed within 20

days and must admit or deny specifically the material allegations of the Complaint. Failure to file on time constitutes a default and, on motion made by another party, the treatment of all relevant facts in the Complaint as admitted. In addition, Pa. R.C.P. 1029(b) provides that averments in a pleading are admitted when not specifically denied.

Construing the notations on the Notice of Appeal as broadly as possible, we fail to find an Answer meeting the requirements of our rules and the Rules of Civil Procedure. Accordingly, the allegations in the Complaint are deemed admitted. While this is sufficient to establish Defendant's violation of the Clean Streams Law and his liability for civil penalties under section 605 of that statute (35 P.S. §691.605), we cannot enter a default judgment for the amount stated in the Complaint. As we held in *DER v. Allegro Oil and Gas Company*, 1991 EHB 34, we can assess a civil penalty only after a hearing.

ORDER

AND NOW, this 10th day of September, 1992, it is ordered as follows:

1. DER's Motion for Default Judgment or Judgment by Admission is granted in part.

2. Judgment is entered against Defendant on the issue of liability.

3. The proceeding shall be placed on the list of cases to be scheduled for hearing. The hearing shall be limited to the amount of civil penalty to be assessed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 10, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

JAMES AND MARGARET ARTHUR	:	
	:	
v.	:	**EHB Docket No. 90-043-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES,	:	**Issued:** September 11, 1992
GREENE TOWNSHIP BOARD OF SUPERVISORS,	:	
Permittee and 507 DEVELOPMENT, INC.	:	
Intervenor		

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT

By Terrance J. Fitzpatrick, Member

Synopsis

A motion for summary judgment is denied where there are unresolved questions of fact.

OPINION

This is an appeal by James and Margaret Arthur (the Arthurs) from a Department of Environmental Resources' (DER) letter dated December 13, 1989, granting a revision to the official sewage facilities plan of Greene Township, Pike County (Township). The purpose of this revision was to provide for the sewage needs of two developments proposed by 507 Development, Inc. (507), an intervenor in this proceeding. One development would consist of a hotel, restaurant, and commercial area; the other would consist of a restaurant, hotel and truck stop. The sewage flow from each development to the sewage treatment plant was estimated at 20,000 gallons per day. The treatment plant discharges to Wallenpaupack Creek.

This Opinion and Order addresses a motion for summary judgment filed by the Arthurs. In this motion, the Arthurs argue that DER erred by granting the revision because the official plan of Greene Township either does not exist, or it is outdated (Memorandum, p. 10). The Arthurs also argue that DER violated 25 Pa. Code §71.53(d)(4) by approving the revision when two of the three members of the Township Board of Supervisors did not know that an official plan existed. The Arthurs further contend that DER erred by failing to apply the revised Chapter 71 regulations (effective June 1989) here, even though those regulations took effect prior to DER's granting the revision. Finally, the Arthurs assert that DER violated Article 1, Section 27 of the Pennsylvania Constitution in that DER did not require compliance with its regulations, citing Payne v. Kassab, 11 Pa. Commw. 14, 312 A.2d 86 (1973), affirmed, 468 Pa. 226, 361 A.2d 233 (1976).

507 filed a response opposing the Arthurs' motion for summary judgment. 507 argues that the Arthurs may not raise the arguments that the official plan was outdated and that two of the Township Supervisors did not know that the plan existed, because neither of these arguments was raised in the Arthurs notice of appeal. 507 also contends that any confusion on the part of the Township Supervisors is irrelevant to the question of whether DER erred in approving the revision. In addition, 507 argues that DER's action was consistent with its revised regulations; accordingly, DER's action did not violate Article I, Section 27 of the Pennsylvania Constitution. Finally, 507 asserts that there are unresolved questions of fact with regard to many of these issues; therefore, summary judgment may not be entered.

Summary judgment may only be granted 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 and matter of law." Pa. R.C.P. 1035(b). The evidence must be viewed in a light most favorable to the non-moving party. Ingram Coal Co. v. DER, 1990 EHB 395. In ruling on a motion for summary judgment, the Board is simply to determine whether there are triable issues of fact and is not to decide such issues. County of Schuylkill v. DER, 1990 EHB 1370, Brodheads Protective Assoc. v. DER EHB Docket No. 91-349-F (Opinion Sur Motion for Summary Judgment issued May 12, 1992.

Applying these standards here, the Arthurs' motion for summary judgment must be denied because there are unresolved, material questions of fact. The Arthurs' first argument attacks the validity of the Township's official plan. Construing the facts most favorably to 507 (the non-moving party), DER approved the Township's official plan in 1976. (Exhibit B attached to Affidavit of Frank X. Browne - Exh. 9 of 507's response to motion for summary judgment.) Moreover, the Arthurs do not point to any undisputed facts which could establish, as a matter of law, that the Township's official plan was outdated. This is a subjective decision which could only be made after a hearing. Finally, the fact that two of the Township Supervisors did not know that an official plan existed does not mandate reversal of DER's action under 25 Pa. Code §71.53(d)(4). This subsection provides that a plan revision for new land development will not be considered complete unless it includes documentation that the proposal is consistent with the official plan or that inconsistencies have been resolved. The fact that two of the Supervisors were not aware of the existence of the official plan does not necessarily mean that the Township did not provide any documentation regarding

the consistency of the proposed plan revision with the official plan. Moreover, if DER determined that the proposed revision was, in fact, consistent with the official plan, we are not prepared to say that DER committed reversible error by failing to insist upon such documentation.[1]

The Arthurs' second argument is that DER failed to apply the revised Chapter 71 regulations (effective June 1989) to this project even though the revised regulations took effect prior to DER's action on this plan revision. In support of this argument, the Arthurs point to a DER guidance document which calls for application of the new regulations on a "case by case basis" to plan revisions which were pending on the date the new regulations took effect. (Exhibit H to the Arthurs' motion.) In addition, the Arthurs rely upon DER's answers to interrogatories, which fail to list the new regulations among the sources of authority which DER relied upon in evaluating the proposed plan revision. (Exhibit G to the Arthurs' motion.)

Summary judgment may not be granted on this issue because there are unresolved questions of fact. Despite what DER stated, or failed to state, in its answers to interrogatories, Mr. Fosko (a DER employee) stated at his deposition that he evaluated the plan revision in light of the new regulations prior to DER's action, and that the new regulations did not mandate a different result. (Fosko deposition at pp. 83-85, Exh. 5 to 507's response.) Evaluating these facts in a light most favorable to the non-moving party, summary judgment may not be granted on this issue.

Finally, the Arthurs argue that DER's approval of the plan revision

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[1] We have not discussed 507's argument that the Arthurs are barred from raising this issue now due to their failure to raise it in their notice of appeal, because, on this same date, we are issuing a separate Opinion and Order in this case granting the Arthur's petition to amend appeal.

contravened Article 1, Section 27 of the Pennsylvania Constitution, because DER did not apply the most recent regulations. This argument is based upon the first prong of the test established for determining compliance with Article 1, Section 27: Was there compliance with applicable statues and regulations relevant to protection of the Commonwealth's public natural resources? Payne v. Kassab, 11 Pa. Commw. 14, 312 A.2d 86, 94 (1973), affirmed, 468 Pa. 226, 361 A.2d 263 (1976). As with the previous issue, summary judgment on this issue is barred because there is a question of fact whether DER evaluated the new regulations before approving the plan revision.

In summary, the Board may not grant summary judgment here because there are material questions of fact which cannot be resolved without a hearing. Accordingly, we enter the following Order.

ORDER

AND NOW, this 11th day of September, 1992, it is ordered that the motion for summary judgment filed by James and Margaret Arthur is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers
ROBERT D. MYERS
Administrative Law Judge
Member

Terrance J. Fitzpatrick
TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

Richard S. Ehmann
RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack
JOSEPH N. MACK
Administrative Law Judge
Member

DATE: September 11, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

JAMES AND MARGARET ARTHUR	:	
	:	
v.	:	EHB Docket No. 90-043-F
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES,	:	Issued: September 11, 1992
GREENE TOWNSHIP BOARD OF SUPERVISORS,	:	
Permittee, and 507 DEVELOPMENT, INC.	:	
Intervenor	:	

OPINION AND ORDER SUR
PETITION TO AMEND APPEAL

By Terrance J. Fitzpatrick, Member

Synopsis

A petition to amend a notice of appeal, seeking to add new objections to the action of the Department of Environmental Resources (DER), is granted. The Appellant has shown good cause to amend the appeal where Appellant reserved the right to add new objections after discovery, and where discovery reveals information which Appellant did not possess previously.

OPINION

The background of this appeal is recited in another Opinion issued on this same date and will not be repeated here.[1]

This Opinion and Order addresses a petition to amend appeal filed by James and Margaret Arthur (the Arthurs). Responses opposing this petition have been filed by 507 Development, Inc. (507), an intervenor in this

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1 See, "Opinion and Order Sur Motion for Summary Judgment," EHB Docket No. 90-043-F, issued September 11, 1992.

proceeding, and by DER. In their petition, the Arthurs seek to add new "objections" to those listed in their notice of appeal. Specifically, the Arthurs seek to add the allegations that:

> 'Greene Township, at the time of reviewing the 507 Development Revision to the Township 537 Plan, did not have any official 537 Sewage Facilities Plan and/or did not believe that they had such a plan to make a revision to'; and, that the alleged plan DER offered during discovery did not and does not meet the statutory requirements for adoption of an official plan and should have been revised and adopted in accordance with the law prior to adding new development revisions such as the 507 Development amendment ... .

(Petition to amend appeal, pages 1-2.) In support of the petition, the Arthurs argue that they were not aware that the Township did not have a plan until they deposed the Township Supervisors. Furthermore, the Arthurs contend that, in their notice of appeal, they reserved the right to amend the appeal based upon evidence obtained during discovery.

507 filed a response objecting to the Arthurs' petition. 507 points out that an appeal may be amended to add new grounds for the appeal only when "good cause" is shown, citing NGK Metals Corp. v. DER, 1990 EHB 376. 507 argues, first, that good cause is not present here because the Arthurs did not reserve, in their notice of appeal, the right to add new reasons for their appeal; they only reserved the right to cite additional evidence in support of the reasons set out in the notice of appeal. 507 also contends that good cause is not present here because the information which was revealed during discovery, and which has led the Arthurs to seek an amendment to their appeal, was available to the Arthurs before the appeal was filed. Specifically, 507 contends that the official plan of the Township is a public record on file at the Township's offices, and that the Arthurs' failure to learn of the official

plan until after the appeal was filed was due to a lack of diligence. Finally, 507 contends that the Arthurs were tardy (waiting one year) in seeking to amend the appeal once they did discover the relevant information.[2]

Commonwealth Court has stated that "a decision to allow a party to amend an appeal to include new grounds ... is analogous to a decision to allow an agency appeal *nunc pro tunc*," and that the Board " need not grant the petition absent a showing of good cause." Commonwealth, Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Commw. 78, 509 A.2d 877, 885-886 (1986), affirmed on other grounds, 521 Pa. 121, 555 A.2d 812 (1989). The Board has followed this precedent. See e.g., NGK, *supra*, Davailus v. DER, 1991 EHB 1191, 1201.

Applying these precedents here, we will grant the Arthurs' petition to amend appeal. In their notice of appeal, the Arthurs reserved the right to add new grounds for the appeal based upon information gathered during discovery (notice of appeal, page 1, para. 3). Such a reservation of rights is a prerequisite to a finding of "good cause" in this type of situation. Pennsylvania Game Commission, 509 A.2d at 886, NGK, 1990 EHB at 379.

We disagree with 507's contention that the Arthurs did not reserve the right in their notice of appeal to amend their appeal following discovery. Paragraph 3 of the Board's standard Notice of Appeal form, submitted by the Arthurs in this case, read: "Objections to the Department of Environmental

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2 DER also filed a response objecting to the Arthurs' petition to amend. DER simply states that the issue which the Arthurs now wish to raise "was not raised timely" (DER Objections, para. 5). We interpret this as a conclusory statement that the Arthurs have not shown "good cause" to amend their notice of appeal.

Resources' action in separate, numbered paragraphs. The objections may be factual or legal and must be specific. Attach additional sheets, if necessary."[3] Under this heading, the Arthurs stated:

> Attached as Exhibit A to the Notice of Appeal is a copy of the Objection filed with Pa. DER concerning this proposal. Exhibit B is a letter from the appellant's consultants specifically identifying the regulatory provisions which have not been addressed by the planning module.
>
> The Appellants and their counsel and consultants have not been provided with much of the documentary and other evidence generated by the review of this project.
>
> Consequently, the appellants reserve the right to supplement this information after discovery.

(Notice of Appeal, page 1.) We find that this language reserved the Arthurs' right to amend their appeal to add new objections following discovery. 507's argument that this language merely reserves the right to cite additional evidence in support of objections already raised is unpersuasive. While an objection may be "factual," there is no requirement that an appellant recite in his notice of appeal the evidence he intends to introduce to establish the objection. Accordingly, there is no need for an appellant to reserve the right to cite additional evidence. Viewed in this light, it is obvious that the language cited above was intended to reserve the Arthurs' right to add new objections following discovery.

We also disagree with 507's argument that the Arthurs' petition should be denied because the information regarding the Township's official

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3 The form filed by the Arthurs was "EHB-1:Rev. 5/88." The current form is "EHB-1:Rev. 1/91." The current form contains the following additional sentence in the heading to paragraph 3: "If you fail to state an objection here, you may be barred from raising it later in your appeal."

plan was available prior to the filing of the appeal. Conceding, *arguendo*, that the information was available, we are not prepared to impose the additional burden upon appellants of requiring them to conduct exhaustive searches of public records prior to filing their appeals, lest they lose their right (reserved in their notice of appeal) to add new objections when they obtain the relevant information during discovery. Appellants have only 30 days from receipt of the DER action to file their appeal. 25 Pa. Code §21.52(a). It would be unduly burdensome to require Appellants to make use of not only information which they have, but also information which is, theoretically, "available" in drafting their notice of appeal.[4] 507 has not cited any cases supporting this proposition, and we decline to adopt it.

Finally, we disagree with 507's argument that the petition should be denied because the Arthurs were tardy in filing their petition to amend after they received the information through discovery. 507 has cited no legal standard for what constitutes a "tardy" petition to amend, nor has it alleged that it was prejudiced by the delay. Moreover, the policy reasons for requiring very prompt petitions to amend are not nearly as compelling as those requiring very prompt petitions to appeal *nunc pro tunc*. Appeals *nunc pro tunc* are disfavored because they may upset legitimate, settled expectations that a decision has become final in that it was not appealed within the required time period. The longer the interlude between the end of the appeal period and the filing of the petition to appeal *nunc pro tunc*, the greater the damage to settled expectations. When an appellant seeks to amend its appeal,

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[4] It is true that a party may sometimes be held to be on "constructive notice" of facts which he does not possess, but which he should possess. However, we see no basis for imposing the duty upon an appellant to search public records before filing an appeal.

however, the world is already on notice that the decision has been challenged; the appellant is only trying to add new reasons for the appeal. Therefore, it is appropriate to take a somewhat more liberal approach when evaluating the timing of the filing of a petition to amend an appeal.

Accordingly, we enter the following Order.

ORDER

AND NOW, this 11th day of September, 1992, it is ordered that the petition to amend appeal filed by the Arthurs is granted, and the following language is added to paragraph 3 of the Arthurs' notice of appeal:

> 'Greene Township, at the time of reviewing the 507 Development Revision to the Township 537 Plan, did not have any official 537 Sewage Facilities Plan and/or did not believe that they had such a plan to make a revision to'; and, that the alleged plan DER offered during discovery did not and does not meet the statutory requirements for adoption of an official plan and should have been revised and adopted in accordance with the law prior to adding new development revisions such as the 507 Development amendment.

ENVIRONMENTAL HEARING BOARD

Terrance J. Fitzpatrick

TERRANCE J. FITZPATRICK
Administrative Law Judge
Member

DATED: September 11, 1992

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M. DIANE SMI
SECRETARY TO THE

BETHENERGY MINES, INC.	:	
	:	
v.	:	**EHB Docket Nos. 92-252-MJ**
	:	**92-253-MJ**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 15, 1992

OPINION AND ORDER SUR
PETITION FOR SUPERSEDEAS

By Joseph N. Mack, Member

Synopsis

The appellant's petition for supersedeas in connection with its appeal of two compliance orders issued under the Bituminous Coal Mine Act is denied. The appellant has not adequately demonstrated a likelihood of success on the merits or that the public, in this case the miners, will not be harmed by the granting of supersedeas.

OPINION

This matter involves a petition for supersedeas filed by BethEnergy Mines, Inc. ("BethEnergy") on July 16, 1992. The petition for supersedeas was filed simultaneously with BethEnergy's appeals of two compliance orders issued by the Department of Environmental Resources ("the Department") on July 15, 1992. The compliance orders cited BethEnergy for failing to comply with Section 242(c) of the Bituminous Coal Mine Act, Act of July 17, 1961, P.L. 659, as amended, 53 P.S. §701-101 *et seq.*, at §701-242(c), dealing with ventilation requirements where belt conveyers are installed. The Department

ordered BethEnergy to isolate conveyer belt entries from adjacent entries so as to provide an intake air split as an escapeway.

These appeals were originally assigned to Board Member Richard S. Ehmann, but on July 29, 1992 were transferred to Board Member Joseph N. Mack for primary handling.

A hearing on the petition for supersedeas was held on August 6, 1992. The Department filed a memorandum of law in opposition to the petition for supersedeas on August 7, 1992, and post-hearing briefs were filed by both parties on August 28, 1992.

For the reasons set forth below, we find that BethEnergy has not met its burden of proof with respect to its petition for supersedeas, and, therefore, its petition shall be denied.

BACKGROUND

At the hearing on August 6, 1992, the parties presented an extensive stipulation regarding the chronology of events leading up to the appeal, which was read into the record at the start of the hearing. This chronology is presented here as background information on the issues that shall be considered herein.

On January 22, 1988, A. M. Pawlosky, a State mine inspector for the Fourth Bituminous District, sent a letter to the superintendent of the BethEnergy mine currently known as "Mine No. 84", indicating that the mine was not in compliance with §242(c) of the Bituminous Coal Mine Act, 52 P.S. §701-242(c) with regard to belt isolation. Inspector Pawlosky requested that he be informed of any corrective measures taken by BethEnergy in the matter.

(Stip. 1; TR. 5-6; BethEnergy Ex. 4)[1]

This was followed on January 28, 1988 by a letter from R. E. Stickler, Manager of Operations of BethEnergy Mines, to Richard Murphy, then Acting Director of the Department's Bureau of Deep Mine Safety, referring to the January 22, 1988 letter. Mr. Stickler's letter requested the appointment of a §334 committee to review BethEnergy's proposal for Mine No. 84.[2]

The proposal provided for, *inter alia*, an early warning fire detection system. (Stip. 2; TR. 6; BethEnergy Ex. 5) On February 5, 1988, Director Murphy appointed a Section 334 commission to conduct an investigation of BethEnergy's proposal. (Stip. 3; TR. 7-8)

On April 13, 1988, State Mine Inspector Pawlosky ordered BethEnergy to install masonry stoppings to isolate all belt lines at the Mine No. 84 complex. (Stip. 4; TR. 8) BethEnergy communicated with Director Murphy to express its dissatisfaction with Inspector Pawlosky's decision to require belt isolation at the Mine No. 84 complex, and to request a review of the decision under §123 of the Bituminous Coal Mine Act.[3] (Stip. 5; TR. 8)

On May 12, 1988, the §334 commission communicated with BethEnergy to request additional information regarding belt entry maintenance, emergency

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[1] "Stip. ____ refers to a paragraph in the parties' joint stipulation. "TR. ____" refers to a page in the transcript of the supersedeas hearing. "Ex. ____" refers to an exhibit introduced by one of the parties.

[2] Section 334 of the Bituminous Coal Mine Act provides for the appointment of a committee or commission at the discretion of the Secretary of Mines and Mineral Industries for the purpose of reviewing proposals for the adoption of new or alternative methods of mining, materials, machinery, equipment, etc., to determine their effect on safety and property. 52 P.S. §701-334.

[3] Section 123 states that if a mine operator, superintendent, or foreman is dissatisfied with the decision of a mine inspector, an appeal may be filed with the Secretary of Mines and Mineral Industries, who shall appoint a commission to make further examination into the matter in dispute. 52 P.S. §701-123.

communications, integrity of intake escapeway, emergency transportation, fireproofing, driveways and slipswitches. (Stip. 6; TR. 8) On June 3, 1988, BethEnergy responded to the commission's letter of May 12, 1988, and proposed the following in lieu of stoppings between the belt and track entry: belt maintenance plan, emergency communication plan, maintenance of positive intake pressure, a parallel intake escapeway, and provision for emergency transportation. (Stip. 7; TR. 8-9) On October 7, 1988,the §334 commission communicated to Thomas J. Ward, Director of Deep Mine Safety, that the commission could not reach a decision regarding BethEnergy's proposed alternative method until the commission received an interpretation of §242(c) of the Bituminous Coal Mine Act, 52 P.S. §701-242(c). No response was made by Mr. Ward to the commission, nor was there an appointment of a §123 commission. (Stip. 8; TR. 9)

The matter was dormant until February 20, 1991, at which time Deep Mine Inspector Bruce Pontani issued a compliance order requiring BethEnergy to utilize more air from the intake escapeway to ventilate working faces and to install stoppings between the belt and track entries. This compliance order was vacated upon the issuance of the two compliance orders which are the subject of the petition for supersedeas. (Stip. 9; TR. 9-10) Inspector Pontani issued a second compliance order on February 3, 1992, which was also vacated upon issuance of the orders herein. (Stip. 10; TR. 10)

On February 19, 1992, in an attempt to resolve the ongoing dispute, BethEnergy submitted a §702 request for a variance from the requirements of §242(c).[4] (Stip. 11; TR. 10) BethEnergy included in its §702 request a

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[4] Section 702 allows the adoption or use of new machinery, equipment, tools, supplies, devices, methods and processes of mining, so long as it footnote continued

proposal for the installation of an early warning fire detection system, redundant communications, and improved escapeability. (Stip. 11; TR. 10) On April 14, 1992, the Department notifed BethEnergy that its §702 request as submitted failed to provide protection substantially equal to or in excess of the requirements set forth in §242(c). (Stip. 12; TR. 10-11)

Thereafter, on July 15, 1992, Deep Mine Inspector Steve Strange issued two compliance orders to BethEnergy requiring isolation of belt entries from adjacent entries so as to provide an intake air split as an escapeway for all future development in the Mine No. 84 complex. (Stip. 13; TR. 11; BethEnergy Ex. 1 and 2)

It is from these two compliance orders that BethEnergy filed its appeals at EHB Docket Nos. 92-252-MJ and 253-MJ, and it is from these two orders that supersedeas is requested.

DISCUSSION

Pursuant to 25 Pa. Code §21.78(a), the party requesting a supersedeas bears the burden of showing (a) that it is likely to prevail on the merits of its appeal; (b) that it will suffer irreparable harm if the supersedeas is not granted; and (c) that the public or other parties are not likely to be harmed if the supersedeas is granted. F.A.W. Associates v. DER, 1990 EHB 1791; Pennsylvania Fish Commission et al. v. DER, EHB 619. Where the petitioner fails to show any one or more of these factors its petition must be denied. Pennsylvania Mines Corporation v. DER, 1990 EHB 1348, 1357. However, if the Department lacked the authority to issue the order, as BethEnergy claims herein, or if the Department's action was unlawful, then a supersedeas is appropriate. NY-TREX, Inc. v. DER, 1980 EHB 355.

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continued footnote
accords protection to personnel and property substantially equal to or in excess of the requirements of the Bituminous Coal Mine Act. 52 P.S. §701-702

In considering this case, it is important to note that at the start of the hearing both parties stated that the focus of this appeal deals with mine safety and that all of the matters herein should be considered with that in mind. (TR. 17, 20)

We first examine whether the Department had the authority to issue the orders in question.

BethEnergy argues that §§121 and 123 of the Bituminous Coal Mine Act, under which the compliance orders were issued, provide no authority for issuance of the orders.[5]

Section 121 states, *inter alia*, that whenever a mine inspector finds a condition which may jeopardize life or health, he shall at once notify the Secretary of Mines and Mineral Industries, who shall appoint a commission to make a full investigation. If the mine inspector finds that any delay may result in loss of life or serious injury, he may order the temporary withdrawal of the miners. 52 P.S. §701-121. Section 123, as noted previously, states that a "mine inspector shall exercise sound discretion in the performance of his duties under the provisions of [the Bituminous Coal Mine Act]..." and if the mine operator, superintendent, or foreman is dissatisfied with the mine inspector's decision, that decision may be appealed to the Secretary of Mines and Mineral Industries, who shall appoint a commission to make further examination. 52 P.S. §701-123. BethEnergy argues that neither of these sections authorizes the issuance of compliance orders to correct an allegedly dangerous condition.

---

[5] The orders were also issued under the authority of §118, 52 P.S. §701-118, dealing with duties of electrical inspectors, which is not applicable here.

The question of the Department's authority to issue orders under the Bituminous Coal Mine Act has been previously addressed in another case involving BethEnergy. In BethEnergy Mines, Inc. v. DER, 1987 EHB 567, the action being appealed was a Department letter directing BethEnergy to conduct a pre-shift examination. BethEnergy initially questioned the Board's jurisdiction to hear the appeal on the basis that §121 required the Department to convene a commission to investigate the conditions in the mine prior to issuing an order. The Department countered that §123 provided alternate review remedies. Ultimately, BethEnergy contended that it should not be compelled to pursue the remedy of commission review because that remedy was futile. The Board concurred with both the Department and BethEnergy in finding that it did have the jurisdiction to review a Department order issued under §§121 and 123. Id. at 573-574.

The Department argues that implicit in any conclusion that the Board has the authority to review a Department action is the premise that the Department had the authority to take the action in the first place. The Department also argues that §1917-A of the Administrative Code, 71 P.S. §510-17, grants further authorization for the issuance of the orders on the basis that, by focusing on public health and safety matters, it enlarges the authority granted to the Department by the various environmental protection statutes.

The case of Pennsylvania Mines Corporation v. DER, *supra*, also dealt with orders which had been issued by the Department pursuant to §§118, 121, and 123 of the Bituminous Coal Mine Act and §1917-A of the Administrative Code, which the appellant mining company also challenged as being beyond the scope of the Department's authority. In rejecting Pennsylvania Mines' argument, that Opinion held that, reading the Bituminous Coal Mine Act as a

whole, together with §1917-A of the Administrative Code and prior case law, the Department had the authority to issue the orders in question.

We find that, based on the aforesaid holdings, the Department did have the authority pursuant to §§121 and 123 of the Bituminous Coal Mine Act, 52 P.S. §§701-121 and 701-123, and §1917-A of the Administrative Code, 71 P.S. §510-17, to issue the orders herein.

BethEnergy also raises the following issues as a basis for the likelihood that it will prevail on the merits: First, BethEnergy insists that §242(c) does not require isolation of the belt entries from adjacent entries to provide an escapeway nor isolation of the belt entries where they are ventilated by main air currents, and that this interpretation is a substantative policy change by the Department. Secondly, it contends that the Department's interpretation of §242(c) constitutes a conflict with the Federal Mine Safety and Health Act of 1977 ("FMSHA"), 30 U.S.C. §801 *et seq.*, which it claims has preempted this area.

To arrive at an understanding of what §242(c) is, we will attempt once again to make an interpretation of what is part of a rather inarticulate statute which has little uniformity. See, e.g., Pennsylvania Mines Corporation, supra; BethEnergy Mines, Inc. v. DER, supra.

Section 242 of the Bituminous Coal Mine Act contains a number of ventilation requirements for underground mines. 52 P.S. §701-242. Paragraph (c) of that section, amended in 1967, reads as follows:

> (c) Where belt conveyors are installed, main stoppings and regulators shall be so arranged as to reduce the quantity of air traveling in the belt conveyor entry to a minimum for effective ventilation and to provide an intake air split as an escapeway from the face area to the main air current.
>
> This provision does not apply to approved mobile belt conveyors when such are considered part of the equipment required for face mining

> operations, provided doors are installed in all stoppings between the two belt conveyor entries to provide an escape way in cases of fire, smoke, or any other emergency, providing the application submitted by the operator has the approval of a Commission of Mine Inspectors designated by the Secretary of Mines and Mineral Industries.
>
> 52 P.S. §701-242(c).

As pointed out by the Department in its brief, §242(c) applies only to underground mining operations that install belt conveyers to transport coal. It requires that main stoppings and regulators be so arranged as to reduce the amount of air on the belt entry to a minimum for effective ventilation and to maintain an air split as an escapeway. Two things should be noted. First, this section seems to deal with a single belt entry, whereas in Mine No. 84, the belt and the rail line are in adjoining entries which are open to each other to form a common entry. Secondly, this section deals with an intake air split as an escapeway. It should be noted that the word "escapeway" appears only in this section of the Bituminous Coal Mine Act. Elsewhere in the Act, where there is a discussion of exiting the mine it is referred to as an "egress". See, e.g., 52 P.S. §§710-290(g) and 710-290(k). The Department suggests that the intention of §242(c) is the same, that is, to provide for an escapeway or another method of egress from the mine.

BethEnergy maintains that this reading of the statute is a substantative policy change which has the effect of a regulation. We do not agree. The Department admits that, historically, its interpretation and enforcement of §242(c) has been inconsistent. However, there has been no standard interpretation of §242(c) up to this point which is inconsistent with the position the Department is now asserting. (TR. 231) On the contrary, the majority of the Department's deep mine inspectors have required belt isolation in their enforcement of §242(c). (TR. 231)

The Department's interpretation of §242(c) is entitled to certain deference, unless clearly erroneous. Baumgardner v. DER, 1988 EHB 786. We find the Department's interpretation of §242(c), at this stage of the proceedings, to be reasonable and at least sound enough to avoid supersedeas. Helen Mining Company v. DER, EHB Docket No. 92-259-E (Opinion and Order Sur Petition for Supersedeas issued September 9, 1992), at p. 10.

As to whether this interpretation is in conflict with the Federal Mine Safety and Health Act ("Federal Act"), 30 U.S.C. §801 *et. seq.*, we look to §506(b) of that Act, which provides as follows:

> "The provisions of any State law or regulation in effect upon the operative date of this Act, or which may become effective thereafter, which provide for more stringent health and safety standards applicable to coal or other mines than do the provisions of this Act...shall not thereby be construed or held to be in conflict with this Act. The provisions of any State law or regulation in effect on the date of enactment of this Act, or which may become effective thereafter, which provide for health and safety standards applicable to coal or other mines for which no provision is contained in this Act...shall not be held to be in conflict with this Act."
>
> 30 U.S.C. §955(b).

Thus, more stringent state standards shall not be held to be in conflict with the Federal Act.

The Federal Act requires two escapeways one of which must be ventilated with intake air. The second escapeway may be located on the belt entry or return entry and may be ventilated with return air. 30 U.S.C. §877(f); 30 C.F.R. §75.1704.

Pennsylvania's Bituminous Coal Mine Act requires at least three escapeways. Like the Federal Act, §290(g) requires two escapeways at the intake and return entries. 52 P.S. §701-290(g). Additionally, §242(c)

requires that the belt entry also be maintained as an escapeway. 52 P.S. §701-242(c). Thus, the escapeway requirements of the state statute are more extensive than those of the Federal Act. However, as noted above, this does not result in a conflict with the Federal Act.

Based on the above, we find that BethEnergy has not met its burden of demonstrating a substantial likelihood of success on the merits.

Moreover, we also find that BethEnergy has failed to demonstrate that no harm is likely to result to the public, in this case the miners, from granting the supersedeas.

Bethenergy argues that there will be no harm to the miners who work at Mine No. 84 from the grant of a supersedeas because BethEnergy's system provides protection against fire over and above what is required by the Department and because the elimination of stoppings between the belt and track does not create a potential for hazard.

In considering the question of the harm to the miners, it is important to note that all of the witnesses who appeared, both those on behalf of BethEnergy and those on behalf of the Department, testified that stoppings and separation of the entries did in fact retard the spread of fire, smoke or contaminants, and that the increase in the number of escapeways did in fact increase the possibility for escape from a fire or explosion in the face area.

Bethenergy's engineer, Mr. Bookshar, agreed that a stopping is a barrier to keep air in one location and that contaminants probably will not spread as quickly from the belt to the track where a barrier is in place. (TR. 97, 98) Mr. Gallick, the Safety Director of BethEnergy, agreed that stoppings can act as a barrier to the spread of a fire, and he explained that the stoppings must be able to withhold a fire for one hour. (TR. 140) Mr. Rabbitt, a United Mine Workers official who testified on behalf of the

Department, explained that installation of stoppings between the belt and track will contain the byproducts of fire, and that the containment of contaminants in one entry at the beginning stages of a fire will give miners more time to escape. (TR. 171, 172) He testified specifically that the installation of stoppings between the track and belt entries in Mine No. 84 would have the effect of containing fire in either of those entries or limiting its spreading. (TR. 174, 175, 177) Not having stoppings isolating the belt from the track allows the fire to move more easily. (TR. 177)

Joseph Spaffoni, Chief of Field Operations with the Department's Bureau of Deep Mine Safety, compared stoppings to fire doors in a building and explained that stoppings, like fire doors, limit the fire to a certain area. (TR. 134)

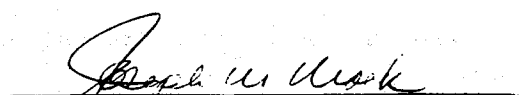
Based on the testimony of the aforesaid witnesses, it appears that the grant of supersedeas could result in harm to the miners.

Because the evidence indicates that the issuance of a stay will adversely affect the public interest, the public in this case being the coal miners, and because BethEnergy has not demonstrated a likelihood of success on the merits, we need not reach the third element of 25 Pa. Code §21.78(a), the question of irreparable harm. Because BethEnergy has not met its burden of proving that a supersedeas is appropriate, its petition shall be denied.

O R D E R

AND NOW, this 15th day of September, 1992, it is hereby ordered that BethEnergy's petition for supersedeas is denied.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 15, 1992

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

THE HELEN MINING COMPANY	:	
	:	
v.	:	**EHB Docket No. 92-259-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 16, 1992**

OPINION AND ORDER SUR
THE HELEN MINING COMPANY'S MOTION
FOR LEAVE TO AMEND NOTICE OF APPEAL

By: Richard S. Ehmann, Member

Synopsis

Where during a supersedeas hearing the petitioner is advised by the Board's sustaining of an objection to certain of its testimony that its Notice of Appeal does not raise a certain issue and that the Petitioner may still timely file an amendment of the Notice of Appeal to raise that issue, Petitioner's Motion For Leave To Amend Notice Of Appeal must nevertheless be denied where filed subsequently but untimely. The lack of prejudice to the Department of Environmental Resources (DER) and notice to it of this issue are not sufficient by themselves to establish good cause to allow untimely amendment under Commonwealth, Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), affirmed on other grounds, 521 Pa. 121, 555 A.2d 812 (1989) ("Game Commission").

OPINION

Because of an incident involving fan stoppage at the Helen Mining Company's ("Helen") Homer City Mine at Homer City in Indiana County on July 11, 1992, DER issued Helen an administrative order directing it to undertake

certain steps in the event of an occurrence of any future fan stoppages. On July 23, 1992, Helen filed both a timely Notice of Appeal from DER's order and a Petition For Supersedeas. The merits of Helen's Petition were heard on July 31, 1992 and, on that date, this Board issued its Order denying that Petition.

During the course of the supersedeas hearing, the following exchange occurred during Helen's counsel's examination of its witness:

> Q. All right. Well, would the use of battery powered track mounted vehicles increase the risk of an explosion in the event that a fan had gone down?
>
> ATTORNEY CHARLTON:
>
> I'd like to place an objection to any testimony further in this regard. It's my understanding from the Notice of Appeal the Petition for Supersedeas, the complaint is only with the verification time and not any requirements in regard to battery powered equipment. If I had misread this --- your pleadings, I apologize. But it was my understanding that the reason for the Superseads [sic] Hearing was because the verification requirement and that that is what is being requested to be superseded.
>
> JUDGE EHMANN:
>
> Let us go off the record for a moment, please.
>
> OFF RECORD DISCUSSION
>
> JUDGE EHMANN:
>
> Let's go back on the record, please. The objection which has been raised deals with the relevancy of the testimony from this witness as to an issue which Counsel for the Department suggests is not in the current Notice of Appeal. I have read paragraph 12-C of the Notice of Appeal as cited to me by Counsel for Helen Mining Company. I do not find in paragraph 12-C the specification of the area in which testimony is now being offered.
>
> Accordingly, I have advised Counsel in our off the record colloquy that the time for filing an appeal has not yet expired. They can amend their Notice of Appeal, but that at this point in time I am sustaining the Department's objection to this line of question. Please proceed. If either of you think I left anything out incidentally with regard to what I just told the Court Reporter to put on the

record, say so and I'll add it back in, but I think I covered everything. If not, please proceed with your questions.[1]

(Supersedeas Hearing Transcript pp. 46 to 48).

Thereafter, on August 17, 1992, the Board received Helen's Motion. It sets forth the above, notice to DER of this issue during the Supersedeas hearing and alleges a lack of prejudice to DER if the Motion is granted.[2]

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[1] At the hearing Counsel for Helen cited paragraph 12(c) as the only point in Helen's Notice Of Appeal where he contends Helen raised the issue that DER's order made withdrawal of miners from the mine after a fan outage more hazardous to them if battery-powered track equipment could not be used by Helen in their evacuation. Paragraph 12(c) provides:

> c. Compliance with the DER's five (5) minute notice period will unreasonably subject Helen management to unnecessary and costly de-energizing and re-energizing of the electrical systems of the Homer City Mine without the ability to first verify whether, in fact, a ventilation fan has ceased operation necessitating such de-energization. Inasmuch as 52 P.S. Section 701-221(d) permits miners to remain underground for fifteen (15) minutes subsequent to the stoppage of a ventilation fan pending efforts to restart the fan, disconnection of power in the mine only five (5) minutes after the fan's possible stoppage is arbitrary, unreasonable and capricious.

No suggestion has been made by Helen that this issue was raised elsewhere in Helen's Notice Of Appeal. As a result, this opinion assumes counsel's contention is still operative.

[2] On August 25, 1992, Helen's counsel "faxed" a letter to this Board commenting on what he perceives to be mischaracterizations of Helen's Notice Of Appeal set forth in DER's Brief. Of importance for the reasons set forth below, the second paragraph of this letter also states "Helen is seeking instantly merely the opportunity to raise as an additional objection to the subject compliance order" its assertions as to the potentially hazardous consequences of prohibiting evacuation of miners using Helen's battery-powered track equipment after a fan outage .

On August 21, 1992, we received DER's Response To Motion For Leave To Amend Notice Of Appeal. It opposes the Motion and raises the issue of the Motion's timeliness, saying it seeks an untimely amendment and fails to show good cause for the Board to grant leave to amend Helen's Notice Of Appeal.

As DER correctly asserts, under 25 Pa. Code §21.52(a) an appeal of its order must be timely filed (filed within 30 days of receipt) or we lack jurisdiction over it. Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). Helen's initial appeal was timely and DER does not dispute this fact. Because the appeal challenges DER's July 11, 1992 Order (received by Helen that same day), DER asserts this Motion had to be filed August 11, 1992 to be timely. Accordingly, DER says the Motion is untimely. Our thirty day appeal period is clearly jurisdictional, so DER is correct that amendments adding new grounds for appeal to an otherwise timely appeal must also be filed in a timely manner. According to 25 Pa. Code §21.51(e), any objection not raised in a timely notice of appeal is deemed to be waived unless good cause is shown to allow its subsequent addition. Environtrol, Inc. v. DER, EHB Docket No. 91-388-W (Opinion issued June 1, 1992).

The Commonwealth Court has interpreted "good cause" as used in §21.51(e) to be similar to the cause which must be shown to allow an appeal *nunc pro tunc*. In Game Commission, after saying that appeals to this Board are not like civil suits where leave to amend should be liberally granted, the Court said, "the time period cannot be extended *nunc pro tunc* in the absence of a showing of fraud or breakdown in the court's operation". Id. at ___, 509 A.2d at 886. It is clear that in filing this Motion, Helen is responding to the colloquy at the supersedeas hearing. While its motion alleges notice to DER and a lack of prejudice to DER, it makes no attempt to show either

fraud or a breakdown in the Board's operation. Accordingly, this Motion does not meet the standard to allow this amendment as set forth in Game Commission and must be denied.[3] In reaching this conclusion, however, because of the unusual way in which Helen's motion came to be filed, we do not rule herein that such a showing cannot be made, only that Helen has not attempted it.

O R D E R

AND NOW, this 16th day of September, 1992, it is ordered that Helen's Motion For Leave To Amend Notice Of Appeal is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge

DATED: September 16, 1992

cc: **Bureau of Litigation**
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L. Jane Charlton, Esq.
Western Region
For Appellant:
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3 Because of the way in which this Board came to write this opinion and the assertions of the parties' counsel, we conclude that the Commonwealth Court's opinion in Croner, Inc. v. Commonwealth, DER, 139 Pa. Cmwlth. 43, 589 A.2d 1183 (1991), does not apply.

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M. DIANE SMITH
SECRETARY TO THE BOA

FAIRVIEW WATER COMPANY	:	
	:	**EHB Docket No. 85-318-W**
v.	:	**(Consolidated Docket)**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 22, 1992

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

By Maxine Woelfling, Chairman

Synopsis

A water supply operator's appeal of a compliance order is dismissed where the only issue is whether the Department of Environmental Resources (Department) should be held liable for the costs of eradicating hydrocarbon contamination allegedly resulting from ordering the operator to perform a 48 hour pump test on the well. The operator pumped the well 26 hours beyond the pump test period and had limited pumping of the well for at least 13 years because of fears of possible contamination.

The operator's appeal of a civil penalty assessment is sustained in part and dismissed in part. Where the Department failed to establish that the operator had violated 25 Pa. Code §§109.605(2) and 109.710, the civil penalties for those violations will be vacated. The remaining portion of the assessment will be reduced in light of the harm, the nature of the conduct, and the statutory maximum penalty per violation. The operator's appeal of

another order will be dismissed as moot where the order, in accordance with Department counsel's representations on the record of the hearing on the merits, is deemed withdrawn.

INTRODUCTION

This matter was initiated with the filing of three separate notices of appeal by the Fairview Water Company (Fairview) and its president, George Walker.[1] Fairview operates four water supply sources serving customers in the borough of Mount Pocono, Monroe County, which are the subject of the Department's actions appealed herein. The Department's actions were taken pursuant to the Pennsylvania Safe Drinking Water Act, the Act of May 1, 1984, P.L. 206, 35 P.S. §721.1 *et seq.* (Safe Drinking Water Act), and the rules and regulations adopted thereunder at 25 Pa. Code §109.1 *et seq.*

The appeal originally docketed at No. 85-318-W sought review of the Department's July 2, 1985, order requiring Fairview not to reconnect the Sterling Road well, one of its sources of water supply, to the distribution system until a permit amendment demonstrating adequate treatment to remove benzene and other contaminants from the source was approved by the Department. The second appeal, which was docketed at No. 85-406-W, sought review of the Department's September 6, 1985, issuance of an $8000 civil penalty assessment to Fairview and Walker as a result of violations at the four water supply sources. The third appeal, which was docketed at No. 85-533-W, pertained to a November 12, 1985, order relating to monitoring and disinfection requirements. The Board consolidated the three appeals at Docket No. 85-318-W by order dated January 6, 1986.

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[1] Fairview and Mr. Walker will be collectively referred to as Fairview.

Hearings on the merits were conducted by the Board on October 28-30, 1986.

Fairview filed its post-hearing brief on January 28, 1987. It contended that the Department bears the burden of proof in these matters[2] and that the Board should modify the Department's July 2, 1985, order to impose the costs Fairview would incur in complying with the order on the Department because the contamination at the Sterling Road well was the result of the Department's negligent acts in requiring that the well be operated continuously for a 24 hour period when it was aware of a potential contamination source. With regard to the civil penalty assessment, Fairview argued that the Department failed to establish the violations for which the civil penalty was assessed in that Fairview's permit did not require the installation of automatic chlorinating devices, that it provided continuous disinfection at Wilson Spring, and that its failure to disinfect the Summit Hill well was the result of mechanical failure. Fairview alleged that the Department failed to substantiate its contention that Fairview did not have an adequate chlorine residual because the Department did not produce any evidence of bacteriological contamination. Finally, Fairview attacked the amount of the civil penalty, asserting that it was unduly harsh in light of Fairview's size and the economic impact upon it and that it was an abuse of discretion because it was not reflective of uniform enforcement policy in the drinking water program.

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[2] The parties' post-hearing briefs addressed only issues relating to the appeals originally docketed at Nos. 85-318-W and 85-406-W because of the Department's representation on the record of the hearings on the merits that it had withdrawn the November 12, 1985, order which was the subject of the appeal docketed at No. 85-533-W. We will hold the Department to its representation and dismiss Docket No. 85-533-W as moot.

The Department filed two post-hearing briefs, one addressing the July 2, 1985, order on March 19, 1987, and one addressing the civil penalty assessment on March 16, 1987. With regard to the July 2, 1985, order, the Department contends that Fairview bore the burden of proof under 25 Pa. Code §21.101(d), that the evidence did not establish that the Department's suggested testing procedure was responsible for contamination of the Sterling Well, and that, in any event, Fairview continued to pump the well for 26 hours after the 48 hour period suggested by the Department. The Department also asserted that the Board had no power to modify the July 2, 1985, order to impose costs on the Department because the order was issued in response to a mandatory duty imposed on the Department.

As for the civil penalty assessment, the Department conceded that it bore the burden of proof and argued that it established that Fairview violated its water supply permits by not installing the chlorination equipment authorized by the permits, that Fairview did not maintain an adequate chlorine residual in violation of the Department's regulations, and that Fairview's failure to provide continuous disinfection during a boil water advisory and failure to maintain an adequate chlorine residual were statutory and common law nuisances. As for the amount of the civil penalty assessment, the Department maintained that the penalty was consistent with its penalty policy and took into account the seriousness of harm, culpability of Fairview, duration of violations, and Fairview's size.

In accordance with Lucky Strike Coal Company and Louis J. Beltrami v. Commonwealth, Department of Environmental Resources, 119 Pa. Cmwlth. 440, 546 A.2d 447 (1988), we will deem as waived all arguments not raised in the parties' post-hearing briefs.

After a full and complete review of the record, we enter the following findings of fact.

FINDINGS OF FACT

1. Appellants are the Fairview Water Company and its president, George Walker. (Notice of Appeal)

2. Appellee is the Department, the agency of the Commonwealth with the duty and responsibility to administer and enforce the Safe Drinking Water Act and the rules and regulations promulgated thereunder.

3. Fairview provides water to approximately 500 customers in Mount Pocono, Monroe County. (N.T. 195-196)[3]

4. At the time of the hearing, George Walker had been the president and sole operator of the company for 32 years. (N.T. 195-196)

5. Fairview operates four sources of water supply: Wilson Spring, a surface water supply, which is geographically lower than the rest of the system and must be pumped uphill, and three groundwater wells, Sterling Well No. 1, Summit Hill Road No. 2, and Pine Hill Road No. 3. (N.T. 65-66)

6. There are chlorination facilities at all four sources. (N.T. 65-66)

7. The water from the four sources can either be pumped directly into the distribution system or into the reservoirs and then into the distribution system. (N.T. 65-66)

8. The Wilson Spring source was approved as a source of public water supply by Permit No. 1736, which was issued by the Water Supply Commission on May 28, 1915. (Ex. C-1)

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[3] References to the transcript of the hearing on the merits are denoted by "N.T. ___." The Appellant's exhibits are referred to as "A-__," while the Department's exhibits are referred to as "C-___."

9. Fairview, by Public Water Supply Application No. 166W5 dated March 25, 1965, requested the approval of the Department of Health[4] to, *inter alia*, install chlorination facilities. (Ex. C-1)

10. The reviewing engineer, Richard P. Ryer, recommended that a permit be issued "approving Well No. 1 and the proposed chlorination facilities, as described in the application, engineering plan and report, ..." (Ex. C-1, p.4)

11. An "advance" dual gas chlorinator was proposed for both the Sterling Well and Wilson Spring. (Ex. C-1, p.3)

12. The Department of Health issued Water Works Permit No. 166W5 (1966 Permit) to Fairview on June 27, 1966. (Ex. C-1A)

13. Neither the plans and specifications accompanying Public Water Supply Permit Application No. 166W5 nor Water Works Permit No. 166W5 were introduced into the record of the hearing on the merits; the Department of Health's letter transmitting the permit to Fairview was introduced into evidence. (Ex. C-1A)

14. Responding to concerns about possible gasoline loss at a nearby service station, Department Sanitarian Mark E. Warfel sampled Fairview's Sterling Well No. 1 on February 15, 1985. (DA)[5]

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[4] The Department of Health was the Department of Environmental Resources' predecessor in administering and enforcing the Act of April 22, 1905, P.L. 260, as amended, 35 P.S. §711 *et seq.* (the 1905 Act), which was subsequently repealed by the Safe Drinking Water Act.

[5] The parties agreed to rely on affidavits for the Board's disposition of this issue. Fairview relied upon the affidavit of Mr. Walker, which will be referred to as "FA," while the Department relied upon the affidavit of Mr. Warfel, which will be referred to as "DA."

15. Walker believed the well had been contaminated since the early 1970s and therefore limited his use of the well to three hours a day because he feared drawing certain groundwater contaminants into the water supply. (DA)

16. The analysis of Warfel's February 14, 1985, samples did not reveal the presence of either gasoline or benzene in the Sterling Well. (FA, p.1)

17. On April 22, 1985, Walker notified the Department of benzene contamination at four surrounding wells and expressed his concern about the proximity of the contamination of the Sterling Well. (FA, Ex. A)

18. On April 25, 1985, the Department received a map from Walker's counsel addressing the loss of gasoline at Art Barry's service station. The Department felt Sterling Well No. 1 was drawing from an aquifer not contaminated with gasoline. (DA)

19. Warfel suggested that a 48 hour standard pump test be run on the Sterling Well from May 12, 1985, to May 14, 1985. (DA)

20. Analyses of samples taken from the Sterling Well on May 14, 1985, showed the presence of benzene, but neither party introduced evidence of the level of benzene. (DA; FA, p.3)

21. By order dated July 2, 1985, the Department mandated Fairview not to reconnect the Sterling Well to its distribution system until Fairview applied for and received a permit to provide adequate treatment to remove benzene and other contaminants from the source. (Notice of Appeal, Docket No. 85-318-W)

22. By application dated January 21, 1974 (1974 permit application), Fairview submitted a request to the Department for approval of the Summit Road Well No. 2 and Pine Hill Well No. 3 as water supply sources. (Ex. C-2)

23. The 1974 permit application proposed the use of calcium or sodium hypochlorite for disinfection; a "positive displacement hypochlorite feeder" was to be used "to transfer the solution from the mixing tank and inject it into the well." (Ex. C-2; N.T. 11-12)

24. The Department issued Water Supply Permit No. 4574502 (1974 Permit) to Fairview on July 3, 1974. (Ex. A-1)

25. The 1974 Permit included the statement, "No deviations from approved plans or specifications affecting the treatment process or quality of waters shall be made without written approval from the Department." (Ex. C-6; N.T. 14)

26. Both gas chlorinators and positive displacement chlorinators (hereinafter known as automatic chlorinators) automatically place a measured amount of chlorine into the system depending on the volume of water involved. (N.T. 22-23, 37-39, 43-44, 48-49)

27. Department inspections in 1981 revealed that the automatic chlorinators authorized in the 1966 and 1974 Permits had not been installed. (Ex. C-8, C-9; N.T. 17, 66-68)

28. The chlorination system used by Fairview in 1981 consisted of a basket hanging over a garbage can-type container with chlorine tablets in the basket. Every time the water pump was activated, a portion of the water would splash over the chlorine tablets, thereby dispensing an uneven amount of chlorine into the system. High concentrations of chlorine would get into the system in the beginning of the day, with progressively weaker amounts flowing into the system as the day wore on. (N.T. 23-24, 43-44, 45)

29. Walker admitted that he did not install the gas chlorinator system authorized by the 1966 Permit and that he did not advise the Department of this change. (N.T. 213-215)

30. Similarly, Walker admitted that he did not install the positive displacement chlorinators authorized by the 1974 Permit and did not advise the Department of this. (N.T. 215)

31. Fairview never requested a modification to either the 1966 or 1974 Permits to authorize a different means of disinfection. (N.T. 58-59)

32. Fairview, through Mr. Walker, admitted that it never received written approval from the Department to modify the disinfection systems prescribed in either permit. (N.T. 214-215)

33. The Department notified Fairview in June and July of 1981 that it was in violation of 25 Pa. Code §102.21 for operating a chlorination system without a permit and in violation of 25 Pa. Code §102.22 for deviating from approved plans without Department approval. At this time the Department requested Fairview to install the automatic chlorinators in accordance with the 1966 and 1974 Permits. (Ex. C-7A, C-7B, C-7C; N.T. 25-26)

34. By notice of violation dated May 27, 1982, the Department again advised Fairview that it was in violation of 25 Pa. Code §§101.21 and 101.22 for failing to install the automatic chlorinators. (Ex. C-10; N.T. 68-69)

35. During the course of the Department's June 24, 1982, inspection, the automatic chlorinators were found to be installed and operating. (Ex. C-11; N.T. 69-70)

36. Walker admitted he installed the units after receiving the May 27, 1982, notice of violation. (N.T. 199, 213)

37. After six to eight months of operation, the positive displacement chlorination units were removed. (N.T. 200, 201, 212)

38. Although the Department made yearly inspections of Fairview's permitted facilities, it did not cite Fairview for removal of the chlorinators or do any sampling of the water until 1985. (N.T. 198, 202)

39. In preparation for an upcoming Public Utility Commission hearing, the Department sampled water from the Fairview distribution system on April 8, 1985, and found high coliform bacteria levels. Four of the eight samples had coliform bacteria counts in excess of one coliform colony per 100 milliliters of water. (Ex. C-13; N.T. 70-72)

40. Coliform is used as an indicator to judge drinking water quality. When coliform is present there is an increased likelihood that other bacteria or viruses that may cause illness are also present. (N.T. 97)

41. On April 15, 1985, the Department notified Fairview of the high coliform bacteria levels in its water supply. (Ex. C-14; N.T. 55)

42. On April 15, 1985, the Department issued a notice to all customers of Fairview (through the local paper) advising them to boil their water for at least one minute prior to consumption (hereinafter "Boil Water Advisory"). (Ex. C-14)

43. A Boil Water Advisory will not be lifted until sampling conducted by the operator indicates that the coliform level does not exceed one colony per 100 ml water for three consecutive days and the Department confirms this in its own sampling. (N.T. 85, 87)

44. During its April 17, 1985, inspection the Department observed that the automatic chlorinator at Pine Hill was not connected to the electrical system required for operation and chlorine was being hand fed into the reservoir; that the automatic chlorinator at the Summit Well was not in use but was sitting on a shelf; and that there was no automatic chlorinator at the Sterling Well, although there were bottles of bleach near the reservoir. (N.T. 78-79)

45. On April 18, 1985, the Department notified Walker personally of the need to maintain adequate chlorine residual throughout the system in order

to destroy bacterial growth and to re-install the chlorinators in accordance with the 1966 and 1974 Permits. Walker was also advised that the Boil Water Advisory would not be lifted until the residual chlorine levels and bacteriological monitoring and disinfection means were satisfactory. (Ex. C-16; N.T. 80-81)

46. These deficiencies were also set forth in a notice of violation dated April 22, 1985. (Ex. C-17)

47. On April 23, 1985, during the Boil Water Advisory, the Department again inspected the Fairview facility and observed that no automatic chlorinators were operating. The homemade suction device chlorination system was not operating either. There was a five gallon drum of chlorine dripping into the source at Wilson Spring and at one of the wells. (Ex. C-18; N.T. 82-83)

48. On May 13, 1985, the Department ordered Fairview to, *inter alia*, install properly sized automatic positive displacement chlorinators; provide a Boil Water Advisory to its customers which would remain in effect until further notice from the Department; and monitor the distribution system. (Ex. A-3)

49. Walker re-installed the automatic displacement chlorinators in May, 1985. (N.T. 205, 212)

50. On June 3, 1985, the Department collected samples from Fairview's distribution system after receiving Fairview's samples which indicated three consecutive days with no coliform bacteria. (Ex. C-19, C-20; N.T. 110-111)

51. On June 4, 1985, again during the Boil Water Advisory, the Department inspected Fairview to measure chlorine residual, which is the amount of chlorine left in the system after it has passed through the distribution system and is coming out of the consumer's tap. The Department

was unable to find a chlorine residual at any of four different locations. (Ex. C-23; N.T. 112-113)

52. Also on June 4, 1985, the Department inspected Fairview's water sources and found that the automatic chlorinator at the Summit Well No. 2 was operating and there was chlorine in the device, but the chlorine was not being pumped into the reservoir; the automatic chlorinator at Pine Hill Well No. 3 was operating, but without chlorine; and the automatic chlorinator at the Wilson Spring was operating. The Department immediately notified Walker of its findings. (N.T. 112-114)

53. Walker checked the Fairview sources on June 4, 1985, and agreed that Summit Well No. 2 was operating, but not pumping chlorine into the system because the level of chlorine had fallen below the intake point. (N.T. 211)

54. Walker did not check his automatic chlorinators on June 4, 1985, because he was attending to a leak in the line on that date. (N.T. 209)

55. On June 4, 1985, upon learning of the problems with the wells, Walker did refill the automatic chlorinators. (N.T. 112-114)

56. The Department again sampled the distribution system later on June 4, 1985, after Walker refilled the chlorine, and found a measurable and acceptable chlorine residual in the system. (N.T. 112-114)

57. On June 6, 1985, based on the results of the June 3, 1985, samples, the Department lifted the Boil Water Advisory. (Ex. C-22)

58. On September 6, 1985, the Department assessed civil penalties against Fairview for its violations of the disinfection requirements, including removal of the chlorinators; failure to provide continuous disinfection, and failure to maintain adequate chlorine residuals. (Notice of Appeal, Docket No. 85-406-W)

59. This civil penalty assessed against Fairview was the first to be assessed under the Safe Drinking Water Act. (N.T. 127, 151)

60. The assessment was prepared in accordance with guidelines communicated by telephone; these guidelines were not memorialized in writing until April, 1986. (N.T. 127, 145-146, 193; Ex. C-24)

61. In assessing a civil penalty, the Department considers four factors: the seriousness of the violation to the community, culpability of the operator, the size of the water company that caused the violation, and the duration of the violation. (N.T. 128)

62. The amount of the penalty is adjusted according to the size of the water company, thus taking into account the water company's ability to pay. (N.T. 129, 190)

63. Since Fairview was a small water company, any assessments would be at the mid-point of the penalty range for seriousness and for culpability. (N.T. 129)

64. The Department assessed Fairview $4000 in civil penalties for its April 23, 1985, removal of the automatic chlorinators. The penalty was broken down into these components:

a) **Seriousness of Harm** - The removal of the chlorinators was considered a non-imminent threat, so the range of assessment was from $300 to $400. Since Fairview was a small water company, the assessment was at or less than the mid-point, or $350. (N.T. 130, 134)

b) **Culpability** - This was considered deliberate conduct because of the number of times Walker had knowingly failed to install or had removed the automatic chlorinators. The range of assessment for this level of culpability was from $3000 to $5000. Since this was a small

water company, the actual assessment was at or less than the mid-point, or $3650. (N.T. 135)

c) **Duration** - The assessment was for a single day of violation - April 23, 1985. (N.T. 137)

65. The Department assessed Fairview a penalty of $3000 for its failure to provide continuous disinfection on June 4, 1985. The penalty was broken down into these components:

a) **Seriousness of Harm** - The failure to provide continuous disinfection during an emergency situation was considered an imminent threat (N.T. 140) and the range of assessment was from $2000 to $5000. Since this was a small water company, the actual assessment was at or less than the mid-point, or $2500. (N.T. 140)

b) **Culpability** - Fairview's conduct was considered negligent, so the range for this factor was from $100 to $1000. Since Fairview was a small water company, the assessment for this factor was at less than the mid-point, or $500. (N.T. 140-141)

c) **Duration** - The assessment was for a single violation on June 4, 1985.

66. Fairview was assessed a civil penalty of $1000 for its failure to maintain an acceptable chlorine residual in its distribution system on June 4, 1985, during the Boil Water Advisory. The penalty was broken down into these components:

a) **Seriousness of Harm** - The failure to maintain an acceptable chlorine residual was considered a non-imminent threat violation and the range for assessment was between $400 and $500. Since Fairview was a small water company, the actual assessment was at or less than the mid-point, or $450. (N.T. 142)

b) Culpability - Because Fairview's conduct was considered negligent, and the range for this assessment was between $100 and $1000. Because of Fairview's size, the actual assessment was at or less than the mid-point, or $550. (N.T. 142)

c) Duration - The assessment was for the April 23, 1985, violation. (N.T. 137)

DISCUSSION

The Department has the burden of proving by a preponderance of the evidence in each of these consolidated appeals that its action was not arbitrary, capricious, contrary to law, or otherwise an abuse of discretion. This is so whether the Board is reviewing the two orders at issue or the civil penalty assessment. 25 Pa. Code §§21.101(b)(1) and (b)(3), Gordon and Janet Back v. DER, 1991 EHB 1667, and Carl Oermann v. DER, 1991 EHB 1542, reconsidered at 1991 EHB 1943.

The September 2, 1985 Order

Fairview argues that the Department's September 2, 1985, order was an abuse of discretion, in essence, because the Department's action in requiring the 48-hour pump test of the Sterling Well was the cause of the alleged benzene contamination in the well. Fairview further contends that the Department should bear the expenses associated with obtaining the permit amendment.

There is no dispute between the parties regarding the presence of benzene in the Sterling Well, and, the parties do not differ over the desirability of removing a hydrocarbon-contaminated water supply source from service. Rather, the dispute here is over whether, because the 48-hour pump test "required" by the Department was the cause of the benzene contamination, the Department should bear the costs of eradicating the contamination.

While it is unclear whether the Department "suggested" the 48-hour pump test, or "required" it, the fact of the matter remained that Fairview continued to pump the Sterling Well some 26 hours beyond the 48-hour pumping period. Indeed, Fairview even admitted in its affidavit that, since 1972, it limited pumping of the well to three hours a day because of fears of possible contamination. Therefore, we cannot conclude that the Department was the cause of the contamination in the well.

Similarly, we cannot find that the Department is responsible for any costs associated with securing the mandated permit amendment. For these reasons and because Fairview has not otherwise challenged the order as an abuse of discretion, we sustain the Department's July 2, 1985 order.

The Civil Penalty Assessment

Under §13(g) of the Safe Drinking Water Act the Department is authorized to assess civil penalties for violations of the statute, rules and regulations promulgated thereunder, orders issued thereto, or the terms and conditions of permits issued thereunder. The recipient of the civil penalty assessment may contest the violations which formed the basis for the assessment, as well as the amount of the assessment, in its appeal to the Board.[6] Because Fairview is contesting both the fact of the violations, as well as the assessment, the Department's burden here is, by a preponderance of

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[6] There are analogous civil penalty assessment provisions in several other statutes administered by the Department, with the most familiar being that in the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.* For a discussion of the scope of appeals of such civil penalty assessments see Kent Coal Mining Company v. Department of Environmental Resources, 121 Pa. Cmwlth. 149, 550 A.2d 279 (1988).

the evidence, to establish the violations and then to convince the Board that the amount of the assessments was not an abuse of discretion. We will first address the alleged violations.

The first violation for which Fairview was assessed a civil penalty was the alleged removal of its automatic chlorinators from operation on April 23, 1985, in violation of the terms and conditions of both the 1966 and 1974 Permits and 25 Pa. Code §109.703. Fairview raises two arguments regarding this violation. First, it asserts that it was not in violation of its permit because the permit did not specify automatic displacement chlorinators. And, it argues that it has always operated in accordance with the terms and conditions of its permit, pointing to the fact that the Department apparently never took issue with the type of chlorinators it employed until 1985.

Both of Fairview's permits were issued pursuant to the 1905 Act and the rules and regulations promulgated thereunder at 25 Pa. Code §109.1 *et seq.*[7] Section 3 of the 1905 Act required the operator of any waterworks to obtain a permit for the construction or extension of the waterworks. 35 P.S. §713. Section 21 of the 1971 regulations mandated that

> Construction of water supplies, or additions and alterations thereto shall start only upon receipt of a permit and shall be in compliance with plans, designs and other data approved by the Department.

Any deviation from "approved plans or specifications affecting the treatment process or quality of water" had to be approved in writing by the Department. Section 22 of the 1971 regulations. Although the Safe Drinking Water Act

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[7] These regulations were originally adopted by the Sanitary Water Board and re-promulgated as regulations of the Department at 1 Pa.B. 1804 (Sept. 11, 1971). They will be referred to herein as "Section ___ of the 1971 regulations," as the regulations promulgated under the Safe Drinking Water Act were also codified at Chapter 109.

repealed the 1905 Act, permits issued under the 1905 Act were deemed to be permits issued under the Safe Drinking Water Act. §7(g) of the Safe Drinking Water Act.

The 1971 regulations continued in effect until the adoption of regulations under the Safe Drinking Water Act. §15 of the Safe Drinking Water Act. New implementing regulations were adopted by the Environmental Quality Board on October 23, 1984, and were effective immediately upon publication in the Pennsylvania Bulletin on December 8, 1984.[8] Under 25 Pa. Code §109.502(a):

> A public water system operating under a valid permit issued under the act of April 22, 1905, 1905 (P.L. 260, No. 182) (35 P.S. §§711--716), may continue to operate in accordance with the terms and conditions of the prior permit so long as the public water system is operated in compliance with this chapter and the act. A condition in a prior permit which is inconsistent with this chapter shall be null and void, except for conditions concerning construction of facilities which have been completed. Substantial modification of facilities operated under a prior permit requires a permit amendment under §109.505 (relating to permit amendments).

Any "plans, specifications, reports, and supporting documents submitted as part of the permit application" are incorporated by reference into the permit. 25 Pa. Code §109.510(b). The permitted facilities are required to be operated in accordance with the terms and conditions of the permit. 25 Pa. Code §109.703(a).

Given the clear language in the statutes and regulations, we cannot give any credence to Fairview's arguments that the plans and specifications for an advance gas chlorinator at the Wilson Spring and the Sterling Well and

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[8] See 14 Pa.B. 1479 (Dec. 8, 1984).

positive displacement hypochlorite feeder for the Pine Hill and Summit Road Wells were not incorporated into the 1966 and 1974 Permits, respectively. Furthermore, there is no dispute in the record that Fairview was never given written permission by the Department to alter its method of disinfection or that the automatic chlorinators were not operating on April 23, 1985. Nor can we accept Fairview's arguments that the Department was somehow precluded from assessing a civil penalty for failure to install the approved chlorinators because it did not cite Fairview until 1981 and then again ignored it until 1985. The Department's laxity in enforcing the law can never be grounds for preventing it from implementing its statutory duty. Lackawanna Refuse Removal Inc. v. Department of Environmental Resources, 65 Pa. Cmwlth. 372, 442 A.2d 423 (1982).

The second violation for which Fairview was assessed civil penalties was its alleged failure to provide continuous disinfection on two of its three sources of supply on June 4, 1985 (which was during the Boil Water Advisory issued to its customers); continuous disinfection was not occurring because the two chlorinators were empty. The civil penalty assessment issued by the Department asserts that this is a violation of 25 Pa. Code §109.605(2) and, consequently, a statutory nuisance under §12(a) of the Safe Drinking Water Act. The Department's post-hearing brief does not address 25 Pa. Code §109.605(2) and asserts that Fairview's allowing the chlorinators to become empty during a Boil Water Advisory constitutes both a statutory and a public nuisance. Fairview argues that even if the Department establishes that continuous disinfection was not occurring, it could not assess a civil penalty for a violation of 25 Pa. Code §109.605(2) because the regulation did not apply to Fairview.

We agree with Fairview. The Department's authority to assess civil penalties stems from §13(g) of the Safe Drinking Water Act. Civil penalties may be assessed, as we previously stated, for violations of the statute, rules and regulations, orders, or the terms and conditions of permits. We will not look beyond an assessment to find another potential violation for which a penalty may be assessed where the Department specifically cites the alleged violation in its assessment.

The regulation cited by the Department in its assessment, 25 Pa. Code §109.605(2), by its own terms, does not apply to existing (pre-Safe Drinking Water Act) permitted sources until they seek permit modifications to increase the supply. Since Fairview was an existing source at the time of the alleged violation, it was not subject to this regulation. If it was not subject to the regulation, its failure to provide continuous disinfection in violation of the regulation could not be considered a statutory nuisance under §12(a) of the Safe Drinking Water Act. And, we need not decide whether Fairview's conduct constituted a public or common law nuisance, for the Safe Drinking Water Act does not authorize the Department to assess civil penalties on this basis.

The last alleged violation for which the civil penalty was assessed was failure to maintain an acceptable residual of chlorine[9] during a Boil Water Advisory, on June 4, 1985, in violation of 25 Pa. Code §109.710. Fairview challenges the Department's assertion on grounds that since the regulation ties the level of chlorine residual to the microbiological maximum contaminant level (MCL) and there has been no showing of exceedance of that

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[9] "Chlorine residual" is defined as the amount of chlorine in treated water which is available to oxidize any contaminants entering the system. Lee, Environmental Engineering Dictionary, Government Institutes, 1989.

MCL, no violation of the regulation has been established. Alternatively, Fairview argues that because the regulation at issue does not even specify a particular minimum chlorine residual and no testimony established one, the Department's assessment of a penalty for such a violation is arbitrary and unconstitutional. The Department does not elaborate in its post-hearing brief on why it believed Fairview violated 25 Pa. Code §109.710.

The relevant regulation, 25 Pa. Code §109.710, provides that:

> A disinfectant residual acceptable to the Department shall be maintained throughout the distribution system of the community water system sufficient to assure compliance with the microbiological maximum contaminant level specified in §109.202 (relating to State maximum contaminant levels and treatment technique requirements). The Department will determine the acceptable residual of the disinfectant considering such factors as type and form of disinfectant, temperature and pH of the water, and other characteristics of the water system.

The National Primary Drinking Water Standards promulgated by the Environmental Protection Agency at 40 CFR §141.11-141-16 were incorporated by reference as state regulations at 25 Pa. Code §109.202(1).

The MCL for coliform bacteria, which is the regulated microbiological contaminant, is prescribed based upon the analytical technique employed and the monitoring frequency, which, in turn, is dependent upon the population served by the system. 40 CFR §141.14. Thus, by virtue of 25 Pa. Code §109.710, the Department is to determine an acceptable chlorine residual--*i.e.* one which assures that the microbiological MCL is achieved--taking a number of variables relating to the system into account. This MCL, in turn, is dependent on other variables as described above.

We have no evidence in the record here as to what the acceptable chlorine residual is for the Fairview system.[10] The only evidence we have is that the Department found no chlorine residual in the system on June 4, 1985. However, given the language of the applicable regulation, we cannot find that Fairview violated 25 Pa. Code §109.710. Similarly, for the reasons described above in our discussion of the continuous disinfection standard, we cannot find the existence of a statutory nuisance and we will not find a public nuisance, given the scope of the Department's authority to assess civil penalties.

Having found that the Department failed to prove that Fairview violated the applicable requirements for continued disinfection and acceptable chlorine residual, we will vacate the $3000 and $1000 civil penalties assessed by the Department. We turn now to a consideration of the reasonableness of the civil penalty assessed by the Department for Fairview's removal of the chlorinators mandated by the terms and conditions of its permits.

Fairview attacks the Department's assessment on a number of bases. First, it contends that the assessment was arbitrary because the Department ignored its existing guidelines for penalty assessments and, instead, applied

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[10] The only numerical reference we have is a question in Part B, Module 8 of the 1974 Permit application:

> 2. Is the chlorinator capacity such that a free chlorine residual of at least 2 milligrams per liter can be attained in the water after a contact time of at least 20 minutes? ___ Yes ___ No

Even if this could be construed as a chlorine residual, it was superseded by 25 Pa. Code §109.710. See 25 Pa. Code §109.502(a).

guidelines yet to be reduced in writing, resulting in a higher assessment.[11] It also argues that the penalty was excessive, given Fairview's efforts to comply and its ability to pay, and that, since the chlorinator violations pre-dated the passage of the Safe Drinking Water Act, civil penalties could not be assessed.[12]

Unlike many of the other environmental regulatory statutes administered by the Department, the Safe Drinking Water Act does not address what factors should be considered by the Department in assessing a civil penalty. But, since it prescribes a maximum civil penalty of $5000, obviously the Department was to exercise some discretion in assessing the penalty amount. The expression of that discretion is the civil penalty policy in the enforcement strategy. However, the Board is not bound by the Department's enforcement strategy and, at most, deviation from the policy could be regarded as an abuse of discretion.

As for Fairview's argument regarding the applicability of the civil penalty provisions of the Safe Drinking Water Act, it must be rejected. The penalty was assessed for a violation occurring on April 23, 1985, clearly long after December 8, 1984, the effective date of the Safe Drinking Water Act. And, the Department accounted for the small size of Fairview (and thus, its ability to pay) in calculating the assessment.

Turning now to the specifics of the penalty assessment, the Department considered four factors: seriousness, the culpability of the operator, the size of the water company, and the duration of the violation.

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[11] There was no authority under the 1905 Act to assess civil penalties.

[12] Fairview also argues that the penalty is invalid because it was not assessed in a uniform fashion. Since this was the first civil penalty to be assessed under the Safe Drinking Water Act, it could hardly be uniform.

Bearing in mind that the statutory maximum penalty is $5000, there is only one day of violation for which the penalty was assessed, and the penalty assessment referred to a violation of 25 Pa. Code §109.703, rather than to individual violations of the 1966 and 1974 Permits, we must conclude that the penalty was excessive.

There is no evidence to support any conclusion that the removal of the chlorinators resulted in serious harm and the Department's assessment accounted for this. So, the $350 calculated for this component of the assessment was reasonable. We, like the Department, find that Fairview's conduct in removing the chlorinators was deliberate, but we will assess $2000 for this component of the assessment.[13] Thus, we will reduce the assessment to $2350.

Finally, in the conclusion to its post-hearing brief, the Department requests that we "uphold the Department's assessment of civil penalties against Fairview and Walker, jointly and severally, ..." Although the Department seemed to refer to Fairview and Walker as if they were one and the same in its characterization of the facts, it presented no legal arguments concerning why Mr. Walker should be held jointly and severally liable with Fairview. Consistent with our precedent, we will deem the Department to have abandoned this argument. Lucky Strike Coal Company, *supra*.

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[13] The Department's matrix for calculation of the assessment (Ex. C-24) is rather odd. The penalty is to be calculated using this formula: (Seriousness + Culpability) x Duration = Penalty. But, it is conceivable that the statutory maximum penalty of $5000 could be reached in calculating both the seriousness and culpability components of the penalty, and it would then have to be reduced to $5000. Since we are not reviewing the policy itself, we need not further discuss the matrix.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and the subject matter of these appeals. §1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510.21.[14]

2. The Department has the burden of proving by a preponderance of the evidence that its July 2, 1985, order to Fairview was not an abuse of discretion. 25 Pa. Code §21.101(b)(3).

3. The Department is not responsible for the costs incurred by a water supply operator in pump-testing a contaminated well.

4. The Department's July 2, 1985, order to Fairview was not an abuse of discretion.

5. Under §13(g) of the Safe Drinking Water Act, the recipient of a civil penalty assessment may challenge the violations which formed the basis of the assessment in an appeal of the assessment.

6. In an appeal of a civil penalty assessment under the Safe Drinking Water Act the Department has the burden of proving by a preponderance of the evidence that the alleged violations occurred and that the amount of the assessment was not an abuse of discretion.

7. Fairview was required by both the 1971 and the 1984 regulations to install and operate automatic chlorinators on its water supply wells in accordance with the plans and specifications submitted with its permit applications. 25 Pa. Code §109.510(b) and Section 21 of the 1971 regulations.

8. Fairview removed automatic chlorinators from its wells in violation of 25 Pa. Code §109.703(a).

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[14] These appeals were filed prior to the passage of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7511 *et seq.*

9. Fairview was not subject to 25 Pa. Code §109.605(2), because its permits were issued prior to the passage of the Safe Drinking Water Act.

10. Fairview did not violate 25 Pa. Code §109.710 where its permits do not specify an acceptable chlorine residual.

11. The Department's assessment of civil penalties for violations of 25 Pa. Code §§109.605(2) and 109.710 was an abuse of discretion.

12. The Department has discretion to consider various factors such as wilfulness, seriousness of the violation, size of the operator, and duration.

13. The Department accounted for Fairview's size when computing the seriousness and culpability components of the civil penalty assessment.

14. Fairview's conduct in removing the chlorinators was deliberate.

15. The assessment of a $4000 civil penalty to Fairview for violating 25 Pa. Code §109.703(a) was an abuse of discretion where the duration of the violation was one day, the Department did not regard the violation as causing serious harm, and the statutory maximum penalty is $5000 per day.

16. Where counsel for the Department represents on the record of a hearing that the Department has withdrawn an order which is the subject of the appeal, the Department will be held to that representation and the order will be deemed withdrawn.

17. An appeal of an order will be dismissed as moot where the underlying order has been withdrawn.

O R D E R

AND NOW, this 22nd day of September, 1992, it is ordered that:

1) The Department's July 2, 1985, order to Fairview is sustained and Fairview's appeal at Docket No. 85-318 is dismissed;

2) Fairview's appeal at Docket No. 85-406-W is sustained in part and reversed in part. The Department's September 6, 1985, civil

penalty assessment to Fairview is sustained in part and reversed in part:

A) The $3000 civil penalty assessment for failure to provide continuous disinfection is vacated;

B) The $1000 civil penalty assessment for failure to maintain an acceptable chlorine residual is vacated;

C) The $4000 civil penalty for removal of the automatic chlorinators is reduced to $2350;

3) Fairview's appeal at Docket No. 85-533-W is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

Member Richard S. Ehmann did not participate in this decision.

DATED: September 22, 1992

See next page for service list.

EHB Docket No. 85-318-W

cc: **DER, Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BO

EAST PENN MANUFACTURING CO., INC.	:	
	:	
v.	:	**EHB Docket No. 90-560-E**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 22, 1992**

OPINION AND ORDER SUR
EAST PENN MANUFACTURING CO., INC.'S
MOTION FOR SANCTIONS PRECLUDING THE
DEPARTMENT FROM INTRODUCING OR USING
CERTAIN EVIDENCE

By: Richard S. Ehmann, Member

Synopsis

East Penn Manufacturing Co., Inc.'s ("East Penn") Motion For Sanctions, seeking to preclude the Department of Environmental Resources ("DER") from using in this appeal evidence gathered by inspections of East Penn's facility conducted after the close of discovery, is denied. DER's inspections and sampling under authority 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, 35 P.S. §6018.101 *et seq.*, at East Penn's facility are not restricted by the limited period for discovery set forth in our Pre-Hearing Order No. 1. Because of the *de novo* review given by this Board to the DER action challenged by this appeal, the information gathered by DER in these inspections may be offered as evidence in the yet to be scheduled merits hearing.

Background

On December 21, 1990, East Penn appealed to this Board from DER's issuance of an administrative order revoking a water quality management permit authorizing a discharge of industrial wastes to East Penn's "ore pit" from its lead acid battery manufacturing plant in Richmond Township, Berks County. The Order also directed the cessation of this discharge, the submission of an approvable ore pit clean-up plan to DER, and the implementation of that plan once DER approved same.[1]

Upon receipt of East Penn's appeal and in accordance with the Board's standard procedure, on January 2, 1991 we issued our standard Pre-Hearing Order No. 1 which provided in paragraph No. 2 that all discovery in this matter was to be completed within seventy-five days of the Order's date (or by March 18, 1991).

On July 23, 1991, a DER employee appeared at East Penn's facility and collected samples of storm water runoff including samples of storm waters draining into the ore pit. On July 30, 1991, other DER employees appeared at East Penn's facility and collected samples of the sediment in the ore pit.

Thereafter, in August of 1991, East Penn filed a Motion For Summary Judgment in regard to the validity of DER's order. DER's September 1991 response to East Penn's Motion relies in part on the analysis of the results of the samples collected by DER in July. East Penn then filed a Reply to DER's response objecting to this evidence's usage by DER.

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[1]Nearly simultaneously and on December 27, 1990, East Penn appealed DER's issuance to it of an NPDES Permit for a discharge from this plant to an adjacent dry swale. That appeal was assigned docket No. 90-567-F. By subsequent order of this Board, those two appeals were consolidated at the instant docket number.

Subsequently, on December 24, 1991, East Penn also filed the instant Motion. It asserts that DER violated 25 Pa. Code §21.111 and Pa.R.C.P. 4009(a)(2) in collecting these samples and that the Board should impose a sanction on DER under 25 Pa. Code §21.124 which bars DER from any use of this evidence in this proceeding, whether in response to the pending Motion For Summary Judgment or otherwise. In support of its contention on this matter, East Penn's Motion cites Darmac Coal, Inc. v. DER, 1991 EHB 1883 ("Darmac"), where the Honorable Joseph N. Mack, a member of this Board, barred use of similarly obtained evidence in response to a motion for sanctions filed by Darmac.

DER has filed a response to East Penn's Motion, opposing same. It asserts that Darmac is a "one judge" opinion rather than an opinion by the Board *en banc* and that since the entire Board has not considered this issue, other Board Members are not bound by Judge Mack's opinion to the degree they would otherwise be if it were an *en banc* opinion. DER then asserts that the samples were lawfully obtained and thus may be used regardless of Pa.R.C.P. 4009(a)(2) and that the Board should not create an exclusionary rule for such lawfully obtained evidence. DER also asserts that there is no prejudice to East Penn, that the adoption of such a rule would hamper DER's enforcement powers, that such sanctions are without precedent and contrary to prior Board decisions. In short, DER urges a rejection of Darmac.

On February 14, 1992, East Penn filed a Reply to these DER assertions. It contends our rules and the orderly progress of cases before us require the imposition of sanctions unless DER is to be allowed to ignore our rules on whim. It also asserts DER is required to comply with Pa.R.C.P. 4009(a)(2) and cannot assert a right of inspection superior to those in this

rule once an appeal has begun. East Penn also asserts that the Board's prior decisions are not inconsistent with Darmac, that assertion of an exclusionary rule is not the issue, that the requested sanctions are consistent with prior Board decisions, and that imposing sanctions will not perpetuate litigation as DER asserts and will not hamper DER's enforcement powers. Finally, East Penn asserts it is prejudiced as a result of this sampling.[2]

Having read and reread Darmac and the contentions of the parties in the instant appeal, I must respectfully disagree with Judge Mack's opinion in Darmac and the contentions raised in support thereof by East Penn. DER is correct in pointing out that this Board has not considered this issue in any opinion prepared *en banc*. Therefore, while I do so reluctantly, since I disagree with Judge Mack's conclusion in Darmac, I must deny East Penn's motion for the reasons set forth below.

There is no question but that DER is statutorily authorized to inspect East Penn's facility. Section 5(b)(8) of the Clean Streams Law, 35 P. S. §691.5, clearly empowers DER to inspect East Penn's facility as to water pollution issues, and, as the statute deals with water pollution, of necessity this inspection empowerment includes the right to collect samples of the waters for pollutants. Equally clearly, under Section 608 of the Solid Waste Management Act (35 P.S. §6018.608(3)), DER is empowered to inspect East Penn's facility and collect samples as necessary in regard thereto.[3] Neither

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[2]On September 10, 1992, this matter was reassigned to Board member Richard S. Ehmann due to the resignation of former Board Member Terrance J. Fitzpatrick.

[3]DER is also obligated to conduct certain types of inspections at various (footnote continued)

statute imposes restrictions on these inspection authorizations based upon Pa.R.C.P. 4009 and there is no obligation to seek permission for an inspection in advance thereof from East Penn. Indeed, it takes little imagination to see why unannounced inspections would be a requirement for effective enforcement of these statutes. There is, thus, no question that statutorily DER may inspect East Penn's facility on an irregular unannounced bases, collect samples, and use these inspections and samples as evidence in the on-going efforts to abate pollution and violations of these statutes.

There is also no question that proceedings before this Board are not run by exactly the same rules as trials in the Courts of Common Pleas. See, e.g., Commonwealth, Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877, affirmed, 521 Pa. 121, 555 A.2d 812 (1989). We clearly hold *de novo* hearings on appeals and this allows us to consider evidence not before DER when it took the initial action which generated the appeal. Hrivnak Motor Company v. DER, 1991 EHB 1811. Moreover, where relevant evidence is discovered between conclusion of the merits hearing and entry of an adjudication, it is clear that with the filing of a properly prepared petition, the Commonwealth Court expects this Board to receive this evidence and consider it in adjudicating the merits of the dispute between the parties. Spang & Company v. DER, 140 Pa. Cmwlth. 306, 592 A.2d 815 (1991).

Nothing in the statutes under which DER issued its order, the general rules of administrative practice or our own rules prevents us from considering lawfully obtained evidence. In fact the opposite is true; we are encouraged

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(continued footnote)
types of facilities under the terms of the delegations to it from the Environmental Protection Agency and the Office of Surface Mining of various federal environmental regulatory programs.

by the rules to consider all relevant information regardless of when collected. See, e.g., 1 Pa. Code §35.231. We could hardly perform our *de novo* review function, whether the evidence was offered by East Penn or DER, if we were to adopt the position asserted by East Penn. For example, in most, though not all, cases, expert testimony in support of an appellant is developed only after DER acts and a decision is made to contest that action. Under East Penn's theory, if that testimony is not fully developed by the end of the discovery period, we must reject it, even if it is probative and sheds new light on the issues in dispute. It is because *de novo* review of all evidence is virtually the *raison d'entre* for this Board that this argument must fail.

What, then, of the impact of Pa.R.C.P. 4009(a)(2), 25 Pa. Code §21.111(d) and Darmac? 25 Pa. Code §21.111(d) and Pa.R.C.P. 4009(a)(2) do not apply to DER and its staff's undertaking of the types of inspections authorized by the statutes it enforces. 25 Pa. Code §21.111(d) is simply not intended to address the inspections otherwise already authorized statutorily. Here, DER came solely to inspect and collect samples as authorized by these acts. Had DER instead sought access to East Penn's research and development efforts, a corporate headquarters, a records storage site or an analytical laboratory, the results might arguably be different, since these statutes are not *carte blanche* authorizations for DER to conduct systematic warrantless searches. Commonwealth, DER v. Fiore, 88 Pa. Cmwlth. 418, 491 A.2d 284 (1984).[4] However, that was not the case here. Moreover, if DER seeks to

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[4]It might have been better form, in light of the course of this litigation, for DER to have provided the notice to East Penn spelled out in (footnote continued)

conduct inspections beyond those authorized by these statutes because of a proceeding process before us, it must comply with Pa.R.C.P. 4009 and all of the other rules concerning discovery, just as any other party must. Francis Nashotka, Sr., et al. v. DER, 1988 EHB 1050. Further, as East Penn points out, we have not hesitated to impose sanctions for non-compliance with our orders when they have not been adhered to, even when the sanctioned party is DER. Miller's Disposal and Truck Service v. DER, 1990 EHB 1239. However, when the inspection is authorized by statute 25 Pa. Code §21.111(d)'s existence does not limit or restrict DER's ability to conduct the legislatively authorized inspection or use the evidence gathered thereby. Said another way, DER's obligations under these statutes to regulate and thus inspect this facility did not cease because of the filing of this appeal.

East Penn also argues that it is prejudiced by DER's inspections, but we do not see how. It has daily access to the areas sampled by DER for purposes of its own sampling. Its staff accompanied the DER inspectors who visited East Penn's facility and took these samples, so East Penn could have sampled these locations simultaneously. It has requested copies of the results of DER's analysis and DER says it has provided same. It has not sought leave from us to conduct discovery as to these samples and their analysis and there is no indication that DER would oppose same.[5] Further, the date for a hearing on the merits in this matter has yet to be scheduled;

(continued footnote)
Pa.R.C.P. 4009(a)(2) or at least some advance notice as to the ore pit's sediment which, unlike storm water runoff, is present every day and not precipitation dependent; but, the lack of said notice is not decisive, since the sediment is there every day for East Penn to sample.

[5]Of course if it did, based on the alleged untimeliness of East Penn's request, we would reject such an objection.

thus this potential evidence can be reviewed by East Penn and its experts, eliminating any concerns over a last minute trial-ambush by DER.[6] East Penn says it is prejudiced because it cannot object to this inspection under Pa.R.C.P. 4009(b)(2). It is true that East Penn cannot object, but since this rule does not apply, no right to object to it exists.

East Penn also asserts prejudice because it had no notice of this inspection and thus lost the opportunity to have its experts observe DER's sampling procedure. East Penn's Dan Dellicker obviously followed DER's inspectors around the facility, observing what they did during the sediment sampling, or he would not have been able to put together the notes which comprise a portion of Exhibit B to East Penn's Reply. Exhibit B to East Penn's Motion is an affidavit by Mr. Dellicker indicating that he followed the DER staff collecting both the sediment samples and the storm water runoff samples. Exhibit C to that Motion is the affidavit of DER's sediment sampler describing his sampling procedure. Clearly, DER's activities were observed by a professional employed by East Penn and DER has furnished its sample results to East Penn. While East Penn may not have split samples with DER, it does not aver it asked DER to do so and that DER refused. As to the contention of prejudice because East Penn wanted an expert to accompany DER (other than Mr. Dellicker) but this could not occur, it is based upon the assumption of a right to have this happen. No such right is found in the statutes authorizing these inspections. We encourage DER to allow this whenever possible because

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[6]Despite the fact that East Penn claims severe prejudice to it in its inability to conduct any discovery on these sample analysis data in East Penn's Reply file with us on February 14, 1992, East Penn has not sought leave of this Board to conduct any such discovery in the intervening seven months. This omission on East Penn's part leads us to wonder as to the extent of the actual prejudice to East Penn.

it facilitates mutual understanding and (hopefully) dispute resolution without litigation, but we cannot engraft this obligation into the statutes empowering DER to conduct these inspections by virtue of Pa.R.C.P. 4009's existence.

Nevertheless, to the extent East Penn must gather additional evidence to respond to this sample data or to respond to expert conclusions based thereon or must engage in discovery of how DER's position has changed as a result thereof, we will allow East Penn a period of time to do so if it promptly requests same.

O R D E R

AND NOW, this 22nd day of September, 1992, it is ordered that East Penn's Motion for Sanctions Precluding The Department From Introducing Or Using Certain Evidence is denied. It is further ordered that East Penn is given two weeks from the date of this Order to advise the Board of the scope and extent of any additional discovery or evidence-gathering activities it must engage in as a result of the denial of this Motion, and all proceedings in this appeal are stayed for this two week period.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: September 22, 1992

cc: **Bureau of Litigation**
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SECRETARY TO THE BOARD

ENVIRONMENTAL NEIGHBORS UNITED FRONT, et al.	:	**EHB Docket No. 91-372-MJ**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MILL SERVICE, INC., Permittee	:	**Issued:** September 24, 1992

OPINION AND ORDER SUR
MOTION TO DISMISS

By Joseph N. Mack, Member

Synopsis

A letter from the Department of Environmental Resources advising an applicant for a hazardous waste facility that Phase I criteria have been met does not constitute a final action which is appealable. The application is still subject to further review, and no permit has been issued. In the event a permit is issued following completion of review, Appellants may raise their challenge at that time.

OPINION

This matter originated with the filing of an appeal by Environmental Neighbors' United Front, Smith Township, Robinson Township, and the 22 West Progress Group, Inc. ("the Appellants") on September 9, 1991, challenging an August 8, 1991 letter from the Department of Environmental Resources ("the Department") to Mill Service, Inc. ("Mill Service") regarding Mill Service's application for the construction and operation of a hazardous waste landfill

and treatment facility in Smith Township, Washington County. The August 8, 1991 letter informs Mill Service that the Department has concluded that the proposed facility complies with the Phase I siting criteria found at 25 Pa. Code §§269.21 through 269.29.

On October 10, 1991, Mill Service filed a Motion to Dismiss, asserting that the Department's August 8, 1991 letter (the "Phase I letter") was not an appealable action and, therefore, the Board lacked jurisdiction over this matter. Mill Service also contends that the Appellants lack standing to bring this appeal because they cannot show any substantial interest which has been directly and immediately impacted by the Phase I letter.

The Appellants filed a Memorandum in Opposition to the Motion to Dismiss on November 5, 1991.[1] The Appellants first argue that the subject of an appeal need not be an "action" or an "adjudication". Secondly, the Appellants assert that the Phase I letter meets the necessary criteria for being a final action reviewable by this Board.

Mill Service filed a Reply on November 21, 1991, contesting the Appellants' assertion that the Phase I letter is a final action and that it meets the necessary criteria for being an appealable action.

On April 2, 1992, the Board Member assigned to this case ordered the scheduling of an evidentiary hearing for the purpose of taking testimony on the following matters: (1) the method and form of examination given by the Department to the application for Phase I approval and (2) the interrelationship of Phase I and Phase II in the Department's review process

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[1] Also filing a Memorandum in Opposition to the Motion to Dismiss on November 8, 1991 was the County of Washington, which is not a party to this action. In an Opinion and Order issued on December 6, 1991, it was ordered that the County's memorandum would be treated as an amicus brief.

and whether the Department re-evaluates Phase I criteria in its evaluation of the Phase II application. The hearing was held on May 12, 1992; one witness was called: Karl K. Sheaffer, Hazardous Waste Siting Team Leader for the Department. At the start of the hearing, the written direct testimony of Mr. Sheaffer taken by DER was admitted into evidence, as was the Department's Guidance Manual for Permitting of Commercial Hazardous Waste Treatment or Disposal Facilities. The hearing then proceeded with cross-examination of Mr. Sheaffer by the Appellants and redirect questioning by Mill Service. At the conclusion of the hearing, the presiding Board Member directed that any party wishing to file a post-hearing memorandum setting forth its argument regarding the motion to dismiss in light of Mr. Sheaffer's testimony could do so within 30 days of the hearing.

Mill Service filed a post-hearing memorandum on June 12, 1992 making several references to Mr. Sheaffer's testimony in support of its position that the Phase I letter issued by DER is not a final, appealable action, but simply one step in a multi-step permit application review process. The Appellants filed a post-hearing memorandum on June 15, 1992. The Appellants begin their post-hearing memorandum by stating, "This testimony [of Mr. Sheaffer] eliminates some, but not all, of the prejudice to appellants from dismissal. The testimony is significant but is not dispositive of the issue of ripeness." The Appellants make only one reference to Mr. Sheaffer's testimony in their post-hearing memorandum and that is to p.9 of the transcript where Mr. Sheaffer testified that Part B of Mill Service's application had not yet been submitted at the time of hearing. (App. Post-Hearing Memo., p.5)

We first address the issue of whether the Phase I letter is an "appealable action". Contrary to the position taken by the Appellants in their memorandum in opposition to Mill Service's motion, it is well

established that an appeal will lie only if the subject matter thereof is an "action" as defined in 25 Pa. Code §21.2(a) or an "adjudication" as defined in the Administrative Agency Law at 2 Pa.C.S.A. §101. Borough of Ford City v. DER, 1991 EHB 169; Adams County Sanitation v. DER, 1989 EHB 258; Springettsbury Township Sewer Authority v. DER, 1985 EHB 492. An "adjudication" is "[any] final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding..." 2 Pa.C.S.A. §101. An "action" is defined similarly at 25 Pa. Code §21.2(a). The Board has interpreted these provisions as conferring jurisdiction on the Board to review any decision of the Department which is final and affects personal or property rights, privileges, immunities, duties, liabilities or obligations of a person. RESCUE v. DER, 1988 EHB 731. In the RESCUE case, the Board dismissed an appeal of a proposed consent order and agreement on the basis that it was not a final action or adjudication of the Department.

In the case before us, the letter which is the subject of the appeal informs Mill Service that the Department's review of the preliminary information submitted by Mill Service with respect to its application for a hazardous waste landfill/treatment facility indicates that the proposed facility complies with the Phase I siting criteria at 25 Pa. Code §§269.21 through 269.29. The letter concludes with the following:

> [The Department's] findings on the Phase I siting criteria and compliance history allows Mill Service, Inc., to proceed to submit a Part B application. It must be fully understood that this approval only permits Mill Service, Inc. to move forward with the full application. Until all approvals are obtained to operate a commercial hazardous waste treatment facility and landfill in Smith Township, Washington County, no wastes can be placed in the proposed landfill

(Emphasis added.)

Mill Service argues that the Phase I letter is merely the first stage of a multi-step permit application review process and, therefore, is not a "final" action of the Department which may be appealed to the Board.

The Appellants, on the other hand, contend that the approval of hazardous waste permits is a two-stage process, each with separate approvals. They, therefore, argue that review of the Department's Phase I decision regarding siting should not be postponed until after the Phase II decision because these constitute separate actions by the Department, each of which should be separately appealable.

We do not find the Appellants' argument to be persuasive. The Phase I letter merely indicates that one part of the entire approval process has been completed and advises Mill Service that it may submit the next part of its application. Merely because the Department's procedure for reviewing applications is broken into various parts does not negate the fact that each is simply one part of a single review of an application. The Phase I letter confers no approval on Mill Service to take any further action other than to submit the remainder of its application. This was further supported by Mr. Sheaffer's testimony, when he stated that notice to an applicant that the Phase I exclusionary siting criteria have been met is merely an indication that the applicant may proceed with submitting the remainder of its application for the Phase II criteria and technical review by the Department. (W.T., n.74, p.19)[2] Furthermore, all of the Phase I exclusionary criteria are reviewed and reevaluated again during Phase II. (W.T., n.32, 37, 41, 47,

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[2] A reference to "W.T., n.___, p.___" is to the written testimony of Mr. Sheaffer on direct examination, admitted at the start of hearing on May 12, 1992. The number of the question and Mr. Sheaffer's response is indicated by "n.___", and the page number by "p.___".

51, 55, 59, 63, 70; p.8-17) (T. 19)[3] Not until final approval is obtained and a permit is issued can Mill Service begin construction and use of the proposed hazardous waste treatment and disposal facility. Thus, the Appellants' "personal or property rights, privileges, immunities, duties, liabilities, or obligations" will not have been affected until such final approval is attained.

Moreover, simply because Mill Service's application passed Phase I approval does not guarantee it will withstand the scrutiny of the remainder of the approval process. Not only may the application be rejected for failing to meet the Phase II criteria or technical review, but it may also be determined at any stage that the Phase I criteria are no longer met either because of the discovery of new information or a change in the regulations. Mr. Sheaffer testified that if new information is discovered after the Phase I review which would indicate that the proposed facility site no longer complies with the Phase I exclusionary siting criteria, the Department has an obligation to stop the review at that point and deny the application. (T. 16) The same is true for any change in the regulations which affects the Phase I siting criteria. A final decision as to whether an application complies with all the requisite criteria needed for permit approval is made based on the regulations in effect at the time the permit is either issued or denied. (T. 49) Thus, we cannot anticipate at this stage of the process whether any permit will in fact be issued to Mill Service for construction of the proposed facility.

In Lancaster County Network v. DER, 1987 EHB 592, the Board dismissed an appeal of the Department's notification of preliminary approval of a draft

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[3] "T.___" is a reference to a page in the transcript of Mr. Sheaffer's testimony on cross-examination and redirect examination at the May 12, 1992 hearing.

solid waste management plan on the basis that the approval was not an appealable action. The Board based its decision on the fact that the approval was preliminary and that final approval was dependent on the applicant's submission of certain information required under 25 Pa. Code §75.11. Likewise, in the case before us, the Department's grant of Phase I approval is merely a preliminary step; final approval is dependent on Mill Service's submission of further data which must comply with the statutory and regulatory requirements.

In Phoenix Resources, Inc. v DER, 1991 EHB 1681, the Board dismissed an appeal from DER's "decision" to withhold final action on permit applications. In doing so, the Board held that its jurisdiction did not extend to the "numerous provisional decisions made by DER personnel during the permit review process." *Id* at p.1681. The Board went on to state as follows:

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

Id at p.1684.

The Appellants assert that the Phase I letter meets the definition of an appealable action under the criteria enunciated by the Pennsylvania Supreme Court and the Commonwealth Court in Man O'War Racing Association v. State Horse Racing Commission, 433 Pa. 432, 250 A.2d 172 (1969), and Bethlehem Steel Corp. v. Commonwealth, Department of Environmental Resources, 37 Pa. Cmwlth.

479, 390 A.2d 1383 (1978). The factors set forth in these two cases were examined by the Board in James E. Martin v. DER, 1984 EHB 736, and may be summarized as follows:

> 1. The decision-making power and the manner in which it functions is judicial.
>
> 2. Public policy requires that the action in question be deemed appealable.
>
> 3. The action substantially affects property rights.

The Appellants assert in their post-hearing memorandum that this matter sharply focuses on the "public policy" factor above and, particularly, the concern with unnecessary expenditure of public resources. If Phase I approval is incorrectly granted and a permit review goes into Phase II, and it is subsequently determined that Phase I approval was improper, argue the Appellants, considerable resources will have been unnecessarily spent in reviewing the Phase II application, both administratively and on appeal. The Appellants also argue that "[b]y the time a Phase II approval is 'ripe' for litigation, parties and non-parties are likely to have made substantial land use decisions as well as expenditures of funds." (App. Post-Hearing Memo., p.3) The Appellants also assert that a Phase I approval of a hazardous waste site, even before a Phase II application is submitted, affects property values and development of nearby real estate.

While the Appellants have provided the above-stated public policy reasons for allowing an appeal of the Phase I letter, they have not shown that all of the factors set forth in Man O'War and Bethlehem Steel are present. The Appellants contend that while these are factors which should be considered in determining whether an action is appealable, it is not necessary that all three criteria be met. On the contrary, however, Board decisions interpreting

these criteria have required that all three be satisfied before appealability may be found. Citizens' Association v. DER, 1989 EHB 905; James E. Martin, supra.

Moreover, even where public policy considerations are present, if an action is not final it cannot be appealed. In the case of Snyder Township Residents for Adequate Water Supplies v. DER, 1984 EHB 842, the Board reviewed the appealability of a Department letter responding to a question of one of the appellant's members regarding a mining company's application for a mine drainage permit. The letter stated that it was the opinion of the Department that mining activity would not affect public or private water supplies. The Board ruled that the letter was not a final action since the application was still under review and, therefore, the letter was not appealable. In reaching this conclusion, the Board noted that the Department had not yet acted on the mining application and could still refuse it, and that if the permit were granted, the appellants could raise their challenge at that time. The Board added that although the decision to include an action in the class termed "appealable" involves public policy considerations, as enunciated in Man O'War and Bethlehem Steel, supra, where the appealed-from action clearly is not final it is not appealable. Snyder Township, 1984 EHB at 844.

In the case at hand, although the Department has begun its review of Mill Service's application and found that the first phase complies with the regulatory requirements, the application ultimately may be denied and no permit issued. If, on the other hand, the permit is granted following the Department's completion of its review, the Appellants are free to raise their challenge at that time. Until that point we lack jurisdiction over this matter, and the appeal must be dismissed.

Because we are dismissing this appeal on the basis of lack of jurisdiction, we need not address the issue of standing.

ORDER

AND NOW, this 24th day of September, 1992, upon consideration of the Motion to Dismiss filed by Mill Service, Inc., and the Appellants' response thereto, it is hereby ordered that the motion is granted, and the appeal is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

Attached is Board Chairman Maxine Woelfling's separate concurring opinion in which Board Member Richard S. Ehmann joins.

DATED: September 24, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

ENVIRONMENTAL NEIGHBORS UNITED FRONT *et al.*	:	**EHB Docket No. 91-372-MJ**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** September 24, 1992

CONCURRING OPINION OF
BOARD CHAIRMAN MAXINE WOELFLING

The motion pending before the Board presents issues which are troublesome from both a legal and a public policy standpoint. While I concur in the result of the majority opinion, my rationale for doing so is somewhat different.

In passing the Hazardous Sites Cleanup Act, the Act of October 18, 1988, P.L. 756, as amended, 35 P.S. §6020.101 *et seq.* (HSCA), the General Assembly recognized that in order to facilitate the siting of much needed hazardous waste treatment and disposal facilities in the Commonwealth, there would have to be alterations to the existing permitting process which would increase public awareness and involvement while, at the same time, eliminate unnecessary delays and expense to the applicant. To that end, §309 of HSCA establishes a two-tiered permit application process with strict deadlines for various Department actions.

These new requirements were superimposed on a system unmatched in bureaucratic complexity by any other Department of Environmental Resources (Department) regulatory program. This complexity is partly the result of the

state's efforts to mimic federal regulations and procedures to achieve primacy under the Resource Conservation and Recovery Act, 42 U.S.C. §6901 *et seq.* (RCRA), It is also partly the result of the Department's own peculiar enhancements to the system. Thus, we have Phase I and Phase II exclusionary criteria determinations and Part A and Part B permit applications. Nowhere in the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, the regulations adopted thereunder, or HSCA do we have a cogent or clear description of how these four elements fit together in the application review process. Nor does the written or oral testimony of Mr. Shaeffer or the guidelines introduced at the hearing shed much light on these inter-relationships. Most importantly, it is virtually impossible to ascertain whether there are one, two, three, or four decision points in the process, whether they are determinations, approvals, or some other species of bureaucratic action; when they occur in relation to each other; and the scope of each.

Anyone who wishes to challenge what the Department has decided at each step along the way is presented with the frustrating dilemma of deciding when and what to challenge. If the Department constantly evaluates compliance with the Phase I exclusionary criteria, why challenge anything until the Department has reached its "final" decision? But, if one is the permit applicant, is there any finality to the Department's determination of compliance with the Phase I criteria? And, where is the "real" decision to be made in the process?

The only real clue is a sentence in §309(c) of HSCA:

> Within five months of the receipt of an administratively complete <u>siting module portion of a permit application</u> for a commercial hazardous waste treatment or disposal facility, the siting team shall complete its review of the siting modules to determine the conformity of the

proposed site to the siting criteria established pursuant to Phase I of 25 Pa. Code Ch. 75 Subch. F.[1]

(emphasis added)

This language, coupled with the Department's interpretation of the statutes and regulations, which we must give deference to unless clearly erroneous, leads me to the conclusion that the Department's finding of compliance with the Phase I exclusionary criteria is not a final action appealable to the Board.

I do experience some discomfort in allowing the resolution of an important legal and public policy question to turn on a phrase and a legal presumption. I believe that government has an obligation to inform the regulated community and the public at large of its requirements through the adoption of regulations which are logically organized and clearly written. That is not the case with the hazardous waste management regulations.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Board Member Richard S. Ehmann joins in this concurring opinion.

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: September 24, 1992

cc: See following page

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[1] Now 25 Pa. Code §§261.21-261.29.

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M. DIANE SMITH
SECRETARY TO THE BOARD

C & K COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 91-138-E**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 30, 1992**

ADJUDICATION

By: Richard S. Ehmann, Member

Synopsis

The Board sustains four consolidated appeals by a surface mine operator from various actions taken by the Department of Environmental Resources (DER) relating to a discharge emanating in the right-of-way of a public road running along the boundary of its permit area but not located on the permit area. Since DER did not sustain its burden of proving there was a hydrogeologic connection between the discharge and appellant's permitted area, DER's order to appellant directing it to treat the discharge was an abuse of DER's discretion. Likewise, as the only reason for DER's denial of the appellant's application for bond release was this discharge, DER's denial of bond release was an abuse of its discretion. DER's separate assessments of civil penalties in the amounts of $600 and $10,500 on appellant pursuant to §18.4 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.*, and §605(b) of the Clean Streams Law (Clean Streams Law), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, based upon its responsibility for the discharge was similarly an abuse of DER's discretion, where DER did not prove a hydrogeologic connection exists.

Background

Before the Board are four consolidated appeals filed by C&K Coal Company (C&K) which conducted surface mining on a site known as the Tin Town Mine or No. 198 mine in Monroe Township, Clarion County. C&K's first appeal (EHB Docket No. 91-138-E), filed on April 5, 1991, seeks review of DER's denial of its application for release of bonds posted pursuant to SMCRA and the Clean Streams Law because of a discharge located near the western border of the site in the right-of-way of State Rt. 839 which did not meet the effluent limitations in 25 Pa. Code §87.102 and Surface Mine Permit (SMP) 16850106.

DER issued Compliance Order (CO) 91-K-094S to C&K on April 1, 1991 pursuant to SMCRA and the Clean Streams Law, requiring C&K to submit a plan and schedule for abatement of this discharge while providing interim treatment. On April 16, 1991, C&K filed an appeal (EHB Docket No. 91-147-E) seeking review of this CO.

Subsequently, on June 12, 1991, DER assessed civil penalties in the amount of $600 on C&K, based upon Section 18.4 of SMCRA, 52 P.S. §1396.22, and Section 605(b) of the Clean Streams Law, 35 P.S. §691.605(b), for the unauthorized discharge of mine drainage at Tin Town on March 7, 1991. On July

11, 1991, C&K filed an appeal (EHB Docket No. 91-279-E) challenging DER's assessment of civil penalties.

On July 22, 1991, DER assessed civil penalties on C&K in the amount of $10,500, based upon Section 18.4 of SMCRA and Section 605(b) of the Clean Streams Law for its failure to comply with CO 91-K-094S from May 7, 1991 through May 20, 1991. C&K filed an appeal of this assessment of civil penalties (EHB Docket No. 91-350-E) on August 23, 1991.

In the meantime, on July 12, 1991, DER filed a Motion for Summary Judgment as to EHB Docket Nos. 91-138-E and 91-147-E, which we later denied by an Opinion and Order issued August 26, 1991. We also denied DER's subsequent Petition for Reconsideration of our August 26 order and for amendment of that order to allow for an interlocutory appeal to Commonwealth Court.

Hearings on the merits of these appeals were held on October 23, 24, and 31, 1991 and on November 1, 5, and 7, 1991 before Board Member Richard S. Ehmann.

After a full and complete review of the record, we make the following finds of fact.

FINDINGS OF FACT

The Parties

1. Appellant is C&K, a Pennsylvania corporation with a mailing address of P.O. Box 69, Clarion, PA 16214. (B Ex. 2)[1]

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[1] Reference to "N.T." followed by a page number are references to the transcript of the hearings on the merits. Exhibits for DER are denoted by "C (footnote continues)

2. Appellee is DER, the agency of the Commonwealth with the authority to administer and enforce the Clean Streams Law; SMCRA; 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. (B Ex. 2)

The Tin Town Mine

3. SMP 16850106 was issued to C&K on July 28, 1986, for a 174.4 acre surface mine site (of which 119.3 acres were to be affected) in Monroe Township, Clarion County known as the Tin Town or No. 198 mine. (N.T. 32; B Exs. 1, 2)

4. The boundaries of Tin Town are marked in red on the 6.2 map which was part of C&K's SMP. Rt. 839 runs along the western boundary of the mine. (N.T. 35, 69; B Ex. 1) The Middle Kittanning coal seam is indicated in green on the western side of Tin Town on the 6.2 map. (N.T. 536; B Ex. 1)

5. In the summer of 1986, DER Inspector Supervisor John Sims, as a mine conservation inspector (MCI), conducted a pre-mining inspection of Tin Town. (N.T. 35, 78, 129-131) Sims walked the site but did not notice any seep along Rt. 839. (N.T. 131) Sims did not walk Route 839, however. (N.T. 132)

6. C&K posted surety bonds for the entire 174.4 acres of the Tin Town mine, conditioned upon compliance with, *inter alia*, the Clean Streams

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(continued footnote)
Ex."; exhibits for C&K are indicated "C&K Ex."; stipulated Board exhibits are referenced by "B Ex."

Law, SMCRA, and the rules and regulations promulgated thereunder. (N.T. 261-262, 266; B Exs. 1, 2) The Rt. 839 right-of-way along Tin Town's western border was not bonded. (N.T. 640; B Ex. 1)

7. C&K began coal extracting activities from the Middle Kittanning seam in November of 1986 and mined to within 100 feet of the Rt. 839 road edge. (N.T. 32-33, 42, 72; B Ex. 2) Coal removal and backfilling was completed in December of 1988 and planting was completed in the summer of 1989. (N.T. 33; B Ex. 2) The area affected by C&K's mining is outlined in pink on the map attached to C Ex. 4. (N.T. 65; C Ex. 4)

8. When C&K applied for bond release in the spring of 1989, DER MCI Richard Stempeck, who was the inspector for Tin Town from July of 1986 through the time of the hearing (with the exception of a three month absence in 1987), inspected the site on April 5, 1989 and did not note any significant problems. (N.T. 26, 32, 36-38, 57, 72, 148)

Discovery of Rt. 839 Discharge

9. On April 20, 1989, Stempeck again inspected Tin Town, and this time, while walking an embankment above Rt. 839 and below C&K's toe ditch [2] where he had never walked before, he discovered the Rt. 839 discharge. (N.T. 37-38, 42, 43, 75-78, 121-123)

10. The Rt. 839 discharge (indicated on the 6.2 map by a red "X" inside a circle) is located in the right-of-way of Rt. 839, two to three feet

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[2] A toe ditch is a ditch placed below the toe of spoil to convey surface runoff to a sedimentation pond for treatment. (N.T. 121)

from where the road berm meets the embankment, and is not on the area covered by SMP 16850106. (N.T. 40, 42, 70, 228; B Exs. 1, 2)

11. On April 20, 1989, the Rt. 839 discharge flowed at a rate of three to five gallons per minute (gpm), traveling 85 yards in a northwesterly direction, through a corrugated metal pipe under Rt. 839 to the western side of the road, then fanning out into a farm field and flowing toward an unnamed tributary to Reid's Run about 500 feet away. (N.T. 45, 56, 74-75, 91-92, 110, 123, 186)

12. Prior to his discovery of the Rt. 839 discharge, Stempeck had never walked the Rt. 839 road ditch. (N.T. 127)

13. The emanation point of the Rt. 839 discharge was overgrown with vegetation and had no signs of adverse effects on the environment. (N.T. 75, 93)

14. The Rt. 839 discharge was not visible from C&K's erosion and sedimentation ditches above it. (N.T. 43)

15. Sims had never observed the Rt. 839 discharge from his car when driving Rt. 839. (N.T. 132) Stempeck also had not observed the discharge when driving Rt. 839, but he is not certain that the discharge first occurred at the time when he discovered it. (N.T. 43, 127-128)

16. A Pennsylvania Department of Transportation (Penn Dot) laborer, Fred Foster, has observed a wet area along Rt. 839 (as indicated by green "X's" on an aerial photograph of Tin Town) during the past 21 years. (N.T. 723, 740, 742; C&K Ex. 5)

17. In 1971, Foster was involved in installing a tile underdrain for Penn Dot along Rt. 839's eastern embankment to collect water seeping out of the roadbank so it would not flow onto Rt. 839. (N.T. 732, 735) The underdrain was installed between two 15-inch corrugated metal pipes (CMP's) which cross under Rt. 839. (N.T. 733, 742; C&K Ex. 5)

18. Between 1978 and 1990, James Gourley, who owned the property on the western side of Rt. 839 opposite the Rt. 839 discharge, observed water coming from Rt. 839's eastern embankment in the area of the treatment ditch C&K eventually installed for the Rt. 839 discharge through the two culverts containing the 15-inch CMP's to his farm but did not observe the flow's emanation point. (N.T. 714, 717, 723, 730)

19. C&K's SMP application required "all surface water bodies such as streams, lakes, ponds, springs, wetlands, mine discharges and constructed or natural drains" within 1,000 feet of the permit area be indicated on the 6.2 map. (N.T. 33, 137; B Ex. 1)

20. C&K's 6.2 map did not indicate the Rt. 839 discharge. (N.T. 34, 138; B Ex. 1)

21. C&K did not sample water flowing in road ditches in connection with its SMP application for Tin Town. (N.T. 601)

22. A flow of water at the Rt. 839 discharge pre-dated C&K's mining, but its pre-mining quality is unknown. (N.T. 1010)

23. Although results of samples taken by Stempeck of the Rt. 839 discharge on April 20, 1989 and May 30, 1989 showed it did not meet the effluent limitations of C&K's SMP and 25 Pa. Code §87.102, it was a low

priority for DER enforcement because of its minimal flow volume. (N.T. 44-46; 302; C Exs. 37, 39)

24. DER informed C&K that its bonds would not be released because of the Rt. 839 discharge; C&K opted to withdraw its application for bond release; and DER and C&K agreed to split sampling responsibilities for the discharge. (N.T. 57, 147-148, 188, 602, 606)

C&K's Trench Excavation

25. Sims suggested to C&K's vice president of engineering, James Kindel, that C&K might want to dig a trench on its mine site to show whether it was connected to the seep. (N.T. 189, 588, 607)

26. On August 20, 1990, C&K began to construct a trench parallel to Rt. 839 at a point 80 to 100 feet north of where it anticipated it would intercept the crop of the Middle Kittanning seam and then proceeded southward. (N.T. 59, 607-608, 765-767)

27. The approximate location of the trench is indicated on C&K Ex. 1. (N.T. 632-633, 683; C&K Ex. 1)

28. C&K's excavator dug eight to ten feet into the ground, passing through two feet of spoil covering the surface. (N.T. 196, 767, 784)

29. In the northern end of the trench, the excavator intercepted water coming out of shaley material on both sides of the trench. (N.T. 199, 613, 768, 802)

30. After proceeding southward approximately 75 to 80 feet, the excavator encountered the Middle Kittanning seam lying two to three feet below the surface and clay beneath the seam. (N.T. 767, 785-787)

31. The excavator followed the Middle Kittanning seam, which widened from 12 to 36 inches, southward, excavating the seam to its underclay. (N.T. 60, 612-613, 767-770, 783, 786)

32. No water was coming from the exposed Middle Kittanning seam. (N.T. 193, 618-621)

33. On August 20, 1990, Stempeck sampled water flowing into the northern end of the trench from the eastern sidewall above the coal crop; sample 4211992 showed the following results:[3]

Parameter	Concentration
Total Acidity	150
Total Alkalinity	0
Aluminum (Al)	21.4
Iron (Fe)	1.4
Manganese (Mn)	36.3
pH	3.6
Sulfates	1146

(N.T. 60, 97; C Ex. 51)

34. On the morning of August 21, 1990, when C&K's excavator hit a point about 150 feet south of the Rt. 839 discharge where it could proceed no further, Sims told Kindel that it did not look like C&K was responsible for the Rt. 839 discharge and that it should backfill the trench for safety reasons. (N.T. 191, 197-198, 620-621, 631, 765, 771-772, 780, 805-806)

35. No measurements were taken of the trench before it was backfilled. (N.T. 622, 780) Conditions in the trench on August 21 are shown in photographs C&K Exs. 2-1, 2-2, and 2-3. (N.T. 618-619)

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[3] The concentrations are expressed in milligrams per liter (mg/l), with the exception of pH, which is expressed in standard units.

36. The elevation of the Middle Kittanning seam was found to rise as the trench excavation proceeded southward. (N.T. 553, 615) At the point in the trench where the coal seam was first encountered (i.e., 75 to 80 feet south of its northern terminus, where C&K had first encountered water) the water was infiltrating the trench at an elevation which was approximately 8 to 10 feet lower than the Middle Kittanning seam. (N.T. 613, 769, 803; C&K Ex. 20)

37. At its closest point, the trench was approximately 83 feet east of the Rt. 839 discharge. (N.T. 617)

38. The trench was between 400 and 700 feet long, was wide enough for Stempeck to walk through without his shoulders touching the sides, and was at least twelve feet deep in its northern end and eight feet deep in its southern end. (N.T. 59-60, 96, 709-710, 780)

39. On August 21, 1990, the flow of the Rt. 839 discharge had diminished from its flow of the previous day and dried up before reaching the culvert. (N.T. 200; C Ex. 21)

C&K's Application For Bond Release

40. C&K submitted Completion Report No. 2-90-302 on November 16, 1990, seeking Stage I and II bond release for Tin Town. (N.T. 65, 259; B Ex. 2; C Ex. 4)

41. DER renewed SMP 16850106 on January 24, 1991. (N.T. 874-875; B Ex. 1)

42. Laboratory analyses of samples of the Rt. 839 discharge taken on February 6, 1991 and March 7, 1991 (No. 4211350 and 4211398, respectively), exhibited the following quality:

	Sample 4211350	Sample 4211398
Total Acidity	36	24
Total Alkalinity	6.6	8
Al	6.09	3.3
Fe	.3	.3
Mn	12.9	10.5
pH	4.6*	4.8*
Sulfates	428	334

*Standard Units

(N.T. 50-52; C Exs. 6, 7, 14, 15)

These results showed the discharge violated the effluent limitations for pH, manganese, and alkalinity versus acidity contained in SMP 16850106 and 25 Pa. Code §87.102. (N.T. 50-52; B Ex. 2)

43. By letter dated March 7, 1991, DER denied C&K's bond release application solely based upon the results of sample 4211350. (N.T. 261, 297; B Ex. 2; C Exs. 5, 6)

CO 91-K-094S

44. DER issued CO 91-K-094S to C&K on April 1, 1991, citing it for the March 7, 1991 sample's violation of the effluent limitations and requiring:

> While providing interim treatment, on or prior to April 17, 1991, the operator shall submit to [DER], for approval, a plan and schedule for providing acceptable treatment or abatement of the discharge from area affected by mining activities so as to achieve compliance with the effluent standards set forth in 25 Pa. Code §87.102 and Part A of the [SMP].

(N.T. 52-54, 108, 114, 172; C Ex. 8)

45. James Kindel was orally informed by DER's Compliance Specialist William Allen that the CO 91-K-094S required C&K to provide a plan for permanent treatment of the Rt. 839 discharge. (N.T. 311, 665)

46. Interim type treatment does not allow for sufficient retention time for the discharge so that the iron and manganese content can precipitate out of it and be collected. (N.T. 90, 117, 276)

C&K's First Treatment Attempt

47. Counsel for C&K informed DER by letter dated April 16, 1991 that C&K would be installing interim treatment by digging a ditch along the east berm of Rt. 839 and lining it with limestone. (N.T. 271; C Ex. 60; C&K Ex. 9)

48. DER did not accept C&K's April 16, 1991 letter as a plan for acceptable treatment since it did not provide for adequate retention time or as a schedule for treatment. (N.T. 276-278, 314; C Ex. 60)

49. While excavating this interim treatment ditch on April 16, 1991, C&K encountered a tile drain 60 yards south (upgradient) of the Rt. 839 discharge running parallel to Rt. 839 (as indicated on the 6.2 map by a red "T".) (N.T. 63-64, 101-102, 139, 227; B Ex. 1; C&K Exs. 3-3, 3-6, 3-8)

50. Water was flowing from the tile drain and was seeping from the embankment side of the ditch. (N.T. 754; C&K Exs. 3-3, 3-7) Laboratory analyses of a sample of the water flowing near the tile drain on April 16, 1991 showed the flow met applicable effluent limitations. (N.T. 64, 101-102, 139, 163; C Ex. 56)

51. Also while excavating the treatment ditch C&K encountered a coal seam on the eastern side of Rt. 839 (Middle Kittanning split seam or rider seam) which followed the contour of Rt. 839 approximately 175 to 200 feet north to the culvert and south to the tile drain. (N.T. 656, 668-669, 757-759; C&K Exs. 3-9, 3-11, 3-12)

52. C&K's first attempt at treating the Rt. 839 discharge conveyed it through a pipe in its limestone lined ditch leading to a culvert, C-1 (as indicated on the 6.2 map), and, from there, to the farm field on the western side of Rt. 839. (N.T. 140-142, 215, 643, 661; B Ex. 1)

53. The results of sampling of the discharge after C&K's first treatment attempt showed it did not meet effluent limitations for manganese at the pipe. (N.T. 175, 216, 235, 662)

54. On April 26, 1991, James Kindel sent DER a letter describing C&K's actions toward compliance with the CO and expressing its willingness to install a permanent treatment system upon an adjudication by the Board that C&K is liable for the Rt. 839 discharge. (N.T. 279-280; C Ex. 61)

CO 91-K-122-S

55. On May 7, 1991, DER issued CO 91-K-122S to C&K pursuant to §18.6 of SMCRA, 52 P.S. §1396.24, and §611 of the Clean Streams Law, 35 P.S. §691.611, citing C&K for its failure to comply with CO 91-K-094S and ordering it to comply with that CO and cease all activities other than reclamation and maintenance. (N.T. 54, 220; B Ex. 2; C Ex. 11)

C&K's Second Treatment Attempt

56. On May 8, 1991, C&K reexcavated the 150 foot area along Rt. 839's eastern road ditch north to the first culvert (C-1). (N.T. 653, 836-837, 932)

57. At a depth of approximately two feet, this excavation again exposed the thin coal seam, which was about one or two inches thick and underlaid by gray plastic clay, and also exposed a diffused water seepage. (N.T. 837; C&K Exs. 4, 4-1, 4-2) This water seepage was measured to flow at a rate of three gpm at the culvert, with roughly two and a half gpm coming from the tile drain and one half gpm coming from the seepage area on the Middle Kittanning split seam. (N.T. 837, 846-847)

58. In a few places on the eastern side of Rt. 839, the Middle Kittanning split seam was six inches thick. (N.T. 758, 870-871)

59. C&K also excavated on the western side of Rt. 839 on May 8, 1991 and there, at a depth of five feet, exposed the same two inch thick Middle Kittanning split seam and gray underclay, with water flowing from the coal-clay interface in two places. (N.T. 837-838, 846)

60. C&K made its second attempt at treating the Rt. 839 discharge by installing a section of pipe so the discharge would bypass C-1 and flow through a more northern culvert (C-2 on the 6.2 map). (N.T. 141-142, 215-216, 644-646, 650; B Ex. 1)

61. Testing of the water flowing out of the pipe showed it still did not meet the effluent limitations for manganese. (N.T. 216)

C&K's Third Treatment Attempt

62. C&K's third attempt at providing interim treatment for the Rt. 839 discharge, conveying it through the limestone-lined ditch and then to one of its sediment ponds, brought the discharge within effluent limitations for manganese. (N.T. 205, 215-216)

63. DER received a letter from counsel for C&K on May 17, 1991 stating that the Rt. 839 discharge met effluent limitations and requesting DER to advise C&K of any further action needed to comply with CO 91-K-122S. (N.T. 296-297; C&K Ex. 20)

64. C&K submitted a letter with accompanying maps to DER on May 21, 1991 which specifically described a plan for directing the discharge to its sediment pond and provided for retention time. (N.T. 282-283; C Ex. 59)

65. DER received C&K's May 21, 1991 letter before it had prepared a written response to C&K's May 17, 1991 letter. (N.T. 334)

66. DER accepted C&K's May 21, 1991 letter as an acceptable plan for treatment of the seep and placed C&K in compliance with both COs. (N.T. 283, 348; C Ex. 62)

DER's Assessment of $600 Civil Penalty

67. DER assessed a civil penalty in the amount of $600 on C&K on June 12, 1991 for unauthorized discharge of mine drainage at Tin Town on March 7, 1991, based upon §18.4 of SMCRA, 52 P.S. §1396.22, and §605(b) of the Clean Streams Law, 35 P.S. §691.605(b). (N.T. 284; C Ex. 46)

DER's Assessment of $ 10,500 Civil Penalty

68. On July 22, 1991, DER assessed a civil penalty in the amount of $10,500 on C&K for its failure to comply with CO 91-K-094S from May 7, 1991

through May 20, 1991 pursuant to §18.4 of SMCRA and §605(b) of the Clean Streams Law. (N.T. 288-289; C Ex. 48)

Toe of Spoil Seep

69. A seep emanates from C&K's toe of spoil to the east of the Rt. 839 discharge near drill hole 2V on the 6.2 map (as indicated by a red "S"). (N.T. 62, 103; C Exs. 53, 54, 55; B Ex. 1)

70. The toe of spoil seep, which was not identified in C&K's SMP application, meanders in a northwesterly direction approximately 50 feet before disappearing into the ground. (N.T. 62, 102, 112, 124, 138; B Ex. 1)

71. The results of laboratory analyses of DER's samples taken on June 12, 1991, July 29, 1991 and August 26, 1991 show the toe of spoil seep has the following quality, which is indicative of acid mine drainage (AMD).[4]

	June 12	July 29	August 26
Total Acidity	9.4	3.0	4.4
Total Alkalinity	14	13	10
Aluminum	.5	.5	.5
Iron	.3	.3	.3
Manganese	24.4	29.3	37.6
pH	6.4*	6.0*	5.7*
Sulfates	1133	1122	1273

*standard units

(N.T. 62, 453; C Exs. 53, 54, 55)

Hydrogeologic Connection

72. DER hydrogeologist Barbara Hajel, who testified as an expert witness on behalf of DER, conducted a hydrogeologic investigation of the Rt.

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4 Acid mine drainage is indicated by a decreased pH and by elevated sulfates and manganese. (N.T. 453)

839 discharge, first visiting Tin Town on June 19, 1989. (N. T. 404-407, 470-471; C Ex. 10)

73. Hajel had been a DER hydrogeologist for eleven years, had conducted approximately 170 hydrologic investigations, and had reviewed at least 200 SMP applications on behalf of DER at the time of the merits hearing. (N.T. 404-405; B Ex. 4)

74. During the course of her investigation, Hajel interviewed the DER inspector for Tin Town, reviewed the SMP file for Tin Town (including C&K's quarterly monitoring data), conducted a field review of Tin Town, and reviewed the permit file for the site mined by Glacial Minerals, Inc. (Glacial) on the west side of Rt. 839. (N.T. 406-407, 470-471, 478; C Ex. 10)

75. Hajel was unable to observe any coal seams on Tin Town during her visit because the site had been completely backfilled. (N.T. 477)

76. Because she did not observe the boundary stakes at Tin Town, Hajel's July 17, 1989 report mistakenly stated the Rt. 839 discharge was on C&K's permit area, but later corrected her error in a July 10, 1991 addendum to her report. (N.T. 408-409, 487-488; C Ex. 10)

77. The Middle Kittanning coal seam on the Tin Town mine site is "rolling", which means it may dip in more than one direction. (N.T. 73, 451; C Ex. 10)

78. The elevation of the Rt. 839 discharge is approximately 1,484.83 feet at its emanation point and, north of that, its elevation is 1,480.59 at its maximum flow point. (N.T. 374-381, 553; C Ex. 58)

79. C&K's 6.2 map in its SMP file indicated the elevation of the Middle Kittanning outcrop at drill hole 2V near the Rt. 839 discharge to be 1,483.7 feet. (N.T. 1073, 1116)

80. Hajel's July 17, 1989 report concluded that the Rt. 839 discharge was emanating from the Middle Kittanning crop. (N.T. 408-409, 497, 530; C Ex. 10)

81. Based upon the elevations on the 6.2 map in C&K's SMP file, Hajel believes a small anticlinal feature exists at an elevation of 1,496 near C&K's overburden hole No. 198-3, with the elevation decreasing to the north and south of that point, indicating to her that the Middle Kittanning seam dips [5] to the northwest and southeast near that point. (N.T. 518-519, 522; C Ex. 10)

82. C&K mined near hole 198-3 and the Rt. 839 discharge is located just west of this hole. (N.T. 417, 419, 1103; C Ex. 4; B Ex. 1)

83. By tracing the locations of all of the exploratory drill holes shown in C&K's application for this permit, the Middle Kittanning cropline, and Rt. 839 from the 6.2 map in C&K's SMP file, Hajel prepared a structural contour map to show the structure of the Middle Kittanning pit floor near the Rt. 839 discharge. (N.T. 444, 448, 529; C Ex. 45)

84. Hajel's structural contour map showed the Middle Kittanning seam dips to the northwest (indicated by a blue arrow) in the vicinity of the Rt. 839 discharge (indicated by a red star). (449-450; C Ex. 45)

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5 "Dip" refers to the direction and angle at which the rock bedding is inclined. (N.T. 419).

85. The topography of Tin Town is from east to west, so that water would drain toward the Rt. 839 discharge. (N.T. 120; B Ex. 1)

86. In her July 17, 1989 report, Hajel concluded the Rt. 839 discharge was downgradient and down dip of C&K's mining. (N.T. 408-409, 497; C Ex. 10)

87. When Hajel visited Tin Town on January 7, 1991, Stempeck and C&K's Bill Irwin indicated the previous location of the trench to her since she was not present in August of 1990 to observe it. (N.T. 407-408, 475-476; C Ex. 10)

88. The extreme northern end of the trench was at an elevation of approximately 1,480, with the elevation increasing as the trench proceeded southward. (N.T. 552-553)

89. The quality of the water sampled in C&K's trench in August of 1990 and that of the Rt. 839 discharge is comparable. (N.T. 564)

90. Hajel believed the diminution of the flow to the Rt. 839 discharge on the second day of C&K's trench excavation indicated a hydrologic link between the trench and the discharge, and that water in the trench would have flowed to the discharge by means of some pathway had the trench not intercepted it. (N.T. 552, 564)

91. In Hajel's experience, most seeps occur within 100 feet of coal removal and within two years after completion of mining on a site; she thus believes C&K's removal of coal within 100 feet of the Rt. 839 discharge and its discovery on April 20, 1989 indicates Tin Town was hydrogeologically connected to the seep. (N.T. 42, 49, 410-414, 500, 504)

92. C&K's overburden analysis for its overburden hole No. 198-3 submitted as part of its SMP application showed a net alkaline deficiency of 42 tons calcium carbonate per acre (the amount of alkaline material needed to offset its potential to produce acid mine drainage). (N.T. 417-418)

93. C&K's SMP required it to add 20 tons of calcium carbonate per acre in the area of hole No. 198-3 under a special handling plan. (N.T. 565-566; B Ex. 1)

94. Although there is no evidence suggesting C&K failed to comply with the special handling plan, special handling is no longer believed to be successful in preventing the formation of AMD. (N.T. 567)

95. Hajel viewed the quality of the Rt. 839 discharge as confirming the acid-producing potential of the area near hole 198-3. (N.T. 418-419)

96. In investigating whether Glacial's mine site (outlined in pink and red on the 6.2 map on the west side of Rt. 839) was responsible for the Rt. 839 discharge, Hajel noted Glacial began mining between November 1982 and February 1983, removing coal to within 300 feet of the Rt. 839 discharge and completing backfilling by June of 1983, and that a spring (known as AM-1 or GMT-4) adjacent to Glacial's mine site began to show degraded water quality for pH and manganese in December of 1983. (N.T. 48-49, 70, 108, 124, 251-252, 412; C Ex. 10; B Exs. 1, 2)

97. Hajel concluded that if the Rt. 839 discharge were coming from the Middle Kittanning seam on Glacial's mine site, it would have shown up shortly after Glacial's mining, as did AM-1. (N.T. 412; C Ex. 10)

98. Hajel also believed Rt. 839 would act as a barrier to the flow of water from Glacial's mine site to the Rt. 839 discharge. (N.T. 504; C Ex. 10)

99. Hajel incorporated her conclusions into her January 16, 1991 report. (N.T. 408, C Ex. 10)

100. Additional drill hole information provided to DER after Hajel constructed her structural contour map (C Ex. 45) raises all of the elevations indicated on C Ex. 45 by ten feet, so that the Rt. 839 discharge does not emanate from the Middle Kittanning crop as Hajel indicated in her report. (N.T 497-498, 530)

101. DER did not investigate C&K's additional drill hole information which it received shortly before the hearing to determine whether it was correct. (N.T. 494, 1084)

102. Hajel opined that water contained in the Tin Town spoil percolates to the Middle Kittanning pit floor on C&K's mine along preferred flow channels, including joints,[6] and travels in a northwesterly direction to the Rt. 839 discharge. (N.T. 451, 456-457, 460, 531, 555)

103. Hess & Fisher Engineers, Inc. (Hess & Fisher) were retained by C&K to conduct a hydrogeologic investigation of the Rt. 839 discharge in March of 1991. (N.T. 975) Tomasz Kulakowski and Wilson Fisher, who testified as expert hydrogeologists on behalf of C&K, conducted the investigation. (N.T. 828, 971, 975)

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6 "Joints" are openings in rock units, generally one millimeter wide, which affect the rate of water movement. (N.T. 411, 419, 544, 1040)

104. Kulakowski and Fisher have extensive backgrounds in the field of geology. (N.T. 829-831, 875, 971-974; B Exs. 5, 7)

105. Neither Kulakowski nor Fisher was ever present when C&K was conducting mining operations, as Fisher's first visit to the site was on April 1, 1991 and Kulakowski's was April 17, 1991. (N.T. 829, 976)

106. During their first visits, Kulakowski and Fisher walked the Tin Town site. (N.T. 829-831, 977-978)

107. On May 1, 1991, Kulakowski and Fisher conducted an aerial investigation of Tin Town. (N.T. 831-832, 976, 978)

108. Both Kulakowski and Fisher visited Tin Town on May 8, 1991, walking the entire site and adjacent areas, and located and sampled several seeps on the eastern side of Tin Town (indicated on the 6.2 map by three red "S's" circled in black). (N.T. 835-836, 980) They also viewed the treatment system for AM-1. (N.T. 836, 865, 927; B Ex. 1)

109. Kulakowski and Fisher observed the ditch exavations by C&K on the eastern and western sides of Rt. 839 which exposed the Middle Kittanning split seam or rider seam. (N.T. 837-838, 846; C&K Ex. 13)

110. For their investigation, Kulakowski and Fisher reviewed C&K's SMP file and geologic literature for the Tin Town area, as well as the Number 92 Pennsylvania Geological Survey structural and contour map of coal seams in Clarion County. (N.T. 855, 978, 1050)

111. Since C&K's drill hole data contained in its SMP file was derived from aerial photography and altimeter surveys which can be inaccurate by as much as ten feet (N.T. 384, 597-598), Kulakowski and Fisher decided to

gather their own data. (N.T. 854, 874, 989-990)

112. Kulakowski and Fisher installed piezometers into holes drilled into the subsurface to investigate the groundwater movement at Tin Town. (N.T. 854-856, 988; C&K Ex. 13)

113. Using the structure and contour maps for Clarion County, Kulakowski determined the strike[7] of the Middle Kittanning seam extended east and southwest and the dip extended to the east and southeast and he located the piezometers according to this strike and dip. (N.T. 855-856) Fisher agreed with Kulakowski's placement of the piezometers. (N.T. 988)

114. Both the Middle Kittanning and the Middle Kittanning split seams were potential aquifers, so the piezometers monitored both of these seams. (N.T. 857)

115. The piezometers were placed in six sets of two 2-inch monitoring wells, 1A, 1B, 2A, 2B, 3A, 3B, 4A, 4B, 4BB, 5A, 5B, 6A, and 6B, with the "A" series installed into the Middle Kittanning pit floor and the "B" series installed into the split seam. (N.T. 857, 882; C&K Ex. 13)

116. The locations and elevations of piezometers 1A, 1B, 2A, 2B, 4A, 4B, and 4BB were surveyed in by James Kindel as indicated on C&K Ex. 1. (N.T. 863)

117. The three sets of piezometers drilled on the eastern portion of Tin Town, 3A, 3B, 5A, 5B, 6A, and 6B (indicated on the 6.2 map as PZ 3, 5, and

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7 "Strike" is perpendicular to the dip. (N.T. 419)

6) were abandoned when they did not produce enough water for testing. (N.T. 859, 881-882, 957; B Ex. 1; C&K Ex. 13)

118. Kulakowski and Fisher relied on the results of piezometers 1A, 1B, 2A, 2B, 4A and 4B (4BB was dry). (N.T. 883, C&K Ex. 13)

119. Based upon the survey elevation of the Middle Kittanning underclay in each piezometer hole, Kulakowski determined the strike of the Middle Kittanning seam extends northwest to southeast and the dip extends to the northeast, away from the Rt. 839 discharge. (N.T. 863-865, 964, 1021)

120. Kulakowski and Fisher determined the strike of the Middle Kittanning split seam extends northwest to southeast and the dip extends to the northeast, based upon the surveyed elevations of the split seam in each piezometer hole. (N.T. 863-865, 964, 1021)

121. Samples of water were taken from the piezometers which were not dry. (N.T. 865-866)

122. Using measurements of the water levels in the piezometers, Kulakowski constructed an equal potential map of the Middle Kittanning aquifer and calculated the direction of groundwater flow on the Middle Kittanning pit floor to be away from the Rt. 839 discharge. (N.T. 865, 946-947)

123. According to Kulakowski's calculations, the seeps on the eastern side of Tin Town would be reflective of the water on the Middle Kittanning pit floor, since the groundwater would flow in that direction. (N.T. 865-866)

124. Kulakowski monitored all of the seeps he had located on the eastern side of Tin Town on his May 8, 1991 visit. (N.T. 865)

125. Because the analysis of a sample of the seep on the Middle Kittanning tall spoil toe on the east side of Tin Town had excellent quality, Kulakowski concluded the water on the Middle Kittanning pit floor was of excellent quality. (N.T. 866)

126. Kulakowski concluded the Rt. 839 discharge was not chemically similar to the quality of the sample of the seep on the eastern side of Tin Town and therefore the discharge was unrelated to water on the Middle Kittanning pit floor. (N.T. 866)

127. The piezometers showed the Middle Kittanning pit floor had no significant accumulation of water. (N.T. 954)

128. By using the elevations of the Middle Kittanning pit floor on Tin Town and geologic literature for the area, Kulakowski determined the strike and dip of the Middle Kittanning seam on the west side of Rt. 839 to be to the east. (N.T. 884, 896, 956; Ex. 4 to C&K Ex. 13)

129. Kulakowski's projection of the Middle Kittanning seam on Glacial's mine site (based upon its elevation on the Tin Town mine site) places it at approximately the same elevation as AM-1. (N.T. 926; Ex. 4 to C&K Ex. 13)

130. Kulakowski believes AM-1 is the manifestation of a polluted aquifer which confirms the Glacial site's eastern-oriented dip. (N.T. 926, 957)

131. On May 8, 1991 when C&K's excavation on the western side of Rt. 839 exposed the Middle Kittanning split seam approximately forty feet from the Rt. 839 discharge, Kulakowski was unable to obtain enough water for a

laboratory sample but his field sample showed a pH of 4.1 for water coming off the split seam and its underclay about four feet below the elevation of Rt. 839. (N.T. 846, 870-872)

132. Kulakowski believes the Middle Kittanning split seam is a confined aquifer, one limited by an aquitard or aquiclude. (N.T. 883, 927)

133. Kulakowski was not able to use triangulation to determine the direction of groundwater movement from the Middle Kittanning split seam, since only two piezometers had sufficient water to be used for triangulation. (N.T. 883)

134. No overburden analysis of the Middle Kittanning split seam was conducted so its potential to produce polluted water is unknown. (N.T. 1030)

135. Although C&K did not encounter the Middle Kittanning split seam when it excavated its trench in August of 1990, the elevation of the northern end of the trench where water was flowing correlates with the elevation of the Middle Kittanning split seam. (N.T. 943)

136. Kulakowski theorizes that a zone of depression was created within the aquifer to the Rt. 839 discharge when C&K excavated its trench in August of 1990, creating a drawdown effect which explains the diminution of flow to the Rt. 839 discharge on August 21, 1990. (N.T. 944, 949, 956)

137. Kulakowski projected the elevation of the Middle Kittanning pit floor to be more than ten feet higher than the Rt. 839 discharge. (N.T. 868)

138. While Hajel theorizes that water is flowing from the Middle Kittanning pit floor to the Rt. 839 discharge by means of jointing, Wilson Fisher does not believe that the joint sets occurring on Tin Town are

transmissive of groundwater flow because the joints occurring in the shallow earth zone are closed and would not penetrate through plastic clays to the under clays beneath the Middle Kittanning seam or Middle Kittanning split seam. (N.T. 1041-1042, 1045-1046)

139. There is no evidence that Rt. 839 would act as a barrier to flow traveling from the western side of Rt. 839, since drainable road bases are transmissive of flow and Rt. 839's subgrading was excavated and replaced in 1978. (N.T. 595, 1010-1011)

140. In Fisher's geologic investigation, he found no correlation between the spacial proximity of a discharge and a particular mine site. (N.T. 1013, 1044)

141. Based upon Hajel's structural contour map, the area affected by overburden hole 198.3 on Tin Town is outside the recharge area for the Rt. 839 discharge. (N.T. 1014)

142. The only evidence DER suggests is indicative of poor water quality on the Middle Kittanning pit floor is the water which was sampled in C&K's excavated trench in August of 1990. (N.T. 509; C Ex. 51)

143. DER did not conduct a subsurface investigation of the Rt. 839 discharge on either Tin Town or Glacial's mine site. (N.T. 185)

144. The preponderance of the evidence does not establish that the Rt. 839 discharge is flowing from C&K's mine site.

145. All of the conditions for bond release requested by C&K were met at Tin Town, and, had it not been for the discovery of the Rt. 839 discharge, C&K's Stage I and II bonds would have been released. (N.T. 260-261, 297-298)

DISCUSSION

Both DER and C&K must carry their respective burdens of proof in this case. DER must sustain its burden of proving its issuance of COs 91-K-094S and 91-K-122S was lawful and a sound exercise of its discretion. 25 Pa. Code §21.101(b)(3). To sustain this burden, DER must prove there is a causal connection between C&K's mining operations and the seep, since it is not within the area of C&K's SMP. McDonald Land & Mining Co., Inc. v. DER, 1991 EHB 1956; Penn-Maryland Coals, Inc. v. DER, 83-188-W (Adjudication issued January 22, 1992). This causal connection can be established by either direct testimony of a factual and expert nature or circumstantial evidence. McDonald, *supra*; Hepburnia Coal Co. v. DER, 1986 EHB 563, 598.

C&K bears the burden of proving by a preponderance of the evidence that all of the criteria for bond release were satisfied at Tin Town such that DER abused its discretion or acted contrary to law when it withheld bond release. Dunkard Creek Coal, Inc. v. DER, 1988 EHB 1197; H&R Coal Co. v. DER, 1986 EHB 979.[8]

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8 In its post-hearing brief, C&K acknowledges the burden of proof in an appeal of DER's denial of a bond release is normally on the appellant, as the party asserting the affirmative of the issue, but it argues the present matter is not a "normal" appeal because of the consolidation. C&K asks us to assign DER the burden of proof with regard to the propriety of its bond release denial since the denial was solely based upon C&K's responsibility for the Rt. 839 discharge and DER bears the burden of proving a hydrogeologic connection. While we agree with DER that C&K's request should have been made earlier, we will determine whether DER has sustained its burden of proving the hydrogeologic connection between the Rt. 839 discharge and C&K's mining activities before turning to the appeal from DER's bond release denial.

Both parties recognize that DER bears the burden of proof with regard to its two separate assessments of civil penalties on C&K. N&L Coal Co. v. DER, 1991 EHB 1331; 25 Pa. Code §21.101(b)(1). We have previously explained that in order for the party to sustain its burden of proof by a preponderance of the evidence, more is necessary than that the evidence in favor of the proposition be equal to that opposed to it. McDonald, *supra*; Midway Sewerage Authority v. DER, 1991 EHB 1445. To carry this burden of proof, "the evidence of facts and circumstances on which [the party] relies and the inferences logically deducible therefrom must so preponderate in favor of the basic proposition he is seeking to establish as to exclude any equally well-supported belief in any inconsistent proposition." McDonald, *supra* at 1476; Henderson v. National Drug Co., 343 Pa. 601, ___, 23 A.2d 743, 748 (1942).

A. DER's Motion For Summary Judgment

In its brief, DER renews its motion for summary judgment, which we previously denied and declined to reconsider or certify to the Commonwealth Court for interlocutory appeal, arguing that we abused our discretion when we permitted C&K to withdraw its deemed admissions to DER's Request For Admissions upon which DER's motion was based. We address this matter before proceeding to the substantive issues in this appeal because it potentially is dispositive of part of this matter.

Initially C&K failed to timely respond to DER's Request For Admissions, so the requested matter was deemed admitted pursuant to Pa.R.C.P. 4014(b), which provides for such admissions. When C&K subsequently motioned

to withdraw its admissions and to substitute a response to DER's Request for Admissions, we found that the presentation of the merits of this case would be subserved by permitting C&K to withdraw the admissions and that DER had not shown such a withdrawal would prejudice it in maintaining its action or defense on the merits. We then permitted C&K to withdraw the admissions and to substitute new admissions in their place pursuant to Pa.R.C.P. 4014(d), which states:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. ...[T]he court may permit withdrawal or amendment when the presentation of the merits action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

DER urges that our application of Rule 4014 encourages non-compliance with the rules of civil procedure in that it allows a party who was tardy in filing its response to a request for admissions to withdraw the deemed admissions without regard to whether such a party had "good cause" for failing to timely file its response. DER further asserts that in our decision in Manor Mining and Contracting Corp. v. DER, EHB Docket No. 91-110-E (Opinion issued January 31, 1992), we ruled that a party must have a justification for requesting an extension of the time period for responding to a request for admissions, and that in the instant matter, we have in effect permitted C&K to file an untimely response to DER's request for admissions without any justification. Moreover, DER claims that the Board's permitting C&K to withdraw the deemed admissions interfered with judicial economy.

The requirements for withdrawal of admissions are set forth in Rule 4014(d), *supra*, and were followed by this Board in this case. "Good cause" is not mentioned in Rule 4014(d) as a criterion for permitting withdrawal of admissions, and DER does not offer us any case law in support of its argument or even any definition of what it means by "good cause". Our decision in Manor Mining, *supra*, is not in conflict with our ruling in this matter. In Manor Mining, DER failed to timely respond to a request for admissions brought by the appellant and failed to seek any extension of time in which to respond, resulting in the requested matter being deemed admitted pursuant to Rule 4014(b). When the appellant moved to strike an untimely response which DER later attempted to file, we granted the motion because DER had neither requested an extension of the time for filing its response nor sought to withdraw its deemed admissions pursuant to Rule 4014(d). Further, DER's contention as to judicial economy is unpersuasive since, as we explained in our August 21, 1991 Opinion, we interpret Rule 4014(d) as favoring resolution of matters by hearings on their merits rather than through "paper procedures" and DER's argument presumes that summary judgment in its favor as to part of this appeal would otherwise have been forthcoming.

B. Estoppel

We next address the argument raised in C&K's post-hearing brief that DER is estopped from assigning responsibility for the Rt. 839 discharge to C&K because of representations made by DER Inspector Supervisor Sims. C&K asserts that Sims agreed with James Kindel that if C&K's trench encountered water coming from the Middle Kittanning seam, C&K would admit liability for the

discharge, but, if not, DER would not hold C&K responsible and would release its bonds. C&K further urges that in reliance upon this agreement, it constructed the trench, exposing itself to liability and encountering costs of construction, such that DER should be estopped from denying the existence of this agreement. Moreover, C&K's brief asserts that after the trench was constructed, Sims advised C&K that it was not responsible for the discharge and that it should close the trench. It contends that in reliance upon Sim's representation it did not take measurements of the trench or survey it prior to closing it, causing C&K to lose the opportunity to acquire evidence.

The Board's rules at 25 Pa. Code §21.51(e) provide:

> (e) The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. Such objections may be factual or legal. Any objection not raised by the appeal shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear such objection or objections. For the purpose of this subsection, good cause shall include the necessity for determining through discovery the basis of the action from which the appeal is taken.

The Commonwealth Court has instructed that specifying grounds for an appeal to the Board is jurisdictional. Commonwealth, 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), and, on that basis, we have ruled that we may not consider an issue which an appellant failed to raise in its

notice of appeal. See Carbon/Graphite Group, Inc. v. DER, 1991 EHB 668; NGK Metals Corporation v. DER, 1990 EHB 376; ROBBI v. DER et al., 1988 EHB 500.[9]

As is pointed out by DER's Reply Brief, C&K did not raise estoppel as a specific ground for appeal in its four notices of appeal in this matter, nor can any of the objections stated in the notices of appeal be read as including such an objection to DER's actions. A review of C&K's pre-hearing memoranda further indicates it is raising this objection in its post-hearing brief for the first time. As we explained in Midway Sewerage Authority v. DER, 1990 EHB 1554, a winnowing process takes place from the time a notice of appeal is filed with the Board up to its resolution. Our Pre-Hearing Order No. 1 warns that a party may be deemed to have abandoned legal and factual contentions not set forth in its pre-hearing memorandum. C&K cannot delay in objecting to DER's actions on the ground of estoppel until the merits hearing. Accordingly, this issue has been waived.

C. C&K's Responsibility for the Rt. 839 Discharge

The Rt. 839 discharge is not within the area of C&K's SMP. Thus, in order for C&K to be liable for treating it, DER must prove that there is a causal connection between C&K's mining operations and the seep. Penn-Maryland

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9 In Croner, Inc. v. DER, 1990 EHB 846, applying the decisions in NGK Metals, *supra*, and ROBBI, we found that the appellant therein had failed to raise an issue in its notice of appeal, foreclosing our review of that issue. On appeal, the Commonwealth Court determined that a generally stated objection found in the appellant's notice of appeal was broad enough to include that objection so that we had jurisdiction over that issue. Croner, Inc. v. Commonwealth, DER, _____ Pa. Cmwlth. _____, 589 A.2d 1183 (1991). The Court did not modify its holding in Game Commission, however.

Coals, *supra*. DER's assertion that C&K is responsible for the Rt. 839 discharge is based solely on the expert testimony of its hydrogeologist, Barbara Hajel, whose investigation centered on whether the seep was being caused by C&K's mine site or by Glacial's mine site. Based upon the evidence presented at the merits hearing, we are unable to conclude that such a connection exists in this case.

Relying on her experience that most seeps occur within 100 feet of coal removal, Hajel believed C&K's removal of coal within 100 feet of the Rt. 839 discharge (whereas Glacial removed coal to within 300 feet of the seep) indicates the hydrologic connection between it and C&K's Tin Town. On the other hand, C&K's expert hydrogeologist, Wilson Fisher, opined that a hydrogeologist cannot rely on the proximity between the seep and the mine site as indicating a hydrogeologic connection between the two because there are complex circumstances involved. (N.T. 1013) We place more weight on Mr. Fisher's testimony in this regard.

Relying on her experience that most seeps occur within two years after mining has been completed, Hajel believed a connection between C&K's Tin Town and the Rt. 839 discharge exists because she believed the Rt. 839 discharge had begun to emanate in April of 1989, within six months after C&K's completion of mining on Tin Town but six years after Glacial's mining on the western side of Rt. 839. The preponderance of the evidence offered at the merits hearing, however, established that there had been a flow at the Rt. 839 discharge prior to April of 1989, but its quality prior to C&K's mining on Tin Town is unknown. Even though C&K failed to note the seep's existence in its

SMP application, as it is required to do, we cannot ignore the evidence establishing it pre-dated C&K's mining.[10] There is no evidence that any of DER's employees walked in the area of the Rt. 839 discharge prior to the day when Stempeck first discovered its existence in 1989. The fact that neither Sims nor Stempeck had noticed the discharge through the window of their automobiles while driving along Rt. 839 on other business is insufficient evidence to prove the discharge did not exist before April 20, 1989. Thus, to the extent that Hajel based her opinion that C&K was responsible for the seep because the timing of its appearance, DER's evidence is insufficient to establish the hydrogeologic connection.

Hajel also relied on the acid-forming potential in the area around C&K's overburden hole 198-3, near to which C&K conducted its mining, as indicated by the overburden analysis C&K submitted with its SMP application, as pointing to a connection between C&K's mine site and the Rt. 839 discharge. According to Wilson Fisher's calculations, however, the area near overburden

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10 James Kindel testified on behalf of C&K that in his experience in the surface coal mining industry, operators do not collect samples from discharges flowing in roadside ditches in connection with their permit applications, notwithstanding the fact that nothing in the Clean Streams Law or SMCRA excuses operators from reporting such discharges. (N.T. 601, 670) We do not wish our finding that the Rt. 839 discharge pre-existed C&K's mining to be interpreted as an endorsement of such an unsound policy regarding reporting of discharges in permit applications. To the contrary, evidence documenting the existence of the Rt. 839 discharge in C&K's permit application would have immeasurably strengthened C&K's position in this appeal and possibly could have avoided the need for the hearing before this Board.

hole 198-3 was outside the recharge area for the Rt. 839 discharge. This does not fully rebut Hajel's contention that the site could produce acid, but it does show acid from at least this area is not linked to this seep.

Hajel further believed the quality of the water sampled in C&K's trench excavation in August of 1990 was similar in quality to the Rt. 839 discharge and that the diminution of the flow to the discharge on the second day of C&K's excavation indicated C&K had encountered and rerouted water flowing to the discharge. Kulakowski offered as an explanation for the diminution of flow to the trench that it could have been the result of a drawdown effect created by a zone of depression within the aquifer when C&K excavated the trench. While we do not subscribe to Kulakowski's theory explaining the diminution of flow to the trench, we are not prepared to sustain DER's position as to C&K's liability for the Rt. 839 discharge solely because of some similar qualities of a water sample from the trench and samples from the Rt. 839 discharge.

Using the data from DER's permit file, Hajel prepared a structural contour map of the Tin Town mine. Initially, Hajel had prepared the structural contour map to show both C&K's site and Glacial's site by tracing the exploratory drill hole locations from the 6.2 map in C&K's SMP file and from the Exhibit 5 map in Glacial's permit file, noting the bottom coal elevations contained in the files and extrapolating them, and noting the locations of Rt. 839 and the Middle Kittanning cropline. When DER offered the map showing both the C&K and Glacial mine sites into evidence, C&K objected on the ground of hearsay to the admission into evidence of the drill hole

elevations contained in Glacial's permit file. (N.T. 421) Board Member Ehmann sustained C&K's objection and only the C&K mine site portion of the map was admitted. DER's brief requests us to reconsider this ruling.

Hearsay is a statement made by an out-of-court declarant offered for the truth of the matter asserted. Semieraro v. Com. Utility Equip. Corp, 518 Pa. 454, 544 A.2d 46 (1988). Here, since DER sought to introduce into evidence Glacial's out-of-court statements (as transposed onto the structural contour map) to establish the structure of Glacial's site, Glacial's statements were hearsay and DER failed to show these statements fell within any exception to the hearsay rule. We do not agree with DER that Glacial's statements fall within an exception to the hearsay rule found at 42 Pa.C.S. §6104, which provides for the admission of official records, since even though Hajel had reviewed the application at the time it was submitted pursuant to her official duty (her handwriting appears in the Glacial permit file), she did not review Glacial's statements for their accuracy. (N.T. 442)

While DER argues that pursuant to 30 U.S.C.A. §1260(b)(1), it could not have issued Glacial's permit unless the information in the application was accurate, the evidence shows DER had no independent knowledge of the structure of the Glacial site to be able to say the permit application was accurate, nor did DER attempt to place before us any affidavits of Glacial's corporate officers swearing to the accuracy of the information contained in the applications. Further, contrary to DER's assertion, Section 607 of the Clean Streams Law, 35 P.S. §607, does not require this Board to admit into evidence in this appeal all statements contained in Glacial's permit file. Rather,

that section provides that permit applications are public records which shall be received into evidence subject to the rules of law concerning evidence. The hearsay rule is such a fundamental evidentiary rule of law which we follow when facts crucial to an issue are sought to be placed on the record and an objection is made thereto. Gerald W. Wyant v. DER, et al., 1988 EHB 986. Thus, we sustain the presiding Board Member's ruling sustaining C&K's hearsay objection.[11]

C&K also contends Board member Ehmann erroneously overruled C&K's objection (made upon its cross-examination of Hajel) which sought to strike Hajel's testimony and opinion because she had relied upon facts and information in Glacial's permit file in forming her opinion and Glacial's permit data had previously been excluded from evidence as hearsay. (N.T. 439-440, 480-481)

In response to Board member Ehmann's subsequent examination, Hajel testified she did not form her opinion in reliance on the Glacial permit data which had been ruled inadmissible but had formed that opinion prior to examining Glacial's site. (N.T. 484) Contrary to the assertion by C&K that Board member Ehmann asked leading questions of Hajel for the sole purpose of protecting the record for DER, a review of the hearing transcript shows his

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[11] We note that even if we had overruled C&K's hearsay objection to the Glacial permit data and admitted Glacial's statements into evidence, this evidence, at best, would have served only to show that Glacial's site was not hydrologically connected to the seep, from which DER's brief urges we could then have found a connection to C&K's mine site. A connection to C&K's site suggested in this manner would not have been sufficient for us to find DER met its burden of proof in view of C&K's evidence.

brief interrogation of Hajel merely elucidated Hajel's testimony for the Board and did not exhibit any bias on the part of the factfinder. See Commonwealth v. Seabrook, 475 Pa. 38, 379 A.2d 564 (1977); Carney v. Otis Elevator Co., 370 Pa.Super. 394, 536 A.2d 804 (1988). Thus, as Hajel's opinion was not based on the hearsay statements which were ruled inadmissible, we see no reason to disturb the presiding Board Member's ruling on C&K's motion to strike her testimony.

Based upon the elevations on her map, Hajel calculated the dip of the Middle Kittanning seam near the Rt. 839 discharge to be to the northwest and she pointed to the direction of groundwater flow indicated by C&K's 6.2 map near the discharge as confirming her dip direction. (N.T. 451-452) Hajel opined that water contained in the Tin Town spoil percolates to the Middle Kittanning pit floor on C&K's mine along preferred flow channels, which would include joints, and travels in a northwesterly direction to the Rt. 839 discharge.[12]

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[12] Citing Kravinsky v. Glover, 263 Pa. Super. 8, 396 A.2d 1349 (1979), C&K's post-hearing brief urges that Board member Ehmann should have sustained its objections to Hajel's opinion, i.e., there was no evidentiary basis to support it. (N.T. 456-457) As is stated in Kravinsky, an expert's testimony is admissible once she shows she had some basis in fact for her opinion. Id. at __, 396 A.2d at 1355. Hajel testified that Module 7 of C&K's SMP application required the company to describe the local structure and its relationship to the regional structure, and that C&K's SMP application had stated that all rocks in the vicinity of Tin Town were characterized by orthogonal joint sets, thus establishing some basis in fact for her opinion regarding joints. Further, Hajel had some basis in fact as to her opinion that the water reaching the Rt. 839 discharge was coming from C&K's spoil and then percolating along the Middle Kittanning pit floor based upon her belief of the direction of the dip of the Middle Kittanning seam near the discharge and the relative elevations.

Even with the additional drill hole information provided by C&K before the hearing, Hajel maintained that the elevations on her map would be raised by ten feet but the structure and dip of Tin Town would remain unchanged from what she had indicated on her map. (N.T. 530) Based upon her structural contour map, Hajel believes the Rt. 839 discharge is related to C&K's mine site because the site lies within the recharge area for the seep.

Hajel also recognized a third possible flow mechanism for water reaching the Rt. 839 discharge was that it was coming from some other aquifer, such as the Middle Kittanning split seam. She excluded the possibility that the flow could be reaching the Rt. 839 discharge from the Glacial mine site on the western side of Rt. 839 because she believed the road would act as a barrier to transmission of flow from the west and because seep AM-1 on Glacial's mine site had shown signs of degradation shortly after its mining. Wilson Fisher testified that drainable road bases are transmissive of flow, however. She opined that C&K's Tin Town was responsible for the Rt. 839 discharge because it was located within the recharge area for the seep both topographically and structurally.

On the basis of the elevations of the Middle Kittanning underclay in each of their piezometer holes, Kulakowski and Fisher determined that the Middle Kittanning seam dips from the northeast, away from the Rt. 839 discharge, and that the Middle Kittanning split seam also dips to the northeast. By monitoring the piezometers' water levels, Kulakowski and Fisher confirmed that the Middle Kittanning seam on Tin Town dips away from the Rt. 839 discharge. Further, by analyzing the quality of the Middle Kittanning

tall spoil toe seep on the eastern side of Tin Town, they concluded the Middle Kittanning pit floor water was good quality water, unrelated to the Rt. 839 discharge. Using the elevations of the Middle Kittanning pit floor on Tin Town and geologic literature for the area, Kulakowski determined the strike and dip of the Middle Kittanning seam on the west side of Rt. 839 to be to the east. (N.T. 884, 896, 956; Ex. 4 to C&K Ex. 13) Kulakowski projected the elevation of the Middle Kittanning seam on Glacial's mine site based upon its elevation on the Tin Town site and concluded it was at the elevation of AM-1. (N.T. 926; Ex.4 to C&K's Ex. 13) He believes AM-1 is the manifestation of a polluted aquifer which confirms the Glacial site's eastern-oriented dip. (N.T. 926) Kulakowski further believes the Middle Kittanning split seam is a confined aquifer, an aquifer limited by an aquitard or aquiclude. Importantly, however, he was unable to determine the direction of groundwater movement from the split seam by triangulation. (N.T. 883, 927)

DER, on the other hand, offered testimony through Hajel attacking the validity of Kulakowski and Fisher's investigation, but it did not produce evidence to overcome C&K's evidence that its mining was not hydrogeologically connected to the seep. In view of the totality of the evidence offered in this case, we cannot conclude that DER has proven by a preponderance of the evidence that a hydrologic connection exists between the C&K's mining

operation and the Rt. 839 discharge. Although DER's position is not unsupported, we are unable to sustain DER's issuance of CO 91-K-094S to C&K. Penn-Maryland, *supra*.[13]

D. DER's Denial of Bond Release

C&K's Completion Report No. 2-90-302 sought Stage I and II bond release for Tin Town. Under §4(g) of SMCRA, 52 P.S. §1396.4(g), DER may release 60% of a bond posted (Stage I release) where the permittee has shown it has completed backfilling, regrading, and drainage control of the bonded area in accordance with its approved drainage plan. Broad Top Township v. DER, et al., 1991 EHB 214; 25 Pa. Code §86.175(b)(1). When the permittee has shown that revegetation has been successfully established on the affected area in accordance with the permittee's approved reclamation plan (Stage II release), DER may release an additional amount not to exceed 25% of the total original bond amount on the permit area. Section 4(g) of SMCRA; 25 Pa. Code §86.175(b)(2). In reviewing a challenge to DER's denial of bond release, the Board must examine whether the permittee has shown it satisfied the criteria in §4 of SMCRA 52 P.S. §1396.4, and 25 Pa. Code §86.172. Here, DER's MCI Stempeck testified that C&K's site has been backfilled, topsoil has been applied, erosion ditches have been removed, and growth of vegetation is excellent. (N.T. 31-32) DER compliance specialist Allen gave the Rt. 839

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[13] We also reject DER's argument that its issuance of CO 91-K-094S should be sustained on the basis of its power to order the abatement of a statutory nuisance. DER has not proven C&K caused or contributed to the nuisance, as it must prove to hold C&K liable for abating a nuisance not located on its mine site. Penn-Maryland, *supra*.

discharge as the sole reason for the denial of bond release for Tin Town. Since DER has not proven C&K to be responsible for the seep, DER abused its discretion in denying C&K's bond release application for Stage I and II release.

E. DER's Assessment of Civil Penalties on C&K

On June 12, 1991, DER assessed a civil penalty in the amount of $600 on C&K for its alleged unauthorized discharge of mine drainage at Tin Town on March 7, 1991, based upon §18.4 of SMCRA, 52 P.S. §1396.22, and §605(b) of the Clean Streams Law, 35 P.S. §691.605(b). It later assessed a $10,500 civil penalty on C&K for its failure to comply with CO 91-K-094S from May 7, 1991 through May 20, 1991 pursuant to the same statutory authority.

Section 605(b) of the Clean Streams Law states in relevant part:

> Civil penalties for violations of this act which are in any way connected with or relate to mining and violations of any rule, regulation, order of [DER] or condition of any permit issued pursuant to this act which are in any way connected with or related to mining, shall be assessed in the following manner....

Section 1396.22 of SMCRA likewise states in pertinent part:

> In addition to proceeding under any remedy available at law or in equity for a violation of a provision of this act, rule, regulation, order of [DER], or a condition of any permit issued pursuant to this act, [DER] may assess a civil penalty upon a person or municipality for such violation.

Since DER has not proven C&K to be liable for the Rt. 839 discharge, we cannot sustain either of its civil penalty assessments which were predicated upon C&K's violation of SMCRA and the Clean Streams Law.

CONCLUSION OF LAW

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

2. DER bears the burden of proof in appeals of compliance orders, 25 Pa. Code §21.101(b)(3), and of its assessment of civil penalties. 25 Pa. Code §21.101(b)(1).

3. C&K bears the burden of proving that all of the criteria for bond release were satisfied at its mine permit site. Dunkard Creek Coal, Inc. v. DER, 1988 EHB 1197.

4. In order for an operator to be held liable for abating a discharge off its permitted area, DER must establish a hydrogeologic connection between the discharge and the operator's activities on its permitted area. Penn-Maryland Coals, Inc. v. DER, EHB Docket No. 83-188-W (Adjudication issued January 22, 1992).

5. DER failed to establish by a preponderance of the evidence that there was a hydrogeologic connection between the Rt. 839 discharge and C&K's mining operations.

6. DER's issuance of COs 91-K-094S and to C&K to treat and abate the Rt. 839 discharge was an abuse of DER's discretion.

7. DER's denial of C&K's application for bond release for Tin Town was an abuse of discretion, since the sole reason for its denial was the Rt. 839 discharge and all of the criteria for Stage I and II bond release had been satisfied at the site. Section 4(g) of SMCRA, 52 P.S. §1396.4(g); 25 Pa. Code §86.175(b)(2).

8. DER's June 12, 1991 assessment of civil penalties on C&K in the amount of $600 pursuant to §605(b) of the Clean Streams Law, 35 P.S. §691.605(b), and §18.4 of SMCRA, 52 P.S. §1396.22, was an abuse of DER's discretion because DER did not prove C&K's mining operations on Tin Town were hydrogeologically connected to the Rt. 839 discharge.

9. DER's July 22, 1991 assessment of civil penalties on C&K in the amount of $10,500 pursuant to §605(b) of the Clean Streams Law and §18.4 of SMCRA was an abuse of DER's discretion because DER did not prove a hydrogeologic connection between C&K's mining operations and the Rt. 839 discharge.

ORDER

AND NOW, this 30th day of September, 1992, it is ordered that C&K's appeals at EHB Docket Nos. 91-138-E, 91-147-E, 91-279-E, and 91-350-E are sustained. DER is further ordered to release Stage I and II bonds for SMP 16850106.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge

DATED: September 30, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

PAGNOTTI ENTERPRISES, INC. d/b/a TRI-COUNTY SANITATION COMPANY	:	
v.	:	**EHB Docket No. 92-039-E**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and SAVE OUR LOCAL ENVIRONMENT, II, LAWRENCE P. and LINDA KORPALSKI, KENNETH POWLEY, THOMAS MEYERS, SR., and THE FOSTER TOWNSHIP SUPERVISORS, Intervenors	:	**Issued: October 1, 1992**

OPINION AND ORDER
SUR DER'S MOTION TO DISMISS OBJECTIONS
AND COMPEL ANSWERS TO ITS SECOND SET OF
INTERROGATORIES AND SECOND REQUEST FOR PRODUCTION
OF DOCUMENTS

By: Richard S. Ehmann, Member

Synopsis

Where the Department of Environmental Resources (DER) files interrogatories and a request for production of documents after the close of the discovery period, without leave of this Board to do so or an extension of the discovery period, and the recipient of this discovery objects to its untimeliness, the objection will be sustained.

OPINION

In the instant appeal as part of our normal procedure, on February 4, 1992, we issued Pre-Hearing Order No. 1. As to discovery, it provided: "All discovery in this matter shall be completed within 75 days of the date of this Order, unless extended for good cause upon written motion." Thus, all discovery had to be completed by **April 19, 1992.** During the period of time in

which the instant appeal was consolidated with the subsequently withdrawn appeal of Louis J. Beltrami, Sr., (then found at Docket No. 92-036-E), we granted two extensions of this deadline. On June 9, 1992, we issued an Order providing in part "the parties shall complete all discovery in this matter **by July 10, 1992**" (emphasis added).

On July 10, 1992, DER mailed Pagnotti a Second Set of Interrogatories and a Second Set of Request For Production Of Documents. Pagnotti did not provide responses thereto, but, in August filed objections to the Request For Production and the Interrogatories. DER has filed its instant motion and Pagnotti has replied thereto, restating its objections.

One of Pagnotti's objections is that DER's discovery is untimely. DER's Motion admits its discovery was not mailed out to Pagnotti until July 10, 1992. In Academy of Model Aeronautics v. DER, 1990 EHB 34, we held discovery was timely if begun before the close of the discovery period, even if answers to discovery were not due until after the discovery period ended, because a brief extension of the deadline would give the answering party sufficient response time. The instant appeal raises the first impression question of when was the discovery period over, i.e., if discovery is to be completed by July 10, may it be begun on that date under the rationale of Academy of Model Aeronautics? The answer to this question is no. Our order said discovery was to be completed by July 10, 1992, not completed on or before or completed by the close of business on July 10, 1992; thus, the last day DER could have served its interrogatories and request for production of documents to Pagnotti under Academy of Model Aeronautics was July 9, 1992 unless it secured yet a third extension of this completion deadline in the fashion authorized in Pre-Hearing Order No. 1. DER did not do so. Since the hearing on the merits in this appeal is scheduled to begin on October 27,

1992, there is insufficient time for it to now do so. Accordingly, we must enter the following order.

O R D E R

AND NOW, this 1st day of October, 1992, it is ordered that DER's Motion to dismiss Pagnotti's objections and to compel Pagnotti to answer DER's Second Set of Interrogatories and Second Request For Production of Documents is denied and Pagnotti's objection of untimeliness is sustained.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: October 1, 1992

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M. DIANE SMITH
SECRETARY TO THE BOA

UPPER MONTGOMERY JOINT AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 91-352-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** October 5, 1992

OPINION AND ORDER
SUR
MOTION TO DISMISS

By the Board

Synopsis

The Department of Environmental Resources' (DER) refusal to reverse a final decision on federal grant participation in a wastewater treatment plant project is not an appealable action. Because the appellant failed to file a timely appeal of DER's decision denying grant participation and DER's refusal to reconsider that decision is not an appealable action, the appeal is dismissed.

OPINION

This matter was initiated with the August 26, 1991, filing of a notice of appeal by the Upper Montgomery Joint Authority (Authority) seeking review of a series of letters[1] from DER relating to the Authority's request for federal grant funding for Change Order No. 5, Contract No. 19 of Grant No. C-420844. The grant, which was made pursuant to §201 of the federal Clean Water Act, 33 U.S.C. §1281, funded the upgrading of the Upper Montgomery

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1 The letters are dated August 15, 1990; April 5, 1991; June 6, 1991; and July 26, 1991.

Wastewater Treatment Plant. The particular change order at issue related to increased costs for sludge disposal.

On September 18, 1991, DER filed a motion to dismiss the Authority's appeal for lack of jurisdiction. DER maintains that its final action on the Authority's request for federal grant participation for Change Order No. 5 was issued on August 15, 1990, and that the appeal was therefore, untimely since it was not filed until a year later.

The Authority asserts in its October 10, 1991, objections to the motion that DER's letter of August 15, 1990, was not a final action, as was evidenced by subsequent letters, telephone conversations, meetings and other dealings between the parties. In particular Appellant points to its letters of September 20, 1990; January 22, 1991; April 16, 1991, and July 12, 1991, all of which requested DER to reconsider its denial, and to DER's letters of April 5, 1991; June 6, 1991; and July 26, 1991, responding to the Authority's requests.

In order for the Board's jurisdiction to attach, the appeal of a final DER action must be filed within 30 days of the recipient's receiving notice, Rostosky v. Department of Environmental Resources, 26 Pa. Cmwlth. 473, 364 A.2d 761 (1976). For the reasons set forth below, we hold that DER's letter of August 15, 1990, was a final action, that its three subsequent letters refusing to reconsider the August 15, 1990, denial were not appealable actions, and that since the Authority's appeal of the August 15, 1990, letter was not filed until August 26, 1991, it was untimely and must be dismissed for lack of jurisdiction.

The Board's recent decision in Conshohocken Borough Authority v. DER, EHB Docket No. 91-276-MR (Opinion issued May 8, 1992) is directly on point. There, we held that DER's rejection of federal grant participation is a final, appealable action and that its subsequent refusal to reconsider the denial was not appealable. See, also, Borough of Lewistown v. DER, 1985 EHB 903, and Lansdale Borough v. DER 1986 EHB 654. This is so despite DER's failure to advise the requestor of its appeal rights in this letter communicating the denial. Borough of Lewistown, *supra*.

Here, it is clear from a reading of DER's August 15, 1990, letter that DER's action was a final, appealable action. While the letter did not contain language regarding the Authority's appeal rights, it did state "[t]his action constitutes the Department's final decision on federal grant participation specific to this change order." The ensuing series of letters between the Authority and DER did nothing to alter the nature of the August 15, 1990, letter denying grant participation. At most, DER's responses to the Authority's three requests to review its denial of grant participation reiterated the August 15, 1990, denial.[2]

Because the Authority did not file an appeal of the August 15, 1990, letter until August 26, 1991, its appeal of that letter is untimely and must

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[2] Apparently, DER has not altered its manner of handling change order requests since 1985 when the Lewistown decision was issued by the Board. Multiple requests for reconsideration by grantees apparently are entertained over an extended period of time, thereby potentially conveying the false impression that DER still has not reached its final decision on the change order request. It is obvious to the Board that a modification in DER's procedure whereby the decision on the change order request contains a statement of the grantee's appeal rights would avoid controversies such as this one. While DER is not legally obligated to advise the regulated community of its appeal rights, it routinely does so in most programs. Common sense would dictate the same course of action with the construction grant program.

be dismissed. Similarly, its appeals of DER's three 1991 letters must be dismissed for lack of jurisdiction because those letters are not appealable actions.[3]

---

[3] In light of this opinion, the Authority's motion for enlargement of time constraints is moot.

ORDER

AND NOW, this 5th day of October, 1992, it is ordered that DER's motion to dismiss is granted and the appeal of the Upper Montgomery Joint Authority is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
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Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge

DATED: October 5, 1992

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M. DIANE SMITH
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HEPBURNIA COAL COMPANY	:	
	:	**EHB Docket No. 89-614-MJ**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** October 9, 1992

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

By Joseph N. Mack, Member

Synopsis

DER's denial of an application for a surface mining permit is sustained. The appellant has failed to demonstrate by a preponderance of the evidence that its mining will not cause pollution to the waters of the Commonwealth.

BACKGROUND

Hepburnia Coal Company ("Appellant" or "Hepburnia") filed a Notice of Appeal on December 26, 1989 from a permit denial letter of the Department of Environmental Resources ("the Department" or "DER") dated December 7, 1989 denying Hepburnia's application for a surface mining permit for the Kirk operation in Brady and Union Townships in Clearfield County. This appeal was docketed at No. 89-614-MJ. A hearing was held in Indiana, Pennsylvania on March 5, 6 and 7, 1991 before Administrative Law Judge Joseph N. Mack, a Member of the Board, at which both parties were represented by legal counsel and presented evidence in support of their positions.

Both DER and Hepburnia filed post-hearing briefs on October 3, 1991, and reply briefs on October 28, 1991 and October 30, 1991, respectively.

The record consists of a Notice of Appeal, a partial stipulation of facts, a transcript of 580 pages and 50 exhibits.

After a full and complete review of the record we make the following findings of fact:

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce The Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* ("Clean Streams Law"); the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et. seq.*, ("Surface Mining Act"); Section 1917-A of The Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 ("Administrative Code") and the rules and regulations promulgated thereunder. (Stip. i)[1]

2. Hepburnia is a Pennsylvania corporation with a business address of P. O. Box 1, Grampian, PA 16838, and is in the business of mining coal by the surface mining method. (Stip. ii)

3. Hepburnia has mined coal in Pennsylvania under License No. 100014. (Stip. iii)

4. On or about July 29, 1988, Hepburnia submitted a Surface Mining Permit ("SMP") Pre-Application No. 17880024 to the Department. (Stip. iv)

5. SMP Pre-Application No. 17880024 covered a site in Brady Township, Clearfield County, commonly known as the Kirk Site. (Stip. v)

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[1] "Stip___" refers to facts to which the parties stipulated in paragraph "e" of the joint stipulation filed prior to the hearing on February 21, 1991.

6. In SMP Pre-Application No. 17880024, Hepburnia proposed to mine the Upper Kittanning, Middle Kittanning, Luthersburg and Lower Kittanning coal seams. (Stip. vi)

7. The area covered by SMP Pre-Application No. 17880024 had not been previously surface-mined. (Stip. vii)

8. The area covered by SMP Pre-Application No. 17880024 lies in the Sugarcamp Run, LaBorde, and Luthersburg Branch watersheds. (Stip. viii)

9. On or about June 5, 1989, Hepburnia submitted an application for the Kirk site to the Department, SMP Application No. 17890114. This application covered the same area as the pre-application and proposed mining the same seams. (Stip. ix)

10. Following its review thereof, in a letter dated December 7, 1989, the Department denied SMP Application No. 17890114. (Stip. xii)

11. Two deep mine discharges from the Lower Kittanning Seam existed in the area immediately surrounding the Kirk site. One of these was on the site mined by Glen Irvan Corporation ("the Glen Irvan site"), the other on the Bailey site mined by Strishock Coal Company, both of which adjoin the Kirk site. (NT. 79-81)[2]

12. The LaBorde Branch, Sugarcamp Run, and Luthersburg Branch show effects from prior mining. (NT. 65-66)

13. In the mid-1970's, DER's laboratory analysis reports contained data on negative alkalinity values, but did not contain any data on acidity values. (NT. 105-106)

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[2] "NT. ____" refers to a page in the transcript of the hearing. "App. Ex. ____" refers to exhibits introduced by Hepburnia at the hearing, and "Comm. Ex. ____" refers to exhibits introduced by DER.

14. The values used to plot the acidity on Hepburnia's exhibits are quoted as zero. However, this may simply reflect the fact that no data on acidity was available during the time period covered thereby (as stated above) and not that no acidity was present. (NT. 115-116)

15. Monitoring Point C is located on an unnamed tributary to the Luthersburg Branch. The sampling for C is plotted on Appellant's Exhibit P-1, a graph showing pH, acidity, and alkalinity values. (App. Ex. P-1) While the graph values for pH approached 7.0 mg/l, the sulfate level at the point was, in most cases, well above 300 mg/l and in some cases above 1000 mg/l, a clear indication of the effects of prior mining. (App. Ex. P-1; NT. 120)

16. Monitoring points M and K are located on the main branch of Sugarcamp Run and on a tributary thereto, respectively. These monitoring points indicate a depressed pH as low as 4.7 in 1978, and while the pH subsequently improved, the sulfates increased during most of the same period to an amount in the 400 or 500 range in 1987 and 1988. (NT. 136-137)

17. Acid mine drainage is characterized by low pH levels, acidity exceeding alkalinity, and elevated metals and sulfates. (NT. 378, 382)

18. Duane L. Berry, who testified on behalf of Hepburnia, was, at the time of the hearing, a vice president of the engineering consulting firm of Lee Simpson Associates and a registered professional engineer. Mr. Berry had been involved in the development of the permit application for Hepburnia and, specifically, the water quality data for the overburden analysis in the Luthersburg Branch, the LaBorde Branch, and the Sugarcamp Run watersheds. (NT. 82-85)

19. Wilson Fisher, Jr, who testified on behalf of Hepburnia, was at the time of the hearing, president and chief engineer of Hess and Fisher Engineers, Inc. and worked principally in the field of geophysics. He holds a

Bachelor of Science degree in geophysics and a Master of Science in geochemistry and has completed most of his Ph.D. work in geochemistry. (NT. 154-159) Mr. Fisher has done no independent research in the field of overburden analysis. (NT. 163)

20. The drainage characteristics of an adjoining watershed that has been mined in the pasta are a reasonable indication of the water quality characteristics that one could expect in the course of mining. (NT. 166)

21. In reaching his findings, Mr. Fisher used as comparisons the Strishock Number 7 and Strishock-Bailey operations as well as the Glen Irvan operation, all of which are near or adjacent to the Kirk site covered by Hepburnia's application. (NT. 167-171)

22. Mr. Fisher's observation of the highwall on the Strishock-Bailey operation found no evidence that would indicate any environmental concern or problem. (NT. 171)

23. Based on Mr. Fisher's review, the overburden analysis did not show an obvious tendency to produce either strongly alkaline or strongly acidic water in the post-mining stage. (NT. 185)

24. The presence of lingula, a fossil found in a brackish water depositional environment, the occurrence of prolific locations of pyritic mineralization, and black shale are all associated with the Lower Kittanning Seam throughout Clearfield County. These features result in a potential for the formation of acid mine drainage in and from the Lower Kittanning Seam. (NT. 209, 210-211)

25. Based upon the sulfate concentrates found in the discharges from the Strishock Number 7 site at the time of hearing, that site was producing acid mine drainage which was being neutralized either on the site or just off the site. (NT. 217)

26. The Kirk site and the Strishock Number 7 site are geologically very similar. (NT. 224-225)

27. On February 8, 1989, ten months prior to denying Hepburnia's surface mining application, DER issued a renewal permit to Strishock Coal Company ("Strishock") for the Strishock-Bailey site. (NT. 439-440; App. Ex. D)

28. The Strishock renewal permit was issued after DER became aware of degraded pit water on the Bailey and Number 7 sites and pollutional discharges on the Glen Irvan site. (NT. 440)

29. Neither Mr. Fisher nor his firm performed any overburden analysis for the Kirk site, nor did they perform overburden analysis on the Strishock sites or the Glen Irvan site. (NT. 242-243)

30. Potentially acid forming units were shown in the geological information concerning the Kirk site. (NT. 247)

31. In reviewing an application for a surface mining permit, the Department considers the following factors: adjacent mining applications; pre-mining water quality as well as post-mining water quality from adjacent operations; the history of mining in the area, both deep and surface mining; the hydrologic cycle or groundwaters; and, finally, overburden analysis. (NT. 286-287)

32. Overburden analysis is a geochemical technique used to analyze certain parameters within rock strata. (NT. 287)

33. The Department required Hepburnia to submit an overburden analysis as part of the review. (NT. 313-315; Comm. Ex. 6)

34. The overburden analysis submitted by Hepburnia involved only 3 holes on a site of approximately 100 acres. (NT. 424)

35. David C. Bisko testified on behalf of the Commonwealth. He has a Bachelor of Science degree in geoscience from Pennsylvania State University and has done additional course work in hydrogeology at Penn State and in petroleum geology at the University of Oklahoma. He has worked as a petroleum geologist and has been with DER since 1984 as a hydrogeologist. (NT. 279-282)

36. In his review of Hepburnia's pre-application, Mr. Bisko also reviewed an application which had previously been submitted by Doan Industries for the Kirk site. (NT. 296-299; Comm. Ex. 2)

37. During Mr. Bisko's pre-application visit to the Kirk site, two acid mine drainage discharges were identified on the Strishock-Bailey site immediately to the east and north of the proposed application area. Those discharges were being treated by Strishock at the time of the hearing. (NT. 335-336)

38. The pH of the two aforesaid discharges ranged around 4.0 to 4.5; acidity was 120 mg/l for one discharge and 76 mg/l for the other; manganese was 57 mg/l for one discharge, 45 mg/l for the other; and sulfates ranged between 1300 and 1800 mg/l. (NT. 337)

39. Mr. Bisko examined permits in a large area surrounding the proposed Kirk operation in an attempt to establish the presence and extent of alkaline units, and to establish that the alkaline units are of varying quality and exhibit different neutralization potentials under different covers. (TR. 360-361)

40. Mr. Bisko determined that Hepburnia had not provided presumptive evidence in support of mining the Lower Kittanning and Middle Kittanning Coal Seams on the Kirk property, and that Hepburnia's failure to delete the coal seams from the application should result in a denial of the surface mining permit application. (NT. 367)

41. On December 7, 1989, the Department issued to Hepburnia a denial letter which stated that Hepburnia had failed to provide presumptive evidence that the mine site would not pollute the waters of the Commonwealth. (NT. 368-369)

42. Before holding a pre-denial meeting with Hepburnia, Mr. Bisko examined the DER files and then went into the field and made further samplings of 25 discrete discharges located within a mile and a quarter of the Kirk site, most of which are within one-quarter to one-half mile of the site. These are shown as points S-1 through S-25. Points S-1 through S-7 show acid mine drainage. S-8 shows normal pH with high levels of sulfates. S-9 through S-11 show acid mine drainage with pH levels below 5. S-12 through S-15 have pH levels above 5.9 but with high sulfates. S-16 through S-23 have pH levels in many cases less than 4, and S-24 has a pH of 5.7 with high sulfates. S-25 has a pH of 4.8. (NT. 371, 375-383; Comm. Ex. 1) The following is a summary of the sampling results admitted at hearing as a part of Commonwealth Exhibit 1:

SUMMARY OF SURFACE MINE DRAINAGE

POINT	DATE	LAB pH	ALK. mg/l	ACID. mg/l	MANG. mg/l	SO4 mg/l	DER SAMPLE#	MINE DRAINAGE SOURCE
S1	11/15/89	4.1	4	120	57.9	1807	4458488	B,C,LUTH
S2	11/15/89	4.6	8	76	45.9	1330	4458487	B,C,LUTH
S3	03/13/90	4.8	8	22	5.8	738	4458535	B,C
S4	03/13/90	4.1	3	50	16.3	678	4458532	B,C
S5	09/06/88	4.0	2	70	15.7	588	4458356	B,C
S6	03/13/90	4.8	8	14	4.2	780	4458533	B,C,LUTH,C′
S7	07/25/90	5.1	8	16	1.4	654	4458622	B,C,LUTH,C′
S8	07/25/90	5.8	14	8	23.5	1578	4458621	B,C,LUTH
S9	07/25/90	4.3	6	28	14.1	1500	4458597	B,C,LUTH
S10	07/25/90	4.8	8	46	9.5	414	4458596	B,C,LUTH
S11	07/25/90	4.2	4	36	15.6	768	4458595	B,C,LUTH
S12	10/27/89	6.5	94	0	12.0	852	4458482	B,C,LUTH,C′,D
S13	03/14/90	5.9	56	0	13.6	1680	4458539	B,C,LUTH,C′,D
S14	03/14/90	7.3	208	0	0.4	1710	4458540	B,C,LUTH,C′
S15	06/15/90	6.5	172	0	18.2	572	4458499	C,LUTH
S16	08/07/90	3.9	0	98	36.7	1428	4458635	B,C
S17	08/07/90	4.3	7	30	14.2	732	4458633	B,C
S18	08/07/90	4.1	4	86	52.0	1692	4458632	B,C
S19	08/07/90	3.7	0	42	16.4	462	4458634	B,C.

POINT	DATE	LAB pH	ALK. mg/l	ACID. mg/l	MANG. mg/l	SO4 mg/l	DER SAMPLE#	MINE DRAINAGE SOURCE
S20	08/18/89	4.2	0	38	4.6	850	RESCO	B,C
S21	05/02/88	3.6	0	50	36.7	937	RESCO	B,C
S22	08/18/89	3.6	0	74	8.5	294	RESCO	B,C
S23	08/18/89	3.7	0	228	18.6	978	RESCO	B,C
S24	08/07/90	5.7	28	10	37.2	1470	4458626	C,LUTH
S25	08/07/90	4.8	10	28	21.5	792	4458625	C,LUTH

NOTE: RESCO= WATER DATA FROM L.BAUMGARDNER COAL CO. SMP #17900122

43. The Kirk site is characterized by high sulfur and low neutralization potential. Based on that, Mr. Bisko determined that mining on that site will generate acid mine drainage. His determination also relied on the fact that both the Strishock-Bailey and the Strishock No. 7 operations were forming acid mine drainage. (NT. 386, 387)

44. Mr. Bisko communicated to Hepburnia that discharges had been located and documented which showed that mining of the Middle Kittanning and Lower Kittanning coal formations had produced acid mine drainage in this area. (NT. 465)

45. When mining of the Lower and Middle Kittanning Seams was being conducted in the area adjacent to the Kirk property or near the Kirk property, there were discharges of acid mine drainage, some of which came from pre-Surface Mining Act strip mining, some from deep mining, and other discharges from more recent strip mining. (NT. 486, 487, 488)

46. Mr. Bisko used a computer model in his analysis of the neutralization potential of the Kirk site, but also removed the threshholds built into the computer model. He determined that the overburden results were the same as those the computer model had generated and that there was a deficiency of neutralization on the site. (NT. 494-495)

47. Coal seams which had been formed under marine conditions, particularly the Clarion Coal Seam, the Lower Kittanning Coal Seam, and the

Middle Kittanning Coal Seam, contain brackish shales which are generally acid-producing. (NT. 502, 503)

48. Where there are situations with high sulfur strata and also high neutralization potential strata occurring together it is likely to end up with a neutralized acid mine drainage which can sometimes contain a certain amount of metals as well. (NT. 521-524)

49. If the pyrite oxidation is occurring in any kind of significant amount the sulfate level will be elevated. (NT. 521-524)

50. Factors which are considered in determining whether a particular mining operation may result in acid mine drainage are as follows: pre-mining water quality, which is the water quality of an area before it is affected; post-mining water quality; limestone covers and black shales; and overburden analysis. (NT. 523)

51. Acid-base accounting is the most common method of overburden analysis and is accepted by the Federal agencies as well as several other states and Canada. (NT. 525, 526)

52. Acid-base accounting is a valid predictor of post-mining water quality if it is used in conjunction with other parameters, including overburden analysis, pre-mining water quality, post-mining water quality on adjacent sites, lithology, topography, and surface weathering. (NT. 523, 527)

53. The Kirk site has a high sulfur/low neutralization potential. (NT. 543, 544)

54. The data which was available and associated with the Middle Kittanning and Lower Kittanning Coal Seams indicated a high sulfur strata rather uniformly throughout the general area of the coal seams. (NT. 547)

DISCUSSION

On an appeal from a permit denial the appellant has the burden of proof: 25 Pa. Code §21.101(c)(1). To carry this burden, the appellant must show by a preponderance of the evidence that the Department acted unlawfully or abused its discretion in refusing to issue the permit. 25 Pa. Code §21.101(a).

Hepburnia makes two arguments in its appeal. It argues first that it was arbitrary to refuse Hepburnia's permit application when just prior to the denial, the Department had granted Strishock Coal Company an extension for mining on an adjoining site, the Bailey site. Secondly, Hepburnia argues that it has met its burden of proving that its mining will not produce post-mining pollution, as per 25 Pa. Code §86.37(a)(3), which requires that an applicant for a mining permit demonstrate that "there is no presumptive evidence of potential pollution to the waters of the Commonwealth". Harman Coal Company v. Commonwealth, DER, 34 Pa. Cmwlth. 610, 613, 384 A.2d 289, 291 (1978). See also Magnum Minerals v. DER, 1988 EHB 867, 892; Boyle Land and Fuel Company v. DER, 1982 EHB 1, 18.

Hepburnia maintains that its evidence is stronger than the evidence produced by DER as to comparable mining, adjoining stream water quality and observations of discharges in the field. Hepburnia claims that DER's evidence of overburden analysis is not properly used and that no potential discharge has been demonstrated or, on the contrary, that the evidence produced by Hepburnia has, in fact, overcome the presumption on the question of pollutional discharges. Hepburnia also argues that DER's evidence does not demonstrate the Johnstown Limestone, which would neutralize any acid mine drainage, does not exist as a geological factor on the permitted area.

DER, on the contrary, says that the burden of proof as it applies to Hepburnia is to demonstrate positively that there is no presumptive evidence

of pollutional discharge and that Hepburnia has not so demonstrated. DER also argues that it has not abused its discretion by not issuing the permit and that on the contrary has not issued the permit because it is following the law as it applies to the permit application.

The Department argues that it produced more conclusive evidence on the presence of acid mine drainage and the potential for further acid mine drainage from the entire watershed than did Hepburnia. Finally the Department argues that the use of acid base accounting in analyzing overburden analysis is accepted by the scientific community and does demonstrate under certain circumstances the pollutional potential of the overburden. It is one of the factors which is considered by the Department in any analysis of an application for a surface mining permit.

We shall deal first with Hepburnia's argument that it was arbitrary and capricious for the Department to deny Hepburnia's permit application while permitting mining to occur on immediately adjoining sites, and particularly in authorizing the renewal permit for the Strishock-Bailey site. Hepburnia further contends that since the Department knew of the pollutional discharges and degraded pit water on the Strishock-Bailey and Number 7 sites and the Glen Irvan site at the time the renewal permit was issued to Strishock the Department must have determined that these were not indicative of post-mining drainage from properly conducted surface mining; otherwise, the Department would have been required to deny the renewal permit.

Hepburnia argues that since DER came forth with no evidence to distinguish Hepburnia's denial from the approvals for adjacent sites, DER acted arbitrarily in denying Hepburnia's application. In support of this

argument, Hepburnia cites Fossil Fuels, Inc. v. DER, 1981 EHB 125, for the principle that where an administrative agency adopts a different standard for similar situations, its action is arbitrary.

We agree that DER may not treat those in similar situations differently. Fossil Fuels, supra. It is true that the Kirk Site is adjacent to the Strishock-Bailey, Strishock Number 7, and Glen Irvan sites, and is geologically very similar at least to the Strishock Number 7 site. (F.F. 21, 26)[3] It is also true that DER issued a renewal permit for the Strishock-Bailey site when it was aware of the presence of degraded pit water on the Strishock-Bailey and Number 7 sites and pollutional discharges on the Glen Irvan site. (F.F. 28) Based on this, Hepburnia argues that it, too, should have been issued a mining permit for the adjacent Kirk Site. However, Hepburnia's argument is flawed in that it does not take into consideration the development of additional data during the ten-month period between the renewal of the Strishock-Bailey permit and the denial of Hepburnia's application for the Kirk Site. Nor does it take into consideration DER's ability to re-evaluate or reconsider the effect of mining on this particular area.

Secondly, Hepburnia's argument touches on the issue of estoppel. Hepburnia is, in essence, saying that because DER had permitted mining on sites adjoining the Kirk site, it should be estopped from denying a permit to Hepburnia. However, it is well-established that an agency may not be estopped from carrying out its statutory duties. Commonwealth, DER v. Philadelphia Suburban Water Company, 135 Pa. Cmwlth. 283, 581 A.2d 984 (1990), allocatur denied, ____ Pa. ____, 593 A.2d 427 (1991); Lackawanna Refuse Removal, Inc. v. Commonwealth, 65 Pa. Cmwlth. 372, 442 A.2d 423 (1982). Where an agency may

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[3] "F.F. ____" refers to a finding of fact, as set forth herein.

have been lax in enforcing its regulations in the past, that does not justify continued non-compliance. *Id.* The Commonwealth Court has recently stated that this rule "cannot be slavishly applied where doing so would result in a fundamental injustice", Foster v. Westmoreland Casualty Co., ___ Pa. Cmwlth. ___, 604 A.2d 1131, 1135 (1992). (quoting Chester Extended Care Center v. Department of Public Welfare, 526 Pa. 350, 586 A.2d 379 (1991).) However, in this case unlike Foster, Hepburnia has not been deliberately misled to its detriment by DER.

Therefore, if the evidence fails to establish that there is no presumption of potential pollution to waters of the Commonwealth, as required by 25 Pa. Code §86.37(a)(3), then DER cannot be estopped from denying Hepburnia's application to mine the site, even though it may have permitted the mining of adjacent sites. Accordingly, we reject Hepburnia's argument that because a renewal of an existing permit was issued to Strishock, the Department acted arbitrarily and capriciously in refusing to grant a permit to Hepburnia. The Department has the obligation to examine the application of Hepburnia and to grant or deny the permit based upon the law then existing.

This, then, brings us to the second issue raised by Hepburnia, which is whether Hepburnia has borne its burden of proving that its mining will not produce post-mining pollution, specifically acid mine drainage, to the waters of the Commonwealth. This question of potential pollution was the primary focus of the hearing and the parties' post-hearing briefs, and both parties presented experts who were knowledgeable and articulate in this area.

Wilson Fisher, on behalf of Hepburnia, provided testimony dealing with comparable mining and particularly mining on the Strishock-Bailey operation adjoining the proposed Kirk operation. He also testified extensively on the stream water quality in and near the Kirk operation and

particularly the stream water quality adjoining the Kirk operation. However, we find the testimony of DER's expert witnesses in this case, specifically Keith Brady and David Bisko, to be more comprehensive.

Mr. Bisko produced clear and convincing testimony, specifically with respect to his field observations and his summary of surface mine drainage at twenty-five separate points within the watershed of the Luthersburg branch encompassing the Sugarcamp Run, the LaBorde branch and certain unnamed tributaries to either of the latter or to the Luthersburg branch itself. The twenty-five samples which Mr. Bisko presented at the hearing are from points located within the Luthersburg quadrangle. These samples demonstrate that the operations which have taken place, both strip mining and deep mining along the Luthersburg branch and on its tributaries, including Sugar Camp Run and the LaBorde branch, are largely acidic in nature, based upon sampling which he did in 1988, 1989 and 1990. All of the twenty-five points are located within a mile and a quarter of the Kirk site, and most are within one-quarter to one-half mile of the Kirk site. (F.F. 42)

An examination of the samples from the twenty-five discharges reveals that only six show a pH of 5.7 or above; the other nineteen show a pH level below 5.7. The samples which show a pH of 5.7 or above also show a sulfate concentration of over 1400 mg/l, indicating that there is acid mine drainage present which is being neutralized. However, all of the other sampling points indicate acid mine drainage in its raw form, in many cases showing acidity much in excess of the alkalinity. (F.F. 42)

The balance of the testimony presented by Hepburnia and the Department dealt with overburden analysis and specifically acid-base accounting. Both parties' experts agreed that acid-base accounting is a valid method of evaluating overburden, but differed upon how much importance should

be placed thereon. A great deal of testimony was devoted to discussion of the Johnstown limestone layer which has provided some neutralization of the acid mine drainage produced at some of the discharge points noted above, specifically discharge points 12 through 15. However, based upon the sampling of those discharge points conducted by Mr. Bisko, we do not find that Hepburnia established by a preponderance of the evidence that its mining will not cause pollution to the waters of the Commonwealth. We, therefore, find that it was not an abuse of discretion for DER to have denied Hepburnia's permit application. On the contrary, based upon the discharges already extant in this watershed DER acted properly and in accordance with the requirements of 25 Pa. Code §86.37(a)(3).

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this case.

2. In an appeal from DER's denial of a permit, the appellant bears the burden of proof. 25 Pa. Code §21.101(c)(1).

3. A government agency may not be estopped from carrying out its statutory duties. Philadelphia Suburban Water, supra; Lackawanna Refuse Removal, supra.

4. An applicant for a surface mining permit must demonstrate that there is no presumptive evidence of potential pollution to waters of the Commonwealth. 25 Pa. Code §86.37(a)(3).

5. Hepburnia did not meet its burden of demonstrating that there is no presumptive evidence of potential pollution to waters of the Commonwealth which will result from its mining.

6. The Department did not abuse its discretion in denying Hepburnia's application for a surface mining permit.

ORDER

AND NOW, this 9th day of October, 1992, based upon the failure of the appellant to carry its burden of proof, the Board dismisses Hepburnia's appeal and sustains the Department's denial of Hepburnia's application for a surface mining permit.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: October 9, 1992

cc: **DER, Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOA

EAST PENN MANUFACTURING CO.	:	
	:	
v.	:	EHB Docket No. 90-560-E
	:	(Consolidated)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: October 16, 1992

OPINION AND ORDER
SUR
APPELLANT'S MOTION FOR SUMMARY JUDGMENT

By: Richard S. Ehmann, Member

Synopsis

In this appeal challenging an order issued by the Department of Environmental Resources (DER) to the operator of a lead-acid battery manufacturing facility which, *inter alia*, directed the company to cease discharging industrial waste to a pit located on its premises, the appellant/company's motion for summary judgment is denied. This motion's form is sufficient to defeat DER's request that we quash it for failure to comply with Pa.R.C.P. 1035. However, while appellant's motion asserts DER's order is unsupported by any valid factual findings from which it could be concluded that the company's activities are affecting groundwater, DER's response, which is supported by the affidavits of several DER employees, points to factual data which arguably could support DER's order depending upon the inferences drawn from those facts. Thus, grant of summary judgment in this matter would be inappropriate.

OPINION

This appeal was commenced by East Penn Manufacturing Company, Inc., (East Penn) on December 21, 1990, challenging a DER administrative order revoking a water quality management permit authorizing a discharge of industrial wastes to East Penn's "ore pit" from its lead-acid battery manufacturing plant in Richmond Township, Berks County. The order also directed cessation of this discharge, the submission of an approvable ore pit clean-up plan to DER, and implementation of that plan upon its approval by DER.[1]

Shortly after filing its appeal, East Penn brought a Petition for Supersedeas, seeking to supersede DER's order. Following a January 30 and 31 hearing on the supersedeas petition, former Board Member Terrance J. Fitzpatrick issued an order and an opinion on February 5, 1991 and February 21, 1991, respectively, granting supersedeas based on the conclusion that East Penn had demonstrated DER did not have the evidence to back up the assertions in its order.

Subsequently, on August 9, 1991, East Penn filed its Motion For Summary Judgment on Validity of Department's Order of November 26, 1990 and accompanying brief. DER filed its response to East Penn's motion and

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[1]On December 27, 1990, East Penn appealed DER's issuance to it of an NPDES Permit for a discharge from this plant to an adjacent dry swale. That appeal was assigned docket No. 90-567-F. By subsequent order of this Board, those two appeals were consolidated at the instant docket number.

supporting brief on September 27, 1991, and East Penn submitted its reply to DER's response on October 22, 1991. It is this motion which is presently before the Board for consideration.[2]

In its motion, East Penn asserts it is entitled to summary judgment in its favor on the issue of the validity of DER's November 26, 1990 order. It claims that DER abused its discretion in issuing the order in that it is unsupported by any "valid factual findings" and that the testimony of DER's employees given during the supersedeas hearing and their depositions conclusively establish there is no genuine issue of material fact pertaining to the DER order. East Penn's supporting brief points to specific portions of the supersedeas transcript and exhibits and deposition transcript, as well as DER's Answer to the petition for supersedeas, alleging these materials show DER has no data on the hydrogeology in the vicinity of the ore pit and DER has no data to support the findings in its order.

In its response, DER asserts that affidavits and exhibits attached to its response demonstrate there is a genuine issue of material fact in this matter and East Penn is not entitled to summary judgment as a matter of law. DER's supporting brief also objects to the form of East Penn's motion, contending that it makes only a general assertion that there is no issue of fact concerning the factual basis for DER's order. Citing County of Schuylkill, et al. v. DER, et al., 1990 EHB 1370, DER requests us to quash East Penn's motion on the basis that it fails to set forth the reasons supporting the motion with particularity and urges that representations of

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[2]This matter was reassigned to Board Member Richard S. Ehmann on September 10, 1992, following the resignation of former Board Member Terrance J. Fitzpatrick.

fact set forth in East Penn's brief cannot form the basis for summary judgment.

In reply, East Penn contends DER's objection to the form of its motion is not well-founded and DER has waived this objection by its own prior statements. Moreover, East Penn argues the testimony and affidavits which DER has offered in support of its response further show DER failed to support the order's factual allegations with substantial evidence.

The Board is empowered to grant summary judgment where 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. Robert L. Snyder, et al. v. Department of Environmental Resources, 138 Pa. Cmwlth. 534, 588 A.2d 1001 (1991). The evidence must be viewed in a light most favorable to the non-moving party. Ingram Coal Co. v. DER, 1990 EHB 395. Additionally, summary judgment may only be entered in cases that are free from doubt. Empire Sanitary Landfill, Inc. v. DER, EHB Docket No. 90-467-W (Opinion issued July 10, 1992.)

We first turn to DER's request to quash East Penn's motion based on its allegedly improper form. This Board has previously denied motions for summary judgment which were insufficient in view of the requirements of Pa.R.C.P. 1035. See Brodheads Protective Ass'n v. DER, et al., EHB Docket No. 91-349-F (Opinion Sur Motion For Summary Judgment issued May 12, 1992); County of Schuylkill, 1990 EHB 1370. The instant motion is not lacking in form, however. Unlike the motion in Brodheads Protective Ass'n, which was "a scant two pages" and did not support the factual allegations contained in the motion with any evidence, and the motion in County of Schuylkill, which consisted of

two numbered paragraphs and a request for relief without incorporating, for instance, the notice of appeal or discovery materials filed with this Board, East Penn's motion at paragraph 12 incorporates the testimony of DER's employees as recorded in the transcript of the supersedeas hearing and in the deposition transcripts which were filed with the Board and urges these documents show the absence of any genuine issue of material fact. East Penn's supporting brief then points to specific portions of the pleadings, DER's order, and the supersedeas and deposition transcripts to support the factual allegations made in the brief. While East Penn's motion could have made more specific factual assertions rather than doing so in its brief, we do not find the motion to be fatally flawed because of its form. We accordingly deny DER's request to quash the motion.[3]

We next examine the substance of East Penn's motion. East Penn argues DER has virtually no data on the hydrogeology in the vicinity of the ore pit and DER has no data to support the order's findings that: contamination of groundwater is threatened or present; there are hazardous wastes in the ore pit; there are high levels of waste acids in the ore pit; there are high levels of sulfates, heavy metals (including lead and total dissolved solids (TDS)) in the ore pit; or that an off-site water supply (the Reinhart spring) has been polluted by the activities of East Penn.

Before considering DER's response, we note that East Penn's reply objects to our consideration of any evidence obtained by DER after the

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[3]With this conclusion, there is no need for us to address whether counsel for DER previously waived the argument regarding the form of East Penn's motion through his statement (made in a letter, filed with the Board on September 12, 1991 and attached to East Penn's reply as Exhibit A), that his "additional research would seem to indicate that East Penn's motions are adequate under Pa.R.C.P. Rule 1035."

issuance of its order which has been submitted in support of DER's response, arguing this material was improperly obtained and is inadmissible. East Penn claims that DER conducted no discovery during the discovery period in this matter, but entered East Penn's facility after the close of discovery, on July 23 and 30, 1991, to take samples of stormwater runoff entering the ore pit and sediment samples from the ore pit "under the guise of a facility inspection". The company asserts that by its actions, DER abused its administrative powers and circumvented the time limitations for discovery in this matter. Along these lines, East Penn argues DER's evidence in support of its response is irrelevant because it does not go to the issue of what DER reasonably could have concluded at the time the order was issued. East Penn then urges that DER's order was without substantial evidence to support its factual allegations at the time it was issued, and, as such, DER's issuance of the order was a premature assertion of DER's power, fundamentally unfair and in excess of DER's authority.

We reject East Penn's objection to our consideration of any evidence included in DER's response which DER did not have at the time it issued its order. As we have previously explained, since the Board's review of DER's decision is *de novo*, we may consider evidence which was not before DER when it made its decision. Hrivnak Motor Company v. DER, 1991 EHB 1811. Further, we have ruled in our Opinion and Order Sur East Penn Manufacturing Co., Inc.'s Motion for Sanctions Precluding the Department From Introducing or Using Certain Evidence (Opinion issued September 22, 1992), that the information gathered by DER in its July 23 and 30, 1991 inspections may be offered as evidence in the yet to be scheduled merits hearing in this matter. Thus, we will consider this evidence in connection with DER's response.

We next address East Penn's alternative contention: that even considering DER's factual evidence submitted with its response, DER has not made a showing sufficient to establish the factual allegations in paragraphs 8 and 10 of its order that the ore pit is polluting groundwater and that East Penn's continued use of the ore pit would result in further pollution of the groundwater. East Penn asserts that DER bears the burden of proof in this matter pursuant to 25 Pa. Code §21.101(b)(3) and that DER must support the factual allegations in its order with substantial evidence in order to carry its burden of persuasion. It then contends that DER cannot meet this burden, so summary judgment should be entered in East Penn's favor (citing Godlewski v. Pars Manufacturing Co., 408 Pa. Super. 425, 597 A.2d 106 (1991)).

DER's response points to the sample results in its Exhibit 14 attached to its response as demonstrating DER has reason to believe the activities of East Penn are having an effect upon the groundwater in the vicinity of East Penn's facilities. Citing the affidavit of DER compliance Specialist William H. Jolly, III (which is Exhibit 3 to DER's response), DER states that there are no other manufacturing or industrial operations within two miles of the East Penn facility. DER then asserts that the unlined ore pit has no surface water discharge and that the ore pit ultimately discharges its contents into the groundwater (citing the opinion testimony of DER hydrogeologist Robert Day-Lewis at pp. 256-257 of the supersedeas hearing transcript (N.T. 256-257) and Mr. Day-Lewis' affidavit, which is Exhibit 15). DER further claims that the water in the ore pit contains concentrations of metals, sulfates, TDS, and other constituents in excess of the Federal Safe Drinking Water standards, as shown by the sample results in Exhibits 5, 6, 7 attached to its response, and that samples of sediment taken from the ore pit

show high levels of metals, as reflected in Exhibits 6 and 7 to its response. In addition, DER points to the results of stormwater runoff sampled on July 23, 1991 (Exhibits 9A and 9B to its response) as showing the stormwater runoff entering the ore pit contains extremely high levels of lead, exceeding the Federal Safe Drinking Water standard by at least 400 times. DER also cites the affidavit of Gary Manczka, DER's Chief of the Erie Laboratory, Division of Inorganic Chemistry, which states that the results of sampling of the ore pit sediment which were received by the Erie Laboratory on August 1, 1991, show concentrations of lead in excess of the maximum concentration permitted by DER's regulations, and, as such, the sediments in the ore pit are hazardous wastes under 25 Pa. Code §261.20(a). (Exhibit 11 to DER's response).

In further support of its position, DER points to its Exhibit 12, which it says reflects the results of samples taken of the private water supply on the Reinhart property, and it argues that when the information in Exhibit 12 is considered along with the information in Exhibit 13 (results of sampling taken from the Reinhart supply in the early 1970's), there is further circumstantial evidence showing East Penn's activities are contaminating groundwater in the area near it.

To counter the evidence offered by DER's response, East Penn's reply points to the testimony of DER's hydrogeologist Robert Day-Lewis at the supersedeas hearing and Mr. Day-Lewis' affidavit attached to DER's response. East Penn claims Mr. Day-Lewis concluded at the supersedeas hearing that there was insufficient evidence to demonstrate that contaminants from the ore pit are moving into the groundwater and that there is a hydrogeologic connection between the groundwater surrounding the ore pit and the groundwater supplying this private well. East Penn argues that Mr. Day-Lewis' affidavit does not

state anything contrary to what East Penn has interpreted from his testimony at the supersedeas hearing and that DER "has offered absolutely no opinion testimony to rebut Mr. Day-Lewis' conclusion or to support [the argument of DER's counsel] that a hydrogeological connection can be inferred by this 'circumstantial' evidence." (Appellant's Reply at p. 11) East Penn's reply then proceeds to argue that the evidence which DER has put forth to support its order is insufficient to amount to the "substantial evidence" which it says is necessary for DER to meet its burden of proof here.

Viewing East Penn's motion in the light most favorable to DER and giving DER the benefit of all reasonable inferences which may be drawn from the facts, as we must, it is not readily apparent that there exist no genuine issues of material fact in this matter. DER has produced factual information in addition to that which was considered by the Board when we issued our opinion and order regarding East Penn's supersedeas petition. Since both parties dispute the inferences which should be drawn from DER's facts, it would not be appropriate for us to grant summary judgment in East Penn's favor. See County of Schuylkill, *supra*. As we explained in that decision, in ruling on a motion for summary judgment, we examine whether there are triable issues of fact but we do not decide such issues. See also, Brodheads Protective Ass'n, *supra*. If the parties here wish for us to adjudicate this appeal on a stipulated record, they should file the appropriate motion.

ORDER

AND NOW, this 16th day of October, 1992, it is ordered that East Penn Manufacturing Company's Motion for Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: October 16, 1992

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M. DIANE SMITH
SECRETARY TO THE BOAR

JAMES E. WOOD	:	
	:	
v.	:	**EHB Docket No. 90-280-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES and	:	**Amended Date: October 27, 1992**
M & S SANITARY SEWAGE DISPOSAL, INC.	:	
Permittee	:	**Issued: October 23, 1992**

AMENDED OPINION AND ORDER
M & S SECOND MOTION TO DISMISS,
MOTION TO PRECLUDE EXPERT TESTIMONY
AND MOTION TO STRIKE APPELLANT'S EXPERT "COMMENTS"[1]

By: Richard S. Ehmann, Member

Synopsis

Where a Motion To Dismiss for non-compliance with a Board Order and our procedural rules is not opposed, but James E. Wood ("Wood") makes a filing showing some effort to comply with at least one of our orders, the Motion To Dismiss will be denied as too severe a sanction but sanctions will be imposed. Permittee's unopposed Motion To Preclude Expert Testimony will be granted as a sanction pursuant to 25 Pa. Code §21.124, based on Wood's non-compliance with our order dealing with such evidence. The comments of Patricia Bradt, Ph.D., submitted by Wood as an expert report or summary of expert testimony, are neither an expert report nor a summary of such testimony but are general comments which do not show any scientific or technologic examination by Bradt

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[1]In our opinion issued on October 23, 1992, we inadvertently omitted a portion of a sentence on page 3 of that opinion. This Amended Opinion corrects this error and adds the deleted information.

of the specific issues raised in this appeal, or results and conclusions based on such an examination. The Motion To Strike Appellant's Expert "Comments" is granted since the written comments are not an expert's report or summary of expert testimony and Wood is now barred from offering such testimony.

OPINION

This appeal was first filed with this Board on July 13, 1990. In it James Wood ("Wood") challenges the effluent limitations set by the Department of Environmental Resources ("DER") in NPDES Permit No. PA-0062324 issued to M&S Sanitary Sewage Disposal, Inc. ("M&S") for a discharge to the Delaware River from its facility in Westfall Township, Pike County.

On August 9, 1990, we issued Pre-Hearing Order No. 1, which required Appellant to file its Pre-Hearing Memorandum with this Board by October 23, 1990. That Order indicated this Pre-Hearing Memorandum was to include a description of scientific tests relied upon by any party and summary of testimony of experts.

We will not recount here the volumes of paper filed by the parties before us, who seem happy to waste time in wrangles which produce sound and fury but accomplish no progress down the path toward a merits hearing and a final Board decision on this matter. Included within this paper maze are Motions to Dismiss, Motions to Stay Obligation To Comply with Pre-Hearing Order No. 1, a Motion To Compel Compliance With Pre-Hearing Order No. 1, a Motion To Compel Responses To Interrogatories, a Motion To Preclude Expert Testimony, a Motion To Strike Appellant's Expert "Comments", Answers to these Motions and a Reply or two to the Answers to the Motions.

Many of the aforementioned motions have been aimed by M&S with some success at Wood's seeming inability to comply timely or otherwise with this

Board's procedural rules and our orders. Evidence of this is set forth in former Board Member Fitpatrick's Opinion and Order Sur Motion To Dismiss as reported at 1991 EHB 1156.[2] In denying that Motion To Dismiss for failure to prosecute the appeal because there was at least some evidence on Wood's behalf of his willingness to prosecute he observed:

> Although this is clearly a case of abuse of discovery and filing deadlines, it is not yet a case of non pros.

He subsequently went on to state:

> We warn Wood now that failure to comply with the following order may result in sanctions, including dismissal, pursuant to 25 Pa. Code §21.124.

The Order attached to that opinion directed Wood to file his Pre-Hearing Memorandum by August 9, 1991.

By virtue of the existence of Board Member Fitzpatrick's subsequent Order dated October 4, 1991, which provided in part:

> 3) The motion to compel compliance with pre-hearing order number 1 is granted to the extent that Wood is ordered to file an amended pre-hearing memorandum within 30 days of the date of the Order. The amended pre-hearing memorandum shall provide citations to regulations, statutes, or case law in support of the remaining Contentions of Law, and shall include a summary of the testimony of expert witnesses[,]

it is obvious Wood had again failed to comply with our directives to him concerning the filing of an adequate Pre-Hearing Memorandum.

This Order was followed on November 15, 1991 with a Rule To Show Cause why the appeal should not be dismissed as a sanction for non-compliance with the October 4, 1991 Order, an Order granting Wood an extension until

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[2]Upon Board Member Fitzpatrick's resignation from this Board, this matter was reassigned to Board Member Richard S. Ehmann, on September 22, 1992.

December 9, 1991 to make this filing (and discharging the Rule), a request on December 13, 1991 by Wood's counsel for 30 days more in which to file an expert's report, a December 16, 1991 supplement to Wood's Pre-Hearing Memorandum stating Wood has not identified an expert and asking for time (until March 6) to file this report, and, on March 6, 1992, the alleged expert report filed on behalf of Wood.

In this same period of time we have had M&S file its second Motion To Dismiss, a Motion To Preclude Expert Testimony and a Motion To Strike Appellant's Expert "Comments" which are all pending before us.

Motion To Dismiss

The Motion To Dismiss filed with us on November 18, 1991 by M&S is again based upon Wood's continuing failure to comply with our orders and our rules of procedure. This Motion, like M&S's first Motion To Dismiss, asserts that Wood fails to state the basis for his appeal in an adequate Pre-Hearing Memorandum. As is set forth below, we are denying this Motion even though Wood failed to file a response to the Motion or otherwise indicated opposition to dismissal. It is clear that Wood has again abused our procedures and failed to comply with our orders in a timely manner, but we cannot say the fault for these failings is clearly with Wood; it may be that he has urged his counsel to timely comply and the failures belong to his counsel. We do not know. Moreover, Wood has filed a response to our Order of October 4, 1991 in the form of a Supplement to his Pre-Hearing Memorandum which purports to indicate his legal contentions with at least some further degree of clarity. Finally, dismissal is the most severe sanction we can impose and we are unwilling to dismiss this appeal as a sanction under these circumstances, although imposition of some sanction on Wood for his conduct is appropriate.

Accordingly, they are in part set forth in our order and discussed below. Finally, Wood is expressly advised any further failure to timely comply with our Orders or the Board's rules of procedure may be dealt with via dismissal of this appeal. Our patience is at its end.

Motion To Preclude Expert Testimony

M&S's Motion To Preclude Expert Testimony seeks to bar Wood from offering any testimony based on his failure to comply with our Order of October 4, 1991. This Motion was filed with us on February 12, 1992. By letter dated February 19, 1992, we notified Wood that he had until March 3, 1992 to respond thereto. Other than the March 6, 1992 submission discussed below, Wood did not respond to the Motion. (His counsel had written a letter to the Board dated March 3, 1992 asking for an extension to March 6 to respond to the Motion and provide an expert's report).

Wood had from August 9, 1990 until the present to file a summary of expert testimony and he received numerous orders directing that be done by dates contained in those orders. Wood failed to comply with those orders. On March 6, 1992, Wood filed a two and one half page recitation of issues about which he says his expert expresses concern. For example, in the document appears concern D, which states:

> Upgrading to High Quality
> Given the current very high quality water, why has PA Department of Environmental Resources not designated the river in this area as high quality waters? Such as upgrade would require more stringent effluent limits on dischargers. I propose that all sewage treatment plants on the upper and middle Delaware River require removal of both nitrogen and phosphorus before discharge to the river. Again, land disposal should be a very viable alternative.

This series of comments also concludes:

> Conclusions:
> The Delaware River is the only free flowing river left in the northeast. As such is an extremely valuable resource that should be protected at all costs. Water quality in the Matamoras area is very good and every possible effort should be made to maintain existing water quality and to remedy any existing problems. The presence downstream of the beautiful Delaware Water Gap National Recreation Area increases the need for the preservation of outstanding water quality. Likewise the migration of American shad and the presence of other highly prized game fish species in the river increases the urgent need for continued protection of this unique resource.

This is not an expert's report nor a summary of expert testimony. It is an opinion, and though it is an opinion of a person who has given expert testimony in the past before this Board, that does not make this an expert's report or summary of expert testimony. A description of the method of study of subject of expert testimony, the study results and the conclusions of the expert based on this study is necessary for there to be expert testimony and thus an expert's report or a summary of such expert testimony.

Because this document does not meet even minimum standards necessary for it to be summary of expert testimony, we grant M&S's motion as a sanction pursuant to 25 Pa. Code §21.124.

Motion To Strike Appellant's Expert "Comments"

M&S also has moved to strike the "expert report" filed on March 6, 1992 by Wood. It contends this report offers no evidence useful to this Board for resolution of the issues raised by this appeal. On April 15, 1992, Wood filed his Answer and Memorandum Re: Motion To Strike Appellant's Expert's Reports. In it, he contends Patricia Bradt, Ph.D., is an expert and has been recognized as such in another proceeding before this Board, that her report is opinion but is supposed to be, that M&S can discover her testimony through

deposition, that her opinions do not exceed the bounds of the issues raised in the Notice of Appeal and that DER is required to consider alternatives to the proposal which underlies issuance of the NPDES permit to M&S (contrary to that suggestion in M&S's Motion To Strike).

Having indicated above that the information provided above is not an expert report or a summary of expert testimony and that we are imposing sanctions on Wood barring expert testimony on his behalf, we see no reason not to grant this motion. Clearly, this testimony cannot be allowed as expert testimony in light of this sanction and Bradt's non-expert opinion on these issues as a non-party is not material to our decision on the merits of this appeal.

Accordingly, we enter the following Order.

ORDER

AND NOW, this 23rd day of October, 1992, upon consideration of M&S's Motion To Dismiss, its Motion To Preclude Expert Testimony and Motion To Strike Appellant's Expert "Comments" and the response to Motion To Strike filed on behalf of Wood, it is ordered:

1. M&S's Motion To Dismiss is denied, but pursuant to 25 Pa. Code §21.124, Wood is limited in his legal contentions in opposition to this permit issuance decision to those set forth in his Pre-Hearing Memorandum and its Supplement.

2. M&S's Motion To Preclude Expert Testimony is granted as a sanction pursuant to 25 Pa. Code §21.124 and Wood is barred from offering expert testimony at the hearing on the merits of this appeal.

3. M&S's Motion To Strike Appellant's Expert "Comments" is granted.

4. M&S is directed to file its Pre-Hearing Memorandum in this matter with this Board by November 10, 1992 and DER shall file its Pre-Hearing Memorandum, if any, ten days thereafter.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: October 23, 1992

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M. DIANE SMITH
SECRETARY TO THE BOA

LAWRENCE BLUMENTHAL	:	
	:	
v.	:	**EHB Docket No. 89-230-E**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 26, 1992**

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

By Richard S. Ehmann, Member

Synopsis

The Board grants appellant's motion for summary judgment where there are no genuine issues of material fact and it is clear that since the Department of Environmental Resources (DER) lacked the authority under the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, to order appellant to take certain actions to study and clean up lead contaminated soil solely based upon his ownership of the property, appellant is entitled to summary judgment in his favor as a matter of law. See Newlin Corporation *et al.* v. DER, 1989 EHB 1106, affirmed, 134 Pa. Cmwlth. 396, 579 A.2d 996 (1990), allocatur denied, ___ Pa. Cmwlth. ___, 588 A.2d 915 (1991).

OPINION

This proceeding involves an appeal by Lawrence M. Blumenthal (Blumenthal) from a DER order dated July 18, 1989 and amended on September 13,

1989. DER's amended order was issued pursuant to the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, and directed Blumenthal, his partner Charles Fruman, and Wayne Junk Company to take certain actions to study and clean up soil contaminated by lead at a site located in Waynesboro, Franklin County.

Blumenthal subsequently filed a petition for supersedeas, which DER opposed. A hearing was held on appellant's supersedeas petition on January 11, 1990. Following this hearing and the submission of post-hearing memoranda of law by both parties, former Board Member Terrance J. Fitzpatrick, who had presided at the supersedeas hearing, issued an Opinion and Order on March 6, 1990, granting the petition for supersedeas, thus superseding DER's order pending the disposition of this appeal. The Board's March 6, 1990 Opinion determined DER lacked the authority under the SWMA to order Blumenthal to clean up the lead contamination based solely upon his ownership of the property, citing Newlin Corporation *et al.* v. DER, 1989 EHB 1106, affirmed, 134 Pa. Cmwlth. 396, 579 A.2d 996 (1990), allocatur denied, ___ Pa. Cmwlth. ___, 588 A.2d 915 (1991), and Department of Environmental Resources v. O'Hara Sanitation Co, 128 Pa. Cmwlth. 47, 562 A.2d 973 (1989).

Upon receiving the Board's Opinion and Order regarding his supersedeas petition, Blumenthal applied for an award of fees and expenses under the Costs Act, 71 P.S. §2031 *et seq.*; this application was opposed by DER. In an Opinion and Order issued on March 1, 1991, the Board dismissed Blumenthal's Costs Act application, without prejudice, because the Board's supersedeas ruling was not an adjudication and could not serve as a basis for such an award.

DER then issued another amended order which is dated March 19, 1991, directed at Lawrence Blumenthal and Wayne Junk Company, addressing the lead

contamination at the site in Waynesboro. Blumenthal has appealed DER's March 19, 1991 order in a separate appeal to this Board docketed at No. 91-161-F.

At the same time, the appeal at the instant docket number proceeded toward a merits hearing which was scheduled to take place on May 9, 1991. At appellant's request, however, the Board cancelled the scheduled merits hearing and directed the parties to submit a status report in this matter. DER filed its status report on May 21, 1991, and we received Blumenthal's status report on June 10, 1991. Also on June 10, 1991, Blumenthal filed a motion for summary judgment, alleging that since DER's order challenged in this appeal was issued by DER without legal authority, the order is illegal and void, and, thus, that DER cannot prevail as a matter of law and that summary judgment should be granted in Blumenthal's favor. Included with Blumenthal's motion was a copy of a letter dated April 11, 1991 from counsel for DER to appellant's counsel. (This letter had previously been filed with this Board on April 23, 1991.) The Board notified DER's counsel, through a motion letter dated June 14, 1991, of appellant's motion, giving DER until July 1, 1991 to file any objections it might have to the motion. Our docket reflects that DER has not filed any response to Blumenthal's summary judgment motion at the instant docket number.

Following the resignation of former Board Member Fitzpatrick, this matter was reassigned to Board Member Richard S. Ehmann on September 22, 1992 and the docket number was changed from 89-230-F to 89-230-E to reflect that reassignment.

This Board is empowered to grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of

law. Robert L. Snyder, *et al.* v. Department of Environmental Resources, 138 Pa. Cmwlth. 534, 588 A.2d 1001 (1991). The evidence must be viewed in a light most favorable to the non-moving party. Ingram Coal Co. v. DER, 1990 EHB 395. Further, summary judgment may only be entered in cases that are free from doubt. Empire Sanitary Landfill, Inc. v. DER, EHB Docket No. 90-467-W (Opinion issued July 10, 1992).

Here, it is clear that summary judgment in favor of Blumenthal is appropriate. As we previously found in our March 6, 1990 Opinion, DER issued the order challenged in this appeal asserting authority under the SWMA, but DER lacks authority under the SWMA to order Blumenthal to clean up the lead contamination at the site solely on the basis of his ownership of the property. See Newlin Corporation, *supra*. Thus, there are no genuine issues of material fact in this matter and Blumenthal is entitled to judgment in its favor as a matter of law.[1]

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[1] We observe that it appears from the April 11, 1991 letter from DER's counsel to appellant's counsel, DER's stipulations, and DER's Status Report, that DER issued the March 19, 1991 amended order so as to cite §316 of the Clean Streams Law (Clean Streams Law), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.316, as legal authority for its action. According to DER's Status Report, it is DER's position that "the only issue to be decided is whether [DER's] authority under Section 316 ... is sufficient to require Wayne Junk Company to comply with the requirements of [DER's] order." Further, in his April 11, 1991 letter to Blumenthal's counsel, counsel for DER indicates DER's position that there are no factual issues to be introduced into this matter beyond those which were presented at the supersedeas hearing. While there is an appeal from DER's March 19, 1991 amended order pending before us at Docket No. 91-161-F, that appeal has not been consolidated with the appeal at the instant docket number. Thus, any issue regarding DER's authority under §316 of the Clean Streams Law for its March 19, 1991 amended order is not before us in the present appeal.

ORDER

AND NOW, this 26th day of October, 1992, it is ordered that appellant Lawrence Blumenthal's Motion for Summary Judgment is granted and Blumenthal's appeal is sustained.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: October 26, 1992

cc: **Bureau of Litigation, DER:**
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M. DIANE SMITH
SECRETARY TO THE BOARD

FREDERICK J. MILOS, t/d/b/a FREDDY'S REFUSE	:	
v.	:	**EHB Docket No. 88-206-F**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** October 28, 1992

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

By the Board

Synopsis

An appeal of a civil penalty assessed on appellant by the Department of Environmental Resources (DER) under the Solid Waste Management Act is dismissed where DER presents evidence at the merits hearing which supports its civil penalty assessment and the appellant fails to appear at the hearing on the merits and present any evidence in support of his appeal or to submit a post-hearing brief.

BACKGROUND

This appeal was commenced by Frederick J. Milos, t/d/b/a Freddy's Refuse (Milos) on May 18, 1988, seeking to challenge a Civil Penalty Assessment in the amount of $31,000 which was issued to Milos by DER on April 18, 1988. The civil penalty was assessed under Section 605 of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, for Milos' unpermitted activities involving solid waste on property located in Ararat Township, Susquehanna County (site).

At the time Milos filed his pre-hearing memorandum on May 2, 1989, he

was represented by legal counsel. DER filed its pre-hearing memorandum on July 3, 1989. Counsel for Milos subsequently filed a "Pre-Hearing Memorandum No. 2" on Milos' behalf, and DER then filed its "Supplemental Response to Pre-Hearing Order No. 2."

On March 18, 1991, we received a letter from Milos' counsel in which he withdrew his appearance and advised us that Milos had decided to proceed *pro se* and to not appear at the scheduled merits hearing. This letter also stated that Milos wished to submit "the facts and legal arguments as set forth in his Pre-Hearing Memorandum, and all of those other facts admitted as of record, as his defense to ... [DER's] action." Additionally, the letter requested that Milos' pre-hearing memorandum be considered as his post-hearing brief, and stated that Milos was willing to stipulate to the admissibility of all of the documents attached to DER's Supplemental Response to Pre-Hearing Order No. 2 if DER were willing to stipulate to the admissibility of all of the documents attached to Milos' Pre-Hearing Memorandum and his Pre-Hearing Memorandum No. 2. Milos' counsel then moved the Board to accept any such stipulated documents into the record in this matter.

After considering Milos' request and DER's response thereto, the Board entered an Order denying that request on March 26, 1991 and sent copies of this Order to both Milos and his former counsel. DER then filed a Motion to Dismiss Milos' appeal, based on Milos' failure to prosecute as demonstrated by Milos' March 15, 1991 letter. The Board informed Milos that if he had any objection to this motion, the Board must receive it by no later than April 15, 1991. We received no such objection.

When Milos did not appear at the April 2, 1991 merits hearing, counsel for DER requested the Board to rule on DER's Motion to Dismiss before

DER's presentation of its case. (N.T. at 4.)[1] Former Board Member Terrance J. Fitzpatrick,[2] who was the Board Member presiding at the hearing, directed DER to present its case, indicating that the Board would consider DER's Motion to Dismiss in connection with its adjudication of the matter. (N.T. 4, 49.) As its case-in-chief, DER then presented two witnesses and offered six exhibits which were all admitted into evidence.

Upon our receipt of the hearing transcripts, we issued an order to both Milos and DER directing post-hearing briefs to be filed no later than May 16, 1991. We received DER's Post-hearing Brief on May 16, 1991. Milos did not file a brief, nor has he submitted any other correspondence to the Board since his failure to appear at the merits hearing.

After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant is Frederick J. Milos, t/d/b/a Freddy's Refuse, an individual engaged in the collection and transportation for disposal of municipal waste with a principal place of business at R.D. #2, Box 293, Thompson, PA 18465. (Notice of Appeal)

2. Appellee is DER, the agency of the Commonwealth with the duty and authority to administer and enforce the provisions of the SWMA; the Clean Streams Law, Act of June 22, 1937, P.L. 1937, as amended, 35 P.S. §691.1 *et*

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1 "N.T." denotes the notes of testimony of the hearing held on April 2, 1991 before former Board Member Terrance J. Fitzpatrick, to whom this matter was assigned for preliminary handling.

2 Former Board Member Fitzpatrick resigned from this position with the Board prior to issuing a ruling on DER's Motion to Dismiss. Thus, this matter has been decided on the basis of a cold record, as we are clearly authorized to do. Lucky Strike Coal Co. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

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 adopted under these laws.

3. Milos owns the site located in Ararat Township. (Notice of Appeal; N.T. 7; C-3)[3]

4. In January of 1987, Milos disposed of more than 1,500 cubic yards of municipal waste on the site without having a permit from DER for disposal or storage of municipal waste. (N.T. 13, 25; C-3)

5. DER inspected the site on January 15, 1987 and February 4, 11, 17, 20 and 24, 1987, confirming the disposal of the municipal waste on the site and determining that the municipal waste had not been removed from the site. (N.T. 7, 10, 11; C-3)

6. On February 25, 1987, DER issued a notice of violation to Milos, informing him that the storage of waste on his property constituted a violation of the SWMA and directing him to remove the waste by March 15, 1987. (N.T. 25-26; C-3)

7. DER inspected the site on March 18, 27; April 1, 10, 16, 23; May 1, 8, 21, 29; June 5, 16, 28; and July 6, 10 and 13, 1987, and found that Milos had removed a few loads of waste but most of it still remained at the site. (N.T 12-15; C-2(a)(b)(c), C-3)

8. On July 16, 1987, DER issued an Order to Milos, finding that Milos had violated the SWMA by dumping or depositing municipal waste on the surface of the ground on Milos' property without having first obtained a permit from DER and by operating a solid waste storage facility without a permit therefor in violation of §§201(a) and 610(1), (2), (4), (6) and (9) of

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3 "C-" indicates DER Exhibit.

the SWMA (35 P.S. §6018.201(a) and 610(1), (2), (4), (6) and (9)). (N.T. 26; C-3) This Order required Milos to cease storing and/or disposing of all solid waste on the site and to complete all removal of the waste to a facility permitted to receive it by August 7, 1987. (N.T. 26-27; C-3)

9. Milos did not appeal DER'S July 16, 1987 Order. (N.T. 29; C-4)

10. DER's subsequent inspections of the site, which occurred on July 20, 24; August 4, 7, 17, 20, 27, 31; September 8, 10, 14, 17, 21, 25, 29; October 1, 5 and 8 of 1987, showed that Milos was removing approximately two to three loads of waste from the site each week. (N.T. 17-18)

11. On October 9, 1987, DER filed a Petition for Enforcement of Administrative Order in Commonwealth Court. (N.T. 19, 30; C-4)

12. DER continued to inspect the site on October 16, 19, 22, 27; November 2, 16, 19; December 3, 14, 19, 24 and 30 of 1987. (N.T. 19-20; C-6) DER inspections revealed that as of December 9, 1987, approximately 500 yards of solid waste were remaining on the ground at the site. (N.T. 20)

13. The Commonwealth Court issued an Order to Milos on December 9, 1987, directing Milos to remove all wastes from the site within 14 days of the Order's date. (N.T. 31; C-5)

14. By December 30, 1987, Milos had removed all of the solid waste from the surface of the ground, but some waste remained on the site in roll-off containers or trucks. (N.T. 20)

15. On April 18, 1988, DER issued a $31,000 civil penalty assessment against Milos for the disposal of municipal waste on his property and for Milos' failure to timely comply with DER's Order to remove this waste and dispose of it at a permitted facility. (Exhibit A to Notice of Appeal; N.T. 33)

16. At the time of the merits hearing, all of the solid waste had

been removed from the site. (N.T. 21)

17. In determining the amount of the civil penalty, DER found that Milos' conduct was negligent and that the degree of severity of the violation was low. (N.T. 40, 43)

18. The amount of DER's civil penalty assessment to Milos was based in part upon $500 for each day a violation of §§201(a) and 610(1), (2), (4), (6) and (9) of the SWMA (35 P.S. §§6018.201(a) and 6018.610(1), (2), (4), (6) and (9)) and 25 Pa. Code §§75.21(a) and 75.28, as revealed by DER's inspections on February 4, 11, 20, 24, and March 15 and 18 of 1987, for a total of $3,000. (Exhibit A to Notice of Appeal; N.T. 42, 46-47; C-6)

19. The amount of DER's civil penalty assessment to Milos for each day he failed to remove all solid waste from the site as directed by paragraph 2 of DER's July 16, 1987 Order and required by §603 of the SWMA (35 P.S. §6018.603) was based on $1,000 for each day of violation, as revealed by DER's inspections on August 17, 20, 27, 31; September 3, 8, 10, 14, 17, 21, 25, 29; October 1, 5, 8, 16, 19, 22, 27; November 2, 5, 16, 19; December 3, 14, 19, 24 and 30 of 1987, for a total amount of $28,000. (Exhibit A to Notice of Appeal; N.T. 45-47; C-6)

DISCUSSION

In an appeal from a civil penalty assessment, the burden of proof rests with DER. Donald Zorger v. DER, EHB Docket No. 90-321-MJ (Adjudication issued February 20, 1992); 25 Pa. Code §§21.101(a) and (b)(1). In reviewing DER's action, we look to see whether DER has abused its discretion or carried out its duties in an arbitrary manner. Chrin Brothers v. DER *et al.*, 1989 EHB 875. As we explained in Chrin Brothers, our review of DER's assessment of a civil penalty consists of a two-step process. We first determine whether Milos committed the violations for which the civil penalties were assessed.

If we find Milos has committed the violations, we then examine whether there is a "reasonable fit" between the violations and the amount of the penalties. Chrin Brothers, *supra*.

Here, DER assessed a $3,000 civil penalty on Milos for each day municipal waste remained on the surface of the ground at the site without a permit from DER. The only days DER cited Milos as being in violation of sections 201(a) and 610(1), (2), (4), (6), and (9) of the SWMA (35 P.S. §§6018.201(a) and 6018.610(1), (2), (4), (6), and (9)) were the six days when DER inspected the site and observed the violations in connection with the notice of violation, i.e., February 4, 11, 20, and 24, 1987; and March 15, and 18, 1987. (N.T. 43) DER also assessed a $28,000 civil penalty on Milos for the 28 days DER's inspections showed he failed to remove all solid waste from the site as directed by DER's July 16, 1987 Order, in violation of §603 of the SWMA. (35 P.S. §6018.603) Those 28 days were August 17, 20, 27, and 31, 1987; September 3, 8, 10, 14, 17, 21, 25, and 29, 1987; October 1, 5, 8, 16, 19, 22, and 27, 1987; November 2, 5, 16, and 19, 1987; and December 3, 14, 19, 24, and 30, 1987. (N.T. 45)

As reflected in our findings of fact in this Adjudication, DER produced evidence at the hearing to show that Milos committed the violations which were the basis for DER's civil penalty assessment. Since he failed to appear at the merits hearing, Milos did not offer any evidence to rebut DER's evidence establishing Milos committed the violations of the SWMA. Further, by his failure to file a post-hearing brief, Milos has abandoned any issues which he raised in his notice of appeal which might be viewed as a defense to DER's findings that he violated the SWMA. See Lucky Strike Coal Co. v. DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988) (issues not raised in a party's post-hearing brief are abandoned).

As we noted above, DER's civil penalty assessment must be reasonable in amount; and this Board may substitute our discretion for that of DER where the amount of the civil penalty is unreasonable. Chrin Brothers, *supra*. Since Milos has abandoned any argument as to the reasonableness of the civil penalty amount assessed under Lucky Strike, *supra*, the only evidence before us is that offered by DER. DER argues in its post-hearing brief that a $31,000 civil penalty is reasonable for the illegal disposal and storage of more than 1,500 cubic yards of municipal waste on the unprotected surface of the ground from January 15, 1987 to December 30, 1987, where DER had to issue a notice of violation and an administrative order and had to file a petition in Commonwealth Court for enforcement of its administrative order to abate the conditions at the site.

Under §605 of the SWMA, a penalty of up to $25,000 per violation per day is assessable by DER. 35 P.S. §6018.605. Section 605 states in pertinent part:

> In determining the amount of the penalty, the department shall consider the willfulness of the violation, damage to air, water, land or other natural resources of the Commonwealth or their uses, cost of restoration and abatement, savings resulting to the person in consequence of such violation, and other relevant factors.

Here, DER determined that the degree of severity of the violation was low and that Milos' conduct was negligent. (Finding of Fact No. 16) Initially, DER arrived at a civil penalty assessment amount of $51,000, but it believed this figure was too harsh and adjusted its calculations to reduce this amount, instead using $500 per day for the six days of violation prior to DER's issuance of its July 16, 1987 Order and $1,000 per day for the 28 days of violation after DER issued its Order. (N.T. 46) DER's reasoning for assessing the $1,000 per day amount for the violations occurring following its

Order was that these violations should be treated more seriously than the violations preceding its order, since at the time of the latter violations, DER had an Order in place which Milos had not appealed and DER had to petition the Commonwealth Court for enforcement of its Order.

Although we have the ability to substitute our discretion for that of DER and reduce the amount of the civil penalty it assessed, we find it inappropriate to do so where DER has supported the reasonableness of the amount of its assessment with evidence to show the amount is reasonable. Accordingly, we sustain DER's civil penalty assessment to Milos and dismiss Milos' appeal, making the following conclusions of law and entering the following order.[4]

CONCLUSIONS OF LAW

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

2. DER bears the burden of proof in appeals of civil penalty assessments. Donald Zorger v. DER, EHB Docket No. 90-321-MJ (Adjudication issued February 20, 1992); 25 Pa. Code §§21.101(a) and (b)(1).

3. In reviewing DER's assessment of a civil penalty, the Board looks to see whether the violation for which the penalty has been assessed was committed; if so, the Board then examines whether there is a "reasonable fit" between the violation and the amount of the penalty. Chrin Brothers v. DER *et al.*, 1989 EHB 875.

4. DER's evidence at the merits hearing established Milos committed violations of the SWMA on February 4, 11, 20, and 24, 1987 and March 15 and 18, 1987, when Milos had disposed of more than 1,500 cubic yards of municipal

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4 In light of this Adjudication, DER's motion to dismiss is rendered moot.

waste on the site without having a permit from DER for disposal or storage of municipal waste on the site.

5. DER's evidence at the merits hearing established Milos committed violations of §603 of the SWMA (35 P.S. §6018.603) on 28 separate days when DER's inspections revealed Milos had failed to remove all solid waste from the site as directed by DER's July 16, 1987 Order, i.e., August 17, 20, 27, and 31, 1987; September 3, 8, 10, 14, 17, 21, 25, and 29, 1987; October 1, 5, 8, 16, 19, 22, and 27, 1987; November 2, 5, 16, and 19, 1987; and December 3, 14, 19, 24, and 30, 1987.

6. As Milos did not appear at the merits hearing and present any evidence to rebut DER's evidence nor did Milos file any post-hearing brief, Milos has abandoned any issues which he raised in his notice of appeal which might be viewed as a defense to DER's action. Lucky Strike Coal Co. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

7. Although this Board is authorized to substitute our discretion for that of DER and reduce the amount of civil penalty assessed if that amount is unreasonable, Chrin Brothers, *supra*, it would be inappropriate for us to reduce the amount of the civil penalty assessed in this matter, where DER has provided support for the reasonableness of its civil penalty.

ORDER

AND NOW, this 28th day of October, 1992, it is ordered that the appeal of Frederick J. Milos, t/d/b/a Freddy's Refuse is dismissed and DER's civil penalty assessment in the amount of $31,000 is sustained.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: October 28, 1992

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M. DIANE SMITH
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AL HAMILTON CONTRACTING COMPANY	:	
	:	
v.	:	**EHB Docket No. 88-113-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 29, 1992**

OPINION AND ORDER SUR
OBJECTION TO THE ADMISSION
OF EXHIBIT C-10 AS EVIDENCE

Maxine Woelfling, Chairman

Synopsis

An objection to the admission of a map into evidence is sustained. The best evidence rule applies to documentary evidence such as a photocopy of a Mine Drainage Permit application map when it is being offered as proof or evidence of a material fact. A photocopy is admissible into evidence only when its proponent has offered a satisfactory excuse for the absence of the original and the photocopy satisfies the requirements of the Uniform Photographic Copies of Business and Public Records as Evidence Act.

The Frye test for the admissibility of scientific evidence applies to structure contour lines on a map if those lines were generated by a computer and are being offered as substantive evidence. To be admissible under the Frye test, the proponent must establish that the method of producing the structure contour lines is generally accepted within the relevant scientific field.

OPINION

The facts and procedural posture of this matter were outlined in the Board's August 27, 1992, opinion concerning Al Hamilton Contracting Company's (Hamilton) motion to strike expert testimony and need not be repeated here. For purposes of this opinion, it is important to note only a few additional procedural facts.

The issue presently before the Board is the admissibility of the Department's Exhibit C-10. This is a copy of a topographical map from Hamilton's Mine Drainage Permit (MDP) application. It contains several markings that the Department contends represent the boundary of Hamilton's Caledonia Pike MDP (No. 4577SM8), the structure contours of the underlying Middle Kittanning coal seam, and the six discharge areas (DAs) that are the subject of the Department's Compliance Order (No. 88-H-008). Department hydrogeologist John Berry testified that he made the markings that represent the locations of the six DAs and the structure contour lines (N.T. 316). The outline of Hamilton's MDP was apparently drawn on the map as part of Hamilton's MDP application.

Hamilton objected to the introduction of C-10 into evidence shortly after it was identified (N.T. 87). After Berry's direct testimony, the Department moved to have C-10 admitted into evidence. The Board deferred a ruling on C-10 until after Hamilton's cross-examination of Berry (N.T. 385). Following re-direct examination, Hamilton again objected to C-10's introduction into evidence (N.T. 656-657), the Department renewed its motion to introduce C-10 into evidence (N.T. 661), and the Board requested that the issue of C-10's admissibility be briefed by the parties (N.T. 661).

After-acquired Evidence and *De Novo* Review.

Hamilton contends that the location of the six discharge areas and the structure contour of the Middle Kittanning coal seam were not determined until after the Department issued its Order. Because the Department did not acquire this information until after it issued the Order, Hamilton argues it is irrelevant and, therefore, inadmissible in determining whether the Department's actions were arbitrary and capricious.

It is well-settled that the Board conducts a *de novo* review of discretionary Department actions. In Warren Sand and Gravel Co., Inc. v. DER, The court stated "[t]he Board's duty is to determine if DER's action can be sustained or supported by the evidence taken by the Board." 20 Pa. Cmwlth. 186, 203-204, 341 A.2d 556, 565 (1975); see also, DER v. Pennsylvania Mines Corp., 102 Pa. Cmwlth. 452, 519 A.2d 522 (1986). Most recently, this Board stated that it "bases its decision upon the record developed before the Board, not upon the facts considered by DER . . . Based upon this evidentiary record, the Board may substitute its discretion for that of DER." City of Harrisburg v. DER, 1991 EHB 87, 91.

While admitting that the Board is empowered to conduct *de novo* reviews, Hamilton argues that the Warren Sand and Gravel decision limited this authority to appeals from Department permit actions. This argument is without merit. The Department was correct in its assertion that Warren Sand and Gravel referred to cases appealing discretionary Department action when it stated the Board's standard of review is *de novo* for "cases such as this." See, Pennsylvania Mines Corp., 102 Pa. Cmwlth. at 760, 519 A.2d at 526.

Even if C-10 could be characterized as "after-acquired" evidence, as Hamilton contends, it is not inadmissible on that basis. Hamilton has, however, raised additional arguments that render C-10 inadmissible.

The Best Evidence Rule.

Hamilton argues that C-10 violates the best evidence rule because it is a copy of Hamilton's MDP application map (Exh. 5) and there are questions about its accuracy. The Department contends that the best evidence rule may not apply to maps such as C-10 because they are not writings.

"The 'best evidence' rule limits the method of proving the terms of a writing to the presentation of the original writing, where the terms of the instrument are material to the issue at hand, unless the original is shown to be unavailable through no fault of the proponent." Warren v. Mosites Construction Co., 253 Pa. Super. 395, 402, 385 A.2d 397, 400 (1978). The best evidence rule, however, does not apply only to writings. Pennsylvania courts have applied the rule to maps as well. In Johnston v. Callery, 184 Pa. 146, 154, 39 A. 73, 75 (1898), the court found that the survey map of an area of land, and not the testimony of the surveyors, was the best evidence of the results of the survey. In In re: Change of Grade and Grading, Paving and Curbing of South Beatty Street, Pittsburgh, 75 Pa. Super. 145, 147 (1920), the court found that the map of a street plan, and not the testimony of an engineer who was custodian of the plan, was the best evidence of the plan's contents. See also, Anderson v. Commonwealth, 121 Pa. Cmwlth. 521, 550 A.2d 1049 (1988), appeal denied 523 Pa. 643, 565 A.2d 1168 (1989) (best evidence rule applied to other non-documentary evidence such as a motion picture film, and oral testimony regarding its contents was inadmissible).

The Department also contends that the best evidence rule does not apply to C-10 because C-10 "is not the gravamen of the order or the appeal." The Department argues that the best evidence rule applies only when the terms of the writing are the basis of the case, or when "something internal to the four corners of the document" is at issue.

It is true that the best evidence rule has traditionally been held to apply when the terms of a writing must be proved to make a case. Warren, 253 Pa. Super. at 402, 385 A.2d at 400. However, the best evidence rule also applies "[w]here the terms of a writing are not material, but are referred to as evidence of a material fact . . . ." §1001.2, Packel & Poulin, Pennsylvania Evidence (1987); Brillhart v. Edison Light and Power Co., 368 Pa. 307, 314, 82 A.2d 44, 48 (1951). In Brillhart, the court held that oral testimony offered to prove federal guidelines regarding the height and location of overhead electrical lines violated the best evidence rule. The defendant did not have to prove these standards to establish its defense. They were offered merely as evidence of acceptable industry practice, a material fact. *Id.*

At issue in the present appeal is whether Hamilton is liable for discharges that violate the effluent limitations of the Commonwealth. For liability to attach, the Department must prove that the discharges either occur on land within Hamilton's permitted area or are structurally connected to Hamilton's mine site. Penn-Maryland Coals, Inc. v. DER, EHB Docket No. 83-188-W, (Adjudication issued January 22, 1992). The Department has offered C-10 as evidence of both of these material facts.

The Department correctly asserts that the best evidence rule does not automatically apply. The party challenging the evidence must dispute its accuracy. Warren, 253 Pa. Super. at 402, 385 A.2d at 401. Hamilton has challenged C-10's accuracy on several occasions, the most notable being its cross-examination of Berry and Berry's inability to measure the same distances on C-10 and Exh. 5 (N.T. 478-79). The best evidence rule, therefore, applies.

Because the best evidence rule applies, the copy, C-10, is not admissible into evidence. The Department has not provided any excuse for the

original's absence. "Secondary evidence is admissible whenever a satisfactory reason for non-production of the original is given, as for example, where it is lost or destroyed, or beyond the jurisdiction of the court." Appeal of Koch, 353 Pa. 619, 625, 46 A.2d 263, 266 (1946).

Although not argued by the Department, the Board must also examine whether C-10 is an admissible photocopy. The Uniform Photographic Copies of Business and Public Records as Evidence Act, Act of July 9, 1976, P.L. 586, No. 142, Pa.C.S. §6109(b), provides in relevant part:

> If any . . . department or agency of government, in the regular course of business or activity, has kept or recorded any memorandum, writing, entry, print, representation, or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced . . . the original may be destroyed, in the regular course of business . . . . Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself . . . .

C-10 clearly does not satisfy the standards for admissibility under this section. C-10 was produced from the original MDP application map by counsel for the Department in preparation for this litigation, not in the regular course of business (N.T. 472-473).

> Q. [To Mr. Berry] Who gave you the ten copies of the Exhibit 5 that you used?
>
> A. Mr. Heilman.

The Department's Exhibit C-10 violates the best evidence rule and is, therefore, inadmissible. Even if it could somehow be found that the best evidence rule does not apply, portions of C-10 would still be inadmissible scientific evidence.

The Admissibility of Computer-generated Evidence.

Hamilton lastly objects to the admissibility of C-10 because the structure contour lines representing the Middle Kittanning coal seam at the Caledonia Pike mine site were generated by a computer. Hamilton argues that the Department has not proven the reliability or accuracy of this computer technique and the lines are, therefore, inadmissible. The Department contends in its reply brief that C-10 is being offered merely as demonstrative evidence, and is, therefore, admissible because it is relevant and has been properly authenticated. See, §416.3, Pennsylvania Evidence.

The Department has misconstrued the nature of C-10. It is clear from Berry's testimony that the structure contours marked on C-10 are substantive evidence being offered to prove that there is a hydrogeologic connection between the mine site and the off-site discharge areas.

> Q. . . . [D]o you have an opinion to a reasonable degree of scientific certainty whether a hydrologic connection exists between Hamilton's mining operations on the Caledonia Pike mine site covered by SMP 17773155 and MDP457SM88 and Discharge Area No. 2?
>
> A. Yes, I do.
>
> Q. What is that opinion?
>
> A. That there is a hydrologic connection between the Caledonia Pike site, inclusively, and Discharge Area 2.
>
> Q. What are the bases of that opinion?
>
> A. . . . [T]hat Discharge Area 2 would be possibly structurally controlled, and that the structure, based upon my structure contour map, the Caledonia Pike site would be updip and that Discharge Area 2 would be downdip.
>
> (N.T. 379-380)

Berry repeats this testimony for DAs 3-6 (N.T. 380-382).

It is equally clear that Berry's entire knowledge about the structure contours of the Middle Kittanning coal seam at Hamilton's Caledonia Pike mine site comes from the computer-generated model represented on C-10.

> Q. Did your investigation include an investigation or study of the structure, the geologic structure of this site and area?
>
> A. I looked at the - I'm not exactly sure which one, but it was part of the Pennsylvania Geologic Survey Atlas . . . . But that's a general and fairly - how do you want to say it? It's a regional trend. It just gets you in the ballpark. To get on the site and actually determine the structure, I relied on the drill hole data submitted with the Caledonia Pike operation.
>
> Q. And what did you do with that data?
>
> A. I digitized that information and produced a structure and contour map on a computer.
>
> (N.T. 339-340)
>
> Q. What rock layer or coal seam have you shown on the contour map?
>
> A. All five of the drill holes. I used the data that I could find on the Middle Kittanning. This was all of the information for the surface elevation of the Middle Kittanning for this site.
>
> Q. From this information can you describe the structure? (emphasis added)
>
> A. Actually, from C-10, you can see that there is some variation in the strike and dip . . . . (emphasis added)
>
> (N.T. 343)

From this testimony, it is plain that the structure contour markings on C-10 are not demonstrative evidence intended merely to aid the trier's understanding of the facts. See, §416, Pennsylvania Evidence. They are,

instead, substantive evidence intended to prove a hydrogeologic connection between the mine site and the discharge areas.

Substantive evidence is held to a higher standard of admissibility than demonstrative evidence. In this Commonwealth, the standard for all "scientifically adduced" substantive evidence is the well-known Frye test. Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170, 172 (1981); Hepburnia Coal Company v. DER, 1986 EHB 563, 593.

> "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."* Nazarovitch, 496 Pa. at 101, 436 A.2d at 172 (citing Frye v. U.S., 293 F.2d 1013 (D.C. Cir. 1923)).

The reason for this standard is quite clear. "The requirement of general acceptance in the scientific community assures that those most qualified to assess the general validity of a scientific method will have the determinative voice." Commonwealth v. Topa, 471 Pa. 223, 232, 369 A.2d 1277, 1281 (1977) (citing U.S. v. Addison, 498 F. 2d 741, 744 (D.C. Cir. 1974).

The issue before the Board, therefore, is whether a computer program that converts locations and depths into a topographical contour model has gained general acceptance in the field of hydrogeology. Under 25 Pa. Code §21.101, the Department, as the proponent of this evidence, bears the burden of proving that there is general acceptance of this process in the field of

hydrogeology.[1] See also, Luzerne Coal Corp. v. DER, 1990 EHB 12, 15 (proponent of scientific evidence bears burden of proving it satisfies the Frye test of admissibility).

The Department has not introduced any evidence indicating the use of computer-generated structure contour models is generally accepted among hydrogeologists. The structure contour markings on C-10 are, therefore, inadmissible scientific evidence. See, Hepburnia Coal Company, 1986 EHB at 594 (the Department's "resistivity study" was admissible scientific evidence to prove the existence of a fracture zone because the party against whom it is being offered admitted that such studies are widely accepted by geophysicists).

In conclusion, C-10 is inadmissible under the best evidence rule. The Department has failed to explain the absence of the original MDP application map, and the copy, C-10, does not satisfy the requirements of the Uniform Photographic Copies of Business and Public Records as Evidence Act. Furthermore, the structure contour markings on C-10 that represent the topography of the Middle Kittanning coal seam prior to Hamilton's operations are inadmissible because they do not satisfy the Frye test governing the admission of scientific evidence.[2]

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[1] The relevant field within which the Board must look for general acceptance is not the whole of the scientific community, but rather the specialized field of hydrogeologists. In Topa, the court examined whether spectrographic analyses (voiceprint identifications) had been accepted by the scientific community concerned with acoustical science. Topa, 471 Pa. at 232, 369 A.2d at 1282.

[2] This holding is not meant to suggest that computer-generated structure contour maps will be inadmissible in future hearings. The proper foundation must be laid for the use of such evidence, which was not the case here.

ORDER

AND NOW, this 29th day of October, 1992, it is ordered that Al Hamilton Contracting Company's objection to the admission of Exhibit C-10 into evidence is sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: October 29, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

JAMES HANSLOVAN	:	
	:	
v.	:	**EHB Docket No. 89-363-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 29, 1992**

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

By The Board

Synopsis

Where the only connection between the Appellant and the illegal transportation and dumping of solid waste (shown to have occurred by evidence adduced at the hearing) is that his pickup truck was used for this activity, but the evidence establishes that he was elsewhere when the activity occurred and there is no evidence he consented to this use of his vehicle or even knew the vehicle would be so used prior thereto, the Department of Environmental Resources ("DER") has failed to establish that James Hanslovan ("Hanslovan") violated or assisted in committing these violations of the Solid Waste Management Act and thus that it has a factual basis for its assessment of a civil penalty against him. The Board may issue an opinion in favor of DER based on circumstantial evidence, but not based on conjecture or supposition. The rationale for the imposition of liability in Waste Conversion, Inc. v. Commonwealth, DER, 130 Pa. Cmwlth. 443, 568 A.2d 738

(1990), allocatur denied, __Pa. __, 577 A.2d 892 (1990), cert. denied, __U.S. ___, 111 S.Ct. 253 (1990), is inapplicable to the instant proceeding because Hanslovan was not shown to have undertaken any responsibility for the disposal of the solid waste DER's employee observed being dumped from Hanslovan's truck.

Background

On August 10, 1989, DER issued a $1,000 civil penalty assessment against Hanslovan for his part in certain violations of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, No. 97, as amended, 35 P.S. §6018.101 *et seq.* ("SWMA") Thereafter, on September 8, 1989, Hanslovan appealed therefrom to this Board. Refreshingly, the parties wasted no time on pre-trial motions but filed their Pre-Hearing Memoranda, and, as a result, former Board Member Terrance J. Fitzpatrick conducted the hearing on this appeal's merits on January 14, 1991. Subsequently, the parties each filed a Post-Hearing Brief, and Hanslovan's counsel also filed a Reply to DER's Post-Hearing Brief.

While Board Member Fitzpatrick resigned before preparing a draft decision on the merits of Hanslovan's appeal, the Board is empowered to issue an adjudication, as we do here, based upon a cold record. Lucky Strike Coal Co., et al. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988). This record consists of a transcript of 104 pages, 4 exhibits and a Stipulation Of The Parties In Compliance With Pre-Hearing Order No. 2. Based upon a review of this record, we make the following findings of fact.

FINDINGS OF FACT

1. The Appellant is James Hanslovan, who resides at R.D. Box 104, Morrisdale, PA 16858. (C-2; T-84)[1]

2. The Appellee is DER, which is the portion of the executive branch of Pennsylvania's government vested with the authority and responsibility to administer the SWMA.

3. At the time of the hearing Gary Byron ("Byron") was a District Mining Manager for DER at its Hawk Run Office, and, prior to taking this position, he was a DER mine conservation inspector. (T-4)

4. On Saturday, May 13, 1989, at about 5:00 p.m., Byron was returning to his home in Karthaus via Rolling Stone Road from having played golf at Penn State. (T-5)

5. While traveling on Rolling Stone Road Byron came up behind a slow-moving gold Chevrolet pickup truck, loaded with garbage in bags, used lumber and a child's accordion-type gate, which he followed for two miles. (T-6-7)

6. Because of the type of load, the time of day and the lack of any landfills in the area, Byron was suspicious as to what the operator of the truck was doing. (T-8)

7. When the truck turned off Rolling Stone Road onto a side road, Byron pulled his vehicle over and recorded the truck's license number (in a

---

1 The transcript of the hearing on the merits held on January 14, 1991 is designated by "T-", while DER's exhibits are designated by "C-".

notebook he keeps in his vehicle) then followed the truck about two miles down this side road to a place where the road forks. (T-8-9)

8. At the fork, the gold-colored pickup truck took the right fork, which was an eroded mine road, up over a hill. (T-9, 35)

9. When Byron reached the fork, he took the left fork for a couple hundred yards and parked his truck. (T-9) After leaving his truck, he climbed between 15 and 20 feet of mine spoil and observed two men, about 100 yards away, unloading garbage and throwing it over the side of the abandoned strip mine onto an area of garbage which was approximately 75 feet by 50 feet. (C-1; T-10, 13, 20, 35)

10. The truck's license number is CD-35101. (T-14)

11. After he watched the men unload some of the truck's load, Byron left the area, but the following Monday he told DER's solid waste staff about this incident. (T-15)

12. From the time he first saw the truck until he left the area, the truck was always in Byron's vision except for a two minute period when Byron took the road's other fork, drove a couple of hundred yards, parked and climbed the adjacent bank of mine spoil (T-17, 20). The truck at the dump site was the same truck that Byron had followed on the road. (T-29)

13. James Greene ("Greene") is the solid waste specialist for DER who followed up on Byron's Report of the May 13, 1989 incident. (T-32)

14. A state police identification check of the CD-35101 license number for Greene showed that PennDOT has it registered to James W. Hanslovan and Velma V. Hanslovan. (C-2; T-32)

15. Greene issued Hanslovan a Notice Of Violation for the incident reported by Byron. (T-35)

16. There is no SWMA permit for a landfill at this dump's location and there is no permit issued by DER authorizing James Hanslovan to dump solid waste in this location. (T-38)

17. DER's Notice of Violation told Hanslovan to contact Curt White, a compliance specialist on DER's solid waste staff. (T-42-43)

18. Because he never heard from Hanslovan, White tried to talk to Hanslovan by phone, but only reached Hanslovan's wife. (T-43-44)

19. When he was unable to settle this matter with Hanslovan, White prepared a civil penalty assessment using DER's standard procedure, and this produced a total penalty of $13,550. (C-3; T-44-53)

20. Because this $13,550 was so high, DER compared it to other penalties assessed for similar conduct and reduced the amount set in the Civil Penalty Assessment to $1,000 (C-3; Hanslovan's Notice Of Appeal; T-53-54)

21. DER believes a violation of Section 610(1) of the SWMA, 35 P.S. §6018.610(1), occurred because Hanslovan allowed his truck to be used in this fashion. (T-54)

22. James Hanslovan, his wife and daughter visited one of their sons in DuBois on May 13, 1989, arriving at his home in early afternoon and departing as it got dark between 5:00 and 6:00 p.m. (T-63-64, 89-90)

23. Hanslovan owns a gold Chevrolet pickup truck which he leaves in his driveway when he is not using it. He leaves the keys in the truck and his

six children and their spouses are free to use it at any time without asking. (T-84-85, 92)

24. Hanslovan has been to the area of this dump. (T-86) His father owns property in this area and his father used to own the dump site. (T-88, 95)

25. Approximately a week prior to the May 13, 1989 incident, Hanslovan dumped a load of leaves collected from tenants of his wife's mobile home park on a portion of the land near the dump which his father owns. (T-86)

26. On May 13, 1989 when Hanslovan arrived home, he found his truck parked in his driveway which is where it had been located when he left to visit his son. (T-89-91)

27. Despite the DER Notice of Violation and Civil Penalty Assessment, Hanslovan has never asked anyone in his family if they used his truck on May 13, 1989 (T-95) and he has never kept any check on his family to see why his truck is used any particular day by anyone in the family. (T-103)

DISCUSSION

Of course when there is an appeal from DER's assessment of a civil penalty, it is DER which bears the burden of proof under 25 Pa. Code §21.101(a) and (b)(1). See Donald Zorger v. DER, EHB Docket No. 90-321-MJ (Adjudication issued February 20, 1992).

That Hanslovan's truck was used on May 13, 1989 to haul garbage to this unpermitted dump site was not seriously disputed by Hanslovan and was proven by DER. This activity is unlawful under Section 610(1) of the SWMA (35 P.S. §6018.610(1)), which prohibits the dumping or depositing of solid waste

on the surface of the ground unless a permit to do so has been issued by DER. It is also unlawful to transport solid waste to a disposal area unless that area possesses a permit under 35 P.S. §6018.610(6). Finally, it is unlawful to assist in a violation of this act according to 35 P.S. §6018.610(9). It was also not disputed by Hanslovan that the garbage, lumber and other materials hauled in his truck is solid waste as defined by the SWMA. See 35 P.S. §6018.103.[2]

Hanslovan argues Byron could not have been where he says he was because the photo taken from the helicopter was taken from 3,000 feet from the dump and Byron said he was standing near the spot from which this picture was taken when he saw the garbage being unloaded. Byron originally did say, "I would have been pretty much at the same place as the photographer who took this picture, within twenty-five feet, I would guess..." (T-12). But, he subsequently amended this statement in the following exchange on cross-examination:

> Q Now, you testified that in the picture that has been entered as Exhibit 1, that you were standing at approximately the same spot that this photograph was taken. Is that correct?
>
> A Actually, I was -- by that, I meant I was standing facing that area. (T-17-18)

Byron admitted he could not identify the men dumping this garbage. (T-16) Hanslovan asserts that this admission, coupled with Hanslovan's testimony and that of his son, establishes that Hanslovan did not dump this

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[2] According to Lucky Strike Coal Co., *supra*, a party is deemed to abandon any contentions not raised in its post hearing brief.

garbage and thus that DER has not met its burden of proof as to Hanslovan's violation of the SWMA. DER's argument for liability begins by asserting that civil penalties under Section 605 of the SWMA (35 P.S. §6018.605) are to be assessed on the basis of absolute liability, just like the criminal penalties assessed pursuant to Section 606 of the SWMA (35 P.S. §6018.606). It then asserts, citing Waste Conversion, Inc. v. Commonwealth, DER, 130 Pa. Cmwlth. 443, 568 A.2d 738 (1990), allocatur denied, __Pa. __, 577 A.2d 892 (1990), cert. denied, __U.S.__, 111 S.Ct. 253 (1990), that if a person may have criminal liability under the SWMA for violations of this statute committed by others over whom he exerts some control, this same principle applies to civil penalties under this act. DER then asserts Hanslovan's control of his truck's use, its use and return to his house on this day, its use to dump garbage on land formerly owned by his father and his failure to make any attempt to find out who in his family used his truck, jointly show, via circumstantial evidence, that he exerts enough control to be civilly liable for these penalties.

In his Reply to DER's Brief Hanslovan argues that Waste Conversion, Inc., *supra*, does not apply here. Hanslovan says that in Waste Conversion, Inc., the court properly interpreted the SWMA to find that by Waste Conversion undertaking shipment of the wastes to Michigan, it undertook waste disposal and thus undertook the parallel obligation to see that disposal was done properly. Accordingly, it could be held vicariously liable when improper waste disposal occurred. Hanslovan's Reply argues that unlike Waste Conversion he never undertook any disposal, that allowing his family free use of his truck

is not the same as undertaking disposal and thus that the vicarious liability theory of Waste Conversion, Inc., *supra*, cannot be applied.

While the parties' Briefs present other interesting issues, we do not reach them because DER has failed to prove a violation of this statute by Hanslovan. DER has proved Hanslovan's truck was used to transport these wastes to the site at which they were dumped. It is clear that the transporting and dumping were violations of the act for which a penalty may be assessed, but DER does not link Hanslovan thereto. Any one of a number of people had access to his truck and someone did use it. However, based on the record before us that someone was not Hanslovan.

Moreover, the fact that Hanslovan lets his children and their spouses use his truck without securing his permission prior to each such use is not sufficient to find Hanslovan has assisted in these violations of this act. DER's staff routinely uses cars owned by the Commonwealth in DER's business. If such a DER employee, authorized to use a DER vehicle, used DER's vehicle to dump personal trash illegally, DER would not be liable for such violations of this act. Neither is Hanslovan. The same is true as to Hanslovan's failure to ask who in his family used the truck to do this dumping. Even if Hanslovan now knows who dumped this garbage, that does not show he assisted in illegally transporting or dumping these wastes. To show assistance in violation of the statute for purposes of a civil penalty assessment, DER must show some action by Hanslovan directed at accomplishing the illegal activity. Alternatively, under the SWMA, DER would need to show negligent actions or inactions by Hanslovan assisting in the accomplishing of these violations. *Ex post facto*

knowledge of who did these acts is not such conduct, and the evidence offered by DER did not make this showing.

While DER is correct that a party may prove its entire case by circumstantial evidence, in Peugeot Motors Of America, Inc. v. Stout, 310 Pa. Super. 412, 456 A.2d 1002 (1983), as cited by DER, the court in this opinion went on to cite Winkler v. Seven Springs Farm, Inc., 240 Pa. Super. 641, 359 A.2d 440 (1976), aff'd, 477 Pa. 445, 384 A.2d 241 (1978), for the proposition that while this is so, nevertheless, a verdict cannot be reached merely on the basis of speculation and conjecture. Here, DER's Brief speculates that Hanslovan knew who used his truck and that one of his children or their spouses used this truck for this illegal dumping. DER's speculation to this effect, however accurate, is just speculation; it does not prove violations by Hanslovan.

The rationale in Waste Conversion, Inc, *supra*, cannot be applied here as asserted by DER to buttress the lack of evidence supporting a connection between these violations and Hanslovan. Firstly, Waste Conversion involved a criminal proceeding under Section 606 of the SWMA (35 P.S. §6018.606), whereas this is a civil penalty proceeding under Section 605 of that Act. Secondly, Hanslovan's Brief correctly points out that in that case, the court found that Waste Conversion undertook the disposal of the wastes in part via transportation thereof by this hauler to a disposal site in Michigan and thus assumed the obligation to see that the wastes were properly disposed of. Here, the record fails to show any disposal actions undertaken by Hanslovan, so he could not have assumed any such obligation. The mere fact of his being

the truck's owner does not show he retained control over the truck operator/disposer of this solid waste. Finally, Hanslovan is correct that Waste Conversion was found to have criminal liability in that case because it exercised some control over the hauler. Here, DER failed to show any advance knowledge by Hanslovan that his truck would be borrowed by others to haul garbage to this site. The fact that Hanslovan hauled leaves from the yards of tenants in a mobile home park owned by his wife to a tract near the dump site does not show this knowledge.

Insofar as DER's assertion of absolute liability for civil penalties under Section 605 of the SWMA is an attempt to say Hansolvan is liable in this appeal solely by virtue of his ownership of the truck, we reject it. Absolute liability for criminal violations exists in Section 606(1) of the SWMA. (35 Pa. §6018.606(1)). It includes liability for violations which are unintentional and non-negligent. The legislature had the option of inserting such language in Section 605 as to civil penalties and instead said: "Such a penalty may be assessed whether or not the violation was willful or negligent". 35 P.S. §6018.605. It did not impose absolute liability, i.e., liability even when the violation is unintentional and non-negligent in Section 605, and we will not read it into this statute.[3]

Accordingly, DER has failed to prove its case and we have no option other than to make the following conclusions of law and enter the Order set forth below.

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[3] Even if we so read the statute as we stated on page 9, mere ownership of this vehicle is not a sufficient basis for a finding of liability.

CONCLUSIONS OF LAW

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

2. Since this is an appeal from a civil penalty assessment, it is DER which bears the burden of proof under 25 Pa. Code §21.101(b)(1).

3. While a party may prove its entire case by circumstantial evidence, a decision in favor of the party with the burden of proof cannot be based on speculation or conjecture.

4. The rationale for the imposition of liability under Waste Conversion, Inc., *supra*, cannot be applied to the owner of the pickup truck used to illegally transport and dump garbage in the instant appeal where there is no evidence showing that the truck owner undertook to dispose of these illegally dumped wastes or even that he had knowledge his truck would be so used prior to its use.

5. Where DER fails to show any intentional action by Hanslovan assisting in the violations of law recited in its Civil Penalty Assessment and fails to show negligent actions or failures to act which contributed to the occurrence of these violations, it fails to meet its burden of proof.

ORDER

AND NOW, this 29th day of October, 1992, it is ordered that Hanslovan's appeal is sustained and DER's civil penalty assessment is vacated.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: October 29, 1992

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M. DIANE SMITH
SECRETARY TO THE BOA

GRAND CENTRAL SANITATION, INC.	:	
	:	
v.	:	**EHB Docket No. 89-506-F**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 29, 1992**

ADJUDICATION

By The Board

Synopsis

Where the only evidence offered is that of the Department of Environmental Resources ("DER") and its witnesses are not cross-examined, DER need only make a *prima facie* showing of a violation of the Solid Waste Management Act to support a civil penalty assessment. Because the legislature authorized the Environmental Quality Board to adopt regulations to protect the public health, safety and welfare, DER need only show a violation of a regulation to be entitled to assess a civil penalty. It need not show the regulation's violation was a public nuisance-in-fact.

Where DER fails to offer any evidence to support the propriety of the civil penalty assessed, this Board has no reason to hesitate in its review

thereof to substitute its discretion for that of DER. A review of the $50 civil penalty assessed by DER sustains that assessment based upon the record before us and the failure of the Appellant to challenge this amount.

Background

On October 13, 1989, DER assessed a $50 civil penalty pursuant to Section 605 the Solid Waste Management Act ("SWMA"), Act of July 7, 1980, P.L. 380, No. 97, 35 P.S. §6018.605, as amended, against Grand Central Sanitation, Inc. ("Grand Central") because of an alleged violation of 25 Pa. Code §285.211 by Grand Central.[1] On October 26, 1989 Grand Central appealed this assessment to this Board.

After the filing of their respective Pre-Hearing Memoranda the parties filed a joint Pre-Hearing Stipulation as to certain facts and this Board conducted a brief merits hearing on June 4, 1991. At that hearing DER offered testimony from only one witness who was not cross-examined by counsel for Grand Central. Counsel for Grand Central also offered no evidence at that hearing on behalf of his client. Of course, the parties' counsel filed Post-Hearing Briefs. Accordingly, the record consists of a transcript of 15 pages, the two stipulated Exhibits, and the parties' factual stipulation. After a review of this record we make the following findings of facts.[2]

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1 Simultaneously, DER also assessed a $50 civil penalty for an alleged violation of Section 1101(e) of The Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, No. 101, 53 P.S. §4000.1101(e). By our opinion and order dated December 31, 1990, we dismissed that portion of the appeal. This opinion is found at 1990 EHB 1787.

2 After hearing the evidence on the merits of the parties' contentions, (footnote continues)

FINDINGS OF FACT

1. The Appellant is Grand Central Sanitation, Inc., a corporation with an address of 1963 Pen Argyl Road, Pen Argyl, Pennsylvania, 18072. (Grand Central's Notice Of Appeal).

2. Grand Central is the operator of a municipal waste landfill located at Pen Argyl in Plainfield Township, Northhampton County, Pennsylvania. (Pre-Hearing Stipulation and Notice Of Appeal).[3]

3. Appellee is the DER, which is the agency of the state government of the Commonwealth of Pennsylvania charged with responsibility for administration of the SWMA, 35 P.S. §6018.101 *et seq.*, and the rules and regulations promulgated thereunder.

4. On September 13, 1989, as part of an ongoing program to monitor compliance with the Commonwealth's laws and regulations dealing with the hauling of municipal waste and known as "TRASHNET", DER and other state agencies were inspecting all westbound trucks at the "Route 33 weigh station which is right off Route 22, 78". (T-7, T-9; Pre-Hearing Stipulation)

5. During the course of this inspection, DER inspected a Grand Central truck with license number 42637CJ. (Pre-Hearing Stipulation)

(continued footnote)
Board Member Terrance J. Fitzpatrick resigned from this Board before having an opportunity to prepare a draft adjudication. However, this Board is empowered to enter an adjudication from a cold record, just as it has done here. Lucky Strike Coal Co., et al. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

3 References to Pre-Hearing Stipulation refer to the facts stipulated to by the parties in their joint Pre-Hearing Stipulation. "T-__" is a citation to the transcript. "Exh-__" is a reference to one of the two exhibits.

6. In September of 1989, Margaret Mary Mustard ("Mustard") was the Waste Management Specialist who conducted the inspection of Grand Central's truck. (T-5 and T-10)

7. Joint Exhibit No. 1 is the Notice Of Violation form used for the inspections conducted as part of TRASHNET which Mustard filled out as a result of that inspection and contains information obtained from the truck driver, the truck's license plate and the truck's inspection. (T-8, 9, 10; Exh.-1)

8. According to the Notice Of Violation, Mustard's inspection shows that at the time of the inspection, liquid of the type one usually gets from garbage in a garbage truck was leaking out of the truck. (T-10, 11; Exh.-1)

9. As of the hearing date Mustard did not recollect this inspection clearly enough to be absolutely sure that the information on Exh.-1 matches with the inspection she recollects conducting of a Grand Central truck at this location. (T-11)

10. Based upon this, on October 13, 1989, DER assessed the $50 penalty which is the subject of the instant appeal. (Pre-Hearing Stipulation; Exh.-2)

DISCUSSION

It is obvious under our rules that it is DER which bears the burden of proof as to the basis for its assessment of a civil penalty when the assessment is challenged on appeal. Brian Wallace v. DER, 1990 EHB 1576 and 25 Pa. Code §21.101(a) and (b). To meet this burden it must show by a preponderance of the evidence that Grand Central violated 25 Pa. Code §285.211 and the SWMA and that the amount of the penalty is reasonable. Chrin Brothers

v. DER, 1989 EHB 875. As no evidence was offered by Grand Central in opposition to DER's contentions, we are not confronted in this appeal by the need to weigh conflicting evidence, but must only determine if DER has made a *prima facie* showing of these elements.

The evidence shows that on September 13, 1989, during the course of a "TRASHNET" inspection of trucks on Pennsylvania's highways, DER's Mustard inspected a truck owned by Grand Central and filled out the Notice Of Violation of even date therewith. The Notice, which is Exhibit 1, says Grand Central has transported municipal waste in a way that the waste was not enclosed, covered or managed during transportation to prevent leakage. Elsewhere, the same notice states that to comply with the SWMA in the future, Grand Central should comply with 25 Pa. Code §285.211(a) as to the liquid leaking from the back of Grand Central's truck. Mustard testified the information on this form came from her inspection of this truck and the violation she detected in her inspection. (T-10) She testified the liquid leaking from the truck's rear was the kind usually running off garbage in such trucks.

25 Pa. Code §285.211(a) provides:

> (1) Municipal waste shall be enclosed, covered or otherwise managed during collection and transportation, including parking, to prevent roadside littering, dust, leakage, attraction or harboring of vectors, and the creation of other nuisances.

This testimony and Exh. 1 appear to establish the violation of this regulation and thus the SWMA. In response, Grand Central argues that Mustard's recollection of this inspection was vague. This is clear from the

record. Grand Central then asserts Mustard did not testify that there was municipal waste being hauled, did not identify the liquid leaking from the truck, did not identify the driver and failed to state the impact the liquid had on the environment or the public. From these alleged omissions, Grand Central asserts DER failed to prove a nuisance in fact and failed to prove municipal wastes were being hauled and were not handled in compliance with Section 285.211(a).

Clearly, Grand Central is in error on these proof issues as they affect its liability. The parties have stipulated that it was Grand Central's truck, and if that is so, there is no requirement that the driver be identified. Accordingly, DER did not need to offer testimony identifying him. Mustard also did identify the liquid leaking from the truck. At page 11 of the hearing transcript (T-11), the following question and answer appear:

> Q When you speak of liquid leaking out of the back of the truck, what would that liquid be?
>
> A It would be some sort of liquid coming from the garbage inside the truck usually.

This answer might not be as strong or positive as Grand Central would like, but Grand Central elected neither to offer any evidence nor even to cross-examine this witness. This evidence is thus sufficient. Exhibit 1, a stipulated exhibit, says that Grand Central was hauling municipal wastes in this truck. For purposes of a *prima facie* case and absent cross examination on this point, this is proof of such hauling.

Finally, Grand Central argues, correctly, that DER failed to produce evidence of the impact of this liquid on the environment or the public. No

such testimony was offered by DER, but none was required. The only way such testimony is necessary is if DER is required to prove that leakage from Grand Central's truck rose to the level it created a public nuisance in order to establish a violation of Section 285.211(a) and thus a basis to assess a civil penalty. Citing Teal v. Township of Haverford, 578 A.2d 80 (Pa. Cmwlth. 1990) for support, Grand Central asserts conduct which is not an infringement on public safety or a nuisance cannot be made one by legislative fiat, and, since leakage is equated with "other nuisances" in the statute, leakage is lawful and can only be prohibited if it rises to nuisance levels. Grand Central says leakage is not a nuisance *per se* so it must be proven to be a health hazard, and, absent such proof, no penalty is proper.

The first problem for Grand Central with its arguments starts with the fact that Teal v. Township of Haverford, properly cited as 134 Pa. Cmwlth. 157, 578 A.2d 80 (1990), alloc. denied, ___Pa. ___, 593 A.2d 429 (1991), does not apply. There, a township ordinance prohibited storage of disabled automobiles and was applied to Mr. Teal, who was fined for violating same. The court held that municipalities were only empowered to enact ordinances dealing with a nuisance-in-fact, and, thus, for the enforcement of such an ordinance, a nuisance-in-fact had to be proved. There, to the extent the ordinance made Teal's conduct nuisance *per se*, such an ordinance was beyond the scope of the power to enact ordinances granted to Haverford, so the court said nuisance-in-fact had to be proven if the ordinance was to be constitutional. Here, we are dealing not with a municipal ordinance but a statute enacted by the legislature; thus Teal is inapplicable.

Under the SWMA a violation of regulations is declared to be public nuisance. See 35 P.S. §6018.601. Moreover, the legislature has declared improper and inadequate solid waste practices a threat to public health, a cause of environmental pollution and the cause of irreparable harm to the public health, safety and welfare. See 35 P.S. §6018.102. It also authorizes the Environmental Quality Board, in Section 105(a) of the SWMA (35 P.S. §6018.105(a)), to adopt regulations relating to the protection of public health, safety and welfare, not to mention public property and Pennsylvania's natural resources. It is under this section of the SWMA that 25 Pa. Code §285.211(a) was promulgated. Thus, it must be concluded that a violation of this regulation is an infringement on public safety and a *per se* public nuisance. Accordingly, its violation is all that DER must show before it is authorized to assess a civil penalty pursuant to Section 605 of the SWMA.

Under Chrin Brothers, *supra*, in appeals such as this, this Board must also determine if the $50 penalty assessed by DER is reasonable or if DER abused its discretion in setting it. Here, DER offered us no evidence to support the amount assessed. We advised DER in Chrin Brothers that where it offers us no evidence to support its assessment, we will be less hesitant to substitute our discretion for that of DER since there is no evidence to support DER's action. See Chrin Brothers, at note 5. A penalty of up to $25,000 per violation per day is assessable under Section 605. DER assessed a penalty of $50 and offered no evidence as to the size of the leakage, the willfulness of Grand Central in violating this regulation, any damage to our natural resources or their uses or any of the other elements which it is to

consider in setting this penalty. In this circumstance, assessment of more than $50 would be an abuse of DER's discretion, but we cannot say $50 is too much of a penalty. Indeed, less than this amount might make the assessment meaningless and would constitute no deterrent. Moreover, Grand Central does not argue that it $50 is a wrong amount. Accordingly, we will affirm it, and make the following conclusions of law.

CONCLUSIONS OF LAW

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

2. Where the Appellant elects to offer no evidence and chooses to forego even cross-examination of DER's witness, the Board is unable to weigh conflicting evidence and need only determine if DER has made a *prima facie* showing.

3. All that DER must show by preponderance of the evidence is that Grand Central violated this regulation and that the amount of the penalty assessed is reasonable.

4. DER's evidence demonstrated that there was leakage from Grand Central's truck in violation of 25 Pa. Code §285.211(a).

5. DER need not show the leakage from Grand Central's garbage hauling truck is severe enough to rise to the level of a public nuisance because a violation of this regulation adopted pursuant to an authorization to promulgate regulations to protect public health, safety and welfare is a public nuisance *per se*.

6. While DER failed to offer any evidence that its $50 civil penalty assessment was reasonable, Grand Central did not challenge it and the Board's review of it does not show the amount to be either too high or too low.

ORDER

AND NOW, this 29th day of October, 1992, it is ordered that the appeal of Grand Central is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: October 29, 1992

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

CARLSON MINING	:	
	:	
v.	:	**EHB Docket No. 91-547-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 29, 1992**

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

By Richard S. Ehmann, Member

Synopsis

The appeal by a coal mine operator of an order issued by the Department of Environmental Resources (DER) requiring it to provide for operation and maintenance of a replacement water supply for a homeowner on a permanent basis is dismissed in part and sustained in part. Under §4.2(f) of the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4b(f), DER is authorized to require an operator to permanently provide for increased costs of operating and maintaining an affected homeowner's replacement water supply where these costs are "excessive", i.e., more than marginally higher, when compared with the previous supply system. See Gioia Coal Company v. DER, 1986 EHB 82; Buffy and Landis v. DER, et al., 1990 EHB 1665. As the five-fold increase in operating and maintenance costs to the affected homeowner in this appeal is

excessive, DER properly found the replacement supply did not comply with §4.2(f) and required the operator to provide for the homeowner's increased costs on a permanent basis. Because there is no evidence in the record showing DER gave consideration to the means of providing a fund for the replacement supply which would ensure that the money is used for the replacement supply or to the return of any unused funds to Carlson or showing DER ensured that the amount of funds it seeks will be sufficient to cover reasonable projections for inflation or unexpected operating and maintenance costs in the future, DER abused its discretion in this regard, and the matter is remanded to DER to address the funding mechanism while the Board retains jurisdiction.

Introduction

This appeal was commenced on December 16, 1991 by Carlson Mining (Carlson), challenging an order issued to it by DER pursuant to the Clean Streams Law (Clean Streams Law), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, and SMCRA that required Carlson to submit a plan for acceptable replacement of the water supply to the Mackey residence, which is located near Carlson's Surface Mine Permit (SMP) 37830105 in Slippery Rock Township, Lawrence County. The order further directed that Carlson's plan must provide for the permanent maintenance and operation of the water supply and assure adequate water quantity and quality for the purpose served by the supply.

After engaging in discovery, the parties filed a Joint Motion to Limit Issues and Submit on Briefs and a Joint Stipulation of Facts on March 9,

1992. We granted the Joint Motion and the parties then submitted their respective briefs. It is upon the facts contained in the Joint Stipulation and the parties' briefs that we make the following findings of fact.[1]

FINDINGS OF FACT

1. Appellant is Carlson, a partnership with an address of R.D. 6, Box 483, New Castle, PA 16101. (JS ¶ 2)[2]

2. Appellee is DER, the agency of the Commonwealth with the authority to administer and enforce the Clean Streams Law; SMCRA; Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the rules and regulations adopted thereunder. (JS ¶ 1)

3. Carlson was authorized to conduct surface mining in Pennsylvania pursuant to Surface Mining Operator's License No. 100487 at all times relevant to this appeal. (JS ¶ 4)

4. DER issued SMP 37830105 to Carlson on January 21, 1986 for a surface mine located in Slippery Rock Township, Lawrence County, known as the VanGorder Mine. (JS ¶¶ 5, 8)

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1 We note that exhibit 1 appended to Carlson's brief, which allegedly is a section of DER's Program Guidance Manual dealing with water supply replacement and permitting, is neither a stipulated exhibit nor is it supported by any affidavits or other factual documents. We lack even an assurance that it reflects DER's current policy. As such, we do not consider it to be part of the record before us, which the parties created by stipulation. We further note that exhibit 2 appended to Carlson's brief, which is also neither a stipulated exhibit nor supported by any affidavit, is not part of the record in this appeal.

2 "JS" indicates a citation to the Joint Stipulation of Facts.

5. Carlson conducted surface mining on acreage situated within SMP 37830105. (JS ¶ 10)

6. On December 31, 1987, DER issued Authorization to Mine Permit No. 100487-37830105-04 to Carlson, which was conditioned to prohibit Carlson's mining until the company had provided a permanent replacement for the water supply to the Mackey residence (Mackey replacement supply) approved by DER. (JS ¶ 9)

7. DER issued Compliance Order (CO) 88-K-015S to Carlson on January 29, 1988, citing the company for affecting the area covered by Authorization to Mine Permit No. 100487-37830105-04 prior to providing a DER-approved permanent replacement for the Mackey water supply (which was a spring). (JS ¶ 11, Exhibit 1 to JS)

8. Carlson did not appeal CO-88-K-015S. (JS ¶ 11)

9. DER issued a civil penalty assessment on May 5, 1988 against Carlson for violating its mining authorization permit, based on the company's mining in the area near the Mackey spring before receiving DER's approval to affect that spring (the violation cited in CO 88-K-015S). (JS ¶ 12)

10. Carlson did not appeal the civil penalty assessment. (JS ¶ 12)

11. On April 6, 1990, DER notified Carlson that the Mackey replacement supply provided by the company, a 52-foot-deep well known as Well No. 2, was not a suitable replacement for the Mackey water supply because of excessive concentrations of iron, manganese, and sulfate. (JS ¶ 13) Carlson received this notice on April 27, 1990. (JS ¶ 13)

12. Carlson agreed on May 2, 1990 to provide treatment for Well No. 2 so as to provide adequate water quality, but only for as long as Mrs. Mackey lives at the residence. (JS ¶ 14)

13. Based upon analyses of water samples taken from the spring and Well No. 2 (after treatment) which showed sulfate concentrations to be in excess of 250 milligrams per liter (mg/l), DER issued CO 91-K-099S to Carlson on April 5, 1991, citing the company for its failure to restore or replace the Mackey water supply. (JS ¶ 15)

14. DER vacated CO 91-K-099S on May 13, 1991 and notified Carlson that its replacement for the Mackey water supply was not adequate. DER required Carlson to demonstrate an adequate supply, including the costs of perpetual maintenance of the replacement supply, on or before July 1, 1991. (JS ¶ 16)

15. On July 18, 1991, DER sent Carlson a notice stating that the Mackey water supply had not been adequately replaced based upon an excessive manganese concentration and Carlson's failure to provide for the permanent maintenance and operation of the replacement supply. (JS ¶ 17)

16. DER issued Carlson the Administrative Order No. 91-K-154S, which is challenged in the present appeal, on November 18, 1991. (JS ¶ 18) This order cited Carlson for violating §§4.2(f) and 18.6 of SMCRA (52 P.S. §§1396.4b(f) and 1396.24), §§87.119 and 86.13 of 25 Pa. Code, and §611 of the Clean Streams Law (35 P.S. §691.611), for its failure to provide for permanent maintenance and operation of the Mackey replacement supply. (JS ¶ 18)

17. Carlson installed a Culligan Water Conditioning Exchange System to treat water pumped from the replacement well to the Mackey residence. (JS ¶ 20) DER has accepted this combination of the well and water conditioning system as an adequate means of replacing the Mackey water supply. (JS ¶ 20)

18. The annual cost of treatment, maintenance, and amortization of equipment for the Mackey replacement supply is $247.25. (JS ¶ 21)

19. The annual cost of Mackey's original water supply was $47.01. (JS ¶ 22)

20. The additional annual costs for the Mackey replacement supply are $200.24. (JS ¶ 23)

21. These additional costs to Mackey for operating and maintaining the replacement supply are more than marginally higher and are excessive under the standard set forth in Gioia Coal Company v. DER, 1986 EHB 82.

DISCUSSION

In this appeal challenging DER's order requiring Carlson to provide an acceptable replacement for the water supply to the Mackey residence, it is DER which bears the burden of proof. Gioia, supra. The parties have stipulated that there are three issues on appeal. They are:

> a) Is Carlson required to provide for the maintenance and operation of the Mackey replacement supply on a permanent basis under Section 4.2(f) of SMCRA, 52 P.S. §1396.4b(f), and 25 Pa. Code §87.119?
>
> b) Are the increased operation and maintenance costs of the Mackey replacement water supply sufficient to require Carlson to compensate Mackey for those costs *ad infinitum*?
>
> c) If the Board finds that Carlson is required to compensate Mackey for the increased operation and maintenance costs of the Mackey replacement supply, may DER

require Carlson to create individual trusts or escrow accounts to provide for the payment of the additional costs?

Permanent Operation and Maintenance of Mackey Replacement Supply

Both parties agree that §4.2(f) of SMCRA (52 P.S. §1396.4b(f)) and 25 Pa. Code §87.119 control Carlson's duty to provide a replacement water supply for the Carlson residence. Section 4.2(f) of SMCRA provides:

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

Likewise, §87.119 of 25 Pa. Code provides:

> The operator of any mine which affects a water supply by contamination, pollution, diminution or interruption shall restore or replace the affected water supply with an alternate source, adequate in water quantity and water quality, for the purpose served by the supply. For the purpose of this section, the term "water supply" shall include any existing or currently designated or currently planned source of water or facility or system for the supply of water for human consumption or for agricultural, commercial, industrial or other uses.

We have previously interpreted the requirements of §4.2(f) of SMCRA and 25 Pa. Code §87.119, first in Gioia, *supra*, and later in Buffy and Landis v. DER, et al., 1990 EHB 1665.

Gioia involved a surface mine operator's challenge to a DER order issued post-mining pursuant to §4.2 of SMCRA directing the operator to restore or replace a homeowner's (Novotnak) water supply. The Novotnaks' original

supply was a spring which was shared with their neighbor, McGregor. The operator replaced the spring with a well to service both the homes of Novotnak and McGregor. This well's pump was energized from the main electrical power line to the McGregor home and the fuse box for this line was located inside the McGregor home. Further, McGregor paid the electric bills without requesting Novotnaks to contribute their share of the operating costs for the well's pump. When Novotnaks complained to DER about the adequacy of the replacement supply, DER issued the challenged order.

In our decision in Gioia, we indicated that a replacement supply which requires more maintenance than the original supply could be consistent with §4.2(f) of SMCRA, but a replacement supply which, when compared to the original supply, is unreliable or needs excessive maintenance would not satisfy the requirements of that section. Under the facts presented in Gioia, we concluded that as to the Novotnaks, the replacement supply met the requirements of §4.2(f) regarding reliability, maintenance, and operating costs. Because the Novotnaks had lost the degree of control they had over their original supply, however, we ruled that the replacement supply was not in compliance with the requirements of §4.2(f) as it was not adequate in quantity.

Buffy and Landis, which arose in a pre-mining permitting context, involved two homeowners' (Buffy and Landis) appeal challenging DER's determination that the surface mine operator had shown an adequate replacement supply for their wells prior to DER's authorizing mining within the recharge area of the wells. While distinguishing Gioia from the appeal in Buffy and

Landis because of the distinction between pre-mining permit review and post-mining enforcement, we indicated that the concepts of maintenance and control set forth in Gioia provided guidance for our assessment of the adequacy of the replacement supply.

We further stated that along the lines of Gioia, we did not believe the legislature intended that a replacement water supply which costs more to operate and maintain than the predecessor supply should be regarded as meeting the requirements of §4.2(f). In Buffy and Landis, no evidence of the operating and maintenance costs for the proposed replacement system was presented to the Board, nor was there any evidence of the operating and maintenance costs for the existing Buffy well or Landis well. The operator in Buffy and Landis had proposed to establish an interest-bearing escrow account in the initial principal amount of $30,000 (based on the estimated cost of drilling and building a community well system) for the purpose of ensuring that a community well replacement supply would be operated and maintained in good repair. We sustained the appeal in Buffy and Landis, indicating that without data consisting of a breakdown of all operating and maintenance costs for the homeowner's then-current water supply, neither DER nor this Board could determine the amount which must be escrowed to produce and reproduce these additional costs *ad infinitum*.

In its brief, Carlson contends DER has exceeded its statutory and regulatory authority by its order in this matter. Carlson argues that under Gioia, a replacement supply meets the requirements of §4.2(f) of SMCRA unless its operation and maintenance expenses are excessive. It urges that here,

these expenses are not excessive, and that the increased costs amount to compensatory damages to Mackey which must be assessed on Carlson by a court of common pleas because DER and this Board cannot deal with such damages. Further, Carlson argues DER's demand for an escrow account or other vehicle to facilitate the transfer of funds to Mackey provides insufficient protection to Carlson because there is no assurance that the escrowed funds will be used for operation and maintenance of the well and no provision has been made by DER here for return of any unused funds to Carlson or to ensure that Carlson will not be requested to increase the amount of the funds for the Mackey replacement supply in the future if operating and maintenance costs increase.

DER's brief, on the other hand, contends that in Buffy and Landis we overruled Gioia. It urges us to rule that based on *stare decisis*, Buffy and Landis requires us to find Carlson must provide for any increased operation and maintenance costs to Mackey on a permanent basis. DER further claims that an individual trust, escrow account, or similar financial vehicle is an appropriate way to implement the requirements of Buffy and Landis.

In reply, Carlson argues Buffy and Landis does not control this appeal, but, if we believe it to be controlling, it urges us to reconsider what we said in that decision.

The instant appeal, like Gioia, arises from DER's post-mining enforcement action against a mine operator regarding a replacement water supply. Here, despite DER's prohibition against Carlson's mining in the recharge area of Mackey's spring, Carlson mined the area and apparently was caught by DER. Thus, it is too late to undo what Carlson's mining has done

by way of contamination of the spring's water, and the issue before us is replacement of the Mackey water supply.

Carlson argues that SMCRA and DER's regulations regulate surface mining in a plenary fashion, and it asserts that nowhere in SMCRA or the regulations is DER provided with the authority to require an operator: 1) to provide for maintenance and operation of a replacement supply on a permanent basis, 2) to provide for increased operating and maintenance costs *ad infinitum*, or 3) to provide for an escrow fund or trust fund for such additional costs.

We reject Carlson's contention that DER has exceeded its statutory and regulatory authority under SMCRA and the Clean Streams Law in issuing the presently challenged order. DER has been authorized by the legislature at §4.2(f) of SMCRA to issue orders to a mine operator necessary to assure the operator's compliance with that section in restoring or replacing an affected water supply with an alternate source of water adequate in quantity and quality for the purposes served by the supply.

We have previously ruled in Gioia and Buffy and Landis that the increase in costs and effort of operating and maintaining the replacement supply goes to the question of whether the replacement supply is adequate in quantity and quality. As we stated in Gioia, a replacement supply which requires more maintenance than the original supply can be consistent with the requirements of §4.2(f). For instance, a replacement supply might require the owner to periodically change the filter in the water treatment system whereas the original spring required only seasonal cleaning and did not require

filtration. But, as we concluded in Gioia, where the effort or costs involved in operating and maintaining the replacement supply are "excessive," the replacement supply cannot be considered to be adequate in quantity and quality according to the requirements of §4.2(f).[3] Where the homeowner has to make time in his schedule for dealing with the treatment system for the replacement supply or to deal with a maintenance man for the system, this effort may be more than the effort involved, for instance, in changing the filter on the previous system. While it does not trouble us to say that a *de minimus* increase in the cost of operating and maintenance expenses or increased maintenance efforts, such as changing a filter, does not render a replacement supply inadequate, (i.e., the two sources are equal in all respects), we cannot find the replacement supply to be adequate in quantity and quality where such post-mining costs and efforts are more than a marginally higher.

Clearly, Section 4.2(f) of SMCRA envisions a replacement supply which is adequate in quantity and quality. Such adequacy cannot be determined by whether the homeowner can afford to pay the increased costs of operating and maintaining the replacement supply. For example, if, prior to mining, the

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[3] Under the facts presented in Gioia, this Board was not called upon to explicate what was meant by "excessive," since there was no evidence regarding any increased operating and maintenance expenses or effort to the appellant/homeowner. The Board in Gioia did, however, offer a situation where we might have found the costs to the Novotnaks for the replacement supply to be excessive, i.e., if "the electricity bills now were very much greater than previously." We further pointed to the lack of complaint about the electric bill or a request for contribution of the Novotnaks' share on the part of McGregor as indicating the cost of operating the replacement supply was not excessive. We did not overrule Gioia in Buffy and Landis, as DER asserts, but we did indicate at footnote 6 in Buffy and Landis that we believed Gioia had taken a "grudging" approach to determining adequacy.

homeowner used 350 gallons per day[4] at a cost of only $.02 per gallon and the replacement supply provided after destruction of this supply also produces 350 gallons per day but costs $.25 per gallon to run, the replacement system could only be said to be adequate in quantity for a homeowner who is sufficiently wealthy to run it or who sacrifices in other ways in order to use such a replacement system. (350 gallons x $.25 per gallon x 365 days = $31,937.50 per year.) To suggest that an operator has complied with §4.2(f) by offering a replacement supply which the homeowner could not use because it is too financially burdensome would defeat the concept present in both SMCRA and the Clean Streams Law of holding a mine operator responsible for a condition created by mining.[5] Our inquiry, thus, must be into whether the costs and effort associated with operating and maintaining the replacement system are more than marginally higher than the costs and effort associated with operating and maintaining the previous supply.

Consistent with this concept found in both SMCRA and the Clean Streams Law of holding a mine operator responsible for a condition created by mining, it is the mine operator, and not the homeowner, who must bear the costs of operating and maintaining the replacement supply, forced on the

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4 350 gallons per day is one "EDU", which is a standard flow unit for the average amount of sewage discharged from a single family residence in one day. See Lower Paxton Township Authority, et al. v. DER, 1982 EHB 111.

5 See Commonwealth v. Harmar Coal Company, 452 Pa. 77, 306 A.2d 321 (1973) (the public interest is not served if public, rather than the miner, has to bear expense of abating pollution caused as a direct result of profit-making, resource depleting mining business).

homeowner because of mining, until the original water supply is restored to pre-mining quantity and quality, if ever.[6] As our Supreme Court observed in Commonwealth v. Barnes & Tucker Co., 472 Pa. 115, 371 A.2d 461 (1977) (Barnes & Tucker II), appeal dismissed, 434 U.S. 807, 98 S.Ct. 38, 54 L.Ed. 2d 65 (1977), past mining practices have left our streams polluted and our groundwater unfit for consumption. In Barnes & Tucker II, the Supreme Court upheld an order of the Commonwealth Court requiring that mining company to pump and treat polluted water from its mine which was discharging from the mine and polluting a nearby stream, regardless of the fact that the mining activity which gave rise to the polluting condition was past conduct. The Commonwealth Court's order to Barnes & Tucker Company required the mining company to pump the water from its mine "until such time" as the likelihood of a reoccurrence of a repetition of discharge of untreated acid mine drainage

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6 In its brief, Carlson raises the argument that DER, in issuing the challenged order, has ignored the balancing of interests it says is required by 52 P.S. §1396.1. Section 1396.1 provides in relevant part: "It is also the policy of this act to assure that the coal supply essential to the Nation's and the Commonwealth's energy requirements, and to their economic and social well-being, is provided and to strike a balance between protection of the environment and agricultural productivity and the Nation's and the Commonwealth's need for coal as an essential source of energy." Thus, §1396.1 states the legislative purpose or policy behind SMCRA itself. It does not impose on DER the requirement that it conduct a balancing test every time it acts under this statute. The Board's decision in Buffy and Landis, which DER followed in issuing its order here, merely interpreted the obligations flowing from this legislative determination. Moreover, it strikes us as strange that the mining company, which violated its permit by conducting this mining activity near the Mackey spring and rendered that spring unsuitable for future domestic needs, when being held to account for its conduct, should assert that DER and this Board must conduct such a balancing of competing interests. Clearly, if a balancing was to occur, it was to occur pursuant to the requirements of DER's mining authorization prior to Carlson's mining of the spring's recharge area, not after Carlson had mined that area.

from its mine to the waters of the Commonwealth was past, while also requiring the mining company to maintain a treatment program for the mine water.

Where a mining operator has rendered a water supply unusable, as is the present situation, the Supreme Court's decision in Barnes & Tucker II reinforces the appropriateness of requiring the mining operator to provide for the treatment system for the polluted water supply until the original supply is restored to pre-mining quantity and quality. Should this restoration occur as part of a natural process and take a year, five years or 25 years to occur, then that is the duration for which the mine operator is responsible. Should the original supply never return to its pre-mining quality, for instance, because the recharge area was permanently altered by mining, then the mine operator must bear the operating and maintenance costs for the replacement supply *ad infinitum*.[7]

Additionally, we disagree with Carlson's attack on this Board's jurisdiction, which is based on its argument that we are unable to order Carlson to pay damages to Mackey. We are authorized to review DER's orders and actions and to draw conclusions from those actions. See Environmental

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[7] We reject Carlson's suggestion that this is inconsistent with the limitation on the agency's jurisdiction over the mine operator, for which it cites National Wildlife Federation v. Lujan, 950 F.2d 765 (D.C. Cir. 1991) (stating that enforcement actions cannot be taken against a miner after bond release under federal SMCRA.) According to what we have said here, DER could not release the final stage of a mine operator's bonds posted pursuant to SMCRA where it has rendered a water supply unusable until after the adequacy of the replacement water supply has been addressed or the operator has agreed to provide an adequate replacement, including provision for the financial matters and a mechanism for dealing with the possibility that the water supply might reestablish itself. See Section 4(g) of SMCRA, 52 P.S. §1396.4(g); Ray Carey v. DER, 1990 EHB 828.

Hearing Board Act, Act of July 13, 1988, P.L. 350, 35 P.S. §7514(a). In ordering Carlson to provide funding to Mackey so that the replacement supply offered by Carlson will meet the requirements of §4.2(f) of SMCRA, DER is not ordering Carlson to pay damages to Mackey but rather is ensuring the adequacy of the replacement supply. Thus, Carlson's attack on this Board's jurisdiction is unfounded.[8]

Increased Operation and Maintenance Costs For Mackey Replacement Supply

The question here is whether the increased costs and effort to Mackey for operating and maintaining the replacement supply are excessive. In the present appeal, Carlson attempts to minimize the five fold increase in operating and maintenance expenses to Mackey by breaking it down to $16.69 per month and by contending these costs are minimal in view of the risk allegedly associated with the shallow spring which is Mackey's original supply and stressing the allegedly improved water quality effected by the Culligan water filter as opposed to the original spring. The allegations that the treatment system produces treated water of a better quality than the Mackey spring or that the original supply was shallow and thus might have had more risk

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8 Because Carlson is not being ordered to "compensate" Mackey for the damage to the water supply but to provide an adequate replacement supply, we reject Carlson's arguments that the federal Office of Surface Mining (OSM) regulations have never required an operator to pay compensation to a supply owner and thus that DER's interpretation of an operator's water supply replacement obligations is inconsistent with the federal Surface Mining Control and Reclamation Act, 30 U.S.C. §1201 *et seq.* (federal SMCRA).

attached to it are not supported by any evidence in the record and are not appropriate factors for us to consider in determining the increased operating and maintenance costs to Mackey in any event.[9]

We find the five-fold increase in the cost of operating and maintaining the Mackey water supply to be more than marginally higher. It is excessive.[10]

Use of Escrow Account To Provide For Increased Costs

DER does not dispute that it has sought to have Carlson establish an escrow account, individual trust, or similar financial vehicle, in the amount

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9 While Mackey's ability to pay for the increased operating and maintenance expenses is not at issue, we view the company's argument that an increase of $16.69 per month is not excessive to be somewhat cold-hearted. Individuals of modest means faced with an unsolicited $200 annual increase in the cost of operating and maintaining their water supply would find such an increase to be an unwarranted burden.

10 Carlson's brief argues that we held in Gioia that where the increased costs are not excessive, they fall within "a zone of increased operating and maintenance costs - effectively 'compensatory damages'-which neither DER nor the Board can transfer from Carlson to Mackey" and that Mackey must be compensated for increased costs which fall in this zone through a civil action in Common Pleas Court. Since we have found the increased costs to Mackey are excessive, we need not rule on Carlson's argument, but we wish to clarify what we meant in Gioia. As we have previously in this Adjudication, in Gioia there was no evidence regarding any increased operating and maintenance expenses or effort to the Novotnaks, and we indicated that our ruling did not foreclose the Novotnaks from bringing an action before Common Pleas Court to recover for damage to their water supply. We later noted in footnote 6 in Buffy and Landis that individuals who must incur additional expenses in connection with a replacement water supply should not be forced to bring an action in Common Pleas Court to recover damages, as that would defeat the purpose behind SMCRA of protecting and maintaining the water supply. See 52 P.S. §1396.1. Rather, the supply owner's common law remedy for contamination or diminution of his water supply would be in addition to requiring the operator's compliance with the mandates of §4.2(f) of SMCRA. See, e.g., Hughes v. Emerald Mines Corporation, 303 Pa.Super. 426, 450 A.2d 1 (1982).

of $7,200 to provide for the operating and maintenance expenses for the replacement supply Carlson has installed for Mackey.[11] DER has taken the position that Mackey must have control over the fund provided by Carlson, otherwise the homeowner will not have an adequate replacement supply. DER further takes the stand that financial institutions are well-suited to create a funding vehicle which can exist *ad infinitum*.

We agree that the use of an escrow account, individual trust, or similar financial vehicle is an appropriate mechanism to provide for the increased costs of operating and maintaining the Mackey replacement system.

DER's reluctance to assume the role of escrow agent, as evidenced by footnote 4 of its brief, is not sufficient justification for DER to mandate that financial institutions must handle these matters. While the familiarity of lending institutions with establishing financial vehicles, such as escrow accounts, may be a factor for DER to consider in devising the appropriate means for Carlson provision of funds for the Mackey replacement supply system, there are other factors which DER must explore.

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[11] Based on what is stated in Joint Exhibit 2, which is a letter dated December 20, 1991 from Carlson to DER's William Allen, DER had advised the company to provide a fund which is 36 times the annual increase in operating and maintenance costs. Since the annual increase here is $200.24, this is apparently how the amount of $7,200 for the fund was derived. There is no evidence before us to show whether reasonable costs for factors such as inflation and the amortized costs of replacing the water conditioner system components as they wear out and labor therefor are reflected in the amount of money DER seeks to have Carlson post. Factors such as these should be considered by DER in determining the amount Carlson must make available to provide for the Mackey replacement supply. Without such evidence before us, this Board is unable to determine the present value of a sum which, if invested now, will provide a sufficient income stream to reproduce these additional costs *ad infinitum*, as Carlson's brief requests.

Carlson has raised a legitimate concern regarding whether the escrowed funds will in fact be used for operating and maintaining the replacement supply or for other creature comforts. Likewise, Carlson's concern over the lack of provision for return of the funds to Carlson should the initial Mackey water supply return to its pre-mining quantity and quality and its concern that DER might require it to increase the amount in the fund if the replacement water supply worsens in quality after an escrow account is established are matters which DER should have addressed here. Mackey cannot have the option of spending the money to be provided by Carlson for operating and maintenance of the replacement supply for other purposes, such as for a vacation; the statute directs replacement of the water supply. Moreover, DER should have provided for return of any unused funds to Carlson if, for instance, the Mackey spring reestablishes itself to pre-mining quality, and DER must create a mechanism to make it clear that Carlson will not be required to increase the amount of the fund once it is established.

Accordingly, although we find DER properly ordered Carlson to replace the Mackey water supply, we remand this matter to DER to develop a mechanism for addressing the funds needed to provide a replacement supply adequate in quantity and quality for Mackey *ad infinitum* or for what might turn out to be of a more limited period of time.[12]

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12 We recognize that as this is the first appeal in which the issue of the appropriate funding mechanism for a replacement water supply has arisen, DER will probably want to adopt a uniform procedure to address these issues through regulations proposed to the Environmental Quality Board at some point (footnote continues)

CONCLUSIONS OF LAW

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

2. DER bears the burden of proof pursuant to 25 Pa. Code §21.101(b)(3).

3. A replacement water supply cannot be considered as complying with the requirements of §4.2(f) of SMCRA, 52 P.S. §1396.4(b)(f) and 25 Pa. Code §87.119, where cost of operating and maintenance for the replacement supply and maintenance effort, when compared to the original supply, are excessive. Gioia Coal Company v. DER, 1986 EHB 82.

4. Where the increase in the costs of operating and maintaining the homeowner's replacement water supply and the effort involved in maintenance of the replacement supply, when compared with the cost of operating and maintaining the homeowner's previous water supply and maintenance effort involved therewith, is more than marginally higher, so that the effect on the homeowner is more than *de minimus*, the operating and maintenance cost and maintenance effort associated with the replacement supply is excessive.

(continued footnote)
in the future. As for the amount of the fund Carlson must provide, DER's policy regarding calculation of bond amounts where perpetual treatment is contemplated might be a good starting point for DER. It is not necessary that this be done as to Carlson, however, and we are remanding this matter to DER to address the concerns discussed in this Adjudication within 120 days of the order attached to this Adjudication while we retain jurisdiction. We note that in so doing, we are not necessarily accepting DER's position that it is unable to serve as an escrow agent, and DER should address this issue on remand.

5. The five-fold increase between the costs of operating and maintaining the Mackey original supply and replacement supply (a total annual increase of $200.24) is more than marginally higher and is excessive.

6. DER did not abuse its discretion in determining Carlson's replacement supply for Mackey failed to satisfy the requirements of §4.2(f) of SMCRA and 25 Pa. Code §87.119.

7. DER did not abuse its discretion in ordering Carlson to bear the operating and maintenance costs for the Mackey replacement supply on a permanent basis. Commonwealth v. Barnes & Tucker Company, 472 Pa. 115, 371 A.2d 461 (1977), appeal dismissed, 434 U.S. 807, 98 S.Ct. 38, 54 L.Ed. 2d 65 (1977).

8. Should the Mackey original supply never return to its pre-mining quality, Carlson may be held responsible for the operating and maintenance costs for the Mackey replacement supply *ad infinitum*.

9. DER abused its discretion by not ensuring the funding mechanism will be used for the Mackey replacement supply, by not providing for return of any unused funds to Carlson, and by not ensuring it is seeking an amount of funding which will be sufficient to cover projected increases in the operating and maintenance costs because of inflation or unexpected increase in those expenses for the Mackey replacement supply.

ORDER

AND NOW, this 29th day of October, 1992, it is ordered that the appeal of Carlson Mining Company is dismissed in part, to the extent that DER determined that the Mackey replacement supply does not meet the requirements

of §4.2(f) of SMCRA and ordered Carlson to provide for operation and maintenance of the Mackey replacement supply on a permanent basis. The appeal is also sustained in part, insofar as DER has failed to address concerns relating to the mechanism for funding the Mackey replacement supply.

It is further ordered that this matter is remanded to DER to devise, within 120 days of this order, a funding mechanism by which Carlson will provide funding for the Mackey replacement supply in accordance with the foregoing Adjudication. This Board retains jurisdiction over this appeal.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

Board Member Joseph N. Mack has a dissenting opinion which is attached.

DATED: October 29, 1992

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
Michael J. Heilman, Esq.
Western Region
For Appellant:
Stephen G. Allen, Esq.
Philadelphia, PA

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TELECOPIER 717-783-4738

M. DIANE SMI
SECRETARY TO THE

CARLSON MINING	:	
	:	
v.	:	**EHB Docket No. 91-547-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** October 29, 1992

DISSENTING OPINION OF BOARD MEMBER
JOSEPH N. MACK

I have reviewed the majority opinion carefully several times and am forced to dissent.

The majority rests its opinion squarely on an interpretation of §4.2(f) of SMCRA, 52 P.S. §1396.4b(f), which authorizes DER to require an operator who affects a public or private water supply to "restore or replace the affected supply with an alternate source of water adequate in quantity and quality for the purposes served by the supply."

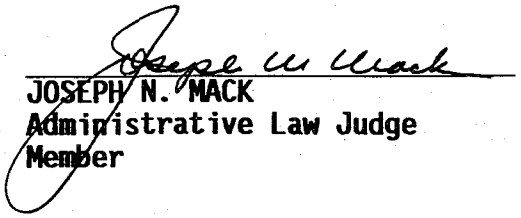
DER acknowledges in its brief, at proposed finding of fact 20, that it has accepted the system installed by Carlson as an adequate replacement. DER, however, argues that there is a further requirement that such replacement supply must be at the same or nearly the same cost to the landowner and that DER has the authority under the statute to require the operator to provide a bond or escrow fund to defer any excessive cost to the landowner.

While I might wish that there was such a requirement in the statute, it is clear from a reading of §4.2(f) that the only requirement is that the replacement of the water supply be adequate as to quality and quantity.

Without further statutory instructions from the legislature, I do not feel that we can engraft on the written word of the legislature the further requirements proposed by DER and the majority opinion.[1]

I must therefore respectfully dissent.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: October 29, 1992

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For Appellant:
Stephen G. Allen, Esq.
Philadelphia, PA

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[1] In reaching what I believe to be an erroneous result, the majority opinion elevates dicta in the two cases relied upon, i.e., Buffy and Landis, *supra*, and Gioia, *supra*, to the level of *stare decisis*.

COMMONWEALTH OF PENNSYLVANIA
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M. DIANE SMITH
SECRETARY TO THE BO

COUNTY OF CLARION	:	
	:	
v.	:	**EHB Docket No. 91-435-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: October 30, 1992**
and CONCORD RESOURCES GROUP OF	:	
PENNSYLVANIA, INC.	:	

OPINION AND ORDER
MOTION TO DISMISS

By Maxine Woelfling, Chairman

Synopsis

The Board dismisses a third-party appellant's appeal as moot when the Board can no longer grant the relief appellant seeks. The Board cannot grant the relief sought where the Appellant contested a Department of Environmental Resources (Department) determination that an application was administratively complete, seeking to prevent further Department review of the application. Subsequent events effectively ended the Department's technical review of that application and, therefore, mooted the appeal.

OPINION

Concord Resources Group of Pennsylvania, Inc. (Concord) applied to the Department under, *inter alia*, the Hazardous Sites Cleanup Act, Act of October 18, 1988, P.L. 756, 35 P.S. §6020.101 *et seq.*, for a permit to construct and operate a hazardous waste treatment and disposal facility in Clarion County. The first step in the application process was a Phase I

siting application, which Concord submitted to DER on August 16, 1991. Shortly thereafter, on September 17, 1991, the Department advised Concord's Richard Gimello that the Phase I siting application was "administratively complete," and the Department would begin its technical review.[1]

The County of Clarion (County) appealed the Department's September 17 administrative completeness determination on October 17, 1991. County argued that the Department's determination was arbitrary and capricious and contrary to law because Concord's Phase I siting application did not contain all of the information required under the regulations. County further argued that the Department's determination effectively undermined County's right, under 35 P.S. §6020.309(c), to also review Concord's Phase I siting application.

The Department's technical review of Concord's Phase I siting application, which began after the September 17 completeness determination letter, lasted only until October 7, 1991, when the Department denied Concord's Phase I siting application on its merits because Concord had failed to comply with the exclusionary criteria regarding wetlands under 25 Pa. Code §269.23. On November 6, 1991, Concord filed a notice of appeal from this denial at EHB Docket No. 91-482-W, and then on March 6, 1992, petitioned the Board to withdraw that appeal. By order dated March 11, 1992, Concord's appeal was closed and discontinued.

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[1] Under 35 P.S. §6020.309(c), the Department had five months from its receipt of Concord's "administratively complete" Phase I siting application to review it for conformity with the Phase I exclusionary criteria at 25 Pa. Code Ch. 269, Subch. A. If the Department approved Concord's Phase I siting application, it would have 90 days to determine whether the Phase II application is "administratively complete." 35 P.S. §6020.309(d). The Department would then have ten months to review the Phase II application for conformity with the permit requirements of 25 Pa. Code Ch. 265, Subch. R, and the Phase II exclusionary requirements of 25 Pa. Code Ch. 269, Subch. A.

On January 6, 1992, Concord filed this motion to dismiss County's appeal, arguing that County's appeal was moot because the Department had since denied Concord's application on the merits.[2] In response to Concord's motion to dismiss, County argued that its appeal was not moot because Concord had appealed the Department's denial of the siting application, and, if Concord were successful in its appeal, the Department would then continue its technical review of an incomplete application.

"A matter before the Board becomes moot when an event occurs [that] deprives the Board of the ability to provide effective relief." *New Hanover Corp. v. DER*, 1991 EHB 1127, 1129. In *New Hanover Corp.*, appellant challenged the Department's refusal to process its application for an earth disturbance permit modification. The Department subsequently denied appellant's application on the merits. *Id.* at 1127-28. Because the Department had already processed Appellant's application, the Board could no longer grant the relief sought and dismissed the appeal.

Here, the Board can no longer grant the relief County seeks. In its notice of appeal, County objected to the Department's determination that Concord's siting application was "administratively complete." County wanted the Board to prevent any technical review of Concord's application until the application was truly complete. The relief County sought has been effectively accomplished through subsequent events. Because Concord withdrew its appeal of the Department's denial on the merits, there is no possibility that the

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[2] Concord also argued that the Department's determination of administrative completeness was not an appealable action and that County lacked standing to file its appeal. Since the Board is deciding this motion on the basis of mootness, it is unnecessary to address Concord's other arguments.

Department will continue its technical review of the application. The Board cannot grant County any effective relief and County's appeal is, therefore, moot.

ORDER

AND NOW, this 30th day of October, 1992, it is ordered that Concord's Motion to dismiss is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: October 30, 1992

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M. DIANE SMI
SECRETARY TO THE

CARROLL TOWNSHIP BOARD OF SUPERVISORS	:	
	:	
v.	:	EHB Docket No. 92-219-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: November 2, 1992

OPINION CONFIRMING ORDER DENYING
PETITION FOR SUPERSEDEAS

OPINION DENYING PETITION FOR RECONSIDERATION

Maxine Woelfling, Chairman

A petition for supersedeas of a Department of Environmental Resources' ("Department") order directing petitioners to enact an ordinance prohibiting the issuance of building permits or the granting of final subdivision approval without the requisite planning approval under the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 *et seq.* ("Sewage Facilities Act") is denied where petitioners have failed to satisfy any of the criteria for grant of a supersedeas. Petitioners are unlikely to succeed on the merits of their claim that the order is not authorized by the Sewage Facilities Act and impermissibly pre-empts the Pennsylvania Municipalities Planning Code, the Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §10101 *et seq.* ("Municipalities Planning Code"). Nor can the petitioners succeed on the merits of their claim that the order was an unreasonable response to an isolated incident where the petitioners have approved numerous subdivisions

without sewage facilities planning approval. Petitioners have no standing to assert claims of irreparable harm on behalf of their residents nor will petitioners suffer irreparable harm as a result of the expense, inconvenience, and political consequences of enacting an ordinance. Finally, petitioners cannot establish that the public will not be harmed by the grant of a supersedeas where prospective purchasers of lots with no planning approval may suffer harm.

A petition for reconsideration must be denied where it merely repeats the same arguments initially made in support of petitioners' claims.

OPINION

This matter was initiated with the June 16, 1992, filing of a notice of appeal by the Carroll Township Board of Supervisors ("Supervisors"), seeking review of a May 18, 1992, order from the Department. The order, which was issued pursuant to the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, and the Sewage Facilities Act, alleged that the Supervisors had issued an on-site sewage disposal system permit in a subdivision which had not received the requisite sewage facilities planning approval. The Supervisors disputed the necessity for Sewage Facilities Act planning approval for the subdivision and challenged the order as being beyond the Department's authority in that subdivision ordinances adopted by municipalities pursuant to the Municipalities Planning Code pre-empt any planning requirements for subdivisions imposed by the Sewage

Facilities Act. The Supervisors also argued that even if the Department had the authority to issue the order, it was an abuse of discretion because it was an unreasonable response to an isolated incident.[1]

On August 13, 1992, concurrent with the filing of their pre-hearing memorandum, the Supervisors filed a petition for supersedeas.[2] Because, but for the filing of the Department's pre-hearing memorandum, the matter was ripe for scheduling a hearing on the merits, the Board suggested that a combined supersedeas/merits hearing be scheduled on September 8, 1992. That hearing was conducted on the scheduled date and, on September 22, 1992, an order was issued denying the Supervisor's petition. Thereafter, on October 13, 1992, the Supervisors petitioned for reconsideration of the order.[3] This opinion confirms that order and disposes of the petition for reconsideration.

PETITION FOR SUPERSEDEAS

Section 4(d) of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7514(d), empowers the Board to supersede a Department action pending an appeal to the Board and directs the Board to consider irreparable harm to the petitioner, the likelihood of injury to the public or third parties, and the petitioner's chance of succeeding on the

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[1] The order, *inter alia*, directed the Supervisors to adopt, within 90 days,
ordinances prohibiting the issuance of building permits and the granting of final subdivision approvals prior to either the approval of a sewage facilities plan revision for the subdivision or a determination by the Department that sewage facilities planning approval was unnecessary.

[2] The deadline for compliance with the Department's order was August 6, 1992.

[3] The Supervisors also filed a petition for review at No. 2178 C.D. 1992 which was *sua sponte* dismissed by the Commonwealth Court.

merits of its claim. A supersedeas cannot issue where it would result in pollution or injury to the public health, safety, or welfare. This statutory provision also recognizes that the Board is to be guided by its own precedents, as well as relevant judicial precedents, in evaluating requests for supersedeas.

The Supervisors' claim that they are likely to succeed on the merits of their appeal fall into two categories - the Department had no authority to issue the order and, even if it did, it was an abuse of discretion. While the Board may supersede an action of the Department where the Department had no authority to take such action and need not evaluate harm to the petitioners or third parties, Lawrence Blumenthal v. DER, 1990 EHB 187, that is not the case here.

A point of contention between the Department and the Supervisors is whether a plan revision is required under 25 Pa. Code §71.51 where no immediate construction on the lots within the subdivision is contemplated by the developer and/or municipality. While the Supervisors' argument has some practical appeal, it is inconsistent with the language of the statute. A municipality is required to revise its official plan whenever a new subdivision is proposed, unless exempted by 25 Pa. Code §71.55. The definitions of "lot" and "subdivision" in §2 of the Sewage Facilities Act make it clear that the Department's authority to require plan revisions for subdivisions of land extends to any subdivision and not just those where building will soon occur. Neither of these definitions make any reference to construction or building. The definition of "lot" refers to a part of a subdivision "used as a building site or intended to be used for building purposes, whether immediate or future...," while "subdivision" refers only to the division of the land into two or more lots. Given such clear definitions,

it can hardly be said that the Department could not require a plan revision under the circumstances herein.

As to the remedy selected by the Department - requiring Sewage Facilities Act planning approval for a subdivision prior to its final approval under the Municipalities Planning Code, it cannot be concluded that the Department lacked the authority to prescribe such a remedy. Section 10 of the Sewage Facilities Act gives the Department broad authority to order a local agency to undertake appropriate actions to assure that the permitting provisions of §7 of the statute are administered in conformance with the requirements of the Act. This authority is elaborated upon in 25 Pa. Code §72.43(c)(2) and (6), wherein the Department is empowered to order the local agency to modify its administrative procedures and to co-ordinate issuance of on-lot disposal permits with subdivision approvals under local ordinances. The actions ordered here by the Department are certainly within the ambit of §10 of the statute and §72.43 of the regulations.

The Supervisors also contend that the Department's order is inconsistent with the Municipalities Planning Code as it applies to subdivision approval and, is, therefore, pre-empted. More specifically, they assert that 25 Pa. Code §71.51 is inconsistent with §503(4) of the Municipalities Planning Code, 53 P.S. §10503(4). However, what the Department has ordered does not conflict with the Municipalities Planning Code.

An examination of the language of §503(4) reveals no such inconsistency for it authorizes municipalities to adopt subdivision and land development ordinances containing

> "Provisions which take into account phased land development not intended for immediate erection of buildings where ... improvements may not be possible to install as a condition precedent to

> final approval of the plats, but will be a condition precedent to the erection of buildings on lands included in the approved plot."

Planning for sewage facilities under the Sewage Facilities Act and 25 Pa. Code §71.51 and installing such facilities as part of the land development are two related, but nonetheless, separate aspects of property development. As a matter of common sense, planning for improvements such as sewage facilities should be well thought out in advance of actual subdivision development. The scheme suggested here by the Supervisors places sewage facilities planning very late in the process, at a point where it is sure to contribute to delay in land development.

Similarly, it cannot be concluded that the order was an abuse of discretion in that it was a response to a single incident which was later addressed by the Supervisors. Paragraph D of the order does refer to a single permit in the Gore subdivision, but that reference is preceded by "includes, but is not necessarily limited to, ... " And, Mr. Feister, a Water Quality Specialist responsible for reviewing the work of municipal sewage enforcement officers, testified regarding another incident involving the Dodge subdivision (N.T. 46-51).

But, most telling is the testimony of Norman H. Shelly, Jr., a Carroll Township Supervisor. He indicated that since 1988, 21 subdivisions "not for development" were approved without sewage facilities planning approval (N.T. 99-100). Thus, rather than the Gore subdivision being an isolated incident, Carroll Township apparently routinely approves subdivisions without sewage facilities planning approval if the subdivider indicates there will be no immediate development. Under such circumstances, the Department's order is hardly an abuse of discretion.

The Supervisors' claims of irreparable harm fall into two categories: harm to the residents of Carroll Township if they must secure sewage facilities planning approval for subdivisions where the subdivider has no immediate building plans and infringement on the local political process as a result of Carroll Township being forced to enact an ordinance without benefit of public input.

The former of these claims must fail because, as the Department correctly points out, the Supervisors have no standing to assert that the Department order will result in harm to individual property owners in the municipality. Ramey Borough v. Department of Environmental Resources, 15 Pa. Cmwlth. 601, 327 A.2d 647 (1974). The latter claim must also fail, for while it takes time and effort to enact an ordinance, the Department's order did not foreclose public involvement in the local legislative process. The Second Class Township Code, the Act of May 1, 1933, P.L. 103, as amended, 53 P.S. §65741, prescribes a range of not less than seven nor more than 60 days for advertisement of ordinances.[4] Such a range in the statute preserves public participation in the local legislative process, even where time schedules for enactment of ordinances are constricted by state legislative or administrative mandates. Nor do we believe that the costs to a municipality of drafting and publishing an ordinance rise to the level of irreparable harm. The enactment of any municipal ordinance entails the involvement of the municipal solicitor and advertisement in a local newspaper. The Supervisors have failed to advance any evidence which would distinguish the costs associated with the enactment of the ordinance at issue here from the costs associated with the enactment of any other ordinance. And, finally, the fact that the Supervisors

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[4] We take official notice that Carroll Township is a second class township.

may suffer political harm if forced to comply with the Department's order does not constitute irreparable harm. Public officials often must carry out duties and responsibilities which may not win the favor of their constituents.

The Supervisors argue that there will be no harm to the public or third parties should the Department's order be superseded by the Board, reasoning that the Department's exemption of certain subdivisions from planning approval requirements is a recognition that no harm will befall the public should sewage facilities planning not occur with every subdivision. This rather simplistic argument ignores the nature and extent of the exemptions set forth in 25 Pa. Code §71.55. The exemptions are severely limited[5] and there must be assurances of suitability for on-lot sewage disposal systems. Those safeguards are not present with the Supervisors' method of dealing with subdivisions where building will not immediately occur, for the determination of suitability will not be made until very late in the process. Nor can the notification required by §7.1 of the Sewage Facilities Act obviate this problem, for all the statutory provision requires is that a sales contract for a lot advise the purchaser of the availability of a community sewage disposal system and the necessity for obtaining a permit for an on-site sewage disposal system. Thus, while the developers would not incur the costs of testing the subdivision for on-lot sewage disposal systems, the prospective purchaser may later incur unanticipated costs in testing the lot and, if possible, designing an on-site sewage disposal system. Because the Board must consider the likelihood of injury to other parties in deciding whether to grant a supersedeas and such a likelihood exists here, the petition must fail on these grounds.

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[5] Subdivisions of ten lots or less, involving single-family detached homes with on-lot sewage disposal systems.

PETITION FOR RECONSIDERATION

The Supervisors have petitioned for reconsideration of the order denying their request for supersedeas. The Department, in its response, correctly points out that the Supervisors merely re-iterate their initial arguments in support of the petition for supersedeas. Consequently, the Supervisors' petition for reconsideration must be denied, Centre Lime and Stone Company, Inc. v. DER and Bellefonte Lime Company, Inc., EHB Docket No. 88-271-F (Opinion issued July 9, 1992).

O R D E R

AND NOW, this 2nd day of November, 1992, it is ordered that:

1) The Board's order of September 22, 1992, denying the Supervisors' petition for supersedeas is affirmed; and

2) The Supervisors' petition for reconsideration is denied.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: November 2, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

BOARD OF COMMISSIONERS OF UNION COUNTY	:	
	:	
v.	:	EHB Docket No. 91-539-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES and	:	
U.S.P.C.I. OF PENNSYLVANIA, INC., Permittee	:	Issued: November 3, 1992

OPINION AND ORDER SUR
PERMITTEE'S MOTION TO DISMISS

By: Richard S. Ehmann, Member

Synopsis

Where the Department of Environmental Resources ("DER") advises the applicant for a permit to operate a hazardous waste facility that the Phase I application has been determined to be sufficiently complete so that DER may begin a technical review of the merits thereof, it has not acted in such a way that its actions generate a right in third parties to appeal therefrom to this Board. DER's action is not a final action on this application and thus the Motion To Dismiss must be granted.

OPINION

By letter dated November 8, 1991, DER wrote to U.S.P.C.I. of Pennsylvania, Inc. ("USPCI") advising it that USPCI's Phase I application had been determined to be administratively complete and that as a result, DER would begin its technical review thereof. On December 12, 1991, this Board received a Notice Of Appeal from the Board of Commissioners for Union County ("Union County") challenging for numerous reasons the decision reflected in

DER's November 8, 1991 letter.[1] Thereafter, USPCI filed a Motion To Dismiss the appeal and Memorandum Of Law in support thereof. Union County has filed a Response To Motion To Dismiss. It has also filed a Motion to Consolidate the instant proceeding with its appeal from DER's approval of USPCI's Phase I application. This latter appeal is found at Docket No. 91-284-F. By Order dated September 29, 1992 we denied the Motion To Consolidate. By letter dated March 26, 1992, DER joined in USPCI's Motion To Dismiss.

The basis for USPCI's Motion To Dismiss is that this Board's jurisdiction is limited to appeals of orders, permits, licenses or decisions by DER as affecting personal or property rights, privileges, immunities, duties, liabilities or obligations and that this DER letter does none of these. Hence, USPCI argues the letter is not a DER action or an adjudication appealable to this Board and thus we lack jurisdiction to hear this appeal.

Union County's Response To Motion To Dismiss merely admits or denies the allegations in USPCI's Motion. It denies we have any restricted jurisdiction and its Memorandum Of Law says USPCI and DER misinterpret what constitutes an adjudication. Union County argues Springettsbury Township Sewer Authority v. DER, 1985 EHB 492, gives "decision" its commonly understood meaning. Union County then asserts that the DER positions set forth in its

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[1] The Notice Of Appeal states Union County is only appealing from DER's November 8, 1991 letter, but elsewhere within the County's objections it also lists objections to a DER letter of October 4, 1991. Only the November 8th letter is attached to the Notice of Appeal and is before us in this appeal. However, had DER's letter of October 4, 1991 been before us, it would suffer from the same weakness in terms of appealability as the November 8th letter. DER's October 4, 1991 letter (attached to USPCI's Motion To Dismiss as Exhibit 2) set forth DER's determination that because of the type of facility proposed by USPCI, certain exclusionary criteria found in 25 Pa. Code §§269.21, 269.24 and 269.25 would not apply to the subsequently filed Phase I application.

two letters are decisions affecting "personal or property rights, privileges, immunities, duties and liabilities and obligations", even though they admittedly do not grant USPCI a permit. Union County asserts the cases cited in USPCI's Memorandum Of Law are inapplicable because they involve local opposition groups, not host counties, that DER's letter violates the terms of its own guidance manual, and that DER's approval denies Union County the right to inspect UPSCI's site as set forth in an agreement between Union County and USPCI. Finally, Union County asserts in response to allegations made by USPCI that while Section 309(e) of the Hazardous Sites Cleanup Act, Act of October 18, 1988, P.L. 756, No. 108, 35 P.S. §6020.309(e), may discourage review of DER preliminary decisions on such sites by this Board, that statutory discouragement is only meant to exclude reviews of the preliminary decisions by the Secretary of the Department of Environmental Resources, not review of preliminary decisions of others at DER.

We start our evaluation of this Motion and Response with our recent decision in Environmental Neighbors United Front, et al. v. DER, et al., EHB Docket No. 91-372-MJ (Opinion issued September 24, 1992) ("E.N.U.F. v. DER"). There, citizens groups and two municipalities challenged a DER approval of an application for a hazardous waste facility permit as complying with the requirements found in 25 Pa.Code §§269.21 through 269.29. These are the sections of the regulations setting forth the criteria which automatically cause rejection of an application when they are not met. They are the Phase I criteria applicable to USPCI's proposed facility in the instant appeal. There, the Motion To Dismiss was granted. We found such an approval by DER was not an action or adjudication which could be appealed to this Board and said that in the event a permit is granted following completion of DER's

review of that application "...Appellants are free to raise their challenge at that time." What applied there applies, as well, here. Insofar as DER has not decided that a permit may be issued to USPCI or even that USPCI's application meets the Phase I requirements and may yet reject this USPCI application,[2] its decision is not final as to this application. As such, it is not appealable to this Board. If, and when that decision is made and Union County elects to appeal it, Union County may raise every error it believes that DER has made whether dealing with issues in DER's October 4, 1991 letter, and its November 8, 1991 letter or errors it has yet to make in the ongoing review process.

As to Union County's assertion that the case law cited by USPCI does not apply to it, we point again to the decision in E.N.U.F. v. DER, wherein many of the cases cited by USPCI are applied to reach the conclusion we concur with above. The fact that Union County is the potential host county for the USPCI proposed facility does not affect the applicability of this Board's prior decisions as to what constitutes an appealable act or decision of DER.

As to Union County's assertion that DER's November 8th letter violates the terms of DER's guidance manual, this is a factual assertion based on facts *dehors* the record and for resolution at a hearing on the merits of an appeal from an appealable action or adjudication of DER. Even if we assume that Union County's assertion is true, this does not impact on the appealability of DER's letter and Union County's Memorandum Of Law offers no suggestion that it does.

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2 That DER has already rejected one version of a USPCI application is evidenced by the proceeding captioned U.S.P.C.I of Pennsylvania, Inc. v. DER, et al., EHB Docket No. 91-392-F, wherein Union County is an intervenor.

The basis for Union County's argument that DER's action deprives it of the right to inspect USPCI's facility, which right is set forth in an agreement between USPCI and the County, is also not spelled out anywhere in Union County's filing. Moreover, while its counsel has signed a verification the allegations in Union County's Response To Motion To Dismiss are true and correct, this factual allegation is set forth in the County's unverified Memorandum Of Law. Agreements between Union County and USPCI and their breach are not a basis for finding jurisdiction of this Board or a lack thereof. If there can be an appeal to this Board, it is because of actions of DER, not agreements between other parties, especially where there is no explanation given as to how DER's action could deprive Union County of this right.[3] Accordingly, this right's existence and its enforceability cannot be before this Board and, if it exists, it does not form a basis for our jurisdiction since its existence is independent of DER's letter.

Finally, USPCI asserts that the only appeal which lies for Union County lies at the point the Secretary of DER makes a decision to issue the hazardous waste facility's permit. It cites Section 309(e) of the Hazardous Sites Cleanup Act, *supra*, for this proposition. In reply, Union County has asserted that Section 309(e) may limit appeals from interim actions of the Secretary but not from interim actions of lower level DER personnel. In light of the limited time frame for DER actions on applications for permits for hazardous waste facilities, we see some weakness in Union County's position since appeals to us from lower level approvals could prevent the statutory time table found in Section 309 from being met. However, we are also not

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3 We also lack the power to adjudicate private contract rights. Bob Groves-Plymouth Co., et al. v. DER, 1976 EHB 266.

prepared to say that only the Secretary's decision is appealable regardless of the facts which may surround some other DER action on a permit application, and that Section 309 eliminates all appeals by third parties except for that specified therein.[4] We need not reach a decision on this point however because we have decided USPCI's Motion has merit in this appeal. Accordingly, we enter the following Order.

ORDER

AND NOW, this 3rd day of November, 1992, it is ordered that USPCI's Motion To Dismiss is granted and Union County's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

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4 The speed with which the DER Secretary must act to approve or reject this permit application after publication of notice of his intended action is not spelled out in this statute.

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: November 3, 1992

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M. DIANE SM
SECRETARY TO THE

SUNSHINE HILLS WATER COMPANY	:	
	:	
v.	:	EHB Docket No. 91-518-E
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	: :	Issued: November 5, 1992

OPINION AND ORDER SUR
SUR DER's MOTION TO DISMISS

By Richard S. Ehmann, Member

Synopsis:

Where the moving party in a motion for summary judgment establishes factual support for its contentions via affidavits and the other means outlined in Pa. R.C.P. 1035, then, pursuant to Pa. R.C.P. 1035(d), the burden shifts to the non-moving party to establish the existence of a material factual dispute. Where no such filing is attempted by the non-moving party, the only question left is whether the movant is entitled to the summary judgment sought on the theory advanced by the motion.

Where the facts show a public water supply sought a variance from the obligation to comply with the iron and manganese maximum contaminant levels (MCLs), but did not demonstrate compliance with 25 Pa. Code §109.901(a)(1), DER properly returned the request to the variance-seeker pursuant to 25 Pa.Code §109.905 because compliance with §109.901(a)(1) is a mandatory prerequisite to issuance of a variance by DER. A motion for summary judgment on this theory is therefore sustained.

OPINION

On December 2, 1991, the Board received a Notice of Appeal filed by Sunshine Hills Water Company (Sunshine). Sunshine was appealing from the Department of Environmental Resources' (DER) letter to Sunshine dated November 14, 1991, which denied Sunshine's request for a variance under 25 Pa. Code §109.901 from the requirement to treat the water it provides to its customers to the degree necessary to meet the MCLs for iron and manganese at its water supply in Penn Township, Perry County.

After Sunshine had filed its pro se Pre-Hearing Memorandum, DER filed a Motion For Summary Judgment. DER's Motion asserts that while Sunshine has sought a variance, the statements of fact in its Pre-Hearing Memorandum show that Sunshine fails to meet the mandatory standards set forth in Section 109.901(a) for the granting of a variance by DER. Accordingly, DER concludes its denial of the variance request must be sustained.

Sunshine's Response to DER's Motion, in addition to a letter stating it objects to the request for summary judgment, does not directly respond to the issue raised by the Motion and the contention set forth therein. Rather, Sunshine's unverified Response is that it intends to show the levels of iron and manganese levels in its water in amounts above DER's current standard are common conditions, and that iron and manganese are secondary contaminants, not health hazards, and they are manageable by regular flushing as undertaken by Sunshine. Sunshine then repeats each of the reasons it has appealed DER's variance denial. It asserts regular flushing is the best method of treatment, and that other methods, including that suggested by DER, are no better in treatment and produce an environmentally undesirable sludge, in addition to being expensive. Next, Sunshine says flushing is the only method it can use because any other method must be approved by DER, which has not approved any other methods since 1988, even though Sunshine wishes to use another method

called sequestration.[1] Finally, Sunshine's response argues that DER failed to offer it a chance to resolve this disagreement with DER prior to DER's denial of the variance request.

Motions for summary judgment before this Board are governed generall by the standards set forth in Pa.R.C.P. 1035. Felton Enterprises, Inc. v. DE 1990 EHB 42. This is of critical import here because Pa.R.C.P. 1035(d) provides in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, 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. (Emphasis added.)

Here, DER's Motion is supported by 2 affidavits and 2 exhibits. The first affidavit by Patricia J. Romano, a DER Sanitarian Supervisor, recites the violations by Sunshine of the of the iron and manganese MCLs found in 25 Pa.Code §109.301. The second affidavit is by DER's Crystal Newcomer, a professional engineer and Chief of the Technical Services Section within DER's Bureau of Community Environmental Control. Newcomer's affidavit states that Sunshine has not installed the best treatment technology, treatment methods, or other means that the Department, in connection with the Administrator of EPA, finds are generally available to reduce the level of iron and manganese. It states the best methodology for this type of treatment is green sand filtration and that DER's Public Water Supply Manual (a copy of portions of this Manual are attached to the affidavit), the policy document on design and

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[1]Sunshine presently has an appeal pending before this Board at Docket No. 92-112-E from DER's denial of its application for a public water supply permit. There, DER rejects use of the sequestration methodology for treatment of the water as one ground for denial of Sunshine's application for a permit.

construction of public water supply systems, lists four methods of treatment, none of which are flushing or sequestration. The affidavit says regular flushing is not the best treatment technology, treatment method or a means that DER and the EPA Administrator find to be generally available to reduce contaminant levels, but is a necessary operation and maintenance procedure for all water distribution systems and not a treatment technology or method. Also attached to DER's Motion is a copy of DER's letter which Sunshine appealed and Sunshine's letter of July 14, 1991 seeking the variance under 25 Pa. Code §109.901, stating that Sunshine uses "the best method of regular flushing" to treat iron and manganese.[2]

Sunshine's Response to DER's Motion contains no supporting affidavits or documents of any type which make a showing that there is a factual dispute between Sunshine and DER as to the allegations in DER's Motion. When DER filed its Motion and supporting documentation, the burden shifted to Sunshine to offer rebuttal. Roland v. Kravco, Inc., 355 Pa. Super. 493, 513 A.2d 1029 (1986). This burden has not been met. Accordingly, under Felton Enterprises, Inc., *supra*; Thompson & Phillips Clay Company, Inc. v. DER, 1990 EHB 105, affirmed, 136 Pa. Cmwlth. 300, 582 A.2d 1162, (1990), pet. for alloc. denied, __Pa.__, 598 A.2d 996(1991); and Pa. R.C.P. 1035(d), we see no disputes on material facts and move on to determine whether DER is entitled to summary judgment based thereon.

DER acted pursuant to regulations promulgated under the Pennsylvania Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, 35 P.S. §721.1 *et seq.* ("the Act"). In section 2(a) (35 P.S. §721.2), the Act states that the Federal Safe Drinking Water Act, 42 U.S.C. §300(f) *et seq.*, provides a

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[2]Patricia Romano's affidavit did not accompany DER's Motion when filed with us on Friday, June 5, 1992, but was received on Monday June 8, 1992.

comprehensive framework for regulating potable water's collection, treatment, storage and distribution. It goes on to say it is in our state's public interest to assume primary enforcement responsibility under the federal statute. Thereafter, section 4 of the Act (35 P.S. §721.4) empowers the Environmental Quality Board ("EQB") to adopt regulations to implement the Act, and in Section 5 (35 P.S. §721.5) DER is empowered to enforce drinking water standards and administer the Act and regulations (including the steps needed to maintain primacy under the federal statute). The regulations promulgated by the EQB under the Act are found at 25 Pa. Code Chapter 109. 25 Pa Code §109.202(2) adopts by reference the MCLs for iron and manganese in a public water supply's water set forth in 40 C.F.R. §143.3 as applicable standards within Pennsylvania. Romano's affidavit states that the MCLs are .3 mg/l and .05 mg/l for iron and manganese respectively, and lists the dates and amounts of the violations thereof from analysis of water sampled at Sunshine's facilities. Sunshine's request for a variance from compliance with these MCL standards also implicitly admits noncompliance therewith.

25 Pa. Code §109.901(a) provides:

> The Department may grant one or more variances to a public water system from a requirement respecting a maximum contaminant level upon finding that:
>
> (1) The public water system has installed and is using the best treatment technology, treatment methods or other means that the Department in concurrence with the Administrator finds are generally available to reduce the level of the contaminant.
>
> (2) The water supplier has demonstrated to the Department that, because of characteristics of the raw water sources which are reasonably available to the system, the system cannot meet the requirements respecting the maximum contaminant levels.

Obviously Section 109.901(a) requires DER to find each of subparts (1) and (2) before it can grant any variance to Sunshine. DER's affidavit by Crystal Newcomer, P.E., says there are four methods to treat water containing iron and manganese to the point it meets the respective MCLs and they are set forth in DER's Public Water Supply Manual. They are: (1) oxidation, detention and filtration; (2) Lime-Soda Softening; (3) Manganese Green Sand Filtration; and (4) ion exchange.[3] The pages of this manual attached to Newcomer's affidavit confirm these are the recognized treatment methods and that regular flushing and "sequestration" are not DER and EPA approved methods of treating for compliance with these MCLs. Accordingly, Sunshine's variance request fails to demonstrate compliance with 25 Pa. Code §109.901(a)(1). Under these circumstances DER could not lawfully grant Sunshine a variance, so its return of Sunshine's request for the variance to Sunshine pursuant to 25 Pa. Code §109.905 was proper. Had it granted this variance it would have done so in violation of these regulations and DER may not ignore its own regulations. Mil-Toon Development Group v. DER, 1991 EHB 209 (and the cases cited therein). Accordingly, we must sustain DER's Motion and enter the following order.

O R D E R

AND NOW, this 5th day of November, 1992, it is ordered that DER's Motion for Summary Judgment is sustained and Sunshine's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

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[3]DER's Public Water Supply Manual is approved by these regulations as containing the acceptable design standards and technical guidance. See 25 Pa. Code §109.503 and Frank T. Perano v. DER, EHB Docket No. 92-195-MR (Opinion issued July 29, 1992).

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: November 5, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

HOWARD BARR	:	
v.	:	**EHB Docket No. 92-277-MJ**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
ROBERT N. BARR	:	
v.	:	**EHB Docket No. 92-283-MJ**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** November 5, 1992

OPINION AND ORDER SUR MOTION TO DISMISS

By Joseph N. Mack, Member

Synopsis

The Department of Environmental Resources' motion to dismiss each of these two appeals is granted where it is established that the appeals were not timely filed and that grounds for an appeal *nunc pro tunc* are not present. An appeal must be received by the Board, as opposed to being postmarked, within the thirty-day appeal period in order for it to be timely. Where the appellants speculate that delay occurred after the appeals were mailed due to reasons unknown to them or beyond their control, but provide no factual basis in support of this allegation, they have not established grounds for allowing an appeal *nunc pro tunc*. Nor does the appellants' allegation that the Department of Environmental Resources will not be prejudiced establish a basis for allowing an appeal *nunc pro tunc*.

OPINION

This matter involves two appeals[1], one filed by Howard Barr, at Docket No. 92-277-MJ, and the other by Robert N. Barr, at Docket No. 92-283-MJ, both from a letter of the Department of Environmental Resources ("Department"), notifying the Barrs that entry would be made on their property by the Department for the purpose of installing and maintaining an underground pipeline and collection system for the abatement of mine drainage from an abandoned mine. The Department's letter was dated June 26, 1992. The notices of appeal state that the letter was received by each of the Barrs on June 27, 1992. The appeals were received and docketed by the Board on July 28, 1992.

On September 17, 1992, the Department filed a motion to dismiss both appeals, asserting that the appeals were untimely and, therefore, outside the Board's jurisdiction.

The Barrs filed identical responses to the Department's motion on October 13, 1992. In their responses, Howard Barr and Robert Barr assert that each mailed his notice of appeal to the Board by certified mail on July 25, 1992, and that the notices of appeal were postmarked in Harrisburg on July 26, 1992, as evidenced by a copy of the return receipt card attached to the responses as Exhibit "A".[2] The Barrs state that for reasons unknown to them and beyond their control, the appeals were not docketed by the Board until July 28, 1992. A copy of the return receipt card attached to the Barrs' responses shows the date of receipt by the Board as July 28, 1992. The Barrs also request leave to file their appeals *nunc pro tunc*.

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[1] Because the appeals are taken from the same action and are identical, we have elected to treat both in the same Opinion and Order.

[2] Because of the poor quality of the reproduction of the return receipt card, it is unclear whether the date of the postmark reads "26 July 1992" or "28 July 1992". However, because of our ruling herein, the date of the postmark in Harrisburg is not an issue in contention.

The Board's rules at 25 Pa. Code §21.52(a) state as follows:

> [J]urisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of such action...

The Barrs' appeals were filed on July 28, 1992, thirty-one days after receiving the Department's letter on June 27, 1992. Therefore, they were untimely and the Board is without jurisdiction to hear them.

The Board upon written request and for good cause shown may grant leave for the filing of an appeal *nunc pro tunc*. 25 Pa. Code §21.53(a). It has been established that "good cause" requires a showing of fraud or a breakdown in the operation of the Board. Falcon Oil Company v. DER, 1991 EHB 1503, 1505; Parker Oil Company v. DER, 1991 EHB 1180, 1182; Pierce v. Penman, 357 Pa. Super. 225, 515 A.2d 948 (1986), appeal denied, ___ Pa. ___, 529 A.2d 1082 (1987).

The Barrs have raised no allegations of fraud or breakdown in the internal operation of the Board. The only bases provided by the Barrs for allowance of their appeals *nunc pro tunc* are (1) that they made a good faith effort to comply with the Board's rules since their appeals were postmarked prior to the end of the thirty-day appeal period but for reasons unknown to them were not received by the Board until one day after the appeal period, and, (2) that the Department has not been prejudiced by the late filing.

As to the Barrs' argument that they made a good faith effort to comply with the Board's rules, it is the date on which an appeal is received by the Board, as opposed to the date on which it is postmarked, that is determinative of whether it is timely filed within the thirty-day appeal period, 25 Pa. Code §21.11. See Wayne McClure v. DER, EHB Docket No. 92-023-E (Opinion and Order Sur Timeliness of Appeal issued March 5, 1992). As to the

Barrs' contention that the receipt and docketing of the appeals by the Board were somehow delayed for reasons unknown to the Barrs and beyond their control, they have provided us with no factual basis supporting this allegation. Mere speculation as to a breakdown either in the postal system or in the Board's internal filing procedures does not provide a basis for granting an appeal *nunc pro tunc*. See Sylvia and Jean Defazio t/a Diamond Fuel, Inc. v. DER, 1990 EHB 823.

As to whether the Department would suffer any prejudice as a result of the one-day late filing, there is no support for the Barrs' assertion that a lack of prejudice to the opposing party serves as a basis for allowing an appeal *nunc pro tunc*. Township of Potter v. DER, 1991 EHB 564, 566.

Finally, as to the Barrs' contention that the Board's rules are to be liberally construed, where there is a specific time limit established by the rules, there is no room for liberal interpretation or construction. The language of 25 Pa. Code §21.52(a) is clear and has been strictly interpreted by the Commonwealth Court and adhered to by the Board. Edgar Newman, Jr. v. DER, 1991 EHB 1508, 1510.

In conclusion, we find that the Barrs' notices of appeal were not timely filed and further, that they have provided us with no grounds for allowing their appeals to be filed *nunc pro tunc*. Because the Board lacks jurisdiction to hear an appeal which is not timely filed, this appeal must be dismissed. Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

O R D E R

AND NOW, this 5th day of November, 1992, it is hereby ordered that the Department's motion to dismiss is granted, and the appeals docketed at No. 92-277-MJ and 92-283-MJ are dismissed.

EHB Docket Nos. 92-277-MJ
92-283-MJ

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
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DATED: November 5, 1992

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M. DIANE SMITH
SECRETARY TO THE BOA

AL HAMILTON CONTRACTING COMPANY	:	
	:	**EHB Docket No. 85-392-W**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** November 6, 1992

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

By Maxine Woelfling, Chairman

Synopsis

An appeal of a permit denial pursuant to the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.* (Surface Mining Act), and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (Clean Streams Law), is dismissed. The Department of Environmental Resources (Department) is justified in denying a permit under the Surface Mining Act and Clean Streams Law where the applicant concedes that the site in question has the potential to generate acid mine drainage and the applicant fails to demonstrate either that it could neutralize any acid mine drainage produced or that it could prevent the acid mine drainage from escaping into waters of the Commonwealth.

Where a permit applicant fails to demonstrate that its proposal will comply with all applicable statutes and regulations of the Department, the Department need not, under Article I, Section 27, of the Pennsylvania Constitution, determine whether the environmental harm has been minimized or balance the environmental harm against the benefits to be derived.

The Department did not violate the due process clause by denying a permit application containing an alkaline addition proposal. While no statutes, rules, or regulations specifically address how the Department should evaluate alkaline addition proposals, the Department can exercise discretion in reviewing such proposals. An assertion by a permit applicant that the Department approved other permit applications which proposed alkaline addition is, without more, insufficient to establish violations of the due process clause. The Department's decisions were based in part on the particulars of the alkaline addition plans--not simply the fact that the applications contained alkaline addition proposals--and the permit applicant failed to establish that the particulars of the other alkaline addition plans were comparable to its proposal. The due process clause, moreover, does not require that the Department "cooperate" with a permit applicant's consultant, since such cooperation is neither a "fundamental value" nor does it pertain to notice or "an opportunity to be heard and to defend in an orderly proceeding before an impartial tribunal of competent jurisdiction."

The Department did not violate the equal protection clause by denying a permit application containing an alkaline addition proposal, simply because no statutes, rules, or regulations govern the particulars of alkaline addition. The equal protection clause is implicated only where a governmental unit adopts a rule that has a special impact on less than all persons subject to its jurisdiction.

The Board, finally, may consider post-denial evidence when determining whether the Department abused its discretion by denying a permit.

INTRODUCTION

This matter was initiated with the September 24, 1985, filing of a notice of appeal by Al Hamilton Contracting Company (Hamilton), seeking review

of the Department's August 30, 1985, denial of a surface mining permit under the Surface Mining Act and the Clean Streams Law. Hamilton sought to mine property on the Lansberry site in Bradford Township, Clearfield County. The denial letter identified three reasons for the Department's decision: (1) Hamilton failed to demonstrate that there was no presumptive evidence of potential pollution of Commonwealth waters; (2) Hamilton failed to demonstrate that it would prevent damage to the hydrologic balance, both within and outside the permit area; and, (3) the proposed activity would present an unacceptable risk to adjacent water supplies.

The Board conducted a hearing on the merits on June 9, 10, 11, and 12, 1987, and August 27 and 28, 1987. During the course of the hearing Hamilton moved to strike expert testimony of Joseph J. Lee regarding the efficacy of Hamilton's alkaline addition plans, the direction of groundwater flow, and the likely impact of the proposed mining operation on nearby water supplies. Both parties submitted memoranda on the motion and the presiding Board Member, Maxine Woelfling, denied the motion at 1991 EHB 1799. The Board as a whole hereby adopts that opinion.

Hamilton submitted its post-hearing brief on March 27, 1989, and the Department responded with its brief on July 19, 1989. Any issues not raised in the parties' post-hearing briefs are deemed waived. Lucky Strike Coal Co. and Louis J. Beltrami v. DER, 119 Pa. Cmwlth. 440, 546 A.2d 447 (1988).

Hamilton raises three main issues in its post-hearing brief. It contends that: (1) the Board erred when it admitted post-denial evidence to determine whether the Department abused its discretion by denying the permit; (2) the Department, by denying Hamilton's permit, acted in a manner which was arbitrary, capricious, contrary to law, and a manifest abuse of discretion; and, (3) it has clear entitlement to the permit. The Department, meanwhile,

argues that the Board properly admitted the post-denial evidence, that the Department's denial of Hamilton's permit was in full accordance with the law, and that, in any case, Hamilton has failed to demonstrate that it is clearly entitled to the permit.

The record consists of a transcript of 1,149 pages, 16 exhibits, and the deposition of Keith Brady, a Department hydrogeologist. After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant is Hamilton, a Pennsylvania corporation with its principal place of business at R. D. 1, Box 87, Woodland, Clearfield County, Pennsylvania 16881. (Ex. A-1)[1]

2. Appellee is the Department, the agency with the authority to administer and enforce the Clean Streams Law and the Surface Mining Act and the rules and regulations promulgated pursuant to each.

3. On or about January 12, 1984, Hamilton submitted to the Department a surface mining permit application to mine a 187 acre plot, known as the Lansberry site, in Bradford Township, Clearfield County. (Ex. A-1, A-3)

4. In the permit application as submitted on January 12, 1984, Hamilton requested a waiver of the overburden analysis required by §4(a)(1) of the Surface Mining Act, 52 P.S. §1396.4(a)(1), and 25 Pa. Code §87.44(3). (N.T. 978; Ex. A-1)

5. Although it sought a waiver from the overburden analysis require-quirement, Hamilton's permit application proposed alkaline addition. (Ex. A-1)

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[1] Exhibits from Hamilton are noted as "Ex. A-___" and those from the Department as "Ex. C-___." The notes of testimony, meanwhile, are referred to as "N.T. ___."

6. Joseph J. Lee, Jr., then a hydrogeologist with the Department's Hawk Run Office, was assigned to the permit as lead reviewer. (N.T. 687)

7. At the time of the hearing on the merits Lee had been a hydrogeologist with the Department for over seven years; he received a bachelor's degree in geology and had undergone extensive continuing education, especially in the fields of hydrogeology, overburden analysis, and coal geology. (N.T. 629-658)

8. Lee had reviewed approximately 200 mine drainage permits, 150-250 surface mine re-permits, and over 100 new surface mining permits. (N.T. 645)

9. Of the permits Lee reviewed, approximately 100 to 110 involved overburden analysis review, and between a quarter and a half of these involved alkaline addition or some other abatement techniques. (N.T. 656)

10. In a March 20, 1984, correction letter, the Department denied Hamilton's request to waive the overburden analysis because the site had the potential to produce acid mine drainage and, in the absence of an overburden analysis, it would be difficult to identify toxic materials and ascertain the amount of alkaline addition. (Ex. A-2)

11. Hamilton submitted the requested overburden analysis report on January 23, 1985. (Ex. A-3)

12. The March 20, 1984, correction letter from the Department also requested that Hamilton submit certain other additional information within 45 days. (Ex. A-2)

13. From May 10, 1984, to June 13, 1985, there were a series of responses from Hamilton and further Department correction letters requesting more information. (Ex. A-2, A-3)

14. Representatives from the Department met with Terry Rightnour, a consultant for Hamilton, several times during the permit review process. (N.T. 489, 493, 691-692)

15. The Department denied Hamilton's permit application on August 30, 1985, as a result of potential pollution of the waters of the Commonwealth, the damage to the hydrologic balance, and unacceptable risks to adjacent private water supplies. (Ex. A-4)

The Amount of Acid the Strata Will Generate

16. Hamilton concedes that the Lansberry site has the potential to generate acid mine drainage. (Hamilton's Post-Hearing Brief, p.27)

17. Acid mine drainage is characterized by low pH, high specific conductance, and elevated concentrations of sulfates and iron, and manganese compounds; it results from the weathering of iron disulfide in the geological strata. (N.T. 268, 712-713)

18. Although iron disulfides themselves are neither soluble nor acidic, they react to become soluble, acidic compounds after mining, since mining disturbs the strata, exposing the rock to weathering. (N.T. 270)

19. Once exposed to the elements, the rate of weathering depends upon the pH of the environment--in alkaline environments, iron disulfides weather at an extremely slow rate. (N.T. 270-271)

20. Hamilton hoped to retard the formation of acid mine drainage from the strata disturbed by mining by adding alkaline materials to the spoils and pit floor. (N.T. 540)

21. Approximately 60 acres of strata would be disturbed by Hamilton's proposed mining operation. (Ex. A-1(a))

22. Hamilton drilled 16 bore holes at various locations on the Lansberry site to identify the strata present and the height of the groundwater. (Ex. A-1)

23. When Hamilton drilled the initial series of 16 holes, the drill holes revealed the presence of binder material (at Drill Holes 14 and 16), the Middle Kittanning seam (at Drill Hole 14), and a five-to six-inch-thick coal seam or rider identified as the Lower Kittanning #2 seam (at Drill Hole 16). (Ex. A-1)

24. Hamilton then selected two locations and drilled holes to obtain samples of the strata overlying the targeted coal seam for overburden analysis. (Ex. A-1(a))

25. Each of the overburden holes was two to three inches in diameter. (N.T. 323, 749)

26. The Department has no standards regarding the number of overburden holes necessary to characterize a site. (N.T. 266, 323-324)

27. High concentrations of sulfides can be deposited in very localized areas within the strata. (N.T. 324)

28. A major geologic change can exist six inches from an overburden hole, and the farther one gets from the hole, the greater the likelihood that the strata in the overburden hole are not representative. (N.T. 323, 749)

29. During the drilling of the overburden holes, the geologist supervising the sampling identifies each stratum encountered and measures its depth. (N.T. 265)

30. At least one of the overburden holes should traverse all the strata which would be disturbed during the proposed mining operation. (N.T. 266)

31. Hamilton selected overburden holes which did not intercept the binders, the Middle Kittanning seam, or the Lower Kittanning #2 seam. (Ex. A-1(a))

32. A binder is a lithological unit which interrupts the coal for some distance. (N.T. 742)

33. Binders typically contain high sulfur concentrations, produce ash, and have the potential to produce acid mine drainage. (N.T. 583, 743)

34. The binder intercepted by Drill Hole 16 was approximately one-foot thick and separated close to two feet of coal above it from the one inch of coal beneath it. (N.T. 582-583; Ex. A-1)

35. Terry Rightnour served as a consultant for Hamilton in the preparation of the permit application and alkaline addition plan. (N.T. 483-484)

36. Rightnour holds a bachelor's degree in environmental resource management and a master's degree in environmental pollution control. (N.T. 438-440)

37. Rightnour had worked on approximately two to three dozen surface mining permit applications. (N.T. 450)

38. The Department had issued at least four permits where Rightnour was involved in the overburden analysis. (N.T. 453-456)

39. Dr. Harold Lovell is a retired professor of mineral engineering familiar with the techniques of overburden analysis, including acid-base accounting. (N.T. 263-264; Ex. A-6) 453-456)

40. Hamilton's alkaline addition plan was developed by Rightnour in conjunction with Dr. Lovell. (N.T. 273, 532)

41. The permit application did not address the disposition of the binder intercepted by Drill Hole 16. (N.T. 584; Ex. A-1, A-1(a))

42. Rightnour did not know whether Hamilton planned to remove this binder from the site or treat it as toxic material. (N.T. 584)

43. The binder intercepted by Drill Hole 14 was approximately six inches thick and had an approximately two-feet-thick section of the Lower Kittanning seam lying above it and a one-foot-thick section of the seam lying below it. (Ex. A-1)

44. This binder would be removed and treated as toxic. (N.T. 588)

45. Rightnour was unsure whether Hamilton planned to remove the rider. (N.T. 586-587, 772)

46. No samples from the rider seam were submitted for chemical analysis. (N.T. 587)

47. No samples from the Middle Kittanning seam were submitted for chemical analysis. (N.T. 588)

48. According to its overburden analysis report, Hamilton did not include any of the coal seams on the site in the chemical analysis of the overburden because Hamilton planned to remove each of these seams in its entirety. (Ex. A-1(a))

49. Although both overburden holes passed through the Lower Kittanning coal seam, Hamilton did not include samples from the seam in its chemical analysis of the overburden samples. (Ex. A-1(a))

50. Hamilton obtained total sulfur values for two samples from one of the seams on the site; the values were 2.52% and 1.77%. (N.T. 341)

51. Equipment limitations prevent the removal of 100% of the coal in a seam. (N.T. 340, 581, 1090, 1097)

52. Ninety-percent removal is usually considered effective. (N.T. 1090)

53. Hamilton's alkaline addition calculations did not address any coal from the Lower Kittanning seam which could be separated from the other rock and removed. (Ex. A-1(a))

54. The binders, the rider, and the Middle Kittanning coal were not considered in the calculations of the amount of alkaline material which would have to be added to the site. (Ex. A-1(a))

55. In each of the two overburden holes, samples were taken at every change in strata. (Ex. A-1(a))

56. The sampling regime within a stratum depended upon its composition: strata consisting of sandstone were sampled at least once every five feet; spoils, remaining from earlier mining of the Middle Kittanning seam, were sampled only once in 45 feet; and, strata consisting of other materials were sampled at least once every three feet. (Ex. A-1(a))

57. The fact that the 45 feet of Middle Kittanning spoils were sampled only once leaves a wide margin of variability. (N.T. 330)

58. Samples of each stratum from the bore holes were analyzed to determine the percentage of total sulfur present in each. (N.T. 266-267)

59. Data concerning the percentage of total sulfur allow geologists to calculate the maximum potential acidity--the maximum amount of acid that would be produced if all the sulfur in the sample existed in acid-forming compounds and all of these compounds escaped from the rock into the environment. (N.T. 268-269)

60. The results of the overburden bore and total sulfur determinations were as follows for Overburden Hole 1 (OB-1):

Sample No.	Thickness (ft.)	Rock Type/Color	Total Sulfur %
OB-1-1	45.0	M. K. Spoils	.03
OB-1-2	2.3	Soft Dk. Gr. Claystone	.42
OB-1-3	3.8	Hard Med. Gr. Silty Claystone	.15
OB-1-4	2.3	Dk. Gr. Silt Shale	.06
OB-1-5	1.4	Sand Silt Lam.	.38
OB-1-6	2.9	Dk. Gr. Silt Shale	.48
OB-1-7	2.9	Dk. Gr. Silt Shale	.42
OB-1-8	3.0	Dk. Gr. Silt Shale	.24
OB-1-9	0.9	Dk. Gr. Shale	1.40
OB-1-10	3.2	Lt. Gr. Sand Silt Lam.	2.00
OB-1-11	3.3	Lt. Gr. Sand Silt Lam.	1.36
OB-1-12	2.1	Dk. Gr. Silt Shale	1.76
OB-1-13	2.6	Sand Silt Lam.	.58
OB-1-14	2.6	Sand Silt Lam.	.46
OB-1-15	0.6	Br. Gr. Sandstone	.38
OB-1-16	2.8	Med. Dk. Gr. Silt Shale	.48
OB-1-17	2.9	Med. Dk. Gr. Silt Shale	.22
OB-1-18	2.8	Med. Dk. Gr. Silt Shale	.60
OB-1-19	2.3	Dk. Gr. Silt Shale	1.92
OB-1-21	3.3	Gr. Claystone	1.60

61. The results of the overburden bore and total sulfur determinations for Overburden Hole 2 (OB-2) were as follows:

Sample No.	Thickness (ft.)	Rock Type/Color	Sulfur %
OB-2-1	2.7	Yel.-Orange Clay	.05
OB-2-2	0.6	Lt. Ol. Gr. Clay Shale	.07
OB-2-3	4.0	Bl. Gr. Sandstone	.14
OB-2-4	2.5	Med. Gr. Clay Shale	.34
OB-2-5	0.7	Lt. Gr. Clay	.76
OB-2-6	0.7	Br. Gr. Clay Shale	.30
OB-2-7	3.1	Sand Silt Lam.	.30
OB-2-8	3.1	Sand Silt Lam.	.26
OB-2-9	3.1	Sand Silt Lam.	.16
OB-2-10	4.3	Med. Dk. Gr. Clay Shale	.42
OB-2-11	3.9	Dk. Gr. Silt Shale	2.00
OB-2-13	3.9	Gr. Claystone	1.32

62. Iron sulfides, also called pyrites, can react to form acids when disturbed by mining, but other materials--including other sulfur compounds--ordinarily do not. (N.T. 268-269)

63. To determine what proportion of the sulfur on the site occurred as pyrites and what percentage did not exist in acid-forming compounds, Hamilton chose "representative samples" from those obtained from OB-1 and OB-2 and analyzed them for pyritic sulfur. The results were:

	Strata Sample No.	% Total Sulfur	% Pyritic Sulfur	% of Total Sulfur as Pyritic Sulfur
OB-1	OB-1-2	.42	.39	93
	OB-1-10	2.00	1.67	84
	OB-1-12	1.76	1.68	95
	OB-1-19	1.92	1.79	93

	Strata Sample No.	% Total Sulfur	% Pyritic Sulfur	% of Total Sulfur as Pyritic Sulfur
OB-2	OB-2-5	.76	0.02	3
	OB-2-8	.26	0.07	27
	OB-2-11	2.00	1.96	98

(Ex. A-1(a))

64. Hamilton never explained how it selected these particular samples for pyritic sulfur analysis nor did it detail why these samples were "representative." (Ex. A-1(a))

65. Hamilton calculated the percentage of pyritic sulfur for the strata intercepted in OB-1 by taking the average of the ratios of pyritic sulfur to total sulfur in all four of the "representative" samples and then multiplying that average ratio by the percentage of total sulfur present in each stratum to obtain the amount of pyritic sulfur in each stratum. (N.T. 590-592; Ex. A-1(a))

66. Hamilton calculated the percentage of pyritic sulfur for the strata intercepted by OB-2 by taking the average of the ratios of pyritic sulfur to total sulfur in all three "representative" samples as .30 and multiplying that average ratio by the percentage of total sulfur present in each stratum, except those two lying directly above the coal seam, to obtain the amount of pyritic sulfur present in each stratum. In the case of the two strata lying just above the coal seam, each stratum was assigned a pyritic to total sulfur ratio of 1.0. (N.T. 592; Ex. A-1(a))

67. The actual average of the ratios of pyritic sulfur to total sulfur from the "representative" samples from OB-2 was approximately .43, not .30. (N.T. 592; Ex. A-1(a))

68. Hamilton never explained why it utilized different procedures to calculate the amount of pyritic sulfur in the samples from OB-1 and OB-2. (Ex. A-1(a))

69. When pyritic sulfur to total sulfur ratios are unavailable for a stratum, the normal technique is to substitute the total sulfur value when calculating the amount of pyritic sulfur the stratum contains. (N.T. 773-774)

70. The values for the percentage of pyritic sulfur, also called "maximum potential acidity," for each sample were multiplied by a "reactivity constant" of .333 to calculate the "reactive maximum potential acidity" for each sample. (N.T. 535; Ex. A-1(a))

71. The reactivity constant of .333 was used in the overburden analysis report to reflect the fact that weathering releases only a fraction of the pyrite contained in the rock. (N.T. 534)

72. The .333 figure is arbitrary and without technical basis. (N.T. 374-376, 424)

73. Alkaline addition based on calculations using the .333 "reactivity constant" would neutralize water only to a pH of 5.5. (N.T. 775)

74. If water is neutralized only to a pH of 5.5, an acidic environment could form in the spoil even after alkaline material is added. (N.T. 775)

The Neutralization Potential of the Native and Added Alkaline Materials

75. The neutralization potentials of the samples were calculated on the basis of a leaching test. (N.T. 330-334, 751-756; Ex. A-1(a))

76. In the leaching test, samples are ground to a powder and then boiled with a known excess of hydrochloric acid. (N.T. 330-333, 750-751; Ex. A-1(a))

77. There is no accepted standard length of time that samples are boiled during the leaching test. (N.T. 752-754)

78. The measured neutralization potential of the samples can vary with the length of time the samples are boiled, since some of the acid may boil off with the water. (N.T. 752-754)

79. A fizz test determines the concentration of the hydrochloric acid solution that will be added to the sample during the leaching test. (N.T. 753)

80. The fizz test introduces a subjective aspect to the determination of the neutralization potential of the sample. (N.T. 753)

81. After the hydrochloric acid and powder finish reacting, the amount of acid remaining is measured by titrating the solution with a standardized solution of sodium hydroxide. (N.T. 333; Ex. A-1(a))

82. The neutralization potentials of the samples are problematic because they were determined using titrations, and there is no accepted practice as to how long a sample must stay at a pH of 7.0 for the titration to be at its end-point. (N.T. 754)

83. The shorter the time the pH must stay at 7.0 during titration, the higher the reported neutralization potential. (N.T. 754)

84. The amount of hydrochloric acid consumed in the reaction is determined by subtracting the amount of hydrochloric acid left after the reaction from the initial amount of hydrochloric acid. (N.T. 333)

85. The neutralization potential is the amount of calcium carbonate necessary to neutralize the amount of hydrochloric acid consumed in the reaction with the powdered sample. (N.T. 333)

86. Siderite, a ferrous carbonate, can exert an alkaline effect in the laboratory test for neutralization potential, but will not neutralize acid in the field. (N.T. 337-338, 755)

87. Of those surface mining permits which Lee has reviewed which contain x-ray diffraction reports, siderite typically accounts for much of the carbonate in the coal field. (N.T. 758)

88. Lee expected much of the carbonate at the Lansberry site to occur in the form of siderite. (N.T. 756-758)

89. The neutralization potential was not multiplied by a "reactivity constant"--as the maximum potential acidity was--to account for those acids or bases in the rock which are not released by weathering. (Ex. A-1(a))

90. Hamilton proposed to remove the overburden in benches, according to the alkalinity of the strata and the location of the coal seams. (Ex. A-1(a))

91. The calcium carbonate equivalent--the amount of calcium carbonate needed to neutralize 1,000 tons of the rock sampled--was calculated by subtracting the neutralization potential of each sample from its reactive maximum potential acidity. (N.T. 534-535; Ex. A-1(a))

92. Hamilton planned to remove the overburden intercepted by QB-2 in a single bench. (Ex. A-1(a))

93. The "cumulative excess calcium carbonate," measured in tons of calcium carbonate per 1,000 tons of the rock making up the bench, was calculated by multiplying the calcium carbonate equivalent of each sample by the mass of rock that the sample represented, dividing by the mass of rock making up the entire bench, and then summing the results of each sample in the bench. (Ex. A-1(a))

94. The mass of the rock that each sample represented was calculated by multiplying the assumed density of the rock by its volume. The volume was calculated by multiplying the area of the rock sampled by the thickness of the layer of rock sampled. (Ex. A-1(a))

95. Hamilton's overburden analysis report contained two sets of acid-base accounting calculations, with each set containing the data for the strata intercepted by both overburden holes; the only difference between the two, in terms of the calculations themselves, was the assumed density attributed to the samples. (Ex. A-1(a))

96. One set of the acid-base accounting calculations was undated and listed the assumed densities as follows:

Overburden Hole	Lith. Sample Number	Lithology Description	Assumed Density (Lbs/Ft.3)
OB-1	A1	M. K. Spoils	80
	B2	Sft Dk Gr Clst	115
	B3	Hd Md Gr Slt Clst	110
	B4	Dk Gr Silt Shale	110
	B5	Sand-Silt Lam	105
	B6	Dk Gr Silt Shale	110
	B7	Dk Gr Silt Shale	110
	B8	Dk Gr Silt Shale	110
	C9	Dk Gr Shale	110
	C10	Lt Gr S-S Lam	105
	C11	Lt Gr S-S Lam	105
	C12	Dk Gr Silt Shale	100
	C13	Sand-Silt Lam	105
	C14	Sand-Silt Lam	105
	C15	Br Gr Sndstn	100
	D16	M Dk Gr Silt Shale	110
	D17	M Dk Gr Silt Shale	110
	D18	M Dk Gr Silt Shale	110
	D19	Dk Gr Silt Shale	110
	D20	L. K. Coal	78
	D21	Gr Claystone	110
OB-2	A1	Yel-Orng Clay	115
	A2	Lt Ol Gr Cl Sh	110
	A3	Bl Gr Sndstn	100
	A4	M Gr Clay Shale	110
	B5	Lt Gr Clay	115
	B6	Brn Gr Clay Shale	110

Overburden Hole	Lith. Sample Number	Lithology Description	Assumed Density (Lbs/Ft.3)
OB-2	B7	Sand-Silt Lam	105
	B8	Sand-Silt Lam	105
	B9	Sand-Silt Lam	105
	C10	M Dk Gr Clay Sh	110
	C11	Dk Gr Clay Sh	110
	C12	L. K. Coal	78
	C13	Gr Claystone	110

(Ex. A-1(a))

97. The other set of acid-base accounting calculations contained the caption "Revised 6/13/85" and listed the assumed densities as follows:

Overburden Hole	Lith. Sample Number	Lithology Description	Assumed Density (Lbs/Ft.3)
OB-1	A1	M. K. Spoils	130
	B2	Sft Dk Gr Clst	170
	B3	Hd Md Gr Slt Clst	170
	B4	Dk Gr Silt Shale	170
	B5	Sand-Silt Lam	170
	B6	Dk Gr Silt Shale	170
	B7	Dk Gr Silt Shale	170
	B8	Dk Gr Silt Shale	170
	C9	Dk Gr Shale	170
	C10	Lt Gr S-S Lam	170
	C11	Lt Gr S-S Lam	170
	C12	Dk Gr Silt Shale	170
	C13	Sand-Silt Lam	170
	C14	Sand-Silt Lam	170
	C15	Br Gr Sndstn	170
	D16	M Dk Gr Silt Shale	170
	D17	M Dk Gr Silt Shale	170
	D18	M Dk Gr Silt Shale	170
	D19	Dk Gr Silt Shale	170
	D20	L. K. Coal	170
OB-2	A1	Yel-Orng Clay	170
	A2	Lt Ol Gr Cl Sh	170
	A3	Bl Gr Sndstn	170
	A4	M Gr Clay Shale	170
	B5	Lt Gr Clay	170
	B6	Brn Gr Clay Shale	170
	B7	Sand-Silt Lam	170
	B8	Sand-Silt Lam	170
	B9	Sand-Silt Lam	170
	C10	M Dk Gr Clay Sh	170
	C11	Dk Gr Clay Sh	170
	C12	L. K. Coal	
	C13	Gr Claystone	170

(Ex. A-1(a))

98. The treatment of the rock excavated from the benches would vary depending on the cumulative excess calcium carbonate of the rock in the bench. (Ex. A-1(a))

99. Benches containing strata with less than minus five (-5) tons calcium carbonate equivalent per 1,000 tons of rock would be segregated from the backfill, isolated above the water table, and treated with enough alkaline material to bring the calcium carbonate equivalency level to plus five (+5) tons or more per 1,000 tons rock. (N.T. 539-540; Ex. A-1(a))

100. Benches containing strata with more than +5 tons calcium carbonate equivalent per 1,000 tons rock would be commingled in the backfill without neutralization. (N.T. 539-540; Ex. A-1(a))

101. Benches containing strata with between -5 and +5 tons calcium carbonate equivalent per 1,000 tons rock would be mixed with rock, native to the site, with a higher alkalinity to bring the overall calcium carbonate equivalency to +5 or more tons per 1,000 tons rock. (N.T. 539-540; Ex. A-1(a))

102. The amount of base to be added to each pit floor and bench was determined by subtracting the cumulative excess calcium carbonate equivalent from a "positive alkaline threshold" of five tons calcium carbonate equivalent per 1,000 tons rock. (N.T. 536; Ex. A-1(a))

103. Rightnour selected the value of +5 tons of calcium carbonate equivalent per 1,000 tons of strata because the suggested guidelines of the West Virginia Surface Mine Drainage Task Force defined potentially toxic material as any rock with a value below or equal to -5 tons calcium carbonate equivalent per 1,000 tons strata. (N.T. 284-285, 384-385)

104. Rightnour chose the value of +5 tons calcium carbonate equivalent, reasoning that "if -5 was potentially acidic, then +5 would not be and what falls in between may be." (N.T. 536)

105. Five tons per thousand is not a generally accepted convention. (N.T. 284-285, 503)

106. Even rock with more base than five tons calcium carbonate equivalent per 1,000 tons of rock can produce acid mine drainage because of its sulfur content. (N.T. 777-778)

107. The five tons per 1,000 figure was based on research on West Virginia soil and was not necessarily applicable to Pennsylvania soils or overburden. (N.T. 284-285, 384-385)

108. According to the 1987 report of the West Virginia Surface Mining Task Force, 20 tons of calcium carbonate or more per 1,000 tons of rock is required before rock will usually produce alkaline mine drainage. (Ex. C-8)

109. Some research suggests that adding insufficient amounts of base can actually accelerate pyrite oxidation and exacerbate acid mine drainage problems. (N.T. 786)

110. Some researchers have concluded that, unless four-percent (4%) of the volume of the backfill is calcium carbonate, acid mine drainage may result. (N.T. 786)

111. Bag house lime consists of approximately 50% calcium carbonate and 50% calcium anhydride, calcium hydrate, and trace amounts of other components. (N.T. 295)

112. The overburden plan called for the addition of baghouse lime rather than pure calcium carbonate. (Ex. A-1(a))

113. Rightnour multiplied the amount of calcium carbonate which would be required for each bench by .77 to calculate the amount of baghouse lime required for each bench. (N.T. 596; Ex. A-1(a))

114. According to Dr. Lovell's research, baghouse lime is from 1.2 to 1.5 times more reactive than pure calcium carbonate. (N.T. 596)

115. The reciprocal of 1.3 is .77. (N.T. 596)

116. Rightnour assumed baghouse lime was 1.3 times more reactive than pure calcium carbonate. (N.T. 596)

117. Baghouse lime is generally stored outside by its producers, sometimes for years, and is not subject to any quality control. (N.T. 597)

118. Rightnour's calculation of the alkaline addition amounts involved "individual engineering decisions...of non-standardized activity;" there are not accepted standards. (N.T. 423-424)

Neutralization in the Backfill Environment

119. Hamilton did not plan to test the pH of the strata regularly but would rely instead on visual observation, identifying toxic materials by their color. (N.T. 607)

120. Changes in sulfur concentrations within the strata are not necessarily accompanied by a change in color or structure. (N.T. 786-787, 1127-1128)

121. It is important that the strata be tested for acidity regularly as the mining progresses. (N.T. 405-406)

122. In certain instances, under Hamilton's plan, it would be impossible to tell whether rock was toxic until after it was spoiled, making it necessary to adjust the liming rates and change equipment in mid-operation. (N.T. 787)

123. Neither Dr. Lovell nor Rightnour knew whether Hamilton planned to use a dragline to mine the site. (N.T. 413, 589-590)

124. Michael Gaborek is a mining engineer with the Department's Hawk Run office. (N.T. 1026)

125. Gaborek holds a bachelor's degree in mining engineering and worked for almost two years as a site engineer before joining the Department. (N.T. 1028, 1032, 1036)

126. At the time of the hearing, Gaborek had worked for the Department as a mining engineer for just over two years; during that time he reviewed approximately 112 permit applications. (N.T. 1037-1041, 1050)

127. All of the permit applications Gaborek reviewed proposed special handling of some type; 18 or 20 involved alkaline addition. (N.T. 1050)

128. It would be difficult to separate toxic rock from other overburden materials if a dragline were used. (N.T. 1132)

129. In Module 10.8 of its permit application, Hamilton proposed to handle potentially toxic and acid-forming materials encountered during mining as follows:

A) material deemed potentially toxic would be removed from adjoining strata using a front-end loader and then stored in or near the pit until backfilling operations had progressed to the point where the material could be buried;

B) if the toxic materials were stored outside the pit area, each would be shaped into a mound, preventing the escape of runoff;

C) accumulated water would be pumped to treatment basins for neutralization;

D) toxic materials would be replaced in the backfill above the groundwater take and at least five feet above the coal seam;

E) layers of toxic and non-toxic spoil would be alternated, with toxic layers limited to 24 inches or less and non-toxic materials not exceeding 30 inches in thickness, except for the top layer of non-toxic spoil which would be four feet or more thick; and,

F) before placing fill on top of "toxic pockets," ground agricultural limestone would be added at the rate of ten tons per acre.

(Ex. A-1)

130. Hamilton altered several aspects of the scheme set forth in Module 10.8 of its permit application when it submitted the overburden analysis report. (Ex. A-1(a))

131. The precise mechanics of how Hamilton planned to add the lime to the benches were not set forth in either Hamilton's permit application or its overburden analysis.

132. With regard to the mechanics of adding and mixing the lime, Dr. Lovell testified:

A) overburden from each bench would be carried to a suitable site (N.T. 293);

B) lime would be added by the truckload and dumped in the midst of the overburden material in the appropriate weight ratios, (N.T. 293);

C) the piles of the materials would then be smoothed with a bulldozer, compacted and graded, (N.T. 293);

D) after each bench was completed, the next lower bench would be mined, (N.T. 293); and

E) toxic materials would be selectively removed and placed above the water table, off the "pavement" of the mine, and as far below the surface of the regraded areas as feasible. (N.T. 294)

133. With regard to the mechanics of adding and mixing the lime, Rightnour testified:

A) the overburden would be "placed in designated areas on the mine site and covered in a cellular manner with alkaline material...." (N.T. 539); and

B) "[L]ime [would] be placed from the promimity [sic] and during the spreading process, the levelling process, the material will be levelled along with the lime being spread." (N.T. 541)

134. The location of the "designated areas" Rightnour referred to varied with the number of calcium carbonate equivalents, per 1,000 tons of rock, in each bench:

A) values of positive five or greater - could be stored at any location on the site. (N.T. 541)

B) values between positive five and negative five - would be placed in a "designated initial cut spoil disposal area." (N.T. 541)

C) values below negative five - "An area will be prepared in this for the first few cuts, the initially [sic] spoil area, an area will be prepared where it will be like a bed and this material will be placed in that bed. ... Once the initial site is opened up, of course [sic] then there are areas in the backfill as backfilling is concurrent [sic] whereby this, I believe it's somewhere in the neighborhood of 20 percent of the material will be special handled, will be placed in the backfill area, and concurrent [sic] along the behind [sic] mining." (N.T. 542-543)

135. While the permit application specified layers of non-toxic material 30 inches or less in thickness and toxic material 24 inches or less

in thickness, Rightnour testified that the thickness of the layers would depend on the amount of material encountered in the cut. (N.T. 542)

136. The chemistry of the backfill environment is very complex. (N.T. 786, 788)

137. When calcium carbonate materials are exposed to acidic water in the backfill environment, they tend to develop a coating of calcium sulfate. (N.T. 788)

138. The calcium sulfate coating can prevent some calcium carbonate from mixing with the water in the backfill. (N.T. 355)

139. Complete and thorough mixing of the toxic strata is necessary for the alkaline addition plan to be effective. (N.T. 1109)

140. The size of the rock will vary from microns to boulders. (N.T. 1110)

141. The extensive variation in the size of the rock precludes complete mixing. (N.T. 1109-1110, 1140)

142. The oxidation of pyrites occurs very quickly. (N.T. 760)

143. Hamilton's permit application and overburden analysis report did not detail how long toxic strata would be exposed to weathering prior to disposal within the backfill. (N.T. 1113)

144. The overburden handling plan cannot be implemented in the field. (N.T. 1113-1116)

The Direction of Groundwater Flow

145. The strike and dip of the Lower Kittanning coal seam on the Lansberry site was ascertained at three different locations: at the southern part of the permit area, near the ridge line in the middle of the permit area, and on the northern boundary of the permit area. (N.T. 517-518; Ex. A-1(b))

146. In the southern part of the permit area, the strike was North 68° East and the dip was two-percent North. (N.T. 518-519; Ex. A-1(b))

147. Near the ridge line in the middle of the permit area, the strike was North 5° West and the dip was five-percent West. (N.T. 517-518; Ex. A-1(b))

148. In the northern part of the permit area, the strike was North 78° East and the dip was four-percent South. (N.T. 518; Ex. A-1(b))

149. The dip of the seam, as indicated by the strike and dip measurements, more or less converged in the hollow west of the proposed mine site. (N.T. 519; Ex. A-1(b))

150. Rightnour has been on the Lansberry site approximately four times. (N.T. 519)

151. Rightnour has walked the entire Lansberry site, including the crop line. (N.T. 521)

152. The topographic high on the property runs roughly north to south, separating the eastern third of the Lansberry site from the rest. (N.T. 519-520; Ex. A-1(b))

153. Rightnour saw no evidence of water emanating from the northern, southern, or eastern sides of the site. (N.T. 521)

154. The only seeps or springs on the site lie to the west of the topographic high. (N.T. 521; Ex. A-1(b))

155. Data from LM-258, a sampling point upsteam on Devils Run, was submitted as part of Hamilton's permit application. (Ex. A-1)

156. Of the six flow measurements submitted with the application, three were approximately three gallons per minute (gpm) or more, two were under one gpm, and one was dry. (Ex. A-1)

157. Hamilton planned to mine approximately four acres of coal east of the topographic high. (N.T. 520)

158. Rightnour testified that the wells denoted LM-247, 248, 251, 279, 282, and 283 all lie "up-dip" from the Lower Kittanning coal Hamilton hopes to mine. (N.T. 522-523)

159. Based upon his observations of the property, the strike and dip of the coal, the location of the wells, the flow data from LM-258, the fact that Hamilton planned to mine four acres east of the topographic high and his observation of no water on the eastern side of the property, Rightnour had an opinion about the groundwater flow on the site. (N.T. 523)

160. Rightnour's opinion, which he held to a reasonable degree of scientific certainty, was that the site represented a limited area of groundwater recharge, that the water which passed through the proposed mining area flowed in a westerly direction, and that the strike and dip orientations indicated that there would be no recharge from the proposed mining area to LM-247, 248, 251, 279, 282, or 283. (N.T. 524)

161. Rightnour also opined, again with a reasonable degree of scientific certainty, that mining would increase the permeability of the materials on the site so that water would flow down vertically through the backfill until it reached the clay lying beneath the Lower Kittanning which would act as an aquitard and direct the flow to the west. (N.T. 524)

162. Although Rightnour concluded that the underclay would act as an aquitard based upon the underclay's thickness and its "visual presence," he did not perform any tests on the underclay beneath the Lower Kittanning seam to determine whether the underclay was an effective aquitard. (N.T. 618)

163. Rightnour did not know whether there were any fractures on the site. (N.T. 618)

164. When Hamilton drilled the initial series of 16 bore holes to determine the strata present and the level of water on the site, the strata

traversed in each hole included, at a minimum, the strata lying above the Lower Kittanning seam, the Lower Kittanning seam itself, and the underclay lying immediately beneath the Lower Kittanning seam. (Ex. A-1(b))

165. Water was encountered in only one of the 16 bore holes. (Ex. A-1(b))

166. In the one bore hole which did strike water, the water was not encountered until several layers beneath the underclay lying below the Lower Kittanning seam; more than 15 feet separated the top of the water from the bottom of the underclay. (Ex. A-1(b))

167. Lee testified that water would be impounded in, or perched on top of, the Lower Kittanning underclay if the underclay served as an aquitard. (N.T. 803, 883, 925)

168. Lee testified that the drill hole data regarding water levels indicated that water was neither impounded in, nor perched on top of, the Lower Kittanning underclay. (N.T. 803, 883, 925)

169. With regard to the one drill hole where water was encountered, Lee also testified that the water level and stratigraphy indicated that an aquifer lies in the Clarion formation, below the Lower Kittanning seam and the underclay. (N.T. 803, 925)

170. Based upon the drill hole data regarding water levels and based on the stratigraphy of the Lansberry site, Lee testified that the Lower Kittanning underclay does not impede water flow; water from above the Lower Kittanning seam percolates through the clay on its way to aquifers below. (N.T. 925)

171. Lee's education and experience in the field of hydrogeology are more extensive than Rightnour's. (N.T. 464-469; Ex. C-3)

172. Even if Hamilton were to mine the Lansberry site and treat the backfill--both in accordance with the permit application and overburden handling plan--the disturbed strata could generate acid mine drainage. (N.T. 1113-1116)

173. If Hamilton's mining operation generated acid mine drainage, the acid mine drainage could migrate from the backfill, penetrate the underclay beneath the Lower Kittanning seam, and contaminate the aquifer in the Clarion formation. (N.T. 803, 925)

Miscellaneous

174. At the time of the Department's action on Hamilton's permit application Gary Byron was the District Mining Manager at the Hawk Run office of the Department. (N.T. 155)

175. Byron made the decision to deny the permit that is the subject of the instant appeal. (N.T. 165)

176. Byron did not consider Article I, §27, of the Pennsylvania Constitution when he denied the permit. (N.T. 251)

177. The Department did not deny Hamilton's permit application simply because it contained an alkaline addition proposal; instead, the Department considered the specifics of Hamilton's alkaline addition plan. (N.T. 161, 489-494)

178. Representatives from the Department met with Rightnour, Hamilton's consultant, at least twice during the permit review process. (N.T. 489, 493, 691-692)

DISCUSSION

Under 25 Pa. Code §21.101(c)(1), Hamilton bears the burden of proof and must prove by a preponderance of evidence that the Department's denial of the permit application was arbitrary, capricious, contrary to law or a

manifest abuse of discretion. Warren Sand and Gravel Co., Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975); Franklin Township Board of Supervisors v. DER *et al.*, EHB Docket No. 84-403-W (Adjudication issued March 20, 1992). Hamilton, moreover, must prove that it is clearly entitled to the permit before the Board will order the Department to issue it. Sanner Brothers Coal Co. v. DER, 1987 EHB 202.

As noted earlier in this adjudication, the first issue raised by the post-hearing briefs is whether the Board erred when it admitted post-denial evidence to determine whether the Department abused its discretion. We find that such evidence was properly admitted.

This Board addressed the propriety of considering after-acquired evidence when reviewing a Department action in Robert L. Snyder and Jessie M. Snyder v. DER, 1990 EHB 428. In Snyder, a summary judgment opinion, we held that evidence gathered after a bond forfeiture could be used to support the Department's action. The Board wrote:

> The Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7511 *et seq.*, ...empower[s] the Board to conduct a *de novo* review of the Department's actions. The Commonwealth Court interpreted the nature of that *de novo* review in Warren Sand and Gravel v. [DER], 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975), as imposing a duty upon the Board to determine whether the Department's action can be sustained or supported by the evidence taken by the Board. [footnote omitted.] The Board's decisions have been consistent with the concept of review set forth in Warren Sand and Gravel. In Township of Salford *et al.* v. DER and Mignatti Construction Company, 1978 EHB 62, 77, we held that in reviewing a Department action we were not restricted to a review of the Department's determination on an application for a surface mining permit and allowed expert testimony not developed prior to the Department's action.
>
> (1990 EHB 428, 433)

This Board has consistently held that it is not limited to considering information available to the Department at the time the Department acted. There is no reason to treat this appeal differently.

The next issues raised in the post-hearing briefs are whether the Department, by denying Hamilton's permit, acted in a manner which was arbitrary, capricious, contrary to law, and a manifest abuse of discretion; and whether Hamilton has demonstrated that it is clearly entitled to the permit.

Section 315 of the Clean Streams Law, 35 P.S. §691.315, prohibits the operation of a mine involving any discharge or drainage into the waters of the Commonwealth unless authorized under regulations of the Department or by a permit issued by the Department. The Department's regulations provide that permit applicants must demonstrate "that there is no presumptive evidence of potential pollution to the waters of the Commonwealth." 25 Pa. Code §86.37(a)(3). The Board has construed this language to mean that "the applicant must demonstrate that pollution of the surface and groundwater from its mining activities will not occur," and considers acid mine drainage to be one form of "pollution." Magnum Minerals v. DER, 1988 EHB 867.

Hamilton concedes that the Lansberry site has the potential to generate acid mine drainage (Hamilton's post-hearing memorandum, p.27). To be entitled to the permit, therefore, Hamilton must show either that it can treat any acid mine drainage produced or that the acid mine drainage will not escape into "waters of the Commonwealth." Hamilton has failed to do either.

Acid mine drainage is characterized by low pH, high specific conductance, and elevated concentrations of sulfates and iron, and manganese compounds; it results from the weathering of iron disulfide in the geological strata (N.T. 268, 712-713). Although iron disulfides are themselves neither

soluble nor acidic, they react to become soluble, acidic compounds when weathered (N.T. 269).

Mining accelerates the transformation of disulfides into acidic compounds by disturbing the strata and exposing them to weathering (N.T. 270). Once exposed to the elements, the rate of weathering depends upon the pH of the surroundings: in alkaline environments iron disulfides weather at slow rates, in acidic environments they weather much more quickly (N.T. 270-271).

Hamilton's alkaline addition plan aims to capitalize on the pH-dependent nature of the iron sulfide reaction. By adding alkaline material to the backfill, Hamilton hopes to raise the pH and retard the formation of acid mine drainage (N.T. 540). Whether Hamilton's proposed alkaline addition plan will forestall the discharge of acid mine drainage depends on at least three factors: 1) the amount of acid the strata will generate when disturbed; 2) the neutralization potential exerted by the native and added alkaline materials; and, 3) how effectively the alkaline materials neutralize acid mine drainage in the backfill environment.

I. <u>The Amount of Acid the Strata Will Generate</u>

The approach used to determine the amount of acid in the strata is fairly straightforward. First, geologists seek to obtain representative samples of the strata which will be disturbed during mining (N.T. 266). They identify and measure the depth of each stratum, and determine the total sulfur content for each (N.T. 165-267). From the total sulfur values, geologists calculate the maximum potential acidity--the maximum amount of acid that would result if all the sulfur in the stratum sampled existed in acid-forming compounds and all of these compounds escaped from the rock into the

environment (N.T. 268-269). Iron sulfides, or pyrites, react to form acids when disturbed by mining, but other materials--including other sulfur compounds--ordinarily do not (N.T. 268-269).

Because some sulfur usually occurs in sulfates or organics or trace mineral forms, total sulfur measurements tend to overestimate the amount of acid which would result from weathering of the strata (Ex. C-8). Scientists can make more realistic projections about the maximum amount of acid that any stratum can produce by ascertaining the proportion of sulfur which exists in the form of pyrites (N.T. 534-535; Ex. A-1(a)).

Hamilton's calculation of the amount of acid-forming pyrites present in the strata is problematic. The evidence adduced at the hearing raises serious questions about the methodology Hamilton employed, especially regarding the issues of whether the samples were truly representative of the strata, whether Hamilton accurately calculated the pyritic sulfur values, and whether it was appropriate to multiply the final pyritic sulfur values by a "reactivity constant."

A. **Hamilton's Approach**

Hamilton drilled 16 bore holes at various locations on the site to determine the strata present and the height of the groundwater (Ex. A-1). At two locations on the site, Hamilton drilled overburden holes to obtain samples of the strata overlying the coal for overburden analysis (Ex. A-1(a)). The total sulfur values were determined for every non-coal sample from the strata intercepted by the two overburden holes; Hamilton did not include the coal seams in the chemical analysis because Hamilton planned to remove each of the seams in its entirety (Ex. A-1(a)).

To determine the percentage of sulfur which existed in the form of pyrites, Hamilton selected seven "representative samples"--four from the

samples retrieved from the first overburden hole and three from the samples retrieved from the second--and ascertained the percentage of pyritic sulfur for each (Ex. A-1(a)). Hamilton extrapolated from the results for these "representative samples" to calculate the percentage of pyritic sulfur in the other samples (N.T. 590-592; Ex. A-1(a)).

The technique Hamilton used to extrapolate the results differed depending upon the overburden hole. For the samples from the first overburden hole, Hamilton averaged the ratios of pyritic sulfur to total sulfur in all four "representative" samples, then multiplied by the percentage of total sulfur present in each sample (N.T. 590-592; Ex. A-1(a)). The resulting figure was the pyritic sulfur value, also called the maximum potential acidity, for that sample (N.T. 590-592; Ex. A-1(a)). For the second overburden hole, Hamilton assigned pyrite to total sulfur ratios of 1.0 to the two strata lying just above the Lower Kittanning coal seam (N.T. 592; Ex. A-1(a). For the other samples from that overburden hole, Hamilton used an approach similar to the one it used for the first overburden hole, taking the average of the ratios of pyritic sulfur to total sulfur in all three "representative" samples, and multiplying that average by the percentage of total sulfur present in that sample (N.T. 592; Ex. A-1(a)). The pyritic sulfur value of each sample was then multiplied by a "reactivity constant" of .333 to calculate the "reactive maximum potential acidity" for each sample (N.T. 535; Ex. A-1(a)).

B. <u>The Problems with Hamilton's Approach</u>

There are a number of problems with Hamilton's calculation of the acid-generating potential of the strata on the Lansberry site. The first pertains to the sampling regime. Although approximately 60 acres of the strata would be disturbed by the proposed mining operation, Hamilton used only

two overburden holes, each two to three inches in diameter, to characterize the strata overlying the Lower Kittanning seam (N.T. 323, 749; Ex. A-1(a)). During his testimony, Dr. Lovell, Hamilton's expert, conceded that there is no existing standard regarding the number of overburden holes necessary to characterize a site, that high concentrations of sulfides can be deposited in very localized areas within the strata, and that a major geologic change could exist six inches from an overburden hole (N.T. 266, 323-324, 749). He agreed with Joseph Lee, a hydrogeologist testifying for the Department, that the further one gets from an overburden hole, the greater the likelihood that the strata in the overburden hole were not representative (N.T. 323, 749). Dr. Lovell, furthermore, conceded that the fact that the 45 feet of Middle Kittanning spoils--intercepted by the first overburden hole--were sampled only once left a wide margin of variability (N.T. 330).

Hamilton's calculations are also skewed because Hamilton's chemical analysis failed to consider certain components of the strata which would become part of the backfill. In overburden analysis, at least one overburden hole should traverse all the strata the proposed mining operation would disturb (N.T. 266). Hamilton's initial series of 16 drill holes revealed the presence of binder material, the Middle Kittanning seam, and a coal seam or rider identified as the Lower Kittanning #2 (Ex. A-1). Hamilton, however, selected overburden holes which did not intercept these lithological units (Ex. A-1(a)).

The fact that the overburden analysis did not include the binders is significant because binders typically contain high sulfur concentrations and have the potential to generate acid mine drainage (N.T. 583, 743). Rightnour testified that Hamilton would remove one of the binders and treat it as toxic; the fate of the other binder is uncertain (N.T. 584, 588). Because Hamilton

failed to include either binder in the overburden analysis, however, neither was accounted for in the calculations of how much base would be necessary to neutralize the acid-bearing rock in the backfill (Ex. A-1(a)). Similar reasoning applies to the rider. The rider will have a high sulfur content--yet no samples from the rider were submitted for overburden analysis (N.T. 587). Rightnour was unsure, however, whether Hamilton would remove the rider or place it in the backfill (N.T. 586-587, 772).

Hamilton's failure to include the coal seams in the overburden analysis also skewed the results. While Hamilton maintained in the permit application that no coal would exist in the backfill because it would completely remove the seams, of the three experts who testified on the matter--Rightnour, Dr. Lovell, and Michael Gaborek, a mining engineer for the Department--none testified that an operator could remove 100% of the coal in a seam (N.T. 340, 581, 1090, 1097). No samples from the Middle Kittanning were submitted for chemical analysis, but the total sulfur values for the two samples from the Lower Kittanning seam were high: 2.52% for one, and 1.77% for the other (N.T. 341, 588; Ex. C-6). Because Hamilton's overburden analysis did not take the Lower Kittanning seam into consideration, the calculations underestimated the acid-generating potential of the rock left after the coal is mined.

Turning next to the calculation of the pyritic sulfur values, Hamilton's methodology is suspect for a number of reasons. Hamilton never explained how it determined which samples' pyritic sulfur values it would measure, nor did Hamilton detail why these samples were "representative" of pyritic sulfur values (Ex. A-1(a)). Hamilton also failed to explain why it utilized different procedures to calculate the pyritic sulfur values of the samples from each of the overburden holes (Ex. A-1(a)).

Hamilton's decision to multiply the maximum potential acidity by the "reactivity constant" of .333 also taints its calculations of the acid-generating potential of the strata. According to Hamilton, the reactivity constant was necessary to account for the fact that weathering releases only a fraction of the pyrite contained in the rock (N.T. 534). Dr. Lovell, Hamilton's expert, conceded that the .333 figure was arbitrary and without technical basis (N.T. 374-376, 424). Lee, meanwhile, testified that alkaline addition based on calculations using the .333 reactivity constant "would neutralize water only to a pH of 5.5, a pH low enough that an acidic environment could form in the spoil even after alkaline material is added (N.T. 775).

II. The Neutralization Potential Exerted by the Native and Added Alkaline Materials

The next step in the acid-base accounting analysis was to ascertain the neutralization potentials of the strata samples and compute how much base Hamilton would have to add to prevent the backfill from developing acidic pockets.

B. Hamilton's Approach

The neutralization potentials of the samples were calculated on the basis of a leaching test, where each sample was ground to a fine powder and then boiled with a known excess of hydrochloric acid (N.T. 330-334, 751-756; Ex. A-1(a)). A fizz test determined the concentration of the hydrochloric acid which would be added to each sample during the leaching test (N.T. 753).

After the hydrochloric acid and powder finished reacting, the amount of acid remaining was measured by titrating the solution with a standardized solution of sodium hydroxide (N.T. 333; Ex. A-1(a)). The amount of hydrochloric acid consumed in the reaction was determined simply by subtracting the amount

of hydrochloric acid left after the reaction from the amount of hydrochloric acid before (N.T. 333). The neutralization potential was the quantity of calcium carbonate needed to neutralize the amount of hydrochloric acid consumed in the reaction with the powdered sample (N.T. 333).

The neutralization potential of each sample was used to generate its calcium carbonate equivalent--the amount of calcium carbonate necessary to neutralize 1,000 tons of the rock sampled (N.T. 534-535; Ex. A-1-(a)). The calcium carbonate equivalent of each sample was obtained by subtracting its neutralization potential from its maximum potential acidity (N.T. 534-535; Ex. A-1(a)).

Hamilton proposed to remove the overburden in benches, the depth of each determined according to the alkalinity of the strata and the location of the coal seams (Ex. A-1(a)). It planned to divide the overburden at the first overburden hole into four benches and planned to remove the overburden at the second overburden hole in just one bench (Ex. A-1(a)).

The "cumulative excess calcium carbonate," measured in tons calcium carbonate per 1,000 tons of rock making up the bench, was calculated by multiplying the calcium carbonate equivalent of each sample by the mass of rock that the sample represented, dividing by the mass of rock making up the entire bench, and then summing the results of each sample in the bench (Ex. A-1(a)). The mass of the rock that each sample represented, meanwhile, was calculated by multiplying the "assumed density" of the rock by its volume, which was, in turn, calculated by multiplying the area of the rock sampled by the thickness of the layer of rock sampled (Ex. A-1(a)).[2]

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[2] The assumed densities listed in the overburden report are problematic for a number of reasons. Hamilton's overburden analysis report contains two (footnote continued)

The treatment of the rock excavated in each bench would vary depending upon the cumulative excess calcium carbonate of the rock in each bench:

1. Benches with less than -5 tons calcium carbonate equivalent per 1,000 tons of rock would be segregated from the backfill, isolated above the water table, and treated with enough alkaline material to bring the calcium carbonate equivalency to +5 tons or more (N.T. 539-540; Ex. A-1(a)).

2. Benches containing rock with more than +5 tons calcium carbonate equivalent per 1,000 tons rock would be commingled in the backfill without neutralization (N.T. 539-540; Ex. A-1(a)).

3. Benches containing rock with between -5 and +5 tons calcium carbonate equivalent per 1,000 tons rock would be mixed with rock, native to the site, with a higher alkalinity to bring the overall calcium carbonate equivalency to +5 or more tons per 1,000 tons of rock (N.T. 539-540; Ex. A-1(a)).

The amount of base to be added to each bench and pit floor was determined by subtracting the cumulative excess calcium carbonate equivalent from a "positive alkaline threshold" of five tons calcium carbonate equivalent per 1,000 tons rock (N.T. 536; Ex. A-1(a)). The West Virginia Surface Mine Drainage Task Force, in its suggested guidelines, defined potentially toxic

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(continued footnote)
sets of acid-base accounting calculations, each set containing data for the strata intercepted by both overburden holes (Ex. A-1(a)). Each set of calculations, however, ascribes different values to the assumed densities of the samples (Ex. A-1(a)). The "Overburden Computations" section of the report stated that the assumed density values were "Input Variable[s] from specific [sic] gravity of in place rock or swelled spoil;" otherwise, neither Hamilton's permit application nor the evidence it proffered at the hearing addressed how it derived the assumed density values (Ex. A-1(a)). If the assumed density values were obtained by measuring the specific gravity of the samples, it is difficult to account for the discrepancy between those values in the two sets of data. If the assumed densities were obtained in some other manner, on the other hand, Hamilton should have made that clear and explained how they were derived.

material as any rock with -5 or less tons calcium carbonate equivalent per 1,000 tons strata, so Rightnour, Hamilton's consultant, selected the value of +5 tons, reasoning that "if -5 was potentially acidic, then +5 would not be and what falls in between may be." (N.T. 536; Ex. C-4) Because Hamilton proposed to add baghouse lime, rather than pure calcium carbonate, and pure calcium carbonate is approximately .77 times as reactive as baghouse lime, Hamilton calculated the amount of baghouse lime they would add by multiplying the amount of base, expressed in calcium carbonate equivalents per 1,000 tons rock, by .77 (N.T. 295, 596; Ex. A-1(a)).

B. Problems with Hamilton's Approach

There are a number of problems with Hamilton's calculations of the amount of lime to add to the backfill. The first pertains to the procedure used to measure the neutralization potential. There is no accepted standard length of time that samples are boiled during the leaching test, and Lee testified that the measured neutralization potential of the samples can vary with the length of time that samples are boiled, since some of the acid may boil off with the water (N.T. 752-754). Siderite, furthermore, a ferrous carbonate which can exert an alkaline effect in the laboratory test for neutralization potential but will not neutralize acid in the field, typically accounts for much of the carbonate in the coal field (N.T. 756-758). Lee testified that he would expect much of the carbonate at the Lansberry site to occur in the form of siderite; Hamilton adduced no evidence which would suggest otherwise (N.T. 756-758).[3]

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[3] Lee expressed other reservations about the procedure used to determine the neutralization potentials. He testified that the "fizz test" utilized to ascertain the concentration of hydrochloric acid used in the leaching test introduces a "subjective aspect" to the determination of the neutralization (footnote continued)

Hamilton also failed to explain why the neutralization potentials were not multiplied by a "reactivity constant" as the corresponding values for maximum potential acidity were. In the case of the maximum potential acidities, Hamilton contended that it was necessary to multiply the maximum potential acidities by .333 to account for the fact that only a fraction of the acid precursors present in the rock would be released by weathering (Ex. A-1(a)). Hamilton, however, neither multiplied the neutralization potentials by a similar reactivity constant nor introduced any evidence indicating that more base than acid is released, proportionately, during weathering.

The decision to set the "positive alkaline threshold" at five tons calcium carbonate equivalent 1,000 tons of rock is also suspect. Dr. Lovell testified that the five tons per 1,000 figure was based on research on West Virginia soils and was not necessarily applicable to Pennsylvania soils or overburden (N.T. 284-285, 384-385). Both he and Rightnour conceded that the

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(continued footnote)
potentials (N.T. 753). He also testified that the neutralization potentials are problematic because they were determined by titration and there is no accepted practice as to how long a sample must stay at a pH of 7.0 for the titration to be at its end-point (N.T. 754). The shorter the time the pH must stay at 7.0, the higher the reported neutralization potential (N.T. 754).

Hamilton did not object to Lee's qualifications as a chemist or geochemist, but we do not feel the factors listed above render the neutralization potentials suspect. The procedure used to determine the neutralization potential is in accord with common practice in the field. H. Laitinen, Chemical Analysis, p. 1,113 (2nd. ed., McGraw Hill 1975). The fact that there were subjective aspects in the fizz test Lee described does not mean the leaching test itself is subjective. The fizz test determines the concentration of the solution that will be added to the sample. The sample will react with the same amount of hydrogen chloride, however, whatever the concentration of the solution it is in. See, "Stoichiometry" in D. Considine, The Van Nostrant Reinhold Encyclopedia of Chemistry, p.892-893 (4th ed., Van Nostrant Reinhold 1984).

As for Lee's testimony about the titration end-point, the fact that there is no standardized practice as to how long a solution must remain at pH 7.0 does not, in itself, render the results of titrations suspect. Titrations are an essential part of a host of quantitative chemical analyses. See I. Kolthoff, et al. Quantitative Chemical Analysis, pp. 681-714, 769-774 (4th ed. MacMillan 1969).

figure was not a generally accepted convention (N.T. 284-285, 503). Lee, moreover, testified that even where the "positive alkaline threshold" is five tons calcium carbonate equivalent per 1,000 tons rock, the rock can still produce acid mine drainage because of its sulfur content (N.T. 777-778). Lee added that some research indicated that acid mine drainage can result unless four-percent of the volume of the backfill consists of calcium carbonate and that adding insufficient amounts of base can accelerate pyrite oxidation and exacerbate acid mine drainage problems (N.T. 786). Finally, Dr. Lovell, who developed Hamilton's proposed alkaline addition plan in conjunction with Rightnour, testified that Rightnour's calculation of the alkaline addition amounts involved "individual engineering decisions ... of non-standardized activity," and that there are not accepted standards (N.T. 273, 423-424, 532).

III. The Efficacy of Neutralization in the Backfill Environment

In addition to the problems with Hamilton's acid-base accounting, there are also shortcomings with Hamilton's proposal to implement the overburden handling plan in the field, especially with regard to the identification of toxic strata, what equipment would be used for coal removal, the extent of mixing of the lime and rock, and the length of time the rock would remain outside the backfill. In fact, Michael Gaborek, a mining engineer with the Department, testified that the overburden plan could not be implemented in the field (N.T. 1113-1116).

Rightnour testified that Hamilton did not plan to test the pH of the strata regularly; instead, it would rely on visual observation, identifying toxic materials by their color (N.T. 607). Changes in sulfur concentrations in the strata, however, are not necessarily accompanied by changes in the strata's color or structure (N.T. 786-787, 1127-1128). In certain instances it would be impossible to tell whether rock is toxic until after it is

spoiled, making it necessary to adjust liming rates or change equipment in mid-operation (N.T. 787). Dr. Lovell, moreover, agreed that it was important that the strata be tested for acidity regularly as the mining progressed (N.T. 405-406).

Neither Rightnour nor Dr. Lovell knew whether Hamilton planned to use a dragline to mine the site (N.T. 413, 589-590). Whether Hamilton uses a dragline, however, will affect the treatment of toxic materials. Gaborek testified that it would be difficult to separate toxic rock from other overburden materials if Hamilton used a dragline (N.T. 1132).

Gaborek also testified that complete and thorough mixing is essential for the alkaline addition plan to be effective (N.T. 1109). Complete mixing is unlikely here, however, for two reasons. First, a coating which forms on the added carbonates can interfere with neutralization. Hamilton plans to add baghouse lime--which consists of 50% calcium carbonate and 50% calcium anhydride, calcium hydrate and trace amounts of other components--to the backfill (N.T. 295). When calcium carbonate encounters acidic water in the backfill, it tends to become encrusted with calcium sulfate (N.T. 788). The calcium sulfate coating can prevent some calcium carbonate from mixing with the water in the backfill (N.T. 355). Secondly, the size of the rock in the backfill prevents mixing. The size will vary from microns to boulders, and extensive variation in the size of the rock precludes complete mixing (N.T. 1109-1110, 1140).

Finally, despite the fact that pyrites oxidize very quickly, Hamilton's permit application failed to detail how long toxic strata would be exposed to weathering prior to disposal in the backfill (N.T. 760, 1113).

IV. Will Acid Mine Drainage from the Site Reach "Waters of the Commonwealth"?

Because of the problems with Hamilton's calculations of the acid-generating capacity and the neutralization potential of the strata, the amount of lime necessary, and the impediments to effective neutralization in the backfill, Hamilton has failed to demonstrate that no acid mine drainage will be produced. The only remaining issue, therefore, is whether Hamilton established that if acid mine drainage is produced, it will not escape into "waters of the Commonwealth."

Rightnour, Hamilton's consultant, testified that water from the site would flow down vertically through the backfill until it reached the layer of clay lying immediately beneath the Lower Kittanning seam which would prevent the water from descending into any of the strata below and direct it instead to the west (N.T. 524). He concluded that the underclay would act as an aquitard based upon the clay's thickness and its "visual presence" (N.T. 618). He did not, however, perform any tests on the clay to determine whether it was an effective aquitard, nor did he know whether it contained any fractures (N.T. 618).

Lee came to a different conclusion regarding the underclay, however; he testified that water percolates through the underclay to aquifers below (N.T. 925). He based his opinion on the stratigraphy of the site and the drill hole data regarding water levels and testified that water would be impounded in, or perched on top of, the Lower Kittanning underclay if the underclay acted as an aquitard (N.T. 803, 883, 925). Although each bore hole traversed the underclay and the strata lying above the clay, only one of the 16 holes encountered water (Ex. A-1(b)). Furthermore, in the one bore hole which did strike water, the top of the water lay more than 15 feet below the bottom of the underclay (Ex. A-1(b)). According to Lee, the drill hole data

indicated that water was neither impounded in, nor perched above, the underclay and that an aquifer lay in the Clarion formation, beneath the Lower Kittanning seam and the underclay (N.T. 803, 925).

The testimony of Rightnour and Lee clearly conflicts. Rightnour testified that the underclay is impermeable; Lee testified it is not, and that water from the backfill would migrate to the aquifer below the clay. Because Lee's education and experience in the field of hydrogeology are more extensive than Rightnour's, we find Lee's testimony more persuasive (N.T. 464-469; Ex. C-3).

Pollution of the aquifer in the Clarion formation would constitute pollution of "waters of the Commonwealth." Section 1 of the Clean Streams Law, 35 P.S. §691.1, defines "waters of the Commonwealth" as including "bodies" of "underground water," and an aquifer is a body of underground water.

As discussed earlier in this opinion, Hamilton bore the burden of proving that pollution of the surface and groundwater would not result from the mining operation. Hamilton conceded that the site had the potential to generate acid mine drainage, so it had to demonstrate either that it could treat the acid mine drainage or that no acid mine drainage would escape into the "waters of the Commonwealth." Hamilton failed to do either and, consequently, it has not established that it is clearly entitled to the permit.

V. Other Issues

While Hamilton cannot prevail on this appeal since it failed to show it was clearly entitled to the permit, two of the other issues Hamilton raised deserve mention here. Hamilton maintains that the Department's decision to deny the permit must be reversed because the Department did not consider

Article I, §27, of the Pennsylvania Constitution when denying the permit, and also argues that the Department, by failing to promulgate standards pertaining to alkaline addition, denied Hamilton due process and equal protection.

Gary Byron did fail to consider Article I, §27, when he denied Hamilton's permit application, but the fact that he did so does not taint the Department's action here (N.T. 251). The Supreme Court's opinion in Payne v. Kassab, 468 Pa. 226, 361 A.2d 263 (1976), enunciated the three-fold standard used to resolve conflicts between environmental and societal concerns:

> 1. There must be compliance with all statutes and regulations applicable to the protection of the Commonwealth's natural resources;
>
> 2. there must be a reasonable effort to reduce environmental incursion to a minimum; and
>
> 3. the environmental harm which will result from the challenged decision or action does not so clearly outweigh the benefit to be derived therefrom that to proceed further would be an abuse of discretion.

The Department need not determine whether the environmental harm has been minimized or balance the environmental harm against the benefits to be derived where a permit applicant fails to satisfy the first prong of the Payne test. In Township of Derry v. Commonwealth, Department of Environmental Resources, 1986 EHB 212, in response to a motion to limit issues, we held that a permit applicant could introduce evidence relating to the second and third prongs of the Payne test only if the applicant first established that it satisfied the first prong of the test. The reason for the ruling, we explained in that opinion, is that "[the Department] is not required to balance social and economic considerations against economic [sic] harm unless

there has first been compliance with applicable statutes and regulations." 1986 EHB 212, at 218. There is no reason to treat the instant appeal any differently.

As for Hamilton's assertion that the Department denied it due process and equal protection under the United States Constitution by failing to promulgate standards pertaining to alkaline addition, we disagree. Hamilton maintains that:

> A system where an applicant has no where [sic] to look for regulations concerning alkaline addition, where alkaline addition is permitted in some cases but not in others and where [the Department] is totally uncooperative with the consultant in trying to determine how to obtain the issuance of a permit is a system that lacks due process.
>
> (Appellant's Post-Hearing Brief, p.25-26)

There are a number of problems with Hamilton's argument. First, the fact that no statutes, rules or regulations specifically address how the Department should evaluate alkaline addition proposals does not mean that the Department violates the due process clause any time it denies a permit application containing an alkaline addition proposal. Simply put, the Department need not have rigid rules which address every conceivable problem in every conceivable situation. Carl Oermann v. DER, 1991 EHB 1542, 1551. In many instances, the statutes and rules and regulations authorizing the Department to issue permits afford it discretion in assessing permit applications. Furthermore, "[t]he very nature of due process negates any concept of inflexible procedures universally acceptable to every imaginable situation." Cafeteria and Restaurant Workers, etc. v. McElroy, 367 U.S. 886, at 895 (1961).

Second, the assertion that the Department approved other permit applications which proposed alkaline addition is, without more, irrelevant for

due process purposes. Hamilton never spelled out precisely why the Department's approval of other permits demonstrated that the Department violated the due process clause by denying Hamilton's permit. Presumably, Hamilton feels the other approvals show that the Department's action here is arbitrary or capricious. The Department did not deny Hamilton's application simply because the application proposed alkaline addition, however. The Department's inquiry went further than that, examining the particulars of Hamilton's alkaline addition proposal: the sampling regime, the calculation of the acid-generating potentials and neutralization potentials of native strata, the amount of alkaline materials Hamilton proposed to add, and the efficacy of neutralization in the backfill environment (N.T. 161, 489-494). As noted earlier in this opinion, Hamilton bears the burden of proof in this proceeding. At a minimum, to show that the Department's action was arbitrary and capricious, Hamilton must establish that the other permits which were approved are comparable to the permit application at issue here. Hamilton has failed to do so here. While Hamilton asserts that all of the permit applications contained alkaline addition proposals, it never established that the derivation, mechanics, and other particulars of the other permit applications containing alkaline addition proposals were similar to those of the permit application here.

Last, we turn to Hamilton's assertion that it was denied due process because the Department did not cooperate enough with Hamilton's consultant. Hamilton never identifies whether this is meant to implicate the procedural or substantive protection of the clause; in fact, Hamilton failed to support the assertion with any arguments at all. It is Hamilton's responsibility to make its case, not the Board's, and we need not analyze Hamilton's assertion under each of the many due process arguments Hamilton could have made. "Procedural

due process has as its essential element notice and an opportunity to be heard and to defend in an orderly proceeding before an impartial tribunal of competent jurisdiction." Soja v. Pennsylvania State Police, 500 Pa. 188, 455 A.2d 613 (1982) (plurality opinion as to other issues and outcome of the case). Substantive due process, meanwhile, protects certain "fundamental values." Neither substantive nor procedural due process mandate that the Department "cooperate" with permit applicants or their consultants.[4] Were the Department to accommodate private interests at all times, furthermore, the public interest would suffer.

Finally, the fact that no statutes, rules, or regulations address the particulars of alkaline addition does not mean, as Hamilton contends, that the Department violated the equal protection clause of the Fourteenth Amendment by denying Hamilton's permit application. The equal protection clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." In other words, the clause requires that a state's laws treat all persons equally. Where, as here, the state does not treat persons differently, the equal protection clause is not implicated:

> The [equal protection] clause announces a fundamental principle: the State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction comply with this principle. Only when a governmental unit adopts a rule that has a special impact on less than all persons subject to its jurisdiction does the question whether this principle is violated arise.
>
> New York City Transit Authority v. Beazer, 440 U.S. 568, at 587-588 (1979).

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[4] Representatives from the Department met with Mr. Rightnour, Hamilton's consultant, at least twice during the permit review process (N.T. 489, 493, 691-692).

CONCLUSIONS OF LAW

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

2. A party appealing the denial of a permit by the Department bears the burden of proving by a preponderance of the evidence that the Department abused its discretion. 25 Pa. Code §21.101(c)(1).

3. The Board may consider post-denial evidence when determining whether the Department abused its discretion by denying a permit.

4. The operation of a mine involving any discharge or drainage into the waters of the Commonwealth is prohibited unless authorized under the Department's regulations or by a permit issued by the Department. §315 of the Clean Streams Law, 35 P.S. §691.315.

5. An applicant for a permit under the Surface Mining Act and the Clean Streams Law must demonstrate that its mining activities will not pollute surface or groundwater. 25 Pa. Code §86.37(a)(3).

6. Acid mine drainage is a form of pollution.

7. Because Hamilton conceded that the Lansberry site had the potential to generate acid mine drainage, Hamilton had to show either that it could neutralize any acid mine drainage produced or that no acid mine drainage would escape into waters of the Commonwealth.

8. "Waters of the Commonwealth" include bodies of underground water. 35 P.S. §691.1.

9. An aquifer lying beneath the coal seam Hamilton seeks to mine is a water of the Commonwealth.

10. Hamilton failed to demonstrate that it would either neutralize any acid mine drainage produced by mining or prevent the acid mine drainage from escaping into waters of the Commonwealth.

11. Where a permit applicant fails to demonstrate that its proposal will comply with all applicable statutes and regulations of the Department, the Department need not, under Article I, §27, of the Pennsylvania Constitution, determine whether the environmental harm has been minimized or balance the environmental harm against the benefits to be derived.

12. The Department does not have specific statutes, rules, or regulations which govern the particulars of alkaline addition proposals.

13. The due process clause does not require that the Department have rigid rules which address every conceivable problem in every conceivable situation.

14. The assertion that the Department approved other permit applications containing alkaline addition proposals is irrelevant for due process purposes where the Department's decision to deny Hamilton's application was based, at least in part, upon the particulars of Hamilton's alkaline addition plan and Hamilton never established that the particulars of the approved plans were comparable to those of Hamilton's.

15. The due process clause does not require that the Department cooperate with Hamilton's consultant.

16. The equal protection clause is implicated only where a governmental unit adopts a rule that has a special impact on less than all persons subject to its jurisdiction.

O R D E R

AND NOW, this 6th day of November , 1992, it is ordered that the Department's denial of Hamilton's permit application is sustained and Al Hamilton's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

Member Richard S. Ehmann did not participate in this decision.

DATED: November 6, 1992

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M. DIANE SM
SECRETARY TO THE

GRAND CENTRAL SANITARY LANDFILL, INC. :
:
v. : EHB Docket No. 90-506-E
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES and : Issued: November 6, 1992

**OPINION AND ORDER
SUR DEPARTMENT OF ENVIRONMENTAL
RESOURCES' MOTION FOR
JUDGMENT ON THE PLEADINGS**

By: Richard S. Ehmann, Member

Synopsis

Where appellant's Notice Of Appeal fails to state any ground upon which this Board may grant relief, a DER Motion For Judgment On The Pleadings must be granted. DER's failure to publish notice of its modification of a landfill permit in the Pennsylvania Bulletin is not a ground for the landfill operator to challenge DER's action because that regulation is designed to provide notice of permit modifications to the public rather than to the operator, who is unable to make this assertion as a defense to the modification. Where DER modifies a permit to bring it into compliance with newly adopted regulations, the fact that the modifications may interfere with the landfill's contracts with third parties is no defense thereto. The assertion of a lack of technical justification for a landfill permit's modification is not a valid ground on which to challenge a modification necessitated to bring the landfill into compliance with new regulations, because under the new regulations, the landfill may apply to DER to continue

to accept the fuel contaminated soil. The assertion that the modification of the landfill's permit is contrary to a prior determination by DER on this issue is rejected where the document attached to DER's allegedly inconsistent prior letter offered by Appellant spells out the very policy DER implements by modification of this permit.

OPINION

On July 11, 1991, former Board Member Terrance J. Fitzpatrick issued his Opinion And Order Sur Motion To Dismiss Petition For Supersedeas Without A Hearing in the instant appeal, which granted the Department of Environmental Resources' ("DER") Motion on the basis that Grand Central Sanitary Landfill, Inc. ("Grand Central") was unlikely to succeed on the merits of its appeal. After issuing this opinion on April 28, 1992, Board Member Fitzpatrick ordered DER to file a Motion For Judgment On The Pleadings. In response, DER filed the instant motion based upon the same arguments it advanced in response to Grand Central's Petition For Supersedeas. With exception of a couple of variations addressed below, Grand Central has responded to DER's Motion with the same legal positions it asserted unsuccessfully when seeking supersedeas. Accordingly, after a review of these issues, we have elected to adopt the legal reasoning set forth in the July 11, 1991 Opinion by former Board Member Fitzpatrick without repeating it at length in this opinion. It may be found at 1991 EHB 1160.[1]

As stated in the July 11, 1991 Opinion, Grand Central's appeal challenges DER's modification of Grand Central's solid waste disposal permit. DER's modification superseded a 1985 permit modification allowing the disposal

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[1]On October 16, 1992, this matter was reassigned to Board Member Richard S. Ehmann because of Judge Fitzpatrick's resignation from this Board.

of fuel contaminated soil in that it cut back that 1985 modification to allow only the disposal of "virgin fuel contaminated soil".

Grand Central's Notice Of Appeal asserts four grounds for appeal. First, it states that the modification will interfere with contracts with third parties who rely on Grand Central to dispose of contaminated soil. Second, Grand Central asserts a lack of technical justification for the modification. Third, Grand Central states that DER's position is contrary to its own prior determination of June 19, 1990, so DER's action is arbitrary and capricious.[2] Finally, it urges that DER's action was contrary to 25 Pa. Code §§271.142 and 271.143 because this is a major permit amendment and DER failed to publish notice thereof as required by the regulation.

Grand Central's Petition For Supersedeas raises no new ground for the overturning of DER's action. Indeed, it does not raise the lack-of-technical-justification argument set forth above, although it makes allegations of irreparable harm to Grand Central, a lack of harm to the public health, safety and welfare and the likelihood it will prevail on the merits based upon the allegations already outlined.

In its Pre-Hearing Memorandum, Grand Central repeats its allegations as to interference with its contracts and DER's violation of §§271.142 and 271.143.

Finally, in its Answer To Motion For Judgment On The Pleadings filed with us on May 29, 1992, Grand Central references its allegations in its

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[2]Grand Central also asserts DER's modification affects its contract rights without notice or opportunity to be heard. Insofar as this is so, Grand Central's right to appeal to this Board is an adequate protection of its due process rights. Commonwealth v. Derry Township, Westmoreland County, 10 Pa. Cmwlth. 619, 314 A.2d 874 (1973); Empire Sanitary Landfill, Inc. v. DER, 1991 EHB 102.

Notice Of Appeal, Pre-Hearing Memorandum and Petition For Supersedeas. It asserts the regulations are "unconstitutional" or "unenforceable as against Appellant". In addition, it treats the assertions in DER's Motion as allegations in a civil action complaint filed in Court of Common Pleas by admitting and denying specific allegations, asserting others are conclusions of law and demanding strict proof of still others.[3] Finally, Grand Central objects to DER's Motion as both untimely and unnecessarily delaying the merits hearing.

This Board may grant Motions of this type and has done so in the past. G.B. Mining Co. v. DER, 1988 EHB 1065; Upper Allegheny Joint Sanitary Authority v. DER, 1989 EHB 303; Davis Coal v. DER, 1991 EHB 1908. These motions are judged by determining whether or not the "pleadings" state a valid cause of action, assuming the facts are as plead by the non-moving party.

Contrary to the assertion in DER's Motion, the pleadings in this matter are not limited to Grand Central's Petition For Supersedeas and DER's response thereto. They include Grand Central's Notice Of Appeal and its Pre-Hearing Memorandum. See Donald W. Dietz v. DER, 1990 EHB 263; and Borough of Dunmore v. DER, 1990 EHB 689. For purposes of judging DER's Motion we also obviously consider Grand Central's response thereto.[4]

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[3]Grand Central filed no Memorandum Of Law with its Answer and failed to set forth its legal arguments in support of its Answer other than as stated above.

[4]However, insofar as Grand Central raises new issues as challenges to DER's action there or elsewhere which are not found in its Notice Of Appeal, such as assertions of unconstitutionality and unenforceability, these arguments are barred as untimely amendments to the Notice Of Appeal. See Commonwealth, Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1989), affirmed, 521 Pa. 121, 555 A.2d 812 (1989).

Thus we judge this Motion as it pertains to the issues raised in the Notice Of Appeal. In doing so, we adopt the prior opinion by former Board Member Fitzpatrick to address these arguments. Thus, for example, with regard to the allegations that DER's modification interferes with Grand Central's contracts with third parties, we adopt former Board Member Fitzpatrick's reasoning in finding that DER's obligation to protect the public pursuant to newly promulgated regulations cannot be defeated by this claim. We likewise adopt his reasoning as to the second, third and fourth grounds for appeal contained in the Notice Of Appeal, and, on the basis thereof, conclude that Grand Central's Notice Of Appeal fails to state a claim upon which this Board may grant relief.[5] Accordingly, we enter the following Order.

ORDER

AND NOW, this 6th day of November, 1992, it is ordered that DER's Motion For Judgment On The Pleadings is granted and the appeal by Grand Central is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

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[5]Grand Central's objections to this Motion as to its alleged untimeliness and unnecessary delay of the merits hearing have no merit, since former Board Member Fitzpatrick had yet to schedule a merits hearing in this matter when it was transferred to Board Member Ehmann on October 16, 1992. Accordingly, there is no delay in the disposition of this matter or prejudice to Grand Central therefrom.

Robert D. Myers
Administrative Law Judge
Member

Richard S. Ehmann
Administrative Law Judge
Member

Joseph N. Mack
Administrative Law Judge
Member

DATED: November 6, 1992

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M. DIANE SMI
SECRETARY TO THE

GRIMAUD et al.	:	
	:	
v.	:	**EHB Docket No. 91-510-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: November 6, 1992**
and STONE HEDGE SEWER COMPANY, PERMITTEE	:	

OPINION AND ORDER
SUR
MOTION TO QUASH APPEAL
AND PETITION TO APPEAL NUNC PRO TUNC

Robert D. Myers, Member

Synopsis

A third-party appeal from the issuance of a NPDES Permit will be dismissed as untimely when it is filed more than 30 days after notice of the issuance was published in the *Pennsylvania Bulletin*. Notice by publication in this periodical was sufficient, legally and constitutionally. Appellants, in addition, have shown no grounds for appeal *nunc pro tunc*. Appellants will not be permitted to litigate issues pertaining to the NPDES Permit in their timely appeal from issuance of the Water Quality Management Permit because the matters considered are different with respect to each permit.

OPINION

Gerald C. Grimaud and others (Appellants) filed a Notice of Appeal on November 22, 1991 challenging the issuance by the Department of Environmental Resources (DER) of National Pollutant Discharge Elimination System (NPDES) Permit No. PA-0062375 and Water Quality Management Permit No. 6690402 to Stone

Hedge Sewer Company (Permittee). Both Permits are related to a sewage treatment facility for the Stone Hedge Development and Golf Course in Tunkhannock Township, Wyoming County.

On March 17, 1992 Permittee filed a Motion to Quash Appeal, contending that the appeal from the NPDES Permit was untimely. The Motion was accompanied by a legal memorandum and an affidavit. DER expressed support for the Motion in a letter received on April 1, 1992. On April 15, 1992 Appellants filed Objections to the Motion to Quash Appeal, accompanied by a Petition to Appeal Nunc Pro Tunc. Permittee filed an Answer to this Petition on May 15, 1992 and DER followed with its own Answer on May 18, 1992.

Permittee alleges in its Motion that the NPDES Permit was issued on August 17, 1990, that notice of intent to issue the permit was published in the *Pennsylvania Bulletin* on May 5, 1990, and that issuance of the permit was published in the Pennsylvania Bulletin on September 29, 1990. These allegations are supported by the affidavit of Paul Swerdon, Chief of the Permit Section, Water Quality Management Program, in DER's Northeast Regional office in Wilkes-Barre, and by copies of the publications included as exhibits.

Our rules at 25 Pa. Code §21.52 provide that, in order for our jurisdiction to be invoked, a third-party appeal must be filed within 30 days after publication of the notice in the *Pennsylvania Bulletin.* See *Lower Allen Citizens Action Group v. Commonwealth, DER*, 119 Pa. Cmwlth. 236, 538 A.2d 130 (1988), aff'd on reconsideration, ____ Pa. Cmwlth. ____, 546 A.2d 1330 (1988), and *Pauline Hughes v. DER*, 1991 EHB 1597. Since the appeal here was not filed until November 22, 1991, well over a year after publication of the notice in the *Pennsylvania Bulletin*, the appeal is untimely as to the NPDES Permit.

In their Objections to the Motion, Appellants assert that (1) they were entitled to personal notice of the issuance of the NPDES Permit and that (2) constructive notice by publication in the *Pennsylvania Bulletin* was illegal and unconstitutional. The NPDES Permit was issued by DER pursuant to authority contained in §202 of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.202, and (upon approval of the Pennsylvania program by the Administrator of the U.S. Environmental Protection Agency (EPA)) pursuant to authority contained in §402 of the Clean Water Act, Public Law 92-500, 86 Stat. 816, as amended, 33 U.S.C.A. §1342. The federal statute requires notice to the public and opportunity for public hearing before issuance of a Permit. The CSL has no similar requirement with respect to NPDES Permits issued for the discharge of sewage.[1]

Regulations adopted by EPA to implement the Clean Water Act discuss public notice at 40 CFR §124.10. This provision, which is applicable to state-administered programs, mandates public notice of the preparation of a draft NPDES Permit and a 30-day public comment period during which a public hearing may be requested. The manner of giving public notice generally is by mail (to certain persons and entities) or by publication. Where a state-administered program is concerned, public notice must be given in a manner constituting legal notice to the public under that state's laws.

Pennsylvania's regulations for administering the NPDES program deal with public notice at 25 Pa. Code §92.61. This provision requires public notice of every NPDES Permit application to be given by publication in the *Pennsylvania Bulletin* and by posting near the entrance to the premises and

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[1] §307 of the CSL, 35 P.S. §691.307, does mandate public notice and opportunity for public hearing where a permit for the discharge of industrial waste is involved.

nearby places. A copy of the notice is to be mailed to any person who requests it. Persons desiring to receive such notices on a routine basis may request to be placed on a mailing list for that purpose. It is no surprise (since EPA approved the Pennsylvania program) that these regulatory provisions mirror those at the federal level.

Part II of the Act of 1976, P.L. 877, 45 Pa. C.S.A. §501 *et seq.*, is entitled Publication and Effectiveness of Commonwealth Documents. As defined in §501 "document" includes "permit." Section 904 reads as follows:

> Unless otherwise specifically provided by statute other than a provision of this title, the publication under this part of any document required or authorized by this part to be so published shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby.

Since the CSL does not impose *any* public notice requirement, we must conclude that publication in the *Pennsylvania Bulletin* was adequate notice to Appellants unless such notice was insufficient in law. Notice by publication generally is sufficient when the governmental agency does not know, and cannot reasonably ascertain, the names and addresses of interested parties: *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S.Ct. 654, 94 L.Ed. 865 (1950). This is true of a public improvement project: *In re Condemnation by the Commonwealth*, 22 Pa. Cmwlth. 440, 349 A.2d 819 (1975), where interested parties can request a public hearing. "It would be unreasonable and illogical," said the Court at 349 A.2d 822, to require under principles of constitutional due process that citizens of the Commonwealth having an interest in the project are entitled to personal notice. Notice by publication is proper notice to the public and to "landowners potentially affected by a public improvement project."

This legal principle was applied also in *Friends of Sierra Railroad, Inc. v. Interstate Commerce Commission*, 881 F.2d 663 (U.S. Ct. App., 9th Cir., 1989). The Interstate Commerce Commission (ICC) had established a procedure whereby railroads could abandon certain rail lines without being subject to the "burdensome procedures required by that Act" [Staggers Act]. Pursuant to the procedure, the ICC published in the *Federal Register* a notice that the Sierra Railroad was applying for abandonment of a section of its line under the less burdensome procedure. Appellant failed to see the notice and, a year later, petitioned the ICC to reopen the proceedings. This petition was denied and Appellant appealed, claiming that the published notice was inadequate. The Court of Appeals held that publication in the *Federal Register* "is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance" 881 F.2d at 667-668.

These cases are analogous to the one at hand. Since notice by publication in the *Pennsylvania Bulletin* of DER's issuance of the NPDES Permit was sufficient in law, Appellants are deemed to have knowledge of the contents of that notice.[2] Their appeal, therefore, was untimely filed and we lack jurisdiction to entertain it.

Appellants argue, secondly, that the published notice was defective because it did not adequately identify the applicant or the point of discharge. Since Appellants did not see the notice at the time it was published, we fail to see how they could have been misled by any errors it

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[2] We note that, even though notice by publication is legally adequate where issuance of a permit is involved, DER's regulations require notice to be posted on the applicant's premises and set up a procedure whereby interested persons can be put on a mailing list to receive notices as a matter of routine. Appellants have not claimed that they took advantage of this procedure.

contained. Nonetheless, the notice was accurate, not only with respect to the name of the applicant but also with respect to the point of discharge (which was identified, in part, by map coordinates).

Finally, Appellants argue that their appeal of the Water Quality Management Permit (which was timely) should be held to involve all the issues raised with respect to the NPDES Permit since DER would have had to review them as part of its processing of the later Permit. This argument was rejected recently by Commonwealth Court in *Fuller v. Department of Environmental Resources*, ____ Pa. Cmwlth. ____, 599 A.2d 248 (1991), and we see no need to discuss it further.

Included with Appellant's Objection to the Motion is a petition to Appeal Nunc Pro Tunc. No additional facts are averred in the Petition; the averments of the Objection are incorporated by reference. These averments make no claim that there was fraud or a breakdown in the Board's operation, as required by 25 Pa. Code §21.53 and Board precedent. Nor can we conclude that Appellant's failure to see a published notice rises to that level.[3]

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[3] Appellants raise other constitutional issues that may or may not be meritorious. However, before we may consider any of them, our jurisdiction must be properly invoked. Since it was not, these issues are beyond our reach.

ORDER

AND NOW, this 6th day of November, 1992, it is ordered as follows:

1. Permittee's Motion to Quash Appeal is granted as to the NPDES Permit and Appellant's appeal is dismissed with respect to the NPDES Permit.

2. Appellants' Petition to Appeal Nunc Pro Tunc is denied.

3. Appellants shall file their pre-hearing memorandum with respect to the Water Quality Management Permit on or before December 4, 1992.

4. Appellees shall file their pre-hearing memoranda within fifteen (15) days after the filing by Appellants.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

EHB Docket No. 91-510-MR

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: November 6, 1992

cc: **Bureau of Litigation**
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Northeast Region
For the Appellant:
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For the Permittee:
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M. DIANE SMI
SECRETARY TO THE

CONCERNED RESIDENTS OF THE YOUGH, INC.	:	
	:	
v.	:	**EHB Docket No. 92-106-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and MILL SERVICE, INC., Permittee	:	**Issued:** November 6, 1992

OPINION AND ORDER SUR
PERMITTEE'S OBJECTION TO INTERROGATORIES (FIRST SET)
AND FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

By Joseph N. Mack, Member

Synopsis

Where the appellant files Interrogatories and a Request for Production of Documents after the close of the discovery period without specific leave of this Board, without an attempt to secure an extension in the discovery period, and where the recipient of the discovery objects to the untimeliness, the objection is sustained.

OPINION

This appeal was filed March 16, 1992, and shortly thereafter, on March 19, 1992 Pre-Hearing Order No. 1 was issued granting a 75-day period for discovery which expired on June 2, 1992. This Board, at the request of the appellant, Concerned Residents of the Yough, Inc. ("CRY"), extended discovery until August 3, 1992 and thereafter, at the request of the permittee, Mill Service, Inc. ("Mill Service"), extended discovery until September 2, 1992. Thus, with extensions, all discovery was to be completed by September 2, 1992,

a period of 92 days beyond the normal discovery period of 75 days as set out in Pre-Hearing Order No. 1.

On September 25, 1992, CRY sent to Mill Service a First Set of Interrogatories as well as a First Request for Production of Documents, which were received by the Board on September 28, 1992. On October 5, 1992, Mill Service filed objections to the Interrogatories as well as the Request for Production of Documents, arguing that CRY had failed to serve any discovery requests upon Mill Service prior to the September 2, 1992 deadline. Mill Service further argues that because the requests were untimely, they impose unreasonable annoyance, burden and expense upon Mill Service pursuant to Pa. R.C.P. 4011. The Board notified CRY by first class mail dated October 8, 1992, that any objection or justification for the delay in the filing of the Interrogatories and Request for Production of Documents should be received by the Board no later than October 19, 1992. CRY has not replied to the Board's notice.

CRY has not provided us with any reason for the delay, nor any justification for further extending the discovery period. We further point out to the parties that this matter was discussed in great detail in Pagnotti Enterprises, Inc. v. DER, et al., at EHB Docket No. 92-039-E. (Opinion issued October 1, 1992) Therefore, we enter the following order:

O R D E R

AND NOW, this 6th day of November, 1992, it is ordered that Mill Services's Objections to CRY's Interrogatories (First Set) and First Request for Production of Documents are sustained on the basis of the untimeliness of the discovery request.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: November 6, 1992

cc: **Bureau of Litigation**
Library: Brenda Houck
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For Permittee:
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Harrisburg, PA

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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

CAERNARVON TOWNSHIP, EAST EARL TOWNSHIP AND RED ROSE ALLIANCE	:	
v.	:	EHB Docket No. 91-487-MR
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES AND ENVIROSAFE SERVICES OF PA, INC.	:	Issued: November 10, 1992

OPINION AND ORDER
SUR
MOTION TO DISMISS

Robert D. Myers, Member

Synopsis

Since a DER decision finding that a proposed hazardous waste facility complies with the Phase I Exclusionary Criteria is not a final action, it is not appealable.

OPINION

Caernarvon Township, East Earl Township and Red Rose Alliance (Appellants) filed a Notice of Appeal on November 7, 1991 challenging an October 8, 1991 letter of the Department of Environmental Resources (DER) advising Envirosafe Services of Pennsylvania, Inc. (Permittee) that its proposed hazardous waste facility in Caernarvon and East Earl Townships, Lancaster County, complied with the Phase I Exclusionary Criteria found at 25 Pa. Code §269.21 through §269.29. On December 30, 1991 the Permittee filed a Motion to Dismiss the Appeal, contending that the DER letter is not an

appealable action. DER supported the Motion in a letter dated January 14, 1992. Appellants opposed the Motion in their Answer of January 21, 1992. A Board Order of January 29, 1992 stayed all proceedings pending a decision on the Motion.

The Motion was held in abeyance because the identical issue was involved in the case of *Environmental Neighbors United Front et al. v. DER et al.*, EHB Docket No. 91-372-MJ, and several other appeals. An Opinion and Order was issued in *Environmental Neighbors* on September 24, 1992, ruling that DER's decision that a proposed hazardous waste facility complies with the Phase I Exclusionary Criteria is not appealable. That decision controls the disposition of the Motion before us at this docket number. Accordingly, the appeal will be dismissed.

ORDER

AND NOW, this 10th day of November, 1992, it is ordered as follows:

1. Permittee's Motion to Dismiss is granted.
2. The appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: November 10, 1992

cc: **Bureau of Litigation**
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TELECOPIER 717-783-4738

M. DIANE SMI
SECRETARY TO THE

BOARD OF COMMISSIONERS OF UNION COUNTY :
:
v. : EHB Docket No. 92-151-E
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES and :
U.S.P.C.I. OF PENNSYLVANIA, INC., Permittee: Issued: November 17, 1992

OPINION AND ORDER SUR
MOTION TO DISMISS

By: Richard S. Ehmann, Member

Synopsis

DER's decision, that a proposed hazardous waste facility complies with the Phase I Exclusionary Criteria found at 25 Pa. Code §269.21 through §269.29, is not a final DER action appealable to this Board. Accordingly, the permit applicant's motion to dismiss the host county's appeal is granted.

OPINION

The Board of Commissioners of Union County ("Union") filed an appeal with this Board on April 10, 1992, challenging a March 12, 1992 letter from the Department of Environmental Resources ("DER") to USPCI of Pennsylvania, Inc. ("USPCI"). The letter advised USPCI that DER found USPCI's Hazardous Waste Facility Application to comply with the Phase I Exclusionary Criteria found at 25 Pa. Code §269.21 through §269.29.

On October 2, 1992, USPCI filed a Motion To Dismiss this appeal contending that the decision announced in DER's letter is not a final DER action, citing Environmental Neighbors United Front, et al. v. DER, et al.,

EHB Docket No. 91-372-MJ (Opinion issued September 24, 1992) ("E.N.U.F."). By letter of October 15, 1992, DER joined in the Motion.

On October 23, 1992, Union filed its response thereto opposing this Motion. Union recognizes that E.N.U.F. is on point as to this appeal but argues we should reconsider our prior decision. It then asserts the political and economic cost to Union to review the Phase II application should cause us to reverse ourselves and allow appeal of DER's decision. It also asserts that contrary to our holding in E.N.U.F., DER's decision on the Phase I Criteria does alter is rights and legal position. Finally, it asserts that if this Board relies on E.N.U.F. to grant this Motion, it must specifically find any and all issues may be raised by Union in any appeal from DER's Phase II approval.

While the opinions in E.N.U.F. show that this Board was not unanimous in the reasoning used to reach the conclusion that a DER Phase I approval is not appealable, they show we were unanimous in the conclusion that no appeal lies therefrom. For the reasons set forth in E.N.U.F., we remain unanimous in granting USPCI's Motion To Dismiss in the instant appeal. In accord, see Caernarvon Township, et al. v. DER, et al., EHB Docket No. 91-487-MR (Opinion issued November 10, 1992). In granting this motion we are not unmindful of the costs to Union of proceeding with a review of USPCI's Phase II submissions, but, as the legislature has enacted a statute which does not provide for appeals at this stage in the review process (see Section 309 of the Hazardous Sites Cleanup Act, the Act of October 18, 1988, P.L. 756, as amended, 35 P.S. §6020.309), we are not at liberty to rewrite same. However, it flows logically from the conclusion that DER's Phase I approval is not

appealable that if, and when, DER approves USPCI's Phase II submission and issues USPCI a permit for this facility, all Phase I and Phase II issues may then be raised by timely appeal therefrom.

Nevertheless, at this time, we must dismiss this appeal.

O R D E R

AND NOW, this 17th day of November, 1992, it is ordered that USPCI's Motion To Dismiss is granted and Union's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: November 17, 1992

cc: **Bureau of Litigation**
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For Permittee:
Jonathan E. Rinde, Esq.
Bala Cynwyd, PA

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M. DIANE SMIT
SECRETARY TO THE B

BARRY D. MUSSER	:	
	:	
v.	:	**EHB Docket No. 90-085-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES and TOWNSHIP OF SPRING, INTERVENOR	:	**Issued: December 2, 1992**

ADJUDICATION

By Robert D. Myers, Member

Syllabus:

The Board upholds DER's denial of a planning module for land development pertaining to a proposed 12-lot subdivision to be served by on-site wells and sewage disposal systems. Nitrate concentrations in nearby wells were as high as 9.8 mg/l, approaching the 10 mg/l maximum level for safe drinking water. The Board concludes that Appellant's preliminary hydrogeologic evaluation failed to prove that nitrates generated by the 12-lot subdivision would not elevate the neighboring wells above 10 mg/l. While upholding DER's action, the Board points out inadequacies and inconsistencies in the policy governing nitrates.

Procedural History:

Barry D. Musser (Appellant) filed a Notice of Appeal on February 23, 1990 to seek review of the January 23, 1990 action of the Department of

Environmental Resources (DER) denying approval of a Revision to the Official Plan of Spring Township, Centre County, pertaining to Musser Hills Subdivision, Phase I.

On December 17, 1990 the Board issued an Opinion and Order (1990 EHB 1637) denying Appellant's Motion for Summary Judgment. The Board ruled, *inter alia*, that the hydrogeological report submitted by Appellant on November 20, 1989 constituted a waiver of the time limits for DER's action. Consequently, DER's denial of the Revision on January 23, 1990 was timely.

A hearing was held in Harrisburg on February 11 and 12, 1992 before Administrative Law Judge Robert D. Myers, a Member of the Board. All parties were represented by legal counsel. The Township of Spring, although represented by legal counsel at the hearing, took no active part in it. Appellant's post-hearing brief was filed on April 2, 1992; DER's was filed on May 15, 1992. The record consists of the pleadings, a transcript of 369 pages and 25 exhibits.

After a full and complete review of the record, we make the following

FINDINGS OF FACT

1. Appellant is Barry D. Musser, an individual with a mailing address of R.D. #5, Box 399-M, Bellefonte, PA 16823 (Notice of Appeal).

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Pennsylvania Sewage Facilities Act (SFA), Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 *et seq.* and the regulations adopted pursuant to that Act.

3. Township of Spring (Township) is a Township of the Second Class in Centre County.

4. Appellant owns a 41.362-acre tract of land in the Township, bordering Feidler Road on the southwest and Weaver Hill Road on the northwest. On the northeast side of the tract are residential lots in the Weaver Hill Subdivision and lands of Harold A. Brooks *et ux.* Lands of Margaret E. and James C. Crater are on the southeast side of the tract. Across Feidler Road are residential lots of the Larry Jodon Subdivision and lands of Joseph Musser. Appellant's residence and farm buildings are situated near the northwest corner of the tract along Weaver Hill Road (Exhibit A-10).

5. In February 1988 Appellant (with William S. Shuey acting as his agent) undertook to subdivide the rectangular-shaped tract into 1-acre residential lots. Twelve of the lots would border Feidler Road and the remaining 27 would border a road to be built through the length of the tract, connecting with Weaver Hill Road and Feidler Road. Because he was unwilling to assume the cost of building this road immediately, Appellant elected to proceed with the first phase of the development - the 12 lots bordering Feidler Road (N.T. 12-14; Exhibit A-10).

6. The 12-lot development, known as Musser Hill Subdivision Phase I (Musser Hill) was intended to be served by on-lot wells and on-lot sewage disposal systems. Public water and sewers are available about 1 mile from the tract (N.T. 16; Exhibits A-1 and A-10).

7. A Preliminary Subdivision Plan and a Planning Module for Land Development (Module) for Musser Hill were filed with the Township and approved on or about July 8, 1988 (N.T. 18-20; Exhibits A-1 and A-10).

8. The Module was submitted to DER for its review on July 29, 1988 but was considered incomplete because the comments of the Centre County

Planning Commission were not included. These comments were received by DER on August 4, 1988 and the submission was deemed complete as of that date (N.T. 21, 165-166, 194).

9. Because of reports of high nitrate levels in wells in the general vicinity of Musser Hill, DER decided to withhold action on the Module until nearby wells could be sampled (N.T. 167, 209).

10. On November 14, 1988 DER sent a letter to the Township informing it that testing would be done on nearby wells and completed, hopefully, by December 5, 1988. The letter also stated that DER would require an extension of the 120-day review period (N.T. 209; Exhibit A-3).

11. On December 21, 1988 DER sampled 3 wells in the vicinity of Musser Hill. The Nastase well is in the Larry Jodon Subdivision directly across Feidler Road from lot #4 in Musser Hill. The Whitehill well also is in the Larry Jodon Subdivision but in the second tier of lots southwest of Feidler Road. The McMurtrie well is in the Weaver Hill Subdivision but in the second tier of lots northeast of Appellant's tract (N.T. 168-169; Exhibit A-10).

12. Nitrate concentrations determined from the December 21, 1988 samples were 9.2 milligrams per liter (mg/l) for Nastase, 11.86 mg/l for Whitehill and 9.92 mg/l for McMurtrie (N.T. 170-172; Exhibits C-2A, C-2B and C-2C).

13. Nitrate concentrations determined from June 1988 samples analyzed for Nastase and Whitehill by MicroTechnic Systems Laboratories were 4.49 mg/l and 3.11 mg/l, respectively. These sample results were supplied to DER at or about the time of the December 21, 1988 samplings (N.T. 186, 195).

14. On January 31, 1989 DER sent a letter to Shuey informing him of the nitrate concentrations in the 3 sampled wells and stating that a

preliminary hydrogeologic evaluation would have to be submitted before final action could be taken on the Module (N.T. 25-27, 173, 211; Exhibit A-4).

15. DER was concerned about the nitrates that would be added to the groundwater from on-site sewage disposal systems in Musser Hill and the impact they would have on drinking water from wells in the vicinity. Weaver Hill Subdivision, Larry Jodon Subdivision and individual residences in the area all have on-site wells and on-site sewage disposal systems. If the nitrates in the groundwater reach 10 mg/l, the water will no longer meet safe drinking water standards (N.T. 224-225, 353).

16. Shuey (on Appellant's behalf) retained Milena F. Bucek, a hydrogeologist in Boalsburg, Pennsylvania, to do the preliminary hydrogeologic evaluation. Ms. Bucek met with DER officials to discuss the proposed evaluation on March 10, 1989 (N.T. 28-29, 91, 95, 213-214, 268).

17. In a letter dated April 26, 1989 DER advised Bucek, in part, as follows:

> Submissions should include individual lot-by-lot determinations with appropriate dispersion plumes, in addition to a composite plume for the entire development. If this data can successfully conclude that on both a lot-by-lot basis, as well as a composite basis, groundwater nitrate levels will not be increased on neighboring properties through this development, [DER] planning approval is possible

(N.T. 95, 216; Exhibit A-5).

18. Having received no response from Appellant or his representatives, DER sent a letter to Shuey on June 8, 1989 inquiring whether a preliminary hydrogeologic evaluation would be submitted. An oral response indicated that the evaluation was being prepared and would be submitted (N.T. 217-219; Exhibit A-6).

19. At the direction of Bucek, Shuey (assisted by Richard Mulfinger, a professional engineer) obtained water samples from 17 wells in the vicinity of Musser Hill during October and November, 1989. Five of these were in the Larry Jodon Subdivision directly across Feidler Road from Musser Hill. Eight were in the Weaver Hill Subdivision bordering the Musser tract. The remaining 4 wells were on lands of Brooks, Crater, Sue Fredericks (across Feidler Road from the southern corner of Musser Hill) and Appellant (N.T. 31,33-34; Exhibits A-7 and A-10).

20. The samplings disclosed the following:

(a) in the Larry Jodon Subdivision -

(i) nitrate concentrations ranged from 1.8 mg/l to 8.0 mg/l with an average of 4.6 mg/l;

(ii) the wells proceeding from southeast to northwest showed the following nitrate concentrations: 1.8 mg/l, 3.0 mg/l, 7.3 mg/l, 8.0 mg/l and 3.0 mg/l;

(b) in the Weaver Hill Subdivision -

(i) nitrate concentrations ranged from 0.6 mg/l to 6.9 mg/l with an average of 4.86 mg/l;

(ii) the wells proceeding from southeast to northwest showed the following nitrate concentrations: 6.9 mg/l, 6.6 mg/l, 0.6 mg/l, 5.8 mg/l, 2.7 mg/l, 5.7 mg/l, 6.0 mg/l and 4.6 mg/l;

(c) in the scattered wells -

(i) the nitrate concentrations ranged from 4.5 mg/l to 13.0 mg/l with an average of 8.7 mg/l;

(ii) the wells proceeding from southeast to northwest showed the following concentrations: 13.0 mg/l, 9.8 mg/l, 7.5 mg/l, and 4.5 mg/l

(N.T. 33-35; Exhibit A-7).

21. In her preliminary hydrogeologic evaluation, dated November 15, 1989 and submitted to DER on or about November 20, 1989, Bucek:

(a) determined that Musser Hill lies in the carbonate uplands of the Nittany Valley and is underlain by the Bellefonte (thick-bedded dolomites with chert and sandstone beds) and the Axeman (thin-bedded limestones with dolomite layers) Formations;

(b) determined that the water table is 120 to 150 feet below the ground surface of Musser Hill and that groundwater flows generally toward the northwest;

(c) averaged the nitrate concentrations measured in the 17 wells in the vicinity of Musser Hill during October and November 1989 to obtain a background concentration of 5.8 mg/l;

(d) concluded that, since the lots in Musser Hill are arranged in a row that parallels the groundwater flow, the shape of the dispersion plume will coincide with this layout, consisting of individual plumes developed downgradient from each discharge point;

(e) used an analytical approach to determine that the maximum nitrate concentration added to the groundwater at the downgradient boundary of each lot will be 0.16 mg/l and that the cumulative increase in nitrate concentration from the 12 lots will be 1.92 mg/l;

(f) performed a mass balance calculation to determine that the maximum nitrate concentration added to the groundwater at the downgradient

boundary of each lot will be 0.27 mg/l and that the cumulative increase in nitrate concentration from the 12 lots will be 3.06 mg/l;

(g) concluded, on the basis of these two computations, that the on-site sewage disposal systems in Musser Hill will increase the nitrate concentration in the groundwater to 7.72 mg/l and 8.86 mg/l, respectively, both of which are below the 10 mg/l ceiling for safe drinking water; and

(h) pointed out that the nitrate concentrations found in the 17 wells during October and November 1989 were so variable from lot to lot that no pattern of accumulation appears to exist

(N.T. 98-105, 115, 118-121, 126, 130; Exhibit A-7).

22. About 1 mile southeast of Musser Hill is a limestone quarry operated by Centre Lime and a fertilizer plant owned by Agway Corporation. Because of a belief on the part of some of the local residents that high nitrate levels in their well water came from one or both of these operations, DER caused a study to be initiated in March 1989. The study -

(a) revealed nitrate concentrations in excess of 100 mg/l in monitoring wells drilled on the Agway site 500 to 1,500 feet south of the Crater well;

(b) satisfied DER that a fracture running between the Agway monitoring wells and the Crater well diverts groundwater from its general northwest flow to the southwest where it discharges into Logan Branch, a tributary of Spring Creek; and

(c) satisfied DER that the presence of the fracture prevents nitrates in the groundwater at the Agway site from affecting the water in the Crater well or any of the other 16 wells sampled for the preliminary hydrogeologic evaluation

(N.T. 108-112, 148-149, 256-257, 283-289, 296-297, 361; Exhibit A-13).

23. DER considers the high nitrate levels in the Crater well (13.0 mg/l) to be the result of agricultural activities and an on-site sewage disposal system; and agrees that these two factors also could be the cause of the 9.8 mg/l concentration of nitrates in the Fredericks well (N.T. 297-298, 361).

24. DER disagreed with Bucek's preliminary hydrogeologic evaluation, *inter alia*, for the following reasons:

(a) the background level of 5.8 mg/l was too low in view of the fact that the only sampled wells that actually are upgradient of Musser Hill have much higher concentrations of nitrates (Crater - 13.0 mg/l; Fredericks - 9.8 mg/l);

(b) the conclusion that dispersion plumes from the on-site sewage disposal systems in Musser Hill would be shaped in the direction of groundwater flow, i.e. to the northwest, when DER concluded that it is more likely that the plumes will be irregularly shaped, extending in all directions over a 1-acre to 3-acre area
(N.T. 273-277, 333).

25. DER is convinced that the lot-to-lot variability of the nitrate levels in the samples used in the preliminary hydrogeologic evaluation supports its conclusion that the dispersion plumes go in all directions. If that were not the case, the dispersion plumes would parallel the groundwater flow and the samples would show a rising level of nitrates from one lot to the next (N.T. 278-279).

26. In DER's opinion, the fluctuation in nitrate levels from one lot to the next is a combination of background concentrations, well location and neighboring on-site sewage disposal systems (N.T. 280).

27. Because of the factors included in Findings of Fact 24, 25 and 26, DER concluded that on-site sewage disposal systems in Musser Hill could cause the nitrate concentrations in wells in the Larry Jodon Subdivision to rise to 10 mg/l or higher but would have no impact on the nitrate levels in wells in the Weaver Hill Subdivision. Accordingly, it denied approval of the Module in a letter dated January 23, 1990 (N.T. 222-223, 310-312, 315-316, 345, 353-354; Exhibit A-8).

28. Neither Appellant nor the Township ever requested DER to take action on the Module in the form originally submitted. All indications pointed to a willingness on the part of Appellant and the Township to submit a preliminary hydrogeologic evaluation and to have it considered by DER prior to taking action to approve or disapprove the Module (N.T. 29, 219).

29. Prior to denying approval of the Module DER did not ask Appellant to produce any additional hydrogeologic data because of the expense (which Bucek had indicated was a pertinent factor) and because DER considered it highly unlikely that any additional data would lead to approval of the Module (N.T. 96-97, 223-224).

30. On June 8, 1988 DER approved a Supplement to the Township Plan relating to the Port Subdivison. This 4-lot Subdivision, about 1 mile north of Musser Hill, is not adjacent to any developed area. DER approved the use of on-site wells and sewage disposal systems without requiring any hydrogeologic studies (N.T. 50, 77-82, 173-174; Exhibit A-19).

31. On September 5, 1990 DER approved a planning module for the Rachau Subdivision as an exception to the Township's plan revision requirements. This 4-lot Subdivision, about 4000 feet southwest of Musser

Hill, is surrounded by light residential and agricultural uses. DER approved the use of on-site wells and sewage disposal systems without requiring any hydrogeologic studies (N.T. 46-48, 62-63, 228-229; Exhibit A-11).

32. On December 9, 1991 DER approved a Revision to the Township Plan relating to the Watson Subdivision. This 2-lot Subdivision, about 1500 feet southwest of Musser Hill, has 11 residences in proximity to it. DER approved the use of on-site wells and sewage disposal systems without requiring any hydrogeologic studies (N.T. 42-45, 226-240; Exhibit A-12).

33. The Port, Rachau and Watson Subdivisions were minor subdivisions in DER's categorization whereas Musser was a major subdivision. Because of the volume of minor subdivisions submitted, DER's review is more cursory than with major subdivisions. DER also considers the cost of performing hydrogeologic studies to be unjustified where minor subdivisions are concerned (N.T. 228-240).

34. While Musser Hill's Module was awaiting action by DER's Bureau of Water Quality Management, DER's Bureau of Waste Management was considering an application for the agricultural utilization of sewage sludge from the Borough of Bellefonte treatment plan on the lands of Harold A. Brooks *et ux* bordering Appellant's tract on the northeast. The Bureau of Water Quality Management expressed concern to the Bureau of Waste Management about approving the sludge application with nitrate levels being as high as they are. The application was approved sometime after Appellant's Module was denied approval.

35. DER rationalizes approving the sewage sludge application while denying the Module for Musser Hill as follows:

(a) normal farming operations often involve the use of liquid fertilizer, manure or sewage sludge to increase productivity;

(b) all three of these substances contain nitrates which may find their way to the groundwater;

(c) the use of liquid fertilizer and manure is totally unregulated and DER has no way to control how much is used;

(d) the use of sewage sludge, however, is highly regulated and DER does control how much is used;

(e) because of this regulation, the use of sewage sludge is likely to place fewer nitrates into the groundwater than the use of liquid fertilizer or manure; and

(f) although the application of sewage sludge on the lands of Harold A. Brooks *et ux* could increase the nitrate levels in wells in the Weaver Hill Subdivision, the increase would be less than that brought about by the use of liquid fertilizer or manure

(N.T. 355-359, 365-366).

36. The same wells in the Larry Jodon Subdivision and the Weaver Hill Subdivision that were sampled in connection with the preliminary hydrogeologic evaluation were re-sampled in October, 1991 by Shuey and Mulfinger. The resamplings disclosed the following:

(a) in the Larry Jodon Subdivison -

(i) nitrate concentrations ranged from 1.3 mg/l to 8.9 mg/l and averaged 4.7 mg/l;

(ii) the wells proceeding from southeast to northwest showed the following concentrations: 1.3 mg/l, 3.9 mg/l, 8.9 mg/l, 6.3 mg/l and 2.9 mg/l;

(b) in the Weaver Hill Subdivision -

(i) nitrate concentrations ranged from 0.98 mg/l to 7.7 mg/l and averaged 4.9 mg/l;

(ii) the wells proceeding from southeast to northwest showed the following concentrations: 7.7 mg/l, 6.3 mg/l, 0.98 mg/l, 4.6 mg/l, 5.3 mg/l, 5.5 mg/l, 5.5 mg/l and 3.6 mg/l (N.T. 39-41, 122; Exhibit A-20)

37. From the samplings and re-samplings Bucek drew the following additional conclusions:

(a) the lot-to-lot variation in nitrate concentrations is the result of local conditions;

(b) the wells in the Larry Jodon Subdivision and the Weaver Hill Subdivision do not have nitrate levels over 10 mg/l even though the on-site sewage disposal systems have been functioning for 10 to 15 years in those Subdivisions;

(c) the nitrate levels measured in the re-sampling were basically the same as those measured in the sampling even though 1991 drought conditions would have tended to elevate the levels; and

(d) as a result, the groundwater system apparently is adequate to disperse most of the nitrates and keep them from building up (N.T. 115-116, 124, 156-157).

38. As part of DER's approval of the use of sewage sludge on the lands of Harold A. Brooks *et ux*, monitoring wells were designated (existing wells at nearby residences) and required to be monitored on a quarterly basis. Sludge application began late in 1990 or early in 1991. Nitrate levels measured in some of those monitoring wells during 1991 are as follows:

well	3/28/91	6/5/91	9/24/91	12/11/91
Harold A. Brooks	8.0 mg/l	9.1 mg/l	11.0 mg/l	-
Russell Port	5.8 mg/l	6/1 mg/l	8.0 mg/l	7.7 mg/l
McJunkin	20.0 mg/l	15.0 mg/l	15.0 mg/l	14.3 mg/l
Craig	22.0 mg/l	18.0 mg/l	18.0 mg/l	13.5 mg/l
Crater	13.0 mg/l	12.0 mg/l	11.0 mg/l	15.7 mg/l

(N.T. 55-59, 65-67, 73-76, 82-83; Exhibits A-16, A-17 and A-18).

39. The Brooks and Crater wells both were sampled as part of Bucek's preliminary hydrogeologic evaluation during October and November 1989 at which time they reflected nitrate levels of 7.5 mg/l and 13.0 mg/l, respectively (Exhibit A-7).

DISCUSSION

Appellant has the burden of proof: 25 Pa. Code §21.101(c)(1); *Dwight L. Moyer, Jr. et al. v. DER*, 1989 EHB 248. To sustain his burden, Appellant must show by a preponderance of the evidence that DER acted unlawfully or abused its discretion when it denied approval of Appellant's Module: 25 Pa. Code §21.101(a).

The first of Appellant's arguments we will deal with is a reprise of his Motion for Summary Judgment which the Board denied on December 17, 1990 (1990 EHB 1637). This argument claims that the Module must be deemed to have been approved by reason of DER's failure to act on it timely. We rejected this argument during the pre-hearing stage and see no reason to accept it now. Appellant's voluntary submission of the preliminary hydrogeologic report on November 20, 1989 was wholly inconsistent with any intent to hold DER to the precise time limits set forth in the regulations or in the SFA. As such, it

constituted a waiver of these time limits. DER's action disapproving the Module 64 days after receiving this report was timely; no "deemed approval" sanction is warranted.

Appellant argues that, aside from any "deemed approval," DER should have approved the Module on its merits because the preliminary hydrogeologic evaluation demonstrated that Musser Hill will not raise the nitrates in neighboring wells to the 10 mg/l level. This threshold level, adopted by Pennsylvania at 25 Pa. Code §109.202, is the maximum contaminant level established by the federal government at 40 CFR §141.11 under the provisions of the Safe Drinking Water Act, Public Law 93-523, 88 Stat. 1660, 42 U.S.C.A. §300f *et seq.*

At the time the Module was submitted, it was DER's policy to require a preliminary hydrogeologic evaluation if wells within a 1/4-mile radius of the site had nitrate levels of 5 mg/l or higher. This policy has since been formalized into regulation at 25 Pa. Code §71.62(c)(2). DER became aware of reports that wells in the Township area had experienced high concentrations of nitrates. As a result, it secured water samples from three properties near Musser Hill and found the concentrations near to, or above, the 10 mg/l level. Given these concentrations, DER clearly was justified in taking the position that Appellant had to establish by hydrogeologic analysis that Musser Hill would not worsen conditions. The preliminary hydrogeologic evaluation subsequently submitted by Appellant, prepared by a competent hydrogeologist, was an appropriate response to DER's request.

The problem faced by the hydrogeologist, interestingly, was not a dearth of information (as is often the case). Here, there were 5 wells in the Larry Jodon Subdivision just across Feidler Road from Musser Hill and another 8 wells about 500 feet away in the Weaver Hill Subdivision. Other wells

existed in these two developments at a somewhat greater distance that also could have been used. DER, in fact, had sampled two of them in December 1988. Outside the developments were more wells serving homesites scattered across the countryside. One of these (Appellant's) actually was located midway between Musser Hill and the Weaver Hill Subdivision.

There was an abundance of water data. The problem was interpreting the data to explain the cause of the lot-to-lot variability in the nitrate levels and to assess the impact of adding another 12 on-site sewage disposal systems and another 12 on-site water wells to the milieu. The problem was made more difficult, perhaps, by the absence of hydrogeologic data from the confines of Musser Hill itself. Such data might have been as variable as that from neighboring areas but it might have made it easier to determine the background level of nitrates to use as a starting point.

Bucek averaged the concentrations in the 17 wells sampled for her analysis to arrive at a background level of 5.8 mg/l. DER criticized this approach because it watered down the high concentrations in the only wells upgradient of Musser Hill. If only these two wells are averaged, the background level would be 11.4 mg/l. DER's position in this regard is premised on the supposition that the groundwater flows northwest and will carry these nitrates to Musser Hill. If this is so (and all parties agree the regional groundwater flow is to the northwest), the wells in the two Subdivisions as well as the one at Appellant's residence should show the impact. These wells should provide a more accurate picture of conditions under at least lots 1 to 6 of Musser Hill (which are closest to them) than any other data. Averaging the concentrations in these 14 wells produces 4.75 mg/l

as a background level. Lots 7 to 12 are more upgradient and, presumably, would have a higher concentration of nitrates. Based on this analysis, we are satisfied that Bucek's background level of 5.8 mg/l is reasonable.

The next step is to determine the quantity of nitrates that will be added to this background level by the on-site sewage disposal systems proposed for Musser Hill and the impact on neighboring wells. Bucek determined the quantity to be 0.27 mg/l per system and a cumulative total for the 12 systems of 3.06 mg/l. The total assumed an undeviating northwest flow of the groundwater from lot #12 to lot #1. DER takes issue with this assumption, arguing convincingly that a consistent northwest flow would produce a steady increase in nitrate levels lot-to-lot rather than the variation reflected in the wells in the two Subdivisions near Musser Hill. The more likely scenario, as advocated by DER, is an irregularly-shaped dispersion plume spreading out over one to three acres.

If such dispersion plumes exist, on-site sewage disposal systems in Musser Hill would impact nitrate levels in the wells across Feidler Drive in the Larry Jodon Subdivision. Since some of those nitrate levels already reach 8 mg/l or above, additional nitrates from Musser Hill could push them to 10 mg/l. Appellant has not convinced us that this cannot happen. The fact that it has not happened in the 10 or 15 years that have elapsed since the Subdivisions began, in and of itself, is not persuasive because it presupposes a gradual buildup of nitrates over that time. It is just as likely, considering the evidence presented to us, that the buildup reflects the more recent densification of development within the Township. The dilution capacity of the groundwater may be approaching its limit.

DER was justified in denying approval of Appellant's Module. While we reach this conclusion without hesitation, we are disturbed that the same

environmental laws and regulations that stand in Appellant's way allow others to continue adding nitrates to the groundwater in the general vicinity of Musser Hill. Both before and since the disapproval of Appellant's Module, DER has approved minor subdivisions using on-site wells and sewage disposal systems not very far from Musser Hill.

Minor subdivisions (those not exceeding 10 lots) do not receive the rigorous scrutiny given to larger subdivisions. Not only does DER lack the resources to do so, it is doubtful the citizenry would tolerate the extra costs and delays increased scrutiny would bring to minor subdivisions. Nonetheless, the groundwater can be "nickel-dimed to death" by nitrates released from a number of minor subdivisions just as surely as it can by those released from one or two major subdivisions. At some point all subdivisions must be scrutinized for their impact upon the existing nitrate levels. The realization that Musser Hill might have been approved if it had contained only 9 lots instead of 12 is strong evidence that the policy for nitrate control is inadequate.

Perhaps inadequacy is to be expected in a policy that exempts most farm operations from its scope. Pennsylvania historically has excluded farmers from environmental regulation. As a result, farmers can use as much liquid fertilizer and manure as they want without regard to the nitrates they add to the groundwater. DER acknowledges that the nitrate levels measured in November and December 1988 in the Crater (13 mg/l), Frederick (9.8 mg/l) and Brooks (7.5 mg/l) wells reflect the agricultural activities conducted on those properties. It is ironical, to say the least, that Appellant cannot gain approval to inject into the groundwater by residential development a fraction of the nitrates he could freely add by continuing to farm his land.

DER's approval of the placement of sewage sludge on the Brooks farm provides another example of the strange turns this farm exemption may take. Allowing the application of this sludge on lands adjacent to the Weaver Hill Subdivision, where nitrate levels already exceed 10 mg/l in some wells, cannot be reconciled with the denial of Appellant's Module. DER's rationalization is that the use of sewage sludge is highly regulated by DER; and, as a result, DER can put limits on the nitrates entering the groundwater. DER candidly admits that, even though it may impact the nitrate levels in nearby wells, allowing Brooks to use sewage sludge is preferable to having him use liquid fertilizer or manure.

It is not within our province to pass upon the wisdom of exempting farming operations; that is a policy decision made by the Legislature and the Environmental Quality Board. Choices made by these bodies inevitably favor one group over another. The paradoxical results of the choices rarely stand out as boldly as they do in this case, and we feel compelled to point them out.

CONCLUSIONS OF LAW

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

2. Appellant has the burden of showing by a preponderance of the evidence that DER acted unlawfully or abused its discretion in denying approval of Appellant's Module.

3. Appellant waived the time limits for DER action; DER's action was timely; no "deemed approval" is warranted.

4. Because of concentrations of nitrates in the three wells sampled by DER, DER was justified in insisting that Appellant had to show by hydrogeologic analysis that Musser Hill would not worsen conditions.

5. Bucek's background nitrate concentration of 5.8 mg/l is reasonable.

6. Appellant did not prove that nitrates generated by on-site sewage disposal systems in Musser Hill would not raise the nitrate concentrations in wells in the Larry Jodon Subdivision to 10 mg/l.

7. DER was justified in denying approval of Appellant's Module.

ORDER

AND NOW, this 2nd day of December, 1992, it is ordered that the appeal is denied.

ENVIRONMENTAL HEARING BOARD

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MAXINE WOELFLING
Administrative Law Judge
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ROBERT D. MYERS
Administrative Law Judge
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RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 2, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

CARL OERMANN	:	
	:	
v.	:	EHB Docket No. 88-153-MR
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: December 3, 1992

OPINION AND ORDER
SUR
APPLICATION FOR AWARD OF ATTORNEY'S FEES AND COSTS

By Robert D. Myers, Member

Synopsis

In a proceeding challenging DER's assessment of a civil penalty, the Board initially had sustained the assessment but had reduced it in amount. Subsequently, on reconsideration the Board ruled that DER had not made out a *prima facie* case and struck the assessment in its entirety. In considering an application for legal fees and expenses, filed under the so-called Costs Act, the Board rules that DER's substantial justification for its action must be measured by the evidence presented in DER's case-in-chief since the final disposition of the proceeding was based on DER's failure to make out a *prima facie* case. After reviewing this portion of the record, the Board concludes that DER was not substantially justified in assessing the civil penalty. Appellant having fulfilled the other statutory prerequisites, an award is made.

OPINION

We have before us an Application for Award of Attorney's Fees and Costs under the so-called Costs Act, Act of December 13, 1982, P.L. 1127, 71 P.S. §2031 *et seq.* Appellant filed the Application on January 3, 1992 seeking attorney's fees and costs totalling $4,358.00, expended in connection with his appeal from a civil penalty assessment made by the Department of Environmental Resources (DER). The Board in an Adjudication issued September 10, 1991 (1991 EHB 1542) had sustained the appeal, in part, and had dismissed it, in part, reducing the civil penalty from $5,000 to $3,000. In an Opinion and Order sur Motion for Reconsideration and/or Reargument, issued on December 17, 1991 (1991 EHB 1943), the Board granted the Motion and sustained the Appeal in its entirety. DER appealed this decision to Commonwealth Court (No. 131 C.D. 1992) and withdrew it on April 21, 1992.

Appellant's Application had been stayed, in the meantime, pending Commonwealth Court action. The stay was lifted on April 28, 1992 and DER filed its Answer to the Application on May 22, 1992. A memorandum of law in support of the Answer was filed on June 5, 1992. Appellant's reply memorandum was filed on June 12, 1992.

Section 3(a) of the Costs Act, 71 P.S. §2033(a), provides as follows:

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

The definitions in §2, 71 P.S. §2032, make clear that the civil penalty assessment was an "adversary adjudication" initiated by DER, a

"Commonwealth agency." The allegations of the Application and Appellant's affidavit attached to it, if true, establish Appellant as a "party" under the definition of that term in §2. There is no question that, if he is a "party", he is also a "prevailing party" and that the proceedings are final. DER does not deny that Appellant meets the definition of "party"; it alleges that it lacks information necessary to form a belief as to that averment.

4 Pa. Code §2.1 *et seq.* contain regulations adopted pursuant to the Costs Act. Eligibility, discussed in 4 Pa. Code §2.6, is to be established, *inter alia*, by a statement of net worth fully disclosing all assets and liabilities. Appellant has provided a statement listing his assets and liabilities at the time of filing the Application and showing a net worth less than $500,000. In his affidavit he averred that he owned the same assets in March 1988 (when the civil penalty was assessed) and that, while the values may have varied somewhat, his net worth still was less than $500,000 at that time.

We have held previously in *James E. Martin v. DER*, 1990 EHB 724, that the Costs Act was not intended to require an applicant to present extensive financial data or to require us to engage in a detailed financial investigation of an applicant's affairs. Applying that holding here, we find Appellant's statement of net worth and accompanying affidavit to establish his eligibility as a "party."

Our next inquiry is to determine whether the "position of [DER], as a party to the proceeding, was substantially justified." This term is defined in §2 of the Costs Act, 71 P.S. §2032, as a position that has a "reasonable basis in law and fact." The fact that DER has not prevailed cannot raise a presumption that its position was not substantially justified. Nor can the fact that DER failed to make out a *prima facie* case: *Swistock Associates Coal*

Corporation v. DER, 1990 EHB 1212. However, as noted in *Swistock*, DER's failure to make out a *prima facie* case "points up the paucity of the evidence supporting its action." 1990 EHB 1212 at 1216.

DER argues that we should measure its action on the basis of all the evidence of record. Certainly, this normally would be our approach. The problem with doing that here stems from the unusual course of the proceedings. DER presented one witness as its case-in-chief. At the conclusion of this witness' testimony, Appellant moved for a directed Adjudication on the basis that DER had not made out a *prima facie* case. The presiding Administrative Law Judge announced that he would take the motion under advisement and requested Appellant to proceed with his case-in-chief. Appellant presented one witness (Appellant himself) and rested. DER then was allowed to present two rebuttal witnesses over objections of Appellant that the evidence was not proper rebuttal and could have been presented as part of DER's case-in-chief.

In his post-hearing brief Appellant reargued his motion that DER had not made out a *prima facie* case. The Board's Adjudication, however, made no reference to the motion and failed to dispose of it. The Adjudication, based on all the evidence in the record, found that DER had proved only one violation of its regulations. Accordingly, the civil penalty assessment was sustained but the amount was reduced from $5,000 to $3,000.

Appellant filed a timely Motion for Reconsideration and/or Reargument pointing out that we failed to dispose of his motion and that the evidence supporting the only violation we had found was presented solely by one of DER's rebuttal witnesses. Upon review of the case, we concluded that Appellant was correct. Accordingly, we issued an Opinion and Order in which we held that DER had not made out a *prima facie* case and that Appellant's motion for a directed adjudication should have been granted. We entered an

order sustaining the appeal in its entirety.

Since the proceeding giving rise to the Application was finally decided solely on the basis of the evidence presented in DER's case-in-chief, we are of the opinion that our review of the Application must be limited to the same evidence. While we acknowledge that this may lead to awards in situations where, if we were to consider all of the evidence, we would find DER to have been substantially justified, we see no other fair solution. In our final disposition of the civil penalty assessment, we struck the entire penalty despite the fact that, on the basis of all the evidence, we earlier had approved a penalty of $3,000. Whatever financial loss the Commonwealth may suffer in situations like these, it is attributable directly to the failure of its own representatives to present all of the evidence supporting its position in its case-in-chief.

Limiting our review to the evidence presented by DER in its case-in-chief, we now turn to a consideration of whether DER's civil penalty assessment was substantially justified. The assessment was based on Appellant's alleged failure to comply with 25 Pa. Code §109.4(a)(4) which requires every public water supplier to "take whatever investigative or corrective action is necessary to assure that safe and potable water is continuously supplied to the users." Appellant was charged (1) with allowing the system to malfunction by the failure of a pump, resulting in a water outage for at least three days; and (2) with being unavailable (personally or through an authorized agent) to respond to the emergency.

The evidence to support these allegations was provided by Chester E. Young, a District Supervisor in DER's York Office. He testified that he was notified by telephone on Friday morning May 8, 1987 that an emergency connection had been made the night before between the Dover Township public

water system and the system serving Appellant's mobile home park (Del-Brook Estates) because the park was out of water. After receiving this information, Young attempted to contact Appellant by telephone but got no answer. Young then went to Del-Brook Estates where he observed a hose running from a fire hydrant near the entrance to the park to the nearest mobile home. This was the emergency connection that had been made. Young also saw a truck parked next to a well casing - the type of truck used to pull a pump out of a well casing. He saw no one around. He knew Appellant resided in the park but could not remember whether or not he went to Appellant's mobile home. Young returned to his office. On Monday May 11, 1987 he was notified that the emergency connection had been severed. Neither Appellant nor anyone on his behalf contacted Young when the emergency arose or at any time thereafter.

Although Appellant was charged with allowing the system to malfunction by the failure of a pump, Young testified that he had no knowledge as to what caused the pump to malfunction. He acknowledged that a pump as well as its electrical connections can stop functioning through no fault of the operator. Young also admitted that he had no personal knowledge of when the emergency arose and how long it took for the emergency connection to be made. Nor could he be absolutely certain when the emergency ceased. He approved the emergency connection he observed on May 8 and assumed that the mobile homes in Del-Brook Estates were all receiving water as a result of the connection. He charged Appellant with a three-day water outage because during the emergency the water was supplied by Dover Township. While this was true as to the source of the water, it was also true that the water was being supplied to park residents through Appellant's system.

DER charged Appellant with being unavailable (personally or by authorized agent) to respond to the emergency. Yet Young testified that he

tried to contact Appellant only once. He had no knowledge of when the emergency arose, what caused it, how long it took to make the emergency connection, who made the connection, what repairs were necessary, how long it took to make them and who made them. How, on the basis of such a lack of knowledge, DER could have concluded that Appellant was unavailable puzzles us, to say the least. We suspect that, as Young testified, DER was miffed because Appellant never got in touch with DER directly to report the problem and its connection. Since Appellant was not charged with that failure in the civil penalty assessment, it is meaningless.

We are satisfied that, given the evidence presented in DER's case-in-chief, DER was not substantially justified in assessing a civil penalty. Since we also do not find any special circumstances making an award unjust, we will entertain Appellant's claim.

The claim for fees and expenses totals $4,358 and is accompanied by an affidavit of Appellant's legal counsel, to which are attached copies of his business records. The amount claimed is the amount actually billed to Appellant. Of this total $4,131.38 are legal fees and the balance are disbursements. The time expended by legal counsel totals 88.8 hours. Of this amount, 21.2 hours were expended by a law student and are not properly considered. When the remaining hours (67.6) are divided into the amount billed ($4,131.38) the average rate is $61.11. The time expended and the hourly rate charged are eminently reasonable and well below the $75.00 maximum hourly rate authorized by §2 of the Costs Act, 71 P.S. §2032. The disbursements likewise are reasonable and the total fees and disbursements also fall within the $10,000 limit set by §2 of the Costs Act, 71 P.S. §2032.

ORDER

AND NOW, this 3rd day of December, 1992, it is ordered as follows:

1. Appellant's Application for Award of Attorney's Fees and Costs is granted.

2. DER shall pay to Appellant, within 30 days of the date of this Order, the sum of $4,358.00.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Chairman

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Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 3, 1992

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jm

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M. DIANE SMITH
SECRETARY TO THE BOARD

CONCORD RESOURCES GROUP OF PENNSYLVANIA, INC.	:	
	:	
v.	:	**EHB Docket No. 92-416-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 3, 1992**
and COUNTY OF CLARION, Intervenor	:	

OPINION AND ORDER SUR
PETITION TO INTERVENE
BY REPRESENTATIVE DAVID R. WRIGHT

By Maxine Woelfling, Chairman

Synopsis

A petition to intervene by a state legislator in the appeal of the denial of an application to site a hazardous waste treatment and disposal facility is denied. Where the legislator is seeking intervention in his capacity as a state representative, his interest is not direct, immediate, and substantial, as he has alleged no personal stake in the outcome of the appeal.

OPINION

This matter was initiated with the September 1, 1992, filing of a notice of appeal by Concord Resources Group of Pennsylvania, Inc. (Concord Resources) challenging the Department of Environmental Resources' (Department) August 3, 1992, denial of Concord Resources' application to site a commercial hazardous waste treatment and disposal facility in Millcreek Township, Clarion County. The Department's basis for denial of the siting application was that

the proposed facility was not in compliance with 25 Pa. Code §269.23[1] in that it was to be sited in a wetlands area. Clarion County, the host county, petitioned the Board to intervene in the appeal, and its petition was granted, over Concord Resources' objections, by order dated October 2, 1992.

Presently before the Board for disposition is Representative David R. Wright's petition to intervene, which was filed on September 2, 1992. The essence of the request for intervention is that Mr. Wright is the state representative for Millcreek Township and in that capacity he is

> uniquely qualified to represent in any and all proceedings the interests of his constituents that will be directly and substantially affected by the Board's decision concerning the siting of a hazardous waste facility in Millcreek Township, Clarion County.

He further supports his petition by asserting that he was actively involved in the permitting process relating to Concord Resources' application, as well as in the introduction and passage of legislation regulating hazardous wastes. Finally, he contends that without his participation the citizens of Clarion County will not be adequately represented before the Board in this appeal.[2]

Concord Resources opposed Representative Wright's petition in objections filed with the Board on September 15, 1992. It argues that Representative Wright has no standing to intervene in this appeal because any interest he may have in this appeal "derives entirely from the people of Clarion County and the DER." Concord Resources also asserts that Representative Wright's petition is premature and would politicize the process.

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[1] The so-called Phrase I exclusionary criteria.

[2] The petition set forth a number of other grounds, but, in light of the disposition of the petition, it is unnecessary to elaborate upon them.

Representative Wright replied to Concord Resources' objections on September 21, 1992. Although a number of the allegations in his reply are phrased in terms of the Representative and his constituents, it is apparent that he is contending that his status as a legislator permits him to represent the interests of his constituents in this proceeding. He asserts that "there are no limits to his representation of his constituents" and that he represents "all citizens within his legislative district in all forums that are necessary to fulfill the duties of his public office."

The issue of what standards are to be applied by the Board in deciding petitions to intervene has become somewhat muddled since the passage of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7511 et seq. Section 4(e) allows any interested party to intervene in proceedings before the Board. Prior to this, the Board evaluated petitions to intervene for conformance with its rules of practice and procedure at 25 Pa. Code §21.62, applying a five part test.[3] See, e.g., City of Harrisburg v. DER, 1988 EHB 946. However, this five part test was rejected by the Commonwealth Court in a series of opinions beginning with Browning-Ferris, Inc. v. Department of Environmental Resources, ____ Pa. Cmwlth. ____, 598 A.2d 1057 (1991) and the companion case, Browning-Ferris, Inc. v. Department of Environmental Resources, ____ Pa. Cmwlth. ____, 598 A.2d 1061 (1991), (the BFIs).

In the BFIs the Court interpreted the language of §4(e) of the Environmental Hearing Board Act, allowing "any interested party" to intervene

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[3] Namely, the nature of the prospective intervenor's interest; the adequacy of the representation of that interest by other parties in the proceeding; the nature of the issues before the Board; the ability of the prospective intervenor to present relevant evidence; and the effect of intervention on administration of the statute under which the proceeding is brought.

in proceedings before the Board as requiring the party to show that it will "either gain or lose by direct operation of the Board's ultimate determination." 598 A.2d 1060-1061. Three months later another panel of the Commonwealth Court, in Borough of Glendon and Glendon Energy Company v. Department of Environmental Resources, ____ Pa. Cmwlth.____, 603 A.2d 226 (1992), applied the criteria articulated in William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975)[4] in holding that a municipality's intervention in an appeal before the Board of a solid waste permit was warranted. But, shortly thereafter in Wheelabrator Pottstown Inc. v. Department of Environmental Resources, ____ Pa. Cmwlth. ____, 607 A.2d 866 (1992), the court again applied the standard for intervention articulated in the BFIs.

The Commonwealth Court was not suggesting in any of these decisions that there is an automatic right of intervention under §4(e) of the Environmental Hearing Board Act. Rather, it held that a party must establish some interest in the proceedings before the Board. While the test in BFI/Wheelabrator Pottstown is seemingly less elaborate than the test in Glendon Energy, an examination of the wording leads to the conclusion that the Commonwealth Court was directing the Board to apply the "substantial, immediate and direct" language of William Penn to ascertain whether a party is "interested" for purposes of intervention. Gaining or losing by direct operation of the Board's ultimate decision is just another expression of the direct, immediate, and substantial interest required by William Penn.

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[4] Namely, that the interest be direct, immediate, and substantial. William Penn involved standing to bring the lawsuit and not intervention.

Representative Wright's petition must be denied, for he fails to establish the requisite interest.[5] In a case directly on point, Wilt v. Beal, 26 Pa. Cmwlth. 298, 367 A.2d 876 (1976), the William Penn test was applied to a legislator seeking to participate in a matter by virtue of his status as a legislator. In Wilt, a member of the General Assembly, in his capacity as a taxpayer and a legislator, sought to enjoin the Secretary of Public Welfare and the State Treasurer from taking action to operate the Altoona Geriatric Center as a mental health care facility. The Commonwealth Court dismissed the suit for lack of standing, holding that:

> What emerges from this review of the federal cases is the principle that legislators, as legislators, are granted standing to challenge executive actions when specific powers unique to their functions under the Constitution are diminished or interfered with. Once, however, votes which they are entitled to make have been cast and duly counted, their interest as legislators ceases. Some other nexus must then be found to challenge the allegedly unlawful action. We find this distinction to be sound for it is clear that certain additional duties are placed upon members of the legislative branch which find no counterpart in the duties placed upon the citizens the legislators represent. These duties have their origin in the Constitution and in that sense create constitutional powers to enforce those duties. Such powers are in addition to what we normally speak of as the constitutional rights enjoyed by all citizens,...
>
> Applying this reasoning to the case at hand, we find no connection between Wilt's status as a

---

[5] Board Member Ehmann has recognized that the resolution of which standard is applicable lies with the Commonwealth Court. In the meantime, he has reconciled the two standards by examining what side of the agency action the intervenor wishes to support. The BFI/Wheelabrator test is applied where the intervenor supports the agency action, while the Glendon Energy test is applied where the intervenor opposes the agency action. Pagnotti Enterprises, Inc. v. DER and Foster Township, EHB Docket No. 92-039-E (Opinion filed April 9, 1992). Whether one follows the reasoning in Pagnotti or the William Penn test, the result here is the same.

> legislator and any constitutional provision alleged to have been breached by the defendants' actions. Wilt complains that the purpose of the bill for which he had voted has been frustrated, thus depriving him of the effectiveness of his vote. However, once Wilt's vote had been duly counted and the bill signed into law, his connection with the transaction as a legislator was at an end. Therefore, he retains no personal stake, as required by William Penn, supra, in the outcome of his vote which is different from the stake each citizen has in seeing the law observed. He therefore has no standing to sue in his capacity as a legislator.
>
> 363 A.2d at 331.
> (footnote omitted)

Representative Wright's situation here is very similar to Representative Wilt's in Wilt v. Beal - he has alleged no personal stake in the outcome of this appeal. While it is commendable that he is seeking to protect his constituents' interests before the Board,[6] his position as a legislator does not confer upon him any special status in proceedings before the Board; he must demonstrate an interest beyond any citizen's general interest in assuring adherence to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq., and the Hazardous Sites Cleanup Act, the Act of October 18, 1988, P.L. 756, 35 P.S. §6020.101 et seq.

---

[6] Representative Wright has also alleged that without his participation in this appeal, the interests of the citizens of Clarion County will not be adequately represented. Clarion County has been granted intervention to represent those interests.

O R D E R

AND NOW, this 3rd day of December, 1992, it is ordered that the petition of Representative David R. Wright to intervene in this matter is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: December 3, 1992

cc: **Bureau of Litigation**
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M. DIANE SMI
SECRETARY TO THE

KEYSTONE CHEMICAL COMPANY	:	
	:	
v.	:	EHB Docket No. 91-186-E
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: December 4, 1992
and BOROUGH OF GIRARDVILLE, Intervenor	:	

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT

By Richard S. Ehmann, Member

Synopsis

The Board grants the Department of Environmental Resources' (DER) motion for summary judgment in this appeal taken by an applicant for Part B of a permit to operate a hazardous waste storage and treatment facility challenging DER's denial of its permit application. Where there is no question of material fact that the appellant's Part B Application failed to meet the requirements of DER's regulations at 25 Pa. Code §265.461(b) and the law is clear, DER is entitled to summary judgment in its favor.

OPINION

Appellant Keystone Chemical Company (Keystone) commenced this appeal on May 8, 1991, seeking to challenge DER's denial, pursuant to 25 Pa. Code §270.33, of Keystone's Part B Application for a permit to treat and store hazardous waste at the Keystone facility located in Butler Township, Schuylkill County (site). Among the reasons given in DER's April 5, 1991 denial letter for denying Keystone's Application was that DER needs specific

site information in order to approve Keystone's permit and Keystone had not provided accurate site information and mapping. Specifically, DER's denial letter stated that Keystone had not given consideration to grading and drainage or roadway grades and accordingly revised the drawings contained in its Application to reflect the changes made by its revised site plan.

On August 7, 1991, we issued an order granting the Borough of Girardville's (Girardville) petition to intervene.

After the parties had engaged in discovery, we received DER's motion for summary judgment and accompanying brief on November 13, 1991. Keystone filed its Response and supporting brief opposing DER's motion on December 3, 1991. Girardville filed its Response supporting DER's motion on December 3, 1991, and Keystone filed its Reply to Girardville's Response on December 16, 1991. We subsequently received DER's Reply Brief on December 24, 1991. It is DER's motion for summary judgment which is presently before us for decision.[1]

The Board is empowered to grant summary judgment where 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. Robert L. Snyder, *et al.* v. Department of Environmental Resources, 138 Pa. Cmwlth. 534, 588 A.2d 1001 (1991). The evidence must be viewed in a light most favorable to the non-moving party. Ingram Coal Co. v. DER, 1990 EHB 395. Additionally, summary judgment may only be entered in cases that are free from doubt. Empire Sanitary Landfill, Inc. v. DER, EHB Docket No. 90-467-W (Opinion issued July 10, 1992).

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[1] Following the resignation of former Board Member Terrance J. Fitzpatrick, to whom this matter had been assigned for primary handling, this matter was reassigned to Board Member Richard S. Ehmann on September 22, 1992.

While DER's motion raises several reasons why it believes its denial of Keystone's Application was appropriate and which it argues support summary judgment in its favor, we need not examine each of DER's reasons for denial which have been challenged by Keystone since it is clear DER's denial was appropriate for at least one of these reasons. Empire Coal Mining and Development, Inc. v. DER, EHB Docket No. 91-115-MR (Opinion issued February 11, 1992).

It is apparent from DER's motion and the responses thereto that the parties do not dispute the following facts. In the fall of 1982, DER requested Keystone to submit a Part B Application for a hazardous waste facility permit. Keystone submitted a Part B Application seeking to operate a hazardous waste treatment, storage, and disposal facility on the site on April 18, 1983. On May 27, 1986, DER received a revised Part B Application from Keystone seeking a permit for operation of a hazardous waste treatment and storage (only) facility on the site. DER sent Keystone Notices of Deficiency regarding the revised Part B Application on November 18, 1986, April 17, 1987, November 17, 1987, and February 2, 1988. In late 1989, representatives of Keystone and DER met to discuss concerns about siting criteria for the facility. After this meeting, Keystone submitted to DER a second revised Part B Application, which included a proposal for the utilization of waste piles, on July 24, 1990. This second revised Part B Application contained, *inter alia*, Drawing No. 8, the Proposed Site Plan; Drawing No. 25, the Soil and Sedimentation Plan; Section 15, the Narrative to the Soil and Erosion Control Plan; Drawing No. 24, Section and Details for the proposed buildings; and a narrative describing the construction and design of the buildings. On October 31, 1990, DER received from Keystone a revision of Drawing No. 8, called Drawing No. 8A, which indicated locations for Buildings A and C and their

tanks which differed from the locations previously indicated on Drawing No. 25.

On November 20, 1990, DER issued Keystone a Notice of Intent to Deny its Application in which DER stated that accurate site information and mapping had not been provided to DER by Keystone and that specific site information is necessary for DER to approve Keystone's Application. The Notice of Intent to Deny further indicated that Keystone's October 31, 1990 revised site plan which showed changes of the building locations was submitted without consideration to revising the Application in all areas, including the related drawings, to reflect these changes.

Keystone submitted a Notice of Opposition to DER on January 4, 1991. DER later issued the challenged denial letter on April 5, 1991.

As DER points out in its brief supporting its motion, Section 104(6) of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.104(6), authorizes DER to regulate the storage and treatment of solid waste. Hazardous wastes fall within the definition of "solid waste" provided by §103 of SWMA (35 P.S. §6018.103). In determining whether DER abused its discretion in denying Keystone's permit Application, we must examine the requirements of §§502 and 503 of the SWMA, 35 P.S. §§6018.502 and 6018.503, and the rules and regulations adopted thereunder at 25 Pa. Code §265.430 through §265.470.

Section 502 of the SWMA provides that an application for any permit under that act shall be accompanied by such plans, designs and relevant data as DER may require. Section 503(a) of SWMA states:

> (a) Upon approval of the application, [DER] shall issue a permit for the operation of a solid waste storage, treatment, processing or disposal facility or area ... as set forth in the application and further conditioned by [DER].

35 P.S. §6018.503(a). Implicit in DER's power to approve a permit application

under the SWMA is DER's authority to deny the permit application where it is inadequate to meet the requirements of DER's rules and regulations.[2] See, e.g., T.C. Inman, Inc., *et al.* v. DER, 1988 EHB 613, affirmed, 124 Pa. Cmwlth. 332, 556 A.2d 25 (1989); FR&S., Inc. v. DER, 132 Pa. Cmwlth. 422, 573 A.2d 241 (1990) (FR&S III), allocatur granted, ____ Pa. ____, 597 A.2d 1154 (1991).

Section 265.440 of 25 Pa. Code provides that a person may not begin physical construction on a new hazardous waste management facility without having submitted Part A and Part B of the permit application and received a permit from DER. Section 265.442 of 25 Pa. Code prescribes the general information which, at a minimum, must accompany the submission of a Part B application. Additional specific information is required to be submitted with Part B of the application for tanks, chemical, physical and biological treatment facilities, and storage facilities. 25 Pa. Code §265.460. Pursuant to 25 Pa. Code §265.461(b), this additional information is required to include detailed information on design drawings and specification relative to:

> (1) Management of surface water.
> (2) Erosion control.
> * * * * *
> (11) Grades required for drainage of the facility.
> (12) Cross sections of access roads and all-weather roads, identifying construction materials, slopes, grades and distances.
> (13) Cross sections, grades and profiles of surface drainage diversion ditches, capacities and calculations for ditch volume.

25 Pa. Code §265.461(b)(1),(2),(11),(12), and (13).

DER's motion asserts that Keystone's Part B Application, as revised

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[2] Section 503(c) of the SWMA, 35 P.S. §6018.503(c), specifically authorizes denial of a permit if DER finds the applicant has failed or continues to fail or has shown a lack of ability or intention to comply with, *inter alia*, the SWMA and the rules and regulations of DER. See FR&S III, *supra*.

by Drawing No. 8A, provides insufficient and inaccurate information to meet the requirements of 25 Pa. Code §265.461(b)(1), (2), (11), (12), and (13). The affidavit of Frank Wanko, a construction and sanitary engineer for the Facilities Section of DER's Bureau of Waste Management, Northeast Region, attached to DER's Motion as Exhibit J, states that Keystone's Soil and Erosion Sedimentation Plan Drawing No. 25 and Drawing No. 8A both provide insufficient and inaccurate information for the following reasons. The movement of Tank Farm C would have an impact on the Diversion Terraces as represented on Drawing No. 25; revised grades have not been shown on Drawing No. 8A to accommodate the changed locations of the buildings and tank farms; revisions to the drainage system were not made to account for the changing locations of the buildings and tanks; and no profiles for roads were submitted along with associated drainage facilities for roadway runoff.

Keystone's Response to DER's motion does not point to any information which it submitted to DER in connection with its Part B Application which would show a genuine issue of material fact exists concerning whether Keystone's Part B Application, as revised by Drawing No. 8A, satisfied the requirements of 25 Pa. Code §265.461(b). Keystone makes no allegation that after deciding to change the locations of its Buildings A and C and their associated tanks, it submitted revised information to DER in order to meet the requirements of 25 Pa. Code §265.461(b)(1), (2), (11), (12), and (13) in view of the changed location of its tanks and buildings.

Keystone instead contends that DER's Notice of Intent to Deny was vague and deprived Keystone of an opportunity to cure the deficiencies, that DER should have issued a Notice of Deficiency (pursuant to 25 Pa. Code §270.33(d)) to make Keystone aware of the specific deficiencies in its Application, and that DER failed to comply with 25 Pa. Code §270.33(m) of its

regulations. Additionally, Keystone asserts DER has abused its discretion by requiring Keystone's application to conform to "relatively minor regulatory requirements," and it argues DER caused the deficiencies in its Part B Application by refusing to allow Keystone time to complete a deep boring program to address siting concerns before preparing its application.

Keystone's arguments do not raise any genuine issues of material fact or questions of law. Keystone's contention regarding DER's failure to follow the requirements of 25 Pa. Code §270.33(d) is totally misplaced, since DER's denial of its Part B Application was not premised on Keystone's failure or refusal to correct deficiencies in its Application, but rather, was based upon the inadequacy of that Application which was apparent upon DER's technical review. Moreover, 25 Pa. Code §270.33(m) has no bearing on this matter, since that regulation deals with DER's procedure at the time a final permit is issued, and no final permit was issued here. Further, contrary to Keystone's assertion, DER's Notice of Intent to Deny did afford Keystone notice that its Part B Application was inadequate based upon Keystone's failure to revise its Application in all areas, including drawings, to reflect the building location changes in its October 31, 1990 submission. After receiving the Notice of Intent to Deny, Keystone did not submit any revisions relating to the changed building and tank locations. See Exhibit E to DER's Motion at p. 103. Keystone points to paragraph 17 of the affidavit of Gary Ziegler, the individual primarily responsible for overseeing Keystone's Part B Application process on behalf of Keystone (attached to Keystone's Motion as Exhibit C) in which Mr. Ziegler states he believed DER would refuse to accept any additional revisions to Keystone's Application because when Keystone submitted six copies of Drawing No. 8A (to reflect professional engineer's signature) on November 28, 1990, DER returned these copies stating in its transmittal letter,

"[a]dditional information supplementing the Part B application will not be accepted at this time." Other than this belief on the part of Mr. Ziegler, Keystone does not point to anything which would show it even attempted to submit the specific site information required by DER's regulations after it decided to revise the location of its buildings and tanks. Obviously, DER may say no to mere supplemental or additional data but that is hardly the same thing as rejecting materials designed to correct prior existing submissions. While Keystone seeks to blame DER's imposition of a deadline for its submission of its Application as the cause for its Application's deficiency, it offers no explanation for its failure to revise the drawings related to the changed building locatings when it submitted its Drawing No. 8A in October of 1990, after it had conducted its deep boring program.

DER points out in its motion that Keystone's application states it is submitted as a "conceptual" plan only and indicates a "final" design will be submitted after DER approval of the application is given. See Exhibits E, H, and I to DER's motion. While Keystone's response and the affidavit of Gary Ziegler (Exhibit C to Keystone's response) both assert that Keystone would have provided additional detail in its erosion and sediment control plan had DER specifically requested this information before denying Keystone's application, it is not up to DER to plead with an applicant to provide DER with more information so it can approve the permit, especially where, as here, the application states that the applicant does not intend to provide DER with final plans until after approval of the permit. See Willowbrook, *supra*.

As we explained in Willowbrook Mining Co. v. DER, EHB Docket No. 90-346-E (Adjudication issued March 20, 1992), although there is some give and take in the permit application review process, a permit applicant should take efforts to see that its application satisfies the requirements of DER's

regulations. Where DER's regulations contain specific requirements for Part B Applications such as Keystone's Application, DER is not free to ignore those requirements. Willowbrook, *supra*; Mil-Toon Development Group v. DER, 1991 EHB 209. This is especially so here, where the Part B permit application was both a Phase I and Phase II application for a permit to operate a hazardous waste treatment and storage facility. See 25 Pa. Code §265.450 through §265.452. DER's requirement of adherence to its regulations is not "picayune," as Keystone suggests, but rather shows appropriate concern for protection of the public health, safety and welfare from the short and long term dangers of storage and treatment of hazardous wastes, which is but one of the purposes behind the SWMA. 35 P.S. §6018.102. DER thus did not commit an abuse of its discretion when it required adherence to its regulations.

Accordingly, we find there is no genuine issue of material fact and that DER is entitled to summary judgment as a matter of law and we enter the following order.

ORDER

AND NOW, this 4th day of December, 1992, it is ordered that DER's Motion For Summary Judgment is granted and Keystone Chemical Company's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 4, 1992

cc: **Bureau of Litigation, DER:**
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Northeast Region
For Appellant:
Terry R. Bossert, Esq.
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M. DIANE SMIT
SECRETARY TO THE B

MORTON KISE et al.	:	
	:	
V.	:	EHB Docket No. 90-457-MR
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: December 8, 1992
and WARRINGTON TOWNSHIP BOARD OF	:	
SUPERVISORS, PERMITTEE AND AYCOCK, INC.	:	
INTERVENOR		

ADJUDICATION

By Robert D. Myers, Member

Synopsis

The Board dismisses an appeal from DER's approval of a proposed revision to an Act 537 Plan. The Board discusses the provisions of the Sewage Facilities Act (SFA) and holds that DER's oversight responsibility is limited to a consideration of the particular method of sewage disposal adopted in the proposed revision. Concluding that DER's responsibilities under the SFA cannot be enlarged by Article I, Section 27, of the Pennsylvania Constitution, the Board holds that DER's review is limited to the environmental impacts of the proposed method of sewage disposal. Considering the evidence in this context, the Board holds that the method of sewage disposal adopted in the proposed revision satisfies the Constitutional provision as well as the requirements of the SFA and the regulations.

Procedural History

On October 25, 1990 Morton Kise (Kise) filed a Notice of Appeal from the September 27, 1990 approval by the Department of Environmental Resources (DER) of a Planning Module for New Land Development (Module) constituting a revision to the Official Plan of Warrington Township, York County (Township). The approved revision dealt with a four-lot subdivision on land owned by Aycock, Inc. (Aycock). A supplemental Appeal was filed on October 30, 1990 adding Dane C. and Monica Bickley (Bickleys) as Appellants and stating an additional reason for appeal. Aycock's Petition to Intervene, filed on November 30, 1990, was granted by a Board Order dated January 8, 1991.

On April 1, 1991 Aycock filed a Motion for Partial Summary Judgment to which Appellants filed a Response on April 22, 1991. The Motion was denied in an Opinion and Order issued July 9, 1991. At the request of Appellants a view of the premises was held on November 19, 1991. The hearing commenced immediately thereafter in Harrisburg before Administrative Law Judge Robert D. Myers, a Member of the Board, and continued on November 20 and 21 and December 9, 1991. All parties were represented by legal counsel. At the conclusion of the hearing on December 9, 1991 it was ordered that the record would possibly be reopened to receive the deposition of a witness from the Soil Conservation Service. That deposition was taken on December 24, 1991 and was filed with the Board on January 17, 1992. The admissibility of the deposition will be determined in this Adjudication.

Appellants filed their post-hearing brief on March 6, 1992; the Township filed on April 23 and Aycock filed on April 24. DER filed no brief. In the meantime, on February 26, 1992, Appellants had filed a Motion to Consolidate this appeal with a related appeal pending at Board Docket No. 91-400. The Motion was denied by an Order dated March 27, 1992.

The record consists of the pleadings, a transcript of 816 pages and 41 exhibits. If admitted, the deposition of Garland H. Lipscomb and two deposition exhibits also will be part of the record. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. Appellant Kise is an individual who resides at 115 Ridge Road in the Township with a post office address of Dillsburg, PA 17019 (Notice of Appeal).

2. Appellants Bickleys reside at 180 Ridge Road in the Township with a post office address of Dillsburg, PA 17019 (Supplemental Appeal).

3. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 *et seq.*, commonly referred to as Act 537, and the rules and regulations adopted pursuant to said statute.

4. The Township is a Township of the Second Class in York County.

5. Aycock is a Pennsylvania business corporation with a post office address of P.O. Box 755, Camp Hill, PA 17011 (Petition to Intervene).

6. Aycock owns a 51.1-acre tract of land in the Township, divided by Old York Road which runs in a northwest-southeast direction. About 38 acres front on the southwest side of Old York Road for about 1,575 feet, are bordered by Ridge Road on the southeast and by Beaver Creek which forms the boundary, more or less, on the northwest. The other 13.1 acres front on the northeast side of Old York Road for about 750 feet and are bordered by North Beaver Creek Road on the northwest (Exhibits A-8 and A-37).

7. Aycock proposes to subdivide the tract into four lots. Lot #1 (6.8 acres) and Lot #4 (6.3 acres) are proposed for the 13.1-acre portion

northeast of Old York Road. Lot #2 (22.1 acres) and Lot #3 (15.9 acres) are proposed for the 38-acre portion southwest of Old York Road (Exhibit A-37).

8. Lots #1, #3 and #4 are proposed for residential use (which already exists on Lot #1). Lot #2 is proposed for light industrial use (Exhibits A-5, A-11 and A-37).

9. Aycock plans to move its business operations from its present location in Lower Allen Township, Cumberland County, to Lot #2 and to construct an office building, storage buildings and maintenance and repair buildings. The buildings will aggregate 133,000 square feet. An additional six acres will be covered with concrete, macadam or stone (N.T. 490, 495; Exhibit A-32).

10. Aycock is a mechanical contractor specializing in the installation, maintenance and transportation of machinery and in the erection of steel for commercial and industrial buildings. While its business operations cover the Mid-Atlantic states, they are concentrated in the Harrisburg and York areas (N.T. 489-490).

11. Aycock performs its work at the site of the customer. The only functions performed at its operational base (and the only functions that will be performed on Lot #2) are administrative (17 office employees) and equipment storage and tool maintenance (3 yard laborers and 2 mechanics). Aycock has no present plans to increase the number of these employees (except for the addition of 1 person for property maintenance) but based the Module on the possible future addition of 10 employees (N.T. 492-494).

12. Construction workers employed by Aycock number from 81 to 250. These workers report to the job sites and have no reason to come to the operational base (N.T. 520-521).

13. Motor vehicles and construction equipment owned by Aycock will be brought to the operational base for maintenance and repair and, occasionally, for storage. Tools will be loaded and unloaded. Some fabricating of specialized equipment may be done there to meet the requirements of a particular job. About 99% of this work will be done indoors (N.T. 500-512).

14. The buildings will have concrete floors with no floor drains. Motor oil and hydraulic fluids will be stored in 175-gallon tanks, propane will be stored in 33-pound cylinders and solvents will be stored in a self-contained parts washer. No gasoline or diesel fuel will be stored. Waste fluids will be picked up regularly by a recycling contractor. All storage will be inside buildings and no steam cleaning or truck washing will be done (N.T. 503-508, 523-525).

15. Regular hours of operation for office employees will be 8:30 a.m. to 5:00 p.m. Regular hours of operation for shop employees will be 7:30 a.m. to 4:00 p.m. No night operations are anticipated except in emergency situations (N.T. 494, 522-523, 529-530).

16. Access to Lot #2 will be from Ridge Road and from Old York Road, an arterial route in the Township's Comprehensive Plan. Trucks and construction equipment will be required to use the latter; office employees may use either one (N.T. 500, 518-520).

17. The only exterior lighting that will be on all night is an existing dusk-to-dawn light at the house on Lot #1 and a proposed dusk-to-dawn light at the Old York Road access to Lot #2. Exterior lights in the yard will be used only when night operations require them (N.T. 501-502, 521-523).

18. During the early months of 1990, Aycock filed with the Township, *inter alia*, a Preliminary Subdivision Plan, a Preliminary Land Development Plan, a Planning Module for Land Development, a Stormwater Management Report

and a Sedimentation Control Report. Prior to these filings, Aycock's consultants had met with Township officials to discuss requirements for the project and had requested from DER the appropriate forms to use for the Module (N.T. 67, 558; Exhibits A-2, A-8, A-34, I-30 and I-31).

19. The Module proposed the use of private on-site wells and private on-site sewage disposal systems for the four lots. No public water system exists in the area. Public sewers are about one mile away, but an intervening hill would necessitate pumping (N.T. 298-299, 592; Exhibit A-8).

20. The use of private on-site sewage disposal systems on the Aycock tract is consistent with the York County Comprehensive Sewage Study, completed in 1972 and adopted that same year by the Township as its Official (Act 537) Plan (N.T. 273, 574-575; Exhibits A-22 and A-23).

21. Without being ordered to do so by DER, the Township began the process of upgrading its Act 537 Plan in the spring of 1990 with a view toward adopting its own Plan rather than the York County Plan. As of the date of the hearing neither DER nor the Township had made a determination that the existing Act 537 Plan is inadequate (N.T. 276-277, 279-283, 289-291; Exhibits A-25, A-26 and A-27).

22. At the request of the Township, Aycock had its consultants do additional soils testing, a Traffic Impact Assessment and a Water Feasibility Report (N.T. 562-563, 581-582, 591-592; Exhibits A-14, I-9, I-17 and I-25).

23. The plans and supporting documents filed with the Township by Aycock were reviewed by the Township Engineer, the Township Planning Commission and the Township Supervisors. In addition, the plans were reviewed by the York County Planning Commission, the Stormwater Management Report was

reviewed by the Pennsylvania Department of Transportation (PennDot) and the Sedimentation Control Report was reviewed by the York County Conservation District of the Soil Conservation Service (SCS) (N.T. 551-555).

24. An Aycock consultant prepared a Wetlands Identification and Delineation Report which was reviewed by the United States Army Corps of Engineers (COE). The wetlands depicted on the plans are consistent with the Report (N.T. 570-571; Exhibits A-9 and A-10).

25. The Township Supervisors adopted a resolution on May 2, 1990 approving Aycock's Module as a revision to the Township's Act 537 Plan and forwarded the Module to DER's York District Office (N.T. 17; Exhibit A-13).

26. DER's York District Office received the Module on or about June 4, 1990. It returned the Module as incomplete on June 11, 1990 requesting a preliminary hydrogeologic evaluation. This request was based on a report of nitrate-nitrogen levels exceeding 5 milligrams per liter (mg/l) in domestic water wells in the vicinity of the Aycock tract, supplied by Appellant Dane C. Bickley (N.T. 13-15, 19-21; Exhibits A-1 and A-2).

27. Because nitrate-nitrogen in concentrations greater than 10 mg/l has been shown to cause methemoglobinemia (blue baby disease) and may affect infants younger than 6 months, DER requires a preliminary hydrogeologic evaluation whenever water wells within a 1/4-mile radius of a site have nitrate-nitrogen concentrations greater than 5 mg/l (N.T. 114-115).

28. The purpose of a preliminary hydrogeologic evaluation is to determine the existing concentrations of nitrate-nitrogen on the site and the projected impact on those concentrations of the sewage facilities proposed for the site. If the projected impact would raise the concentration levels to a point greater than 10 mg/l, the proposal cannot be approved (N.T. 21-22).

29. DER has established standards for preliminary hydrogeologic evaluations, including methods of calculation, which must be followed by those performing the evaluations (N.T. 22-23, 697).

30. A Preliminary Hydrogeologic Evaluation was performed for Aycock and is dated July 1990. It was submitted to the Township and sent to DER's York District Office as part of the resubmission of the Module. Robert Feister, Jr., a water quality specialist in that office, provided a preliminary review and forwarded the entire Module to the Harrisburg Regional Office for additional review by Charles Feree, water quality specialist supervisor; Robert Edwards, sanitary sewage specialist; Mark J. Sigouin, hydrogeologist; Robert Muscovin, chief of planning; and Cedric Karper, regional manager for water quality (N.T. 14, 23-24, 626-627; Exhibit A-15).

31. Mark J. Sigouin reviewed the Preliminary Hydrogeologic Evaluation (N.T. 24, 110-115).

32. Philip E. McClain, a hydrogeologist for R.E. Wright Associates, Inc., performed the Preliminary Hydrogeologic Evaluation. In doing so, he

(a) determined that the tract is underlain by Triassic diabase bedrock;

(b) determined that the regional groundwater flow is toward the northeast;

(c) determined that the local groundwater flow is controlled by a groundwater divide that mimics the surface topography, extending along the high ground in a gentle arc that crosses the southeastern corner of Lot #2, parallels Ridge Road for about 200 feet, crosses Old York Road and continues through land southeast of Lots #1 and #4;

(d) determined that groundwater west and northwest of the divide discharges eventually to Beaver Creek while groundwater east and southeast of the divide discharges eventually to an unnamed tributary to Beaver Creek;

(e) determined that all of the proposed on-site sewage disposal systems for the tract would be located west and northwest of the divide and would have no influence on groundwater east and southeast of the divide;

(f) calculated a background concentration for nitrate-nitrogen of 4.7 mg/l from water samples taken from seven wells (points #1, #2, #3, #4, #5, #6 and #11) and two springs (points #8 and #9);

(g) calculated an annualized groundwater recharge rate for the tract of 234 gallons per day per acre;

(h) calculated sewage flows of 1,700 gallons per day (gpd) for the entire tract, based on 400 gpd for each of the 3 residential lots and 500 gpd for the non-residential lot; and

(i) calculated the projected impact of the on-site sewage disposal facilities proposed for the tract to result in a concentration of nitrate-nitrogen at the downgradient property lines of 9.35 mg/l (N.T. 692-696, 718-719; Exhibits A-11, A-15 and I-1).

33. In reviewing the Preliminary Hydrogeologic Evaluation, Sigouin

(a) walked the Aycock tract accompanied by Feister but was unable to determine the precise location of the springs sampled by McClain (points #8 and #9);

(b) disregarded all water samples from wells separated from the Aycock tract either by the groundwater divide or by Beaver Creek, including the wells mentioned in Richenderfer's August 27, 1990 letter (see Finding of Fact No. 34);

(c) calculated a background concentration for nitrate-nitrogen of 4.3 mg/l or 4.4 mg/l by considering water samples only from point #1 (water well at the farmhouse on Lot #1) and points #8 and #9 (springs on Lot #3); and

(d) concluded that the on-site sewage disposal facilities proposed for the tract would not result in concentrations of nitrate-nitrogen at the downgradient property lines greater than 10 mg/l
(N.T. 25, 116-128).

34. At the request of Appellant Kise, Dr. James L. Richenderfer, a hydrogeologist with TETHYS Consultants, Inc., reviewed the Preliminary Hydrogeologic Evaluation. In a letter dated August 27, 1990, which was forwarded to Feister on August 30, 1990, and sent on to Sigouin, Richenderfer expressed concern that the Evaluation's background concentration of 4.7 mgl for nitrate-nitrogen was understated in view of the higher concentrations measured earlier in three nearby wells and forwarded to Feister in Appellant Dane C. Bickley's letter of May 11, 1990. Richenderfer recommended another round of samplings concentrating on the 5 or 6 nearest wells (N.T. 25-27, 127-128, 154-155; Exhibits A-3 and A-4).

35. During the time when the Township was processing Aycock's plan, there was no zoning ordinance in effect but a Comprehensive Plan had been adopted on February 1, 1989. The Aycock tract is part of an area identified as Rural-Agricultural on the Comprehensive Plan. This designation contemplates agricultural operations and single-family dwellings (N.T. 283-285)

36. The Township's Subdivision and Land Development Ordinance was applicable to Aycock's plans and was complied with (N.T. 295).

37. Current land uses in the immediate vicinity of the Aycock tract are agricultural and residential. Commercial uses exist along Old York Road about one mile away in both directions (N.T. 657-658, 686-687).

38. In accordance with requirements of the Township's Subdivision and Land Development Ordinance, 50-foot wide buffer yards will be established along the southwest and northwest boundaries of Lot #2 and planted with white pine trees to serve (along with existing plantings) as a screen (N.T. 497-498, 662-664; Exhibit A-32).

39. The Stormwater Management Report was approved by the Township Engineer; the Sedimentation Control Report was approved by the Township Engineer and SCS; and the Wetlands Identification and Delineation Report received a jurisdictional determination from the COE (N.T. 555-556, 571-572; Exhibit I-16)

40. On September 27, 1990 DER notified the Township (by a letter from Feister) that the Module had been approved as a revision to the Township's Act 537 Plan (N.T. 27-28; Exhibit A-5).

41. Prior to issuing the September 27, 1990 approval letter, Feister had made no determination whether the proposed revision was consistent with the objectives and policies identified in 25 Pa. Code §71.21(a)(5)(i) (N.T. 31-49).

42. Feister had determined that the proposed revision was consistent with a 1971 engineering study which Feister believed the Township had adopted as its Act 537 Plan. He made no consistency determination between the proposed revision and the York County Comprehensive Sewage Study because he was unaware that the Township had adopted it as its Act 537 Plan (N.T. 53-57, 92).

43. Feister was not certain whether he knew, at the time of issuing the September 27, 1990 approval letter, whether the Township was in the process of upgrading its Act 537 Plan (N.T. 58).

44. The Township approved the Preliminary Subdivision Plan on October 3, 1990 (Exhibit A-37).

45. Because of some doubt that the two springs (points #8 and #9) sampled by McClain and utilized by him in calculating a background level for nitrate-nitrogen truly reflected groundwater conditions, Richenderfer proposed to Appellants that additional tests be done (N.T. 157-159).

46. With the consent of Appellants and Aycock, Richenderfer and McClain went to the Aycock tract on February 21, 1991, split-sampled water at seven locations in the vicinity and field-measured temperature, specific conductance and pH. Two of these locations were in Beaver Creek; two others were points #8 and #9 (characterized as springs in the Preliminary Hydrogeologic Evaluation); and the remaining three were wells - points #1 and #2 and the barn well on Appellant Kise's property (the house well was point #5 in the Preliminary Hydrogeologic Evaluation) (N.T. 159, 161; 725-726, Exhibits A-15 and A-35).

47. Richenderfer -

(a) observed that point #8 was in a channel flowing into a pond but was located hundreds of feet downgradient of the source and at the lower end of a wetland;

(b) observed that point #9 was in a cultivated field and looked more like a seep than a spring;

(c) averaged each of his field measurements with McClain's to come up with a mean;

(d) considered the two sampling locations in Beaver Creek to be truly representative of surface water and considered the three well samplings to be truly representative of groundwater;

(e) found the mean temperature at points #8 and #9 to be closer to those in Beaver Creek than to those in the wells;

(f) found the specific conductance at points #8 and #9 to be closer to those in Beaver Creek than to those in the wells;

(g) found the pH at points #8 and #9 to be closer to those in Beaver Creek than to those in the wells;

(h) concluded that the water at points #8 and #9 is not groundwater but is surface water;

(i) concluded that the Preliminary Hydrogeologic Evaluation, which relied on points #8 and #9 to calculate a background level for nitrate-nitrogen, was suspect;

(j) concluded that a more accurate background level could be calculated by using points #1, #2, #3 and #4;

(k) concluded that, if these four points are used to calculate a background level, the impact of the on-site sewage disposal systems would raise the nitrate-nitrogen level to a point higher than 10 mg/l; and

(l) concluded that if only point #1 is used to calculate a background level (because it is the only true groundwater sampling point west and northwest of the groundwater divide), the impact of the on-site sewage disposal systems would raise the nitrate-nitrogen level to a point higher than 10 mg/l

(N.T. 152-153, 157-172; Exhibit A-35).

48. At the hearing, Richenderfer acknowledged

(a) that his only disagreement with the Preliminary Hydrogeologic Evaluation is its treatment of points #8 and #9 as representative of groundwater;

(b) that he agreed with Sigouin that only sampling points west and northwest of the groundwater divide should be considered; and

(c) that additional sampling should be done

(N.T. 154-157, 215).

49. McClain responded to Richenderfer's report by testifying that

(a) when he sampled points #8 and #9 in June 1990, the flows were twice the rate observed in February, 1991;

(b) point #8 had a vertical component to its flow in June 1990, bubbling up 12 to 18 inches below ground surface at a rate of 3 to 5 gallons per minute;

(c) there was no cascading of surface flow from the wetland into point #8 in June 1990;

(d) there was a distinct throat to the source of the spring at point #9 in June 1990 with a small but defined discharge channel that led ultimately to Beaver Creek;

(e) the bedrock underlying the Aycock tract does not permit water to migrate through it to a greater depth;

(f) the depth to bedrock is shallow;

(g) as a result of these factors, the groundwater (which flows in the weathered mantle of the bedrock) also is at a shallow depth;

(h) this conclusion is supported by the fact that the static water level in the well at point #1 is only 7.5 feet below ground level;

(i) with groundwater at such a shallow depth, any perched surface water on the tract would have to be in the soils overlying the bedrock;

(j) such perching would render the soils unsuitable for on-site sewage disposal systems, contrary to the results of the soils analysis;

(k) the specific conductance measured in the field in February 1991 is not conclusive in terms of indicating either a groundwater or a perched surface water regime but the temperature and pH measurements show conclusively that the water at points #8 and #9 is groundwater;

(l) since the temperature of groundwater, as it approaches the surface, acquires the characteristics of the ambient air temperature, the temperature of the water at points #8 and #9 should fall between that in the wells (deeper and better insulated) and that in Beaver Creek (fully exposed to the ambient air);

(m) since the soils on the Aycock tract are somewhat acidic (pH ranging from 5.6 to 6.4) and since rainfall also is acidic (5.5 pH), surface water on the tract could not acquire a pH of 8 as measured at points #8 and #9 in February 1991;

(n) since the bedrock underlying the Aycock tract is basic in nature, the pH of the water at points #8 and #9 reflects exposure to that bedrock in a shallow groundwater regime; and

(o) since wetlands are an acidic environment, the water at points #8 and #9 could not have emanated from wetlands

(N.T. 252, 700, 708, 724-745, 758-759; Exhibits I-41 and I-43).

50. McClain disputed Richenderfer's calculation of the background level for nitrate-nitrogen because

(a) Richenderfer relied on the well at point #1 as the only on-site groundwater location;

(b) the well at point #1 could be impacted by a nearby on-site sewage disposal system that would elevate the nitrate-nitrogen level; and

(c) the other three wells relied on by Richenderfer (points #2, #3 and #4) also could be impacted by nearby on-site sewage disposal systems and, with respect to point #2, by barn runoff

(N.T. 136, 216-222, 763-770; Exhibit I-42).

51. McClain believes his calculations, which show the nitrate-nitrogen levels after development to be less than 10 mg/l, actually overstate the true impact because

(a) the calculation assumed that there will be four additional on-site sewage disposal systems installed, whereas three new systems will be added to the one presently existing;

(b) the recharge rate used was 150,000 gallons per day per square mile whereas the actual rate is closer to 300,000;

(c) the acreage available for recharge used in the calculation excluded rights-of-way even though they have unpaved surfaces;

(d) the acreage available for recharge used in the calculation excluded the portion of the parking and yard areas to be covered with stone;

(e) the discharge rate of 262 gallons per day per household that DER requires to be used in the calculation is high; and

(f) DER does not allow any consideration for denitrification which is the removal of nitrate-nitrogen from water by biological processes in areas such as wetlands

(N.T. 137-139, 249, 709-713, 722, 775).

52. In January 1991 Feister submitted a portion of the Module to the Pennsylvania Historical and Museum Commission (PHMC) for its consideration. On February 27, 1991 PHMC advised Feister that there is a "high probability that archaelogical resources are located in the project area and may be affected by project activities" but that the project "will have no effect on

historic structures." PHMC recommended that Aycock conduct a Phase I survey of the tract to locate any such sites and to develop a plan for their protection. PHMC admonished that, if a Phase I survey is not conducted and if archaeological resources are encountered during construction, Aycock must stop the project, conduct the survey and develop a plan at that time, possibly delaying construction
(N.T. 49-52, 313-315; Exhibits A-20 and A-21).

53. PHMC conducted no site visit. Its conclusion that there was a high probability that archaeological resources are located on the Aycock tract was arrived at in the following manner:

(a) PHMC has a record of about 14,000 archaeological sites, 20 to 30 of which are on the Wellsville, Pa. USGS Topographic Quadrangle, the same map on which the Aycock tract is depicted;

(b) these sites are generally on relatively flat ground with well-drained soils within 200 meters of the confluence of two streams;

(c) the Aycock tract has these characteristics; and

(d) as a result, probably has archeological resources on it (N.T. 316-317, 319-323).

54. Feister forwarded the PHMC comments to Aycock on March 20, 1991. As of the date of the hearing, Aycock had not performed a Phase I survey and had not yet decided whether or not to perform one (N.T. 53, 317, 576).

55. Of the 3,500 Act 537 Plan revisions reviewed by PHMC annually, letters similar to that sent to Aycock are sent to about 20% of the applicants. Most recipients of the letters do not do a Phase I survey (N.T. 320, 323-324).

56. State agencies such as DER must consult with the PHMC but have the final authority to approve or disapprove a project (N.T. 324).

57. The portion of the PHMC letter admonishing Aycock of its duties if archaelogical resources are encountered during construction is an expression of DER policy. Aycock was notified of it when Feister forwarded the PHMC letter on March 20, 1991. (N.T. 53, 325).

58. Six wetlands are present on the Aycock tract according to the Wetland Identification and Delineation Report. Wetland A (0.6 acres) is at the southeast corner of Lot #2; Wetland B (4.23 acres) straddles the border between Lots #2 and #3 and extends to Beaver Creek; Wetland C (1.8 acres) runs along the southwestern side of Old York Road in Lot #2; Wetland D (0.94 acres) is in the eastern portion of Lot #4; Wetland E (1.66 acres) is in the western portion of Lot #3 and extends to Beaver Creek; and Wetland F (1.14 acres) runs along the northeastern side of Old York Road on Lot #1 (Exhibits A-9 and A-10).

59. Wetlands A, B and D are soybean fields; Wetland C is a drainage swale along Old York Road and an adjoining soybean field; Wetland E incorporates an intermittent stream, pond and floodplain of Beaver Creek; Wetland F is a drainage swale along Old York Road and an adjoining mowed field (Exhibits A-9 and A-10).

60. Wetland areas that have been cultivated have severely limited capacity for food chain production. Some portions of Wetlands A, C and E could support food chain production (N.T. 199-200).

61. Wetlands C and E could serve as storage areas for storm and flood waters (N.T. 205).

62. Aycock's proposed development on Lot #2 will not encroach on any wetlands except for the access from Old York Road which will cross the

drainage swale portion of Wetland C. A general permit for this minor road crossing of the wetland was approved by DER's Bureau of Dams and Waterway Management on July 18, 1991 (N.T. 572-573; Exhibits A-32 and I-27).

63. Runoff from a proposed parking lot will flow into Wetland A. Some surface water which, prior to development, would have flowed into wetland areas will be diverted to a stormwater detention pond to be constructed in the northwest corner of Lot #2 near Old York Road (N.T. 600-602).

64. The Township is in the Conewago Creek watershed. No stormwater management plan, as contemplated by the Storm Water Management Act, Act of October 4, 1978, P.L. 864, as amended, 32 P.S. §680.1 *et seq.*, has been adopted for this watershed by York County. DER has not instituted any enforcement action against the county because of a DER policy not to enforce until adequate funding is provided for preparation of plans under section 17 of the Act, 32 P.S. §680.17 (N.T. 346-353).

65. Whether or not a stormwater management plan has been adopted for the watershed, DER requires developers to comply with section 13 of the Act, 32 P.S. §680.13, by taking measures necessary to assure that the maximum rate of stormwater runoff is no greater after development than before development; and that the quantity, velocity and direction of stormwater runoff will be managed so as to protect health and property (N.T. 354).

66. A land development plan that implements these measures satisfies the requirements of section 13 of the Act, *supra*, whether or not a stormwater management plan has been adopted for the watershed (N.T. 355-356).

67. The Stormwater Management Plan prepared for Lot #2, based upon the Township's Subdivision and Land Development Ordinance and the recommendations of the Township Engineer, will achieve the goals stated in section 13 of the Act, *supra* (N.T. 556-558, 595-598; Exhibit I-30).

68. Stormwater directed to the stormwater detention pond will be discharged, without treatment, into Beaver Creek. This stormwater, as well as that flowing off Lot #2 directly into the Creek or into wetlands, could contain substances such as motor oil washed from parking areas (N.T. 598-600).

69. The Traffic Impact Assessment filed with the Township concluded that

(a) 117 passenger car trips and 8 heavy equipment trips will be generated each weekday by the Aycock facility proposed for Lot #2;

(b) these vehicle trips will be increased by 20 to 40 passenger car trips and 4 to 5 heavy equipment trips per weekday if, and when, Aycock expands its workforce by 10 employees;

(c) the sight distances at the intersection of the access to Lot #2 from Old York Road are adequate for 55 mph speeds;

(d) capacity analyses indicate that the intersection of the access to Lot #2 from Old York Road will operate at LOS "A" (little or no delay) during the morning, midday and evening peak hours;

(e) the sight distances at the intersection of Ridge Road with Old York Road are adequate for 55 mph speeds to the left (exiting from Ridge Road) but are adequate only for 45 mph speeds to the right;

(f) an advisory speed sign (45 mph) should be posted for northwest-bound traffic on Old York Road on the existing intersection warning sign in advance of Ridge Road;

(g) "heavy equipment crossing" signs could be posted at least 300 feet from the intersection of the access to Lot #2 from Old York Road for both northwest-bound and southeast-bound traffic

(Exhibit I-25).

70. A Highway Occupancy Permit was issued by PennDOT on March 13, 1991 for the intersection of the access to Lot #2 from Old York Road (N.T. 589-590; Exhibit I-26).

71. Since Ridge Road is a Township Road, no Highway Occupancy Permit was required and no traffic impact assessment was conducted (N.T. 590, 603).

72. The sight distance at the access to Lot #2 from Ridge Road was thought to be inadequate to the right (exiting from the access road) but, after a field examination by Township officials, was approved as adequate (N.T. 606-609).

73. Township officials had concerns about traffic problems initially but their concerns were alleviated when Aycock proposed an access from Old York Road that all trucks and heavy equipment would use (N.T. 287, 297-298, 302).

74. Appellants are concerned about any increase in traffic on Ridge Road or Old York Road but Ridge Road is their primary concern since they live along it close to Lot #2. Currently, Ridge Road is used by hikers, bikers, horseback riders and farm equipment, in addition to other vehicles. The road is narrow, without shoulders and is bordered by drainage ditches (N.T. 369-374, 412-419).

75. Appellants consider the general area in which the Aycock tract is situated to be unique from an aesthetic and recreational standpoint. State gamelands are located to the northwest, Pinchot State Park is located to the east and Beaver Creek meanders through the valley between these facilities. The area is rural, wooded and sparsely populated at this time. Appellants fear that the proposed Aycock facility with its buildings, lights and noise will ruin this idyllic setting and pollute Beaver Creek and the groundwater (N.T. 374, 384-385, 388-389, 396, 438-443).

76. The Township's Zoning Ordinance, which became effective on January 7, 1991, places the Aycock tract in the Rural-Agricultural district. Uses permitted by right in that district include, *inter alia*, single-family detached dwellings, animal hospitals, cemeteries and bed and breakfast inns. Uses permitted by special exception include, *inter alia*, kennels, sawmills, airports, airstrips, agricultural equipment and machinery dealers, shooting and archery ranges, outdoor commercial recreation facilities and halfway houses (N.T. 285, 665-666).

77. Under the Township's Zoning Ordinance, 27 single-family detached dwellings could be built on the Aycock tract, generating sewage and traffic greater than that proposed by Aycock (N.T. 70-71, 666-669, 688-689).

78. The Township approved the Final Subdivision Plan in July 1991 and approved the Final Land Development Plan for Lot #2 in October 1991. These approvals came after numerous public meetings and one public hearing at which Appellants and other persons had opportunity to voice objections and express concerns (N.T. 390, 552, 583).

79. Appellants took no appeal from the Township's approval of the subdivision and land development plans but did file the instant appeal from DER's approval of the Module as a revision to the Township's Act 537 Plan and an appeal docketed at 91-400-MR from DER's approval of the minor road crossing of a wetland (N.T. 394, 471, 573-574).

80. Between the date when DER approved the Module as a revision to the Township's Act 537 Plan (September 27, 1990) and the hearing on this appeal, Feister reviewed the Module in relation to the objectives and policies identified in 25 Pa. Code §71.21(a)(5)(i) and determined as follows:

(a) that the Module is consistent with the Township's Comprehensive Plan developed under the MPC because of the lack of any zoning in effect at the time (§71.21(a)(5)(i)(D));

(b) that the Module was consistent with the prime agricultural land policy in 4 Pa. Code §7.301 *et seq.*, as interpreted by DER (§71.21(a)(5)(i)(G));

(c) that consistency with plans adopted under the Storm Water Management Act was not applicable because York County has not adopted such a plan for the Conewago Creek Watershed (§71.21(a)(5)(i)(H));

(d) that the Module is consistent with the wetland protection provision of 25 Pa. Code Chapter 105, as interpreted by DER (§71.21(a)(5)(i)(I));

(e) that the Module is consistent with the policies set forth in section 507 of the History Code, Act of May 26, 1988, P.L. 414, 37 Pa. C.S.A. §507, relating to the preservation, protection and investigation of archaeological resources (§71.21(a)(5)(i)(K)); and

(f) that the Module is consistent with the objectives and policies identified in §71.21(a)(5)(i) (A), (B), (C), (E), (F) and (J) to the extent applicable to this project

(N.T. 35, 39-50, 85-89).

81. Feister did not consider traffic, noise or aesthetics because DER does not consider them pertinent to its review of a revision to an Act 537 Plan (N.T. 37, 64-65).

82. After becoming aware during the hearing that the Township had adopted the York County Comprehensive Sewage Study as its Act 537 Plan, Feister reviewed the Module and determined that it was consistent with the Plan (N.T. 628).

83. Feister did not find any potential adverse impact on the environment from the project. As a result, he did no balancing of social and economic benefits against the environmental harm (N.T. 64, 93).

84. DER's Consistency Determinations in New Land Development Planning, an interim guidance statement applicable at the time of DER's approval of the Module, provided that consistency determinations with respect to wetland protection policies concerned only the siting of the sewage disposal facilities themselves (N.T. 34-35, 90-91, 102; Exhibit A-18).

85. The Consistency Determinations in New Land Development Planning provided the following with respect to consistency determinations concerning prime agricultural land policies:

(a) the definition of prime agricultural land in 4 Pa. Code §7.305 is so broad that, if implemented literally, it would prohibit the use of on-site sewage disposal systems in Pennsylvania and put a halt to most developments;

(b) to provide a reasonable approach, DER will deny approval of a module for new land development only when the land in question and the adjacent land are in Capability Classification I and devoted to active agricultural production and when the municipality has land use and zoning ordinances in place

(N.T. 41-43, 88; Exhibit A-18).

86. Aycock's Module would not be denied approval under this policy because the soils are Capability Classification II and because the Township had no zoning ordinance in effect at the time (N.T. 41-43).

87. The definition of prime agricultural land in 4 Pa. Code §7.305 includes land in Capability Classification II (Exhibit A-18).

DISCUSSION

Appellants have the burden of proof in this proceeding: 25 Pa. Code §21.101(c)(3); *Dwight L. Moyer, Jr. et al. v. DER*, 1989 EHB 928; *Maxwell Swartwood et al. v. DER*, 1979 EHB 248; *Eagles' View Lake, Inc. v. DER*, 1978 EHB 44. Their argument that 25 Pa. Code §71.12(f) places the burden on the Township and Aycock is a misreading of that provision of the regulations which refers to "civil or administrative action taken under this chapter." That type of "action" obviously concerns implementation of the provisions of Chapter 71. It cannot apply to an appeal to this Board because such an appeal, in and of itself, cannot be an "action taken under" Chapter 71. The appeal may seek review of such an "action," as this one does, but cannot be the "action" itself.

To carry their burden, Appellants must show by a preponderance of the evidence that DER acted unlawfully or abused its discretion in approving the Module as a revision to the Township's Act 537 Plan: 25 Pa. Code §21.101(a).

The question overarching the numerous issues raised in this appeal concerns the division of responsibility between local governmental officials and DER. The SFA was adopted to protect the public health, safety and welfare through the development and implementation of plans for the sanitary disposal of sewage waste (SFA, section 3, 35 P.S. §750.3). Each municipality was required to adopt an official plan designating the methods of sewage disposal to be available in specified areas of the municipality with a comprehension of the present and an eye toward the future (SFA, section 5, 35 P.S. §750.5). Obviously, such planning had to consider zoning, population projections and economics, at least; and to that end, the plan had to be reviewed by local

planning agencies (SFA, section 5, 35 P.S. §750.5). Since a plan based on dynamic factors will become outdated sooner or later, municipalities were required to make revisions (SFA, section 5, 35 P.S. §750.5).

DER was given an oversight role by the SFA. Essentially, it was to make sure that municipalities submitted plans and revisions for review, to approve or disapprove them, and to see to it that they were implemented (SFA, section 10, 35 P.S. §750.10). The Environmental Quality Board (DER's legislative arm) was directed to adopt regulations setting standards for sewage systems and facilities and setting standards for the "preparation, review and acceptance" of plans (SFA, section 9, 35 P.S. §750.9). To accomplish the purposes of the SFA, DER's oversight role had to promote intermunicipal cooperation, coordinated and comprehensive planning, and use of the latest available technology (SFA, section 3, 35 P.S. §750.3).

Regulations adopted by the Environmental Quality Board under the SFA constitute Chapters 71, 72 and 73 of 25 Pa. Code. Chapter 71 focuses on planning, Chapter 72 on permitting and Chapter 73 on standards for sewage disposal facilities. Only Chapter 71 is relevant to this appeal and, more specifically, Subchapter C entitled New Land Development Plan Revisions. Section 71.52 directs the use of the Planning Module for Land Development as the appropriate document for an Act 537 Plan revision and details the contents of the Module. Section 71.53 deals with municipal responsibilities, specifying what needs to be filed, the time available for action and the standards guiding decision-making. Section 71.54 covers this same ground with respect to DER's review activities.

These sections focus of necessity on the sewage flows expected to be generated by the new development, the nature of those flows, the facilities proposed to be used to handle those flows and the manner in which this

proposal agrees or disagrees with the existing Act 537 Plan. The municipality can disapprove the proposed revision, *inter alia*, because it is technically inadequate or because it is inconsistent with land use plans, the Act 537 Plan, or the programs and policies identified in §71.21(a)(5)(i)-(iii) (71.53(f) and (h)). DER's review, while broader in scope, also concentrates on these subjects (§71.54(e)).

There is nothing in the SFA suggesting that DER's review of an Act 537 Plan revision should go beyond the scope of these subjects. The legislative declaration of policy underlying the statute (section 3, 35 P.S. §750.3) speaks only of plans for the sanitary disposal of sewage waste. "Official Plan," as defined in the SFA (section 2, 35 P.S. §750.2), means a "comprehensive plan for the provision of adequate sewage systems" to a municipality. The regulations at 25 Pa. Code §71.11 impose on each municipality the duty to "develop and implement comprehensive official plans which provide for the resolution of existing sewage disposal problems, provide for the future sewage disposal needs of new land development and provide for the future sewage disposal needs of the municipality." The process for developing an Official Plan requires the identification of available alternatives "to provide for new or improved sewage facilities" (§71.21(a)(4)), the evaluation of each alternative (§71.21(a)(5)), and the selection of one alternative "to solve the need for sewage facilities in each area studied" (§71.21(a)(6)). This same process applies to proposed revisions for new land developments (§71.52(a)(3)-(5)).

The alternatives referred to, set forth in Subchapter D beginning at §71.61, are methods of sewage disposal. DER's oversight responsibility (whether on Official Plans or revisions) goes no farther than a review of the municipality's consideration and choice of a particular method of sewage

disposal for the area in question. Within this framework, it is clear that the consistency of the proposed revision with land use plans, the Act 537 Plan, and the programs and policies listed in §71.21(a)(5)(i)-(iii) is determined solely by assessing the particular method of sewage disposal and nothing more.

This is not to suggest that DER's assessment is made "with blinders on." The suitability of any proposed revision must be determined by DER within the context of the municipalities and watersheds surrounding it. This may involve, *inter alia*, the weighing of current water quality conditions, current Act 537 Plans and the cumulative impact of growth and development. But it is the adequacy of the sewage disposal systems that is at issue, not the appropriateness of particular existing or proposed land uses or designs.

Appellants argue, however, that DER's duties under Article I, Section 27, of the Pennsylvania Constitution mandate a much broader assessment of the environmental impact of the proposed development. They argue that DER must determine whether any aspect of the project will adversely affect the people's "right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." This includes, according to Appellants, consideration of the noise, traffic and other effects Aycock's development will have on the surrounding area.

While holding that this constitutional provision is self-executing, Commonwealth Court ruled in *Payne v. Kassab*, 11 Pa. Cmwlth. 14, 312 A.2d 86 (1973), affirmed, 468 Pa. 226, 361 A.2d 263 (1976), that it is not absolute. The Court formulated a three-part standard by which compliance with Article I, Section 27, is to be measured. The governmental action under review must (1) comply with all applicable statutes, (2) minimize all environmental impacts, and (3) produce benefits outweighing environmental harm. Adhering to this

standard, according to the Court, will permit "a controlled development of resources rather than no development" (312 A.2D 86 at 94).

A few months after the *Payne* decision, Commonwealth Court rejected the argument that DER had primary responsibility for enforcement of Article I, Section 27 in *Bruhin v. Commonwealth*, 14 Pa. Cmwlth. 300, 320 A.2d 907 (1974). The court's thinking in this regard was amplified the following year in *Community College of Delaware County v. Fox*, 20 Pa. Cmwlth. 335, 342 A.2d 468 (1975), appeal dismissed as moot, 475 Pa. 623, 381 A.2d 448 (1977), where it held that Article I, Section 27, does not automatically enlarge the powers of a statutory agency such as DER. The Legislature can, and often does, divide responsibility for enforcement of the provision among several governmental bodies. The Court stated at 342 A.2d 478:

> Thus, under the Sewage Facilities Act, the DER is entrusted with the responsibility to approve or disapprove official plans for sewage systems submitted by municipalities, but, while those plans must consider all aspects of planning, zoning and other factors of local, regional, and statewide concern, it is not a proper function of the DER to second-guess the propriety of decisions properly made by individual local agencies in the areas of planning, zoning, and such other concerns of local agencies, even though they obviously may be related to the plans approved. Moreover, impropriety related to matters determined by those agencies is the proper subject for an appeal from or a direct challenge to the actions of those agencies as the law provides, not for an indirect challenge through the DER. As we read the Sewage Facilities Act, the function of the DER is merely to insure that proposed sewage systems are in conformity with local planning and consistent with statewide supervision of water quality management; it is the local government agencies, who are responsible for planning, zoning and other such functions.

Consistent with its holding in the *Community College* case, Commonwealth Court in *Borough of Moosic v. Pennsylvania Public Utility*

Commission, 59 Pa. Cmwlth. 338, 429 A.2d 1237 (1981), rejected the argument that Article I, Section 27, endowed the PUC with extrastatutory power to exercise land use control over a prospective owner outside of the Commission's jurisdiction. Most recently, in *National Solid Wastes Management Association v. Casey*, ____ Pa. Cmwlth. ____, 600 A.2d 260 (1991), the Court held that, once the Legislature implements Article I, Section 27, by specific legislation, the constitutional provision cannot be used by the Governor to disturb the legislative scheme or to alter DER's responsibilities pursuant to that scheme.

It is clear to us that DER's Article I, Section 27, responsibilities must be exercised within the confines of the particular statute under which it is operating and its own jurisdiction under that statute. That means that under the SFA (as already discussed) DER must assess the environmental impact of the specific method of sewage disposal proposed in the plan revision. Depending on the circumstances, that may require consideration of noise, traffic, visual impact, etc.; but these environmental disturbances must be caused by the method of sewage disposal under review and not by other features of the proposed development. Those other features, pursuant to the legislative scheme, are the responsibility of local governments.

Our prior decisions (including the Opinion and Order denying Aycock's Motion for Partial Summary Judgment in this case, 1991 EHB 1138) have not always carefully distinguished DER's Article I, Section 27, responsibilities under the SFA from those under other statutes, especially permitting statutes.[1] This may be justified, in part, by the difficulty of disposing

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[1] *Concerned Citizens for Orderly Progress et al. v. Commonwealth, Dept. of Environmental Resources et al.*, 36 Pa. Cmwlth. 192, 387 A.2d 989 (1978); and footnote continued

of a pre-hearing motion on the point without a complete understanding of an appellant's case. It is not always apparent whether the Article I, Section 27, argument deals with the method of sewage disposal or with other features of the proposed development.

After the hearing in this case, it was clear that much of Appellants' evidence dealt with aspects of the proposed development other than the method of sewage disposal. DER's authority under the SFA and, therefore, this Board's jurisdiction do not extend to these matters. Appellants' forum for litigating them was in the Court of Common Pleas of York County under Article X-A of the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §1101-A *et seq.* Unaccountably, they failed to pursue that avenue of relief.

The method of sewage disposal proposed in Aycock's module was individual on-site sewage disposal systems. Under §71.52(a)(3), Aycock had to demonstrate to the Township and to DER that this alternative is technically adequate and consistent with land use policies, the Act 537 Plan, comprehensive water quality management plans and the programs and policies in §71.21(a)(5)(i)-(iii). The Township was satisfied and adopted the Module as a revision to the Act 537 Plan. DER also was satisfied and gave it approval. Appellants have the burden of showing that this was error.

The technical adequacy of the method proposed by Aycock is measured against the provisions of §71.62. Appellants have concentrated their attack only on the Preliminary Hydrogeologic Evaluation required by §71.62(c)(2)(iii). That Evaluation was triggered by information that wells

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continued footnote
Pennsylvania Environmental Management Services, Inc. v. Commonwealth, Dept. of Environmental Resources, 94 Pa. Cmwlth. 182, 503 A.2d 477 (1986), footnote 9, discuss the scope of DER's inquiry under permitting statutes.

within 1/4 mile of the Aycock tract have nitrate-nitrogen levels exceeding 5 mg/l. It concluded that the proposed development would raise these levels but not to the critical 10 mg/l concentration. Appellants have challenged this conclusion principally because of the background level of nitrate-nitrogen used in the calculation. While there is some disagreement among the hydrogeologists (McClain - Aycock; Sigouin - DER; Richenderfer - Appellants) over which wells are appropriate to use for background purposes, the major dispute concerns water sampling points #8 and #9 - whether they truly reflect groundwater or reflect surface water. While all three experts rendered an opinion, Sigouin's relied on McClain's study without any independent verification of his own. McClain's and Richenderfer's evidence, therefore, governs our resolution of this dispute.

We found both experts to be qualified by education, training and experience. McClain had the advantage of being on the tract when the Evaluation was done during the summer of 1990; Richenderfer was not there at the time and could present no evidence on the condition of the "springs" at points #8 and #9 during that critical period. His knowledge was limited to the joint sampling event in February 1991, concerning which he and McClain were in basic agreement. Richenderfer's interpretations of the temperature, specific conductance and pH readings during that site visit seem, in large part, to be sound; but they fail to explain the high pH readings at points #8 and #9 in an acidic soil and surface water environment. McClain's explanation that these readings reflect exposure to the bedrock (which is basic), as would be the case with groundwater, is more persuasive.

We conclude that Appellants failed to sustain their burden of proof on this point and accept the nitrate-nitrogen readings at points #8 and #9 to be truly representative of groundwater on the tract. The only other sample of

groundwater on the tract is from the Aycock well (point #1). We agree with DER that, where three samples of groundwater under the tract are available, there is no reason to consider off-tract groundwater samples. This is especially true where, as here, the off-tract locations are in a different watershed. Using the three on-tract locations, the calculation produces a concentration of nitrate-nitrogen less than 10 mg/l. Accordingly, it must be concluded that the sewage disposal system proposed in the Module is technically adequate.

A great deal of the evidence presented at the hearing dealt with the consistency or inconsistency of the proposal with local and statewide plans, programs and policies. Much of this evidence concerned the proposed use of the tract (primarily Lot #2) rather than the proposed system of sewage disposal. As discussed earlier, DER's review under the SFA and Article I, Section 27, is limited to an assessment of the Township's consideration and choice of a particular method of sewage disposal. It is clear that the Township's Act 537 Plan and the Township's comprehensive plan contemplate the use of on-site sewage disposal systems on large lots in the area where the Aycock tract is located. The Module is manifestly consistent with three Township plans.

That is not enough, according to Appellants, because the Township's Act 537 Plan was adopted in 1972 and never formally revised. As a result, the Plan is outdated and DER is required by 25 Pa. Code §71.32(f)(3) to disapprove revisions for new land development. The duty of a municipality to review and revise its Act 537 Plan, derived from §71.12(a), is "whenever the municipality or [DER] determines that the plan is inadequate to meet the existing or future sewage disposal needs of the municipality or portion thereof." DER's duty to require a municipality to revise its Plan, set forth in §71.13(a), is "when

[DER] determines that the plan does not meet the requirements of Subchapter D...or the plan, or its parts, is inadequate to meet the sewage needs of the municipality, its residents or property owners or because of newly discovered facts, conditions or circumstances which make the plan inadequate."

DER advised the Township on December 5, 1989 that DER was in the process of reviewing the Act 537 Plan and suggested that the Township initiate an update to the Plan on its own. The Township responded on December 20, 1989 informing DER that it already had made the update decision and was starting the process. The Task Activity Schedule submitted to DER projected final adoption of the updated Plan by May 1993. Township Supervisor Robert E. Stoner testified that the update work is currently in process and is expected to be completed in 1992. To the best of his knowledge, DER had not issued an update order to the Township. The Township has made no decision that the existing Act 537 Plan is inadequate. Revisions to the Act 537 Plan over the years have consisted generally of 2-lot and 3-lot subdivisions, occasionally one of 6-lots. DER's Feister testified that updating an Act 537 Plan usually is required when the density of development increases to a certain level. In his opinion, that level has not been reached in the Township.

The above facts show that the Township has not made the decision required by §71.12(a) that the existing Act 537 Plan is inadequate; nor has DER made the similar but more comprehensive decisions required by §71.13(a); nor has DER ordered the Township to revise the Plan. In the face of these facts, Appellants' argument must fail because the sanction contained in §71.32(f)(3) comes into play only when a municipality does not have an Act 537 Plan or when it fails to implement or revise it "as required by order of [DER]...." The fact that the Township is in the process of updating the Plan in order to prepare for the future does not mandate or justify the disapproval

of revisions for new land development that obviously are consistent with the existing Plan.

Consistency with the programs and policies in §71.21(a)(5)(i) also was necessary before Aycock's Module could be approved. DER's Feister, who processed the Module and issued the approval letter, acknowledged that he did not make the consistency determinations required by this provision prior to approving the Module. He performed it later after the appeal had been filed and, in at least one instance, during the hearing. We do not agree with this type of after-the-fact assessment but will consider the evidence because of the *de novo* nature of our proceedings. We view the evidence with a critical eye, however, because of the tendency of any witness to reaffirm that which he or she previously approved.

Of the programs and policies listed in §71.21(a)(5)(i), Appellants argue in their brief that the Module failed to show consistency with items (D), (G), (H), (I) and (K). We will quote these items verbatim from the regulations and determine from the evidence whether or not the on-site sewage disposal method proposed in the Module is consistent with them.

(D) Comprehensive plans developed under the Pennsylvania Municipalities Planning Code.

We have already ruled that the Module is consistent with the Township's comprehensive plan. Appellants' argument, which deals solely with the proposed land uses on Lot #2 rather than the proposed method of sewage disposal, is misdirected.

(G) Title 4 of the Pennsylvania Code, Chapter 7, Subchapter W (relating to prime agricultural land policy).

This policy, adopted by Executive Order 1982-3, effective October 29, 1982, seeks to protect the State's prime agricultural land from "irreversible

conversion to uses that result in its loss as an environmental or essential food production resource" (4 Pa. Code §7.301). The Executive Order defines "prime agricultural land" as land classified as "Prime, Unique or of State and Local Importance by the USDA Soil Conservation Service, as well as land characterized by active agricultural use" (4 Pa. Code §7.305). The SCS categories include essentially all soils in Capability Classification I, II and III. When land in active agricultural use is added, the definition encompasses most of the developable land in the State and virtually all of the land suitable for on-lot sewage disposal systems.

Recognizing that a literal application of the prime agricultural land policy would interfere with municipal responsibility to plan for sewage disposal facilities, DER developed interim guidelines for making the consistency determination. According to these guidelines, consistency must be found unless the entire proposed development and the land adjacent to it are in Capability Classification I, in active agricultural production and zoned for agricultural use prior to the development proposal. If all these conditions co-exist and if, in addition, the proposed method of sewage disposal will irreversibly convert the prime agricultural land to uses incompatible with food production, a joint decision by the central and the regional offices of DER will be made whether to approve or disapprove the proposal.

When performing his after-the-fact consistency review, Feister determined that soils on the Aycock tract are in Capability Classification II[2] rather than I and that the tract was not zoned for agricultural use

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[2] Since this fact was established by Appellants in their case in chief, there was no need to present evidence on the point in rebuttal. Accordingly, footnote continued

prior to the filing of Aycock's Module. As a result, he concluded that the proposal was consistent with the prime agricultural land policy.

Without mentioning the interim guidelines, Appellants argue that the Aycock tract constitutes prime agricultural land as defined in 4 Pa. Code §7.305 and, therefore, must be preserved. The argument assumes that 4 Pa. Code §7.301 *et seq.* is a DER regulation. It is not. The DER regulation is 25 Pa. Code §71.21(a)(5)(i)(G) which merely requires "consistency" with the other regulation. It is certainly within the power of DER to interpret its own regulation and, once it does so, that interpretation is entitled to controlling authority unless it is plainly erroneous or inconsistent with the SFA: *Orth v. Department of Labor and Industry*, 138 Pa. Cmwlth. 443, 588 A.2d 113 (1991), allocatur denied, 596 A.2d 801 (1991).

To be "consistent" is to be marked by harmony and free from contradiction: Webster's Ninth New Collegiate Dictionary, Springfield, Massachusetts (1987). DER's interim guidelines attempt to reconcile the conflict between the literal application of the prime agricultural land policy and the duties of municipalities to plan for sewage disposal facilities under the SFA. They seek to eliminate the contradictions and bring the two into harmony. We cannot conclude that the manner of doing this is plainly erroneous or inconsistent with the SFA. To the contrary, it appears to be a reasoned approach to balancing conflicting policies. Accordingly, DER's interpretation of the regulation, as set forth in the interim guidelines and as applied here, is controlling.

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continued footnote
the deposition of Garland H. Lipscomb and the 2 exhibits that are a part of it are not admitted into the record.

We cannot leave this subject without making an additional observation. The sewage disposal facilities proposed for the Aycock tract are the least intrusive of all the possible alternatives. A proposal to place 4 of these systems (3 additional since 1 already exists) on a 51-acre tract can hardly be looked upon as interfering with a policy to protect prime agricultural land, even if the soils were of the highest classification. Such a proposal would not irreversibly convert the land to uses incompatible with food production.

(H) Plans adopted by the county and approved by the Department under the Storm Water Management Act (32 P.S. §§680-1 - 680.17).

Appellants' argument here is specious. The undisputed testimony is that York County has not adopted a stormwater management plan for the Conewago Watershed where the Aycock tract is located. Since no plan exists, Feister testified that this item of the regulations is inapplicable. Appellants assert that, since DER has the authority to require York County to fulfill its responsibilities under the Storm Water Management Act, it should not approve Act 537 Plan revisions under the SFA for areas where no plan exists.

DER's Eugene E. Counsil, Chief of the Division of Waterways and Storm Water Management, testified that DER policy has been to withhold enforcement of the Act until adequate funds are appropriated to pay the grants authorized in section 17 of the Act, 32 P.S. §680.17. The fact is that there is no stormwater plan with which to make a consistency determination. If we consider why that fact exists, we open the door to all sorts of extraneous issues dealing with DER's effectiveness. Proper forums and forms of action exist to handle those issues. This Board and its appeal procedure are not set up to do so.

(I) Wetland protection under Chapter 105 (relating to dam safety and waterway management).

Appellants claim that DER failed to determine whether the wetlands on the tract are "important" and failed to assess the impact the buildings and parking areas to be constructed on Lot #2 will have on the wetlands. DER's Feister testified that the interim guidelines require the Module to include a map of the wetlands but limit DER's review under the SFA to determining whether the proposed sewage disposal facilities will encroach on the wetlands. If they don't, the Module is deemed consistent with wetland protection policies.

This is an appropriate reading of DER's responsibilities under the SFA (although greater duties appear to be imposed on DER and Aycock by other statutes). Since the proposed sewage disposal facilities will not encroach on the wetlands on the Aycock tract, DER was justified in concluding that the Module was consistent with wetland protection policies.

(K) Section 507 of Title 37 of Pennsylvania Consolidated Statutes (relating to cooperation by public officials with the Commission).

This statutory provision is part of the Historic Preservation Act which makes up Chapter 5 of the History Code, Act of May 26, 1988, P.L. 414, 37 Pa. C.S.A. §101 *et seq.* Section 507, 37 Pa. C.S.A. §507, requires Commonwealth agencies and political subdivisions to cooperate with the Pennsylvania Historical and Museum Commission (PHMC) in the preservation, protection and investigation of archaeological resources. Essentially, the cooperation expected of DER is notification to the PHMC when DER becomes aware of an undertaking in connection with a State program that may affect an archaeological site.

The interim guidelines, in dealing with this subject, set forth DER's reaction to responses received from the PHMC. According to the guidelines, modules must be disapproved as inconsistent only when the PHMC states that a "significant known archaeological resource" or a "significant historical resource" will be affected by the proposed sewage facilities and when a mitigation plan required by the PHMC is disapproved. A module is not considered inconsistent when the PHMC states that it is a "high probability site" and the developer declines to conduct a site survey. That is the situation here. The PHMC called the Aycock tract a "high probability site" and recommended a Phase I Survey. Aycock has not conducted a survey or indicated whether or not it will do so.

With all deference to the PHMC and the laudable purposes it serves, we are of the opinion that the concern expressed here has little to do with the nature of the sewage disposal systems proposed but has a lot to do with the construction of buildings, parking areas and other facilities proposed for Lot #2. It is the Township that will issue the principal permits for those activities and it is the Township that should determine whether or not a Phase I Survey is a prerequisite. DER's responsibilities under the SFA, once again, focus solely on the sewage disposal facilities planned for the Aycock tract and whether they are consistent with the goals of preserving and protecting archaeological resources. As discussed above with respect to the preservation of prime agricultural land, 4 on-site sewage disposal systems on a 51-acre tract represent a minimal disturbance. We are not prepared to conclude that DER abused its discretion in approving the consistency of this type of system on a "high probability site" without requiring a Phase I

Survey. Besides, if archaelogical resources are discovered during construction of the on-site sewage disposal systems, Aycock is required to stop work until the survey is completed.

Even though not a part of the consistency determinations in §71.21(a)(5)(i) - (iii), Appellants argue that DER was required under Article I, Section 27, of the Constitution of Pennsylvania to consider the impact of noise, traffic and stormwater runoff. As already discussed, these considerations may be relevant to DER decisions under other statutes but are relevant to the SFA only as they pertain to the sewage facilities proposed for use. Here, they relate to the particular land uses proposed for Lot #2 and not the on-site sewage disposal systems. As such, they are not within DER's scope of responsibility under the SFA.

Finally, Appellants complain that Feister did not do the balancing which is the third leg of the *Payne v. Kassab* standard. When asked about this, Feister testified that he found no environmental harm to weigh against benefits. Commonwealth Court indicated in *Concerned Citizens for Orderly Progress v. Commonwealth, Dept. of Environmental Resources*, 36 Pa. Cmwlth. 192, 387 A.2d 989 (1978), that such balancing is always required of DER, even when reviewing local decisions. Accordingly, we have done our own balancing. We agree with Feister that the environmental harm associated with a plan to place 3 more on-site sewage disposal systems on this 51-acre tract is *de minimus* or nonexistent. On the other side of the scale are the public benefits derived from having an adequate plan for the disposal of sewage wastes, an accomplishment which the Legislature stated is desirable for the protection of the public health, safety and welfare (SFA, section 3, 35 P.S. §750.3). The benefits outweigh any harm that may possibly occur.

We sympathize with the Appellants and their apprehension over the changes the Aycock facility will bring to their neighborhood. The impact of development on rural areas is always traumatic to the people residing there; no matter how well regulated or controlled, it inevitably transforms the region in irreversible ways. While there are legitimate devices to slow down and channel the process, there is no way of stopping it entirely. Unfortunately for Appellants, the Tonwship did not make timely use of the tools at its disposal, primarily zoning, to control the uses to which the Aycock tract could be put.

It is our opinion (although doubtless of little comfort to Appellants) that the Aycock facility will have a lower impact upon them than many of the uses authorized by the Township's after-the-fact Zoning Ordinance. We have made Findings of Fact supporting our opinion, even though they involve local land use issues, so that further hearings will be unnecessary in the event our decision on the scope of DER's responsibilities under the SFA and Article I, Section 27, is found to be too restrictive, if and when an appeal is taken from this Adjudication.

CONCLUSIONS OF LAW

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

2. Appellants have the burden of proof. To carry the burden, Appellants must show by a preponderance of the evidence that DER acted unlawfully or abused its discretion in approving the Module as a revision to the Township's Act 537 Plan.

3. DER's oversight responsibility under the SFA, in reviewing a proposed revision to an Act 537 Plan, is limited to considering the particular method of sewage disposal adopted by the proposed revision.

4. DER's responsibilities under Article I, Section 27, of the Pennsylvania Constitution, when reviewing a proposed revision to an Act 537 Plan under the SFA, involve the assessment of the environmental impact of the particular method of sewage disposal adopted by the proposed revision.

5. Assessment of the environmental impact of other features of the development to which the proposed revision pertains is, according to the legislative scheme apparent in the SFA, the responsibility of local government.

6. The method of sewage disposal adopted in the proposed revision to the Township's Act 537 Plan is technically adequate and consistent with Article I, Section 27, of the Pennsylvania Constitution and with the programs and policies set forth in 25 Pa. Code §71.21(a)(5)(i) - (iii).

ORDER

AND NOW, this 8th day of December, 1992, it is ordered that the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
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DATED: December 8, 1992

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KEYSTONE CARBON AND OIL, INC.	:	
	:	EHB Docket No. 92-052-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: December 8, 1992

OPINION AND ORDER
SUR DER'S MOTION TO LIMIT ISSUES

By: Richard Ehmann, Member

Synopsis

Where a prior application for permit was denied by DER and the denial appealed to this Board, but the appeal was subsequently withdrawn by the applicant, a Department of Environmental Resources ("DER") Motion To Limit Issues to those involved in DER's denial of a revised application from the same applicant has merit.

Evidence which goes to issues arising from the denial of the revised permit application is admissible even if it predates the denial of the initial application. Where the *pro se* appellant's factual and legal issues are unclear because it failed to file a Pre-Hearing Memorandum in the format specified by the Board and it has been ordered to rectify this error, the motion must be dismissed without prejudice to its refiling after receipt of the new Pre-Hearing Memorandum.

OPINION

Keystone Carbon and Oil, Inc., filed the instant appeal on January 31, 1992, to challenge DER's denial on January 6, 1992, of its revised application for a "tire reclamation facility".

After the appeal had proceeded through our pre-hearing procedure and was scheduled for hearings on its merits, DER simultaneously filed three motions with us, including the instant Motion. (The other two motions are addressed in separate orders and are not relevant to the issues raised in this Motion and discussed in this opinion.)

In the instant Motion, which was filed on November 12, 1992, DER asserts that Keystone previously appealed to this Board from DER's denial of its prior application for a permit for this tire relocation facility. It asserts that this appeal at Board Docket No. 89-051-F was later withdrawn and we dismissed the appeal on that basis by Order dated January 9, 1990. (The exhibits attached to DER's Motion bear out these allegations.) DER next asserts that any issue which was or could have been raised in that appeal may not be raised here and that we may not consider any evidence available at the time of the prior appeal's termination. DER also asserts that though the *pro se*, Keystone, has not filed an adequate Pre-Hearing Memorandum, it appears Keystone intends to litigate issues predating the termination of the appeal at Docket No. 89-051-F or at least use evidence from that period in the instant proceeding.[1]

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[1]By Order dated November 25, 1992, we had sustained DER's contention that Keystone had failed to comply with Pre-Hearing Order No. 1 with regard to a Pre-Hearing Memorandum and directed it to do so.

Keystone has filed no response to this motion. Accordingly, we conclude it does not disagree with DER's assertions

There is no question that where there was a factual or legal issue which could have or should have been raised in Keystone's prior appeal, it may not now be raised. Commonwealth, DER Wheeling-Pittsburgh Street Corporation, 22 Pa. Cmwlth. 280, 348 A.2d 765 (1975), *aff'd*, 473 Pa. 432, 375 A.2d 320 (1977). We will not adjudicate in this appeal those matters Keystone should have raised in its prior appeal but elected not to do so.

This is not to say that all issues as to the instant permit are beyond the pale, if they are related to issues raised in the prior appeal. For example, if DER denied the prior application for reason that a certain type of information was submitted but was inadequate, and in its revised application Keystone attempted to supply what was originally omitted, then, if the issue of the adequacy of the totality of this original information and its supplement is before us, the doctrine of administrative finality discussed in Wheeling-Pittsburgh Steel Corporation, *supra*, is not applicable. See also Dithridge House Association v. Commonwealth, DER, 116 Pa. Cmwlth. 24, 541 A.2d 827 (1988). Other examples of possible issues which could still be before us come easily to mind but we will not recite them here. On November 25, 1992, we ordered Keystone to file a Pre-Hearing Memorandum in conformance with Pre-Hearing Order No. 1. In its first filing in response to Pre-Hearing Order No. 1, Keystone failed to specify its factual and legal contentions and we have directed it to try again. With that second attempt in hand, DER, Keystone and this Board will be able to judge what issues Keystone wishes to raise, and, if DER seeks to bar our consideration of any of these issues, whether DER's arguments in regard thereto have merit. Until that

occurs, however, as DER's Motion admits, Keystone's position is simply too foggy to allow us to do more.

DER's Motion also seeks to limit evidence we will consider at the hearing on the merits of this appeal to evidence arising subsequent to the prior appeal's termination. The lack of clarity in Keystone's position makes granting DER's motion impossible at this time. Not all potential evidence existing prior to termination of the prior appeal is inappropriate for us to consider. For example, DER would certainly want us to consider evidence of its review of certain issues during evaluation of Keystone's 1988 application for purposes of ruling on whether to bar consideration of identical issues in this appeal. Moreover, Keystone's background data on its proposed plant's process might predate the prior application's denial but be relevant to a new issue arising from DER's rejection of Keystone's revised application. We will not, therefore, issue a blanket order barring all evidence predating termination of the appeal at Docket No. 89-051-F. Until we see clarity in which factual and legal issues Keystone is raising, we can do no more than lay down the general guidelines set forth above and enter the following order.

ORDER

AND NOW, this 8th day of December, 1992, DER's Motion To Limit Issues and Evidence At Hearing is denied without prejudice to its being refiled as to specific contentions of Keystone and evidence Keystone seeks to offer after they are spelled out in Keystone's Pre-Hearing Memorandum.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: December 8, 1992

cc: **Bureau of Litigation**
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NEW HANOVER CORPORATION	:	EHB Docket No. 90-294-W
	:	(Consolidated Docket)
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: December 11, 1992

OPINION AND ORDER SUR
CROSS-MOTIONS FOR SUMMARY JUDGMENT

By Maxine Woelfling, Chairman

Synopsis

Appellant's motion for summary judgment is denied and a cross-motion for summary judgment by the Department of Environmental Resources (Department) is granted. Section 4(c) of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7514(c) (Environmental Hearing Board Act), does not bar the Department from taking action on pending applications for encroachments and earth disturbance permits for a proposed landfill where the applicant has appealed the Department's denial of a solid waste permit application to the Board.

Commonwealth Court orders imposed no obligation on the Department to continue reviewing the encroachments and earth disturbance permit applications on their merits.

In the case of the encroachments permit application, §9(a) of the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §699(a) (Dam Safety Act), and the Department's dam safety

regulations at 25 Pa. Code §105.21(a) provide that a permit applicant must demonstrate that the proposed project will comply with other applicable laws administered by the Department. Thus, denial of the encroachments permit application because of the denial of the solid waste permit application was appropriate.

As for the earth disturbance permit application, the Department has a duty under Article I, §27, of the Pennsylvania Constitution to deny a permit application if the proposed activity does not comply with "all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources." Since the solid waste permit application for the proposed landfill was denied, the project was not in compliance with the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (Solid Waste Management Act), and the Department was justified in denying the related earth disturbance permit application.

OPINION

The motions presently before the Board for disposition involve two more aspects of the controversy arising from the New Hanover Corporation's (New Hanover) attempts to construct a municipal waste landfill in New Hanover Township, Montgomery County.

The appeal originally docketed at No. 90-294-W stemmed from the Department's June 29, 1990, denial of New Hanover's application for an encroachments permit to fill wetlands in order to facilitate the construction and operation of the proposed landfill. The Department denied the encroachments permit application because New Hanover could not demonstrate a need for the permit in light of the Department's prior denial of New Hanover's application for a modification of its solid waste permit (Department's motion for summary

judgment, ¶ 2(h), New Hanover's answer, ¶ 2).[1]

The proposed landfill also required an earth disturbance permit pursuant to the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (the Clean Streams Law), and 25 Pa. Code §102.31. That permit application was also denied by the Department on March 4, 1991, for the same reason that the encroachments permit was denied (Department's motion for summary judgment, ¶ 2(k), New Hanover's answer, ¶ 2). New Hanover's appeal of the earth disturbance permit denial was docketed at No. 91-126-W and consolidated with New Hanover's appeal of the encroachments permit at Docket No. 90-294-W on August 2, 1991.

After a conference with the presiding Board Member during which the parties agreed that disposition on motions was appropriate, New Hanover and the Department filed a stipulation of facts with the Board on September 4, 1991.

New Hanover's October 1, 1991, motion for summary judgment asserts that the Department was without authority to deny the encroachments and earth disturbance permit applications merely because of its denial of the solid waste re-permitting application. In addition, New Hanover maintains that the denials violated the Commonwealth Court's January 4 and February 14, 1990, orders in James Marinari et al. v. Department of Environmental Resources, No. 159 M.D. 1989, and ignored the provisions of §4(c) of the Environmental Hearing Board Act. The Department's October 2, 1991, cross-motion for summary judgment predictably contends that it had the authority to deny the earth disturbance and encroachments permits and that it neither violated the Common-

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[1] New Hanover filed an appeal of the Department's denial of the solid waste permit application at EHB Docket No. 90-225-W on June 5, 1990 (Department's motion for summary judgment, ¶ 2(q), New Hanover's answer, ¶ 2).

wealth Court's orders nor §4(c) of the Environmental Hearing Board Act.

The Board may grant summary judgment where 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. Robert L. Snyder *et al.* v. Department of Environmental Resources, 138 Pa. Cmwlth. 534, 588 A.2d 1001 (1991). The parties here agree that there are no material facts in dispute, so we will proceed to a consideration of which party is entitled to judgment as a matter of law.

The Commonwealth Court's Orders

In its motion for summary judgment, New Hanover maintains that it is entitled to summary judgment based on "the duty of [the Department] to have acted upon all applications relating to the permit modification application as directed by the Commonwealth Court orders dated January 4 and February 14, 1990...." (New Hanover's motion for summary judgment, ¶ 18(f)). We disagree.

While it is open to interpretation whether these two Commonwealth Court orders even pertained to New Hanover's encroachments and earth disturbance permit applications,[2] it is clear that the Department took final

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[2] One portion of the first order directed the Department to "issue its final comment/review letter regarding the application...setting forth the deficiencies and any other defects of the pending application(s)...." (Emphasis added.) (New Hanover's motion for summary judgment, Exhibit A, ¶ 2). Later in the order, however, the Commonwealth Court directed the Department to "take final action on the aforesaid application(s) for permit modification/repermitting by approval of the application...or by denial of the application." (Id., at ¶ 4.) A December 19, 1990, order issued by the Commonwealth Court in New Hanover Corporation v. Department of Environmental Resources, No. 308 Misc. Dkt. 1990, directed the Department to "take granting or denial action" on New Hanover's earth disturbance permit application. The Department apparently had returned New Hanover's earth disturbance permit application without taking any formal action, thereby prompting New Hanover to file an application for peremptory judgment in mandamus in the Commonwealth Court.

action on the permit applications as directed by the Commonwealth Court. That the Department never proceeded to a review of the substantive merits of the permit applications does not change the character of the Department's denial of the applications.

§4(c) of the Environmental Hearing Board Act

We turn next to the question of whether the Department violated §4(c) of the Environmental Hearing Board Act[3] by rejecting the encroachments and earth disturbance permit applications as a result of its denial of the related solid waste management permit application. New Hanover claims that since it appealed the denial of the solid waste permit application to the Board, the Department's action was not final until the Board adjudicated New Hanover's appeal. Therefore, New Hanover reasons, the Department's denial of the solid waste permit could not be used as the basis for its denial of the encroachments and earth disturbance permits.

Neither party has particularly illuminated this issue, and we are unable to find any case law directly on point. However, the Commonwealth Court held in Department of Environmental Resources v. Norwesco Development Corporation, 109 Pa. Cmwlth. 334, 531 A.2d 94 (1987), that, absent the grant of a supersedeas by the Board, the Department was not precluded from seeking enforcement of an order in the Commonwealth Court while an appeal of that order was pending before the Board. While we are dealing with the denial of a

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[3] Section 4(c) of the Environmental Hearing Board Act provides that:

> The department may take an action initially without regard to 2 Pa.C.S. Ch.5, Subch.A, but no action of the department shall be final as to that person until the person has had the opportunity to appeal the action to the board under subsection (g). If a person has not perfected an appeal in accordance with the regulations of the Board, the department's action shall be final as to the person.

permit application rather than issuance of an order and such a denial cannot be superseded by the Board, logic dictates that the Department cannot be prevented from utilizing an otherwise appropriate grounds for its action[4] because of the filing of an appeal with the Board.[5]

The Department's Authority to Deny the Encroachments and Earth Disturbance Permits

While §4(c) of the Environmental Hearing Board Act does not prohibit the Department from utilizing the denial of the solid waste permit as a basis for rejection of the other permit applications, it does not necessarily follow that the Department was authorized to do so.

The Department is empowered by 25 Pa. Code §105.21(a)(2)[6] to deny an encroachments permit application where the "proposed project" does not comply with other relevant statutes administered by the Department. In this case the proposed project--the landfill--was denied the requisite approval under the Solid Waste Management Act and, as a result, was not in compliance with that statute.[7] Therefore, the Department was authorized by

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[4] As explained in the next section of the opinion.

[5] It may well be that where there are multiple approvals involving a proposed facility and several resultant appeals to the Board, staying some of the appeals pending resolution of the major appeal (e.g. in this case, the solid waste management permit) may be practical. However, the parties have elected not to do so here.

[6] The language of this regulation is similar to that in §9(a) of the Dam Safety Act, which, curiously, was not cited by the Department.

[7] "Proposed project" is not defined in either the statute or regulations. If the term is interpreted as meaning only the proposed encroachment, the regulation is rendered virtually meaningless. Since the General Assembly is not presumed to intend a result which is absurd, impossible of execution, or unreasonable, 1 Pa.C.S.A. §1922(1), we must reject interpreting "project" to mean only the encroachment.

§105.21(a)(2) to deny New Hanover's encroachments permit application because the proposed landfill otherwise did not comply with other relevant environmental statutes.

The earth disturbance permitting scheme, which is set forth at 25 Pa. Code §102.1 *et seq.*, does not contain an express requirement that any activity which requires an earth disturbance permit must comply with other statutes[8] and regulations administered by the Department. But, Article I, §27, of the Pennsylvania Constitution and the first part of the three-part test enunciated by the Commonwealth Court in Payne v. Kassab, 11 Pa. Cmwlth. 14, 312 A.2d 86 (1973), impose such a requirement.[9]

The Board analyzed the question of compliance with the first prong of the Payne test in Township of Salford v. DER and Mignatti Construction Company, 1978 EHB 62, wherein the issuance of a surface mining permit for a quarrying operation was invalidated[10] because the Department did not require compliance with the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 *et seq.* More specifically, the Board held:

> In our judgment, the APCA is an applicable statute within the meaning of the first test of the Payne threefold standard. The APCA is administered solely by the DER, in contradistinc-

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[8] Whether there has been compliance with the applicable statutes relevant to the protection of the Commonwealth's natural resources.

[9] While the Commonwealth Court held in National Solid Wastes Management Association v. Casey and Department of Environmental Resources, 143 Pa. Cmwlth. 577, 600 A.2d 260 (1991), that the Payne test was not to be applied in actions involving legislation which expressly states one of its purposes to be the implementation of Article I, §27, the Clean Streams Law, the legislation which governs earth disturbance permits, does not expressly state one of its purposes to be the implementation of the constitutional amendment.

[10] The actual words in the Board's order were "set aside." See 1978 EHB 96.

> tion to those statutes administered by a different agency or level of government and it is intended to protect the environment from consequences directly resulting from the permitted source. See Community College of Delaware v. Fox, supra.
>
> 1978 EHB at 90.

Here, we cannot allow ourselves to obscure the direct consequences of the earth disturbance permit--the construction of a municipal waste landfill. We, therefore, must conclude that the Solid Waste Management Act is an applicable statute within the meaning of the first prong of the Payne test and sustain the Department's denial of the earth disturbance permit for a proposed landfill not in conformance with the Solid Waste Management Act.

O R D E R

AND NOW, this 11th day of December, 1992, it is ordered that:

1) New Hanover's motion for summary judgment is denied;

2) The Department's cross-motion for summary judgment is granted; and

3) New Hanover's appeals at Docket Nos. 91-126-W and 90-294-W are dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
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DATED: December 11, 1992

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GERALD E. BOOHER and JANICE B. BOOHER	:	
v.	:	EHB Docket No. 92-026-MJ
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: December 15, 1992

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT

Synopsis

In this appeal of an order directing the appellants to remove waste tires from their property, summary judgment is granted to the Department of Environmental Resources with respect to the appeal of Gerald E. Booher, but is denied with respect to the appeal of Janice B. Booher.

Mr. Booher is collaterally estopped from reasserting issues which were adjudicated in an earlier appeal, and he is precluded by the doctrine of administrative finality from raising issues which could have been raised in the earlier appeal.

Because Mrs. Booher was not a party to the first action, she is not bound by the doctrine of *res judicata*. Privity does not exist between the Boohers in this matter merely by virtue of their spousal relationship or alleged joint ownership of the property on which the tires are located.

OPINION

This matter involves an appeal filed by Gerald E. Booher and Janice B. Booher, husband and wife, on January 29, 1992, from an order of the

Department of Environmental Resources ("Department") dated January 9, 1992, charging the Boohers with unlawfully storing, processing, and/or disposing of waste tires on their property in violation of the Solid Waste Management Act ("SWMA"), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, and the regulations promulgated thereunder. The order prohibits the Boohers from any further storage, processing, or disposal of waste tires on their property and requires the Boohers to submit a plan to the Department for the removal of the tires.

Procedural History

The order here in question is the second such order issued by the Department with respect to the tires on the Boohers' property. On January 10, 1989, the Department had issued a nearly identical order to Mr. Booher. It ordered Mr. Booher to cease storing, processing, or disposing of waste tires on his property and required him to submit a plan for removal of the tires. Mr. Booher did not appeal the order. On July 6, 1989, the Department assessed a civil penalty against Mr. Booher in connection with the January 10, 1989 order. Mr. Booher appealed the civil penalty assessment to the Environmental Hearing Board ("Board") at Docket No. 89-204-MJ. In an Opinion issued on March 21, 1990, the Board ruled that, in his appeal of the civil penalty assessment, Mr. Booher could also challenge the violations set forth in the January 10, 1989 order. See Gerald E. Booher v. DER, 1990 EHB 285.[1] In an adjudication of the matter issued on June 20, 1991, the Board found that Mr. Booher had violated §§201 and 501 of the SWMA, 35 P.S. §§6018.201 and 6018.501, and the regulations at 25 Pa. Code §271.101 by allowing the disposal

[1] A more detailed account of the procedural history of the appeal docketed at 89-204-MJ is set forth in the adjudication issued in that matter at 1991 EHB 987.

of solid waste, in the form of waste tires, on his property without a permit. The Board also upheld the assessment of a civil penalty against Mr. Booher, but reduced the amount of the penalty. See Gerald E. Booher v. DER, 1991 EHB 987, affirmed, ___ Pa. Cmwlth. ___, 612 A.2d 1098 (1992).

On August 12, 1992, the Department filed a motion in the present action, seeking summary judgment or, in the alternative, to limit the issues on appeal. The Department argues that an appeal of the January 9, 1992 order by the Boohers is barred by the doctrine of *res judicata* because "the present appeal challenges a Department order that is essentially identical to [the January 10, 1989 order] which was unsuccessfully challenged by the Boohers and adjudicated favorably to the Department ..." In the alternative, the Department asserts that the Boohers are collaterally estopped from relitigating the issues previously litigated in the earlier appeal.

The Boohers filed a memorandum of law in opposition to the Department's motion on October 9, 1992, contending that the doctrines of *res judicata* and collateral estoppel are not applicable to this appeal.

Res judicata

As both parties correctly note, before *res judicata* may come into play, four elements must be present: (1) identity of the thing sued upon, (2) identity of the cause of action, (3) identity of persons or parties to the action, and (4) identity of the quality or capacity of the parties suing or being sued. Bethlehem Steel Corporation v. Commonwealth, DER, 37 Pa. Cmwlth. 479, 490, 390 A.2d 1383 (1978); Ganzer Sand & Gravel, Inc. v. DER, 1991 EHB 957, 959. Where these four elements are present, matters which have been litigated in a prior proceeding may not be relitigated. *Id.*

The Department argues that all four elements are present in the instant appeal. We disagree.

We first note that the parties to the two actions are different. As stated above, the January 1989 order and related civil penalty assessment were directed solely to Mr. Booher, and Mr. Booher was the sole appellant in the first action. The January 1992 order is directed to both Mr. Booher and Mrs. Booher, and the appeal thereof includes Mrs. Booher as an appellant.

The Department cites the case of Thompson v. Karastan Rug Mills, 228 Pa. Super. 260, 323 A.2d 341 (1974), which holds that "[r]es *judicata* does not require absolute identity [of parties], but permits the persons and parties or their privies to be the same." 323 A.2d at 345 (Emphasis in original)

Black's Law Dictionary defines "privy" in relevant part as follows:

> In connection with the doctrine of *res judicata*, one who, after the commencement of the action, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, purchase or assignment.
>
> Black's Law Dictionary, 6th ed.

The Department argues that, by virtue of Mrs. Booher's joint ownership of the property on which the tires have been placed and by virtue of her status as spouse, a privy relationship exists.

In response, the Boohers point to paragraph 10 of the Department's motion and page 9 of the Department's supporting memorandum, which state that the Department issued the January 9, 1992 order "to include Mrs. Booher in the action." The Boohers argue that this statement is contrary to any theory that privity exists and is a concession that Mrs. Booher was not included in the first action. They further argue that if the Department believed Mrs. Booher had been included in the first order, it would not have had to issue the second order.

For the reasons stated below, we find that privity does not exist between the Boohers so as to bar Mrs. Booher from bringing this appeal.

The Department contends that privity exists by virtue of Mrs. Booher's joint ownership of the property on which the tires are located. Lacking from the Department's motion, however, is any documentation supporting its allegation that Mrs. Booher is a joint owner of the property. Factual allegations set forth in a motion for summary judgment must be supported by the pleadings and any depositions, answers to interrogatories, admissions on file, or affidavits. Pa. R.C.P. 1035; Ganzer Sand & Gravel, Inc. v. DER, 1991 EHB 430, 433. No verification of joint ownership is provided with the Department's motion.

We do note that a typed statement which was submitted with the notice of appeal on behalf of Mrs. Booher states that she is "being charged with a public nuisance ... on my own property ..." (Emphasis ours) Although this statement makes a claim of ownership of some sort, it does not, by itself, clearly establish joint ownership of the property in question. Moreover, since the Department is the party which has moved for summary judgment, any doubt must be resolved in favor of the Boohers as the non-moving party. Lawrence Blumenthal v. DER, EHB Docket No. 89-230-E (Opinion and Order Sur Motion for Summary Judgment issued October 26, 1992), p. 4. However, even if we accept this statement as evidence that Mrs. Booher is a joint owner of the property in question, the Department cites no authority in support of its position that privity exists by virtue of Mrs. Booher's joint ownership of the property on which the tires are located. Although there are situations in which joint ownership of real property may give rise to privity, such as in an

action to quiet title or other claims over ownership of the property,[2] we can locate no authority which would allow us to find that joint ownership of property, by itself, automatically establishes privity between the owners. Therefore, even if the Department can clearly show that the property on which the tires are located is jointly owned by the Boohers, it has not shown that privity exists merely by virtue of that ownership.

The Department next contends that Mrs. Booher is a privy of Mr. Booher by virtue of her status as spouse, and cites us to Seamon v. Bell Telephone Company of Pennsylvania, 576 F. Supp. 1458 (W.D. Pa. 1983), where privity was found to exist based on a spousal relationship. However, this case can be distinguished on its facts.

In the Seamon case, the plaintiff had filed a Title VII action against Bell Telephone in the District Court which was dismissed with prejudice by stipulation and order. Subsequently, the plaintiff and her husband filed a complaint with the Allegheny County Court of Common Pleas against both Bell Telephone and the union, with the husband claiming loss of consortium. The case was removed to the District Court which entered summary judgment against the plaintiff and her husband on the basis of *res judicata*. The District Court found that the complaint in the second action stated the same underlying factual allegations as the first suit and that the actionable conduct was essentially the same.

In applying the doctrine of *res judicata* against the husband, the District Court found that privity existed between the plaintiff and her husband with respect to the first suit. In reaching this finding, the Court

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[2] See, e.g., Stevenson v. Silverman, 417 Pa. 187, 208 A.2d 786 (1965), *cert. denied*, 382 U.S. 833 (Privity held to exist between plaintiff and members of his immediate family in action in which plaintiff claimed title by adverse possession.)

determined that the husband's claim was closely aligned with that of his wife, arising from the same factual allegations and dependent at least in part on proof of injury to her. The Court also noted that the husband, though not a party to the first lawsuit, had signed the stipulation ending it.

In the present case, Mrs. Booher's claim is not dependent, even in part, on the question of her husband's liability. Rather, her claim arose when the Department issued the second order naming her as a party.

Although spousal privity may be found to exist in certain situations, such as in an action for loss of consortium where one spouse's claim is dependent on proof of injury to the other spouse, it does not follow that spouses are automatically deemed to be in privity simply by virtue of their relationship. In Jones v. Beasley, 476 F. Supp. 116 (M.D. Ga. 1979), which was cited by the District Court in Seamon, the Court acknowledged that even in cases for loss of consortium, there are two views as to whether privity exists, with the majority view finding privity not to exist where spouses sue separately.

Moreover, we agree with the Boohers that, by issuing the second order "to include Mrs. Booher in the action", the Department, itself, did not view Mrs. Booher as a party or privy to the first action. We, therefore, find that privity does not exist between Mr. Booher and Mrs. Booher in this matter, and that Mrs. Booher is not barred by *res judicata* from bringing this appeal.

We also find that the requirement of identity of the thing being sued upon has not been met. The earlier appeal involved a civil penalty assessment in connection with an order directed solely to Mr. Booher requiring him to cease storing, processing, and disposing of waste tires on his property and to submit "a plan indicating where all waste tires will be removed to, and a schedule for removal of said waste tires."

The subject of the present appeal is an order directed to both Mr. Booher and Mrs. Booher. Like the first order, it requires that the storage, processing, and disposal of waste tires on the Booher property cease and that a plan be submitted to the Department for the removal of the tires. However, unlike the January 1989 order, the January 1992 order details a number of areas which the plan must address with respect to any tires which are to be recycled or used for agricultural purposes. Although the present appeal may raise a number of the same issues as were raised in the earlier appeal, which will be discussed hereinafter, we cannot find that the subject of both appeals is identical for purposes of applying the doctrine of *res judicata*.

In conclusion, we find that *res judicata* does not bar this appeal by the Boohers because Mrs. Booher was not a party or privy to the first action, and because the identity of the thing upon which the suit was brought has not been met.

Collateral Estoppel

The Department argues, in the alternative, that the Boohers are collaterally estopped from relitigating issues which were adjudicated in the first appeal.

The doctrine of collateral estoppel is designed to prevent relitigation of issues which have been decided and have substantially remained static, both legally and factually. Keystone Water Co. v. Pennsylvania Public Utility Commission, 81 Pa. Cmwlth. 312, 474 A.2d 368, 373 (1984); Ganzer, 1991 EHB at 960-961. Under this theory, the judgment in the first action operates as an estoppel in the second action only as to those matters which are identical, were actually litigated, were essential to the judgment, and were material to the adjudication. Fiore v. Commonwealth, DER, 96 Pa. Cmwlth. 477, 508 A.2d 371, 374 (1986); Ganzer, 1991 EHB at 960.

The concept of collateral estoppel, as compared to *res judicata*, is discussed in Thompson, *supra*:

> ... while the plea of res judicata always results in a bar to a subsequent suit, it is limited to a relitigation of issues on the same cause of action involving the same subject matter and concerning the same parties or their privies. The doctrine of collateral estoppel is, by its very nature, a broader concept requiring only the same issue of fact and the same party or privy against whom the defense is invoked.
>
> Thompson, 323 A.2d at 344-45

Because we have already ruled that Mrs. Booher was not a party or privy to the first action, she may not be collaterally estopped from asserting any issues in this appeal.

In their memorandum in opposition to the Department's motion, the Boohers further argue that because they have not yet had an opportunity to be heard on the denial of their beneficial use application, they should not be collaterally estopped from addressing the issue of beneficial use.

We find that Mr. Booher is collaterally estopped from raising any issues concerning beneficial use in this appeal. In the earlier appeal, Mr. Booher had argued that he was making "beneficial use" of the tires on his property by building a fence with them and that no permit was required for his activity. The Board, however, concluded that, while no permit was required for a beneficial use of municipal waste with prior written approval from the Department, Mr. Booher had not obtained such prior approval. (See Booher, 1991 EHB at 1003-04.) Sometime thereafter, Mr. Booher submitted a beneficial use application for the use of discarded tires to build a deer control fence. The application was denied by the Department on July 16, 1992.

Mr. Booher contends that he should not be estopped from raising issues concerning beneficial use in this appeal until he has had an

opportunity to be heard on the denial of his beneficial use application.[3] However, the denial of the beneficial use application is not the subject of this appeal, and, therefore, any arguments pertaining to that denial are outside the scope of this appeal. Moreover, Mr. Booher is making the same arguments regarding beneficial use in this appeal as he did in the earlier appeal. As in the earlier appeal, Mr. Booher does not have prior written approval from the Department for beneficial use. Because these arguments were dismissed in the first appeal, and because Mr. Booher's lack of prior written approval from the Department has not changed, he is precluded from reasserting any arguments regarding beneficial use.

The Department also argues that the following issues are precluded on the basis of collateral estoppel: 1) whether the discarded tires on the Booher property constitute source-separated municipal waste; 2) whether reuse of source-separated tires is exempt from the requirement for a Department permit or approval; 3) whether the use of tires as a construction material for a deer control fence constitutes reuse and recycling of tires and is exempt from the requirements for a Department permit; 4) whether use of the tires by the Boohers is exempt from regulation under the agricultural exemption of the Solid Waste Management Act; and 5) whether the action of the Department in issuing the order is unreasonable, arbitrary and contrary to law. The Department contends that these issues have already been litigated in the prior appeal.

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[3] Although Mr. Booher states that "an Appeal to the application for beneficial use approval has been submitted (attached as Appendix A)", no appendices were attached to the Boohers' memorandum. However, the Board's docket does reflect that Mr. Booher filed an appeal from the denial of his beneficial use application at EHB Docket No. 92-275-MJ.

We disagree that any of the issues above were a part of the first appeal. In our earlier adjudication, we held that discarded, used tires are waste, that the disposal of waste tires on one's property without a permit constitutes a violation of the SWMA, that a permit is not required for beneficial use of municipal waste pursuant to 25 Pa. Code §271.101(b)(2) where the person has received prior written approval from the Department, that Mr. Booher had not received prior written approval for the beneficial use of waste tires for a fence, and that Mr. Booher had violated §§201 and 501 of the SWMA, 35 P.S. §6018.201 and §6018.501, by allowing the disposal of solid waste on his land without a permit. The issues which the Department has enumerated above deal with the question of whether the Boohers may qualify under the agricultural waste exemption or recycling exemption of §271.101(b).

The Department appears to argue that since we have already ruled that Mr. Booher did not qualify for a beneficial use exemption under §271.101(b)(2), he may not raise any further arguments as to exemptions for the use of agricultural waste in farming operations, 25 Pa. Code §271.101(b)(1), and for a source separation and collection program for recycling municipal waste, 25 Pa. Code §271.101(b)(4).

Whether Mr. Booher's disposal of tires on his property qualifies for an exemption under paragraph (1) of §271.101(b) relating to agricultural waste or paragraph (4) thereof relating to a source separation and collection program is not the same issue as whether Mr. Booher's actions qualified for an exemption under paragraph (2) of §271.101(b) relating to beneficial use. These are separate issues from those addressed in our earlier adjudication. Because these issues were not addressed in the earlier adjudication, they cannot be precluded on the basis of collateral estoppel.

Administrative Finality

However, if these are matters which could have been raised in the earlier appeal, and were not, then they may be precluded on the basis of the doctrine of administrative finality as to Mr. Booher.

Under the doctrine of administrative finality, where one fails to raise an issue which could have been raised in an earlier appeal, that matter becomes final and may not be raised in a subsequent appeal. Commonwealth, DER v. Wheeling-Pittsburgh Steel Corp., 22 Pa. Cmwlth. 250, 348 A.2d 765 (1975), *aff'd*, 473 Pa. 432, 375 A.2d 320 (1977), *cert. denied*, 434 U.S. 969 (1977); Polar/Bek, Inc. v. DER, EHB Docket No. 91-387-MJ (Opinion and Order Sur Motion for Summary Judgment issued April 29, 1992). Any new issues which have arisen between the earlier action and the subsequent action, however, may be raised. Specialty Waste Services, Inc. v. DER, EHB Docket No. 90-588-E (Opinion and Order Sur Motion to Dismiss issued March 30, 1992).

In his earlier appeal, Mr. Booher argued that he was making beneficial use of the tires on his property by using them for a deer control fence. This argument was rejected on the basis that Mr. Booher had not obtained prior written approval, as required by the regulations, in order to qualify for a beneficial use exemption. Moreover, the Board found that "[t]he evidence indicates that Mr. Booher developed the idea of building a fence out of the tires only after he realized that simply allowing disposal of the tires on his property without a permit was unlawful." Booher, 1991 EHB at 1004. Mr. Booher also argued that he believed the tires could be used as a possible fuel source in the future. This argument was rejected by the Board since there was no immediate market for such use and because it did not change the tires' status as waste.

In the present appeal, Mr. Booher again argues that he has built a fence out of the waste tires which he now claims qualifies for an agricultural exemption under §501(a) of the SWMA, 35 P.S. §6018.501(a), and as an exemption under 25 Pa. Code §271.101(b)(4) for reuse and recycling of municipal waste. (Appellant's Pre-Hearing Memorandum, p. 5)

These clearly are issues which could have been raised by Mr. Booher in the earlier appeal and are now precluded by the doctrine of administrative finality. Because his "beneficial use" argument was not accepted, Mr. Booher has now attempted to justify the tires on his property, whether in a fence or otherwise, by pulling from the statute and regulations other exemptions for which he believes he qualifies.

If Mr. Booher believed he qualified for an agricultural exemption or recycling exemption with respect to the disposal of tires on his property, he had an opportunity to raise these arguments in the earlier appeal. We would advise Mr. Booher that he should have considered whether he qualified for such exemptions prior to placing the tires on his property, rather than having to develop a justification for doing so after they were on his property and after receiving an order from the Department to remove them. Had he done so, he would not be attempting to raise arguments in this appeal which should have been raised in the earlier appeal. We find, therefore, that Mr. Booher is precluded by the doctrine of administrative finality from raising these issues in this appeal.

The Department has asked for summary judgment in its motion. Summary judgment may be granted where the pleadings, depositions, answers to interrogatories, and admissions, together with any affidavits, 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); Summerhill

Borough v. Commonwealth, DER, 34 Pa. Cmwlth. 514, 383 A.2d 1329 (1978). As to Mr. Booher, we find that he has raised issues which either have already been adjudicated by the earlier appeal or could have been raised in the earlier appeal and are now barred by the doctrine of administrative finality. We find that there are no genuine issues of material fact and that the Department is entitled to judgment with respect to Mr. Booher's claim. Because issues do remain with respect to Mrs. Booher, however, the Department is not entitled to judgment as to her claim.

O R D E R

AND NOW, this 15th day of December, 1992, it is hereby ordered that the Department's motion is granted in part and denied in part. The Department's motion for summary judgment is granted against Mr. Booher. The Department's motion for summary judgment, or in the alternative, to limit issues is denied with respect to Mrs. Booher.

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DATED: December 15, 1992

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COMMUNITY REFUSE, LTD. and POLLUTION CONTROL FINANCING AUTHORITY OF CAMDEN COUNTY, Intervenor	:	
v.	:	EHB Docket No. 92-170-MJ
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: December 15, 1992

OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT AND AMENDED NOTICE OF APPEAL

By Joseph N. Mack, Member

Synopsis

Section 701(a) of Act 101 imposes a recycling fee on the disposal of all solid waste at a municipal waste landfill, but exempts from this fee all process residue received from a resource recovery facility. The exemption is not limited solely to process residue which is received from a resource recovery facility located in Pennsylvania as asserted by the Department. Where the words of a statute are clear and unambiguous, the Board may not disregard the express language under the pretext of inquiring into the statutory intent. Therefore, Community Refuse's motion for summary judgment is granted, and the Department is ordered to refund that portion of the recycling fee paid by Community Refuse on process residue received for disposal from an out-of-state resource recovery facility.

The Board dismisses the amended notice of appeal filed by Community Refuse because Community Refuse has not demonstrated good cause for amending its appeal. Moreover, where the parties have stipulated that Community Refuse is "deemed" to have petitioned for a refund of the recycling fee paid on an additional amount of process residue received for disposal at its facility and that the Department is "deemed" to have denied its request, there has been no "action" or "adjudication" by the Department which is appealable.

OPINION

This matter involves an appeal filed by Community Refuse, Ltd. ("Community Refuse") on April 20, 1992 from the Department of Environmental Resources' (the "Department's") denial of Community Refuse's petition for a refund of the recycling fee paid by it in connection with §701 of the Municipal Waste Planning, Recycling and Waste Reduction Act ("Act 101"), Act of July 28, 1988, P.L. 556, 53 P.S. §4000.101 *et seq.*, at §4000.701. Section 701 of Act 101 imposes a recycling fee of $2 per ton on operators of municipal waste landfills and resource recovery facilities. The fee is imposed on (1) all solid waste processed at resource recovery facilities[1] and (2) all solid waste received for disposal at municipal waste landfills, except for process residue[2] and nonprocessible waste received from a resource recovery facility. 53 P.S. §4000.701(a).

The form which the Department uses in connection with collection of the recycling fee distinguishes between process residue and nonprocessible

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[1] "Resource recovery facility" is defined at 53 P.S. §4000.103. Incinerators fall into this category.

[2] "Process residue" includes incinerator ash.

waste received from resource recovery facilities located within Pennsylvania and that received from facilities located outside the state. (Stip. Fact 6)[3]

Community Refuse reported to the Department that, during July through December 1991, it had received 40,142.9 tons of process residue for disposal from a resource recovery facility located in Camden, New Jersey (the "Camden facility"), which is under the direction of the Pollution Control Financing Authority of Camden County (the "Camden Authority"). (Stip. Fact 2, 7) Community Refuse paid a recycling fee in accordance with the Department's requirement. (Stip. Fact 8)

Thereafter, on February 14, 1992, Community Refuse submitted to the Department a petition for a refund pursuant to §702(e) of Act 101 (which provides for refunds for overpayment of the recycling fee). It requested a refund of the amount of the recycling fee attributed to the process residue from the Camden facility, since §701(a) specifically states that process residue received for disposal by a municipal waste landfill is exempt from the recycling fee. (Stip. Fact 9; Notice of Appeal, Ex. A) By letter of March 19, 1992, received by Community Refuse on March 23, 1992, the Department denied Community Refuse's petition for a refund with the following explanation:

> Section 701(a) imposes the recycling fee on all solid waste processed at resource recovery facilities in Pennsylvania and all that disposed at landfills in Pennsylvania, except for process residue ("ash") from resource recovery facilities. It is clear that all solid waste disposed in Pennsylvania, whether at landfills or resource recovery facilities, is intended by the Act to be subject to the recycling fee. If, as suggested by your letter, the recycling fee were not applied to ash from out-of-state resource

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[3] "Stip. Fact ——" refers to the parties' Stipulated Facts, which were filed with Community Refuse's motion for summary judgment on October 2, 1992.

> recovery facilities and disposed in Pennsylvania landfills, no recycling fee whatsoever would be realized from that waste. This would give out-of-state waste a special preference over Pennsylvania waste.
>
> The intent of excluding Pennsylvania process residues in the Municipal Waste Landfill and Resource Recovery Facility Quarterly Operations and Fee Reports completed for landfills is simply to avoid paying the fee on the same waste twice. The Pennsylvania resource recovery facility pays the fee on wastes it burns, therefore, the landfill receiving the ash from that resource recovery facility is not required to pay a fee on it. The landfill is required to pay the recycling fee on ash from out-of-state resource recovery facilities because such facilities will not have paid the fee on wastes they processed and which are ultimately disposed in Pennsylvania. The payment of the recycling fee on process residue from out-of-state resource recovery facilities assures that out-of-state waste disposed in Pennsylvania is subject to the same fee as Pennsylvania waste.
>
> (Notice of Appeal, Ex. B)

On April 20, 1992, Community Refuse filed this appeal challenging the Department's denial. By order of August 17, 1992, the Camden Authority was granted leave to intervene in the appeal.

§701(a) of Act 101

On October 2, 1992, Community Refuse filed a motion for summary judgment and supporting memorandum, as well as a set of Stipulated Facts which had been entered into by the parties. In its motion, Community Refuse argues that §701(a) of Act 101 clearly and unambiguously excludes from payment of the recycling fee the disposal of all process residue received from a resource recovery facility and that the Department's interpretation is contrary to the plain meaning of §701(a). By letter filed on October 23, 1992, the Camden Authority concurred with the motion.

The Department responded with a memorandum in opposition to the motion on October 30, 1992. The Department asserts that the intent of the legislature in drafting §701(a) was to ensure that a recycling fee would be paid on the processing and disposal of all municipal waste in the Commonwealth, but also to avoid having the fee imposed on the same waste twice, i.e. waste that is processed at a resource recovery facility which is then sent to a municipal waste landfill for disposal. Because process residue from out-of-state resource recovery facilities has not already been subject to the recycling fee as has process residue generated by resource recovery facilities within the state, argues the Department, it is not exempt under §701(a). Community Refuse filed a reply to the Department's memorandum on November 17, 1992.

Community Refuse argues that where the words of a statute are clear, we may not go beyond their plain meaning in an attempt to interpret the legislative intent. In support of its argument, Community Refuse points to the Statutory Construction Act, 1 Pa. C.S.A. §1501 *et seq.*, which states, "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S.A. §1921(b). It also points to Big B Mining Company v. DER, where the Commonwealth Court held that "we cannot rely upon congressional or legislative intent when there is no ambiguity in the statute being interpreted." 142 Pa. Cmwlth. 215, 597 A.2d 202, 203 (1991), *allocatur denied*, ___ Pa. ___, 602 A.2d 862 (1992).

The Department argues, however, that there are times when it is necessary to go beyond the express language of a statute in order to interpret its intent. The Department relies on language in the Statutory Construction Act, which states that "[t]he object of all interpretation and construction

of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions." 1 Pa. C.S.A. §1921(a). Secondly, the Department points out that §104(a) of Act 101 calls for a liberal construction of the Act's terms and provisions so as best to achieve its purposes and goals. 53 P.S. §4000.104(a). It asserts that its interpretation of §701(a) is consistent with those purposes and goals, which include the establishment of "a recycling fee for municipal waste landfills and resource recovery facilities to provide grants for recycling, planning and related purposes." 53 P.S. §4000.102(b)(6). Finally, the Department cites the case of Philadelphia Suburban Corporation v. Commonwealth of Pennsylvania as supporting its position that "where there is a clear conflict between the Legislature's intent and the otherwise apparent meaning of the terms of the statute, the Legislature's intent should be given effect." Philadelphia Suburban, ___ Pa. Cmwlth. ___, 601 A.2d 893 (1992).

We agree that Act 101 calls for a liberal construction of its terms and provisions. However, as Community Refuse points out in its reply, the purposes and goals of the Act on which the Department relies, at 53 P.S. §4000.102(b)(6), deal with the Department's power to collect the recycling fee, rather than the application of the fee to certain types of waste.

In the Philadelphia Suburban case cited by the Department, the Commonwealth Court did recognize that there are times when the letter of the law must be disregarded in pursuit of its spirit. However, the Court emphasized that this was a "narrow exception" to be applied only "in rare and exceptional circumstances...where the application of the statute as written will produce a result 'demonstrably at odds with the intentions of its drafters.'" Philadelphia Suburban, 601 A.2d at 899, n.2 (quoting from

Demarest v. Manspeaker, ___ U.S. ___, 111 S. Ct. 599, 604, 112 L.Ed. 2d 608 (1991).) The Court did not find those "rare and exceptional circumstances" present in Philadelphia Suburban. Moreover, the Court went on to quote the following language of Justice Frankfurter:

> The function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy had lodged in its elected legislature ... *A judge must not rewrite a statute, neither to enlarge or contract it ...*

Philadelphia Suburban, 601 A.2d at 899 (quoting from Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 533 (1947) (Emphasis added in Philadelphia Suburban).

With respect to the present matter, there is no ambiguity in the language of §701(a), nor has the Department succeeded in demonstrating that there is a clear conflict between the apparent meaning of the language of §701(a) and the intention of the legislature.

Moreover, in the recent case of Modern Trash Removal of York, Inc. v. DER, the Commonwealth Court in interpreting §701(a) and other sections of Act 101, refused to read any further exceptions into §701(a) than those expressly stated. Modern Trash Removal, No. 1465 C.D. 1991 (Pa. Cmwlth. August 18, 1992). That case involved the relocation of municipal waste from the Sunny Farms Landfill to a landfill owned and operated by the appellant, Modern Trash Removal of York, Inc. ("Modern"). Modern argued that the fees imposed by Act 101, including those of §701(a), did not apply to voluntary cleanups of previously generated wastes. The Environmental Hearing Board determined that the fees imposed by Act 101 did apply to solid waste transferred from one landfill to another as a result of a voluntary cleanup. On appeal to the Commonwealth Court, Modern contended that the Board's failure

to read an exception into the Act was contrary to the policy of Act 101 because it would discourage voluntary cleanup operations. The Commonwealth Court dismissed Modern's argument, holding that the words of Act 101, including those of §701(a), are "clear and unambiguous" and that "any inquiry into the purposes of the Act is unnecessary." Modern Trash Removal, slip op. at 6.[4]

Like Modern, the Department would have us read a further exception into the exclusionary provision of §701(a). That is, the Department would have us interpret §701(a) as follows: the recycling fee is imposed on all solid waste entering a municipal waste landfill, except process residue and nonprocessible waste from resource recovery facilities located in Pennsylvania. However, like the Commonwealth Court in Modern Trash Removal, we also find this section to be clear and unambiguous as to the issue raised in this appeal. The recycling fee is imposed on the disposal of all solid waste at a municipal waste landfill except for process residue or nonprocessible waste from a resource recovery facility. No distinction is made in the statute between process residue and nonprocessible waste generated by a resource recovery facility located within Pennsylvania or that generated by an out-of-state facility. [5]

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[4] The Department argues in footnote 3 of its memorandum that the language of the Commonwealth Court in Modern Trash Removal, *supra*, supports its position since the Court stated, "The words of the Act [101] are clear: the fees are imposed on all solid waste entering a landfill." Slip op. at 5 (Emphasis in original) However, that case did not involve process residue from a resource recovery facility but, rather, solid waste which was being moved from one landfill to another. The Court in Modern Trash Removal was not dealing with either of the exemptions stated in §701(a) but, rather, with solid waste which did not fall into either of these exempt categories.

[5] Nor may we address whether such a distinction could be made. Any footnote continued

If, as the Department asserts, the intention of the legislature in drafting §701(a) was to avoid having the recycling fee imposed on the same waste twice, it could easily have worded §701(a) to exclude from payment any waste for which the fee had already been paid.[6] However, the legislature did not adopt this language, and we may not redraft the statute to read this intent into §701(a). Philadelphia Suburban, *supra.* Therefore, we must find that the Department's interpretation of §701(a) of Act 101 is in error.

The Board is authorized to grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, 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. Robert L. Snyder v. DER, 138 Pa. Cmwlth. 534, 588 A.2d 1001 (1991). In the present case, there are no material facts which are in dispute. Rather, the sole issue involves the Department's interpretation of §701(a).

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continued footnote
distinction to be made between waste which is subject to the recycling fee and that which is not subject to the fee is a matter for the legislature.

[6] The Department notes in footnote 1 of its memorandum that this language is set forth in a regulation recently adopted by the Environmental Quality Board at 25 Pa. Code §273-315(d) (22 Pa. Bulletin 5141), which reads as follows:

> (d) The recycling fee is not applicable to process residues from resource recovery facilities which have paid or will pay, in the next calendar quarter, the recycling fee on the waste from which that process residue is derived. The recycling fee is not applicable to nonprocessible waste from a resource recovery facility that is disposed in a landfill within this Commonwealth.

This regulation went into effect on October 10, 1992, after the filing of this appeal. Because it is not at issue in this appeal and because the language of the form used by the Department for collection of the recycling fee differs significantly from the language of this regulation, this Opinion does not further address it.

Although the Department's interpretation of the statutes it enforces is entitled to certain deference, we may not defer to that interpretation where it is clearly erroneous. BethEnergy Mines, Inc. v. DER, EHB Docket Nos. 92-252-MJ and 92-253-MJ (Opinion and Order Sur Petition for Supersedeas issued September 15, 1992). We have found the Department's interpretation of §701(a) of Act 101 to be in error and contrary to the rules of statutory construction. We further find that Community Refuse is entitled to judgment as a matter of law, and, therefore, we shall enter summary judgment in its favor.

Amended Notice of Appeal

One final matter which must be addressed is an amended notice of appeal which was filed by Community Refuse on October 16, 1992. In this amended notice of appeal, Community Refuse states that it paid the recycling fee on an additional 55,362.6 tons of process residue received from the Camden facility for disposal during the period from January through June 1992.[7]

Paragraph 3 of the amended notice of appeal states in part as follows:

> ... counsel for Community Refuse and counsel for the Department have agreed to stipulate that Community Refuse is deemed to have filed a Petition for Refund of the Recycling Fee for the time period [January through June 1992] and the Department is deemed to have denied said Petition
>
> (Emphasis ours)

The decision to allow a party to amend an appeal after the appeal period has closed, "is analogous to a decision to allow an agency appeal *nunc pro tunc*"; the Board "need not grant the petition absent a showing of good

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[7] As noted hereinabove, the original notice of appeal addresses the recycling fee paid on 40,142.9 tons of process residue received from the Camden facility during the period from July through December 1991.

cause." Pennsylvania Game Commission v. DER, 97 Pa. Cmwlth. 78, 509 A.2d 877, 885-886 (1986), aff'd on other grounds, 521 Pa. 121, 555 A.2d 812 (1989). See also, James and Margaret Arthur v. DER, EHB Docket No. 90-043-F (Opinion and Order Sur Petition to Amend Appeal issued September 11, 1992); NGK Metals Corp. v. DER, 1990 EHB 376. Good cause may include reservation of the right to add new grounds which may only be obtained through discovery. James and Margaret Arthur, *supra*.

In the present matter, Community Refuse has not petitioned for leave to amend its appeal, nor has it made a demonstration of good cause for doing so. In fact, Community Refuse has not sought to add new grounds to its existing appeal but, rather, to expand its appeal to include the recycling fee paid on process residue collected from the Camden facility between January and June 1992.

The Board's jurisdiction extends only to appeals of Departmental "actions", as defined at 25 Pa. Code §21.2(a), and "adjudications", as defined at 2 Pa. C.S.A. §101. Environmental Neighbors United Front v. DER, EHB Docket No. 91-372-MJ; Borough of Ford City v. DER, 1991 EHB 169. In the present case, there has been no "action" or "adjudication" by the Department with respect to the recycling fee paid on the process residue collected between January and June 1992. The parties' stipulation that Community Refuse is deemed to have filed for a refund of this portion of the recycling fee and that the Department is deemed to have denied its request does not constitute an action or adjudication which is appealable to this Board. Mere agreement by the parties will not confer jurisdiction where it otherwise would not lie. John Percival v. DER, 1990 EHB 1077, 1106; Hatfield Township Municipal Authority v. DER, 1988 EHB 122, 125.

We, therefore, must dismiss Community Refuse's amended appeal as failing to comply with the requirements for amending an appeal and as further failing to appeal from an action or adjudication of the Department.

O R D E R

AND NOW, this 15th day of December, 1992, upon consideration of the motion for summary judgment filed by Community Refuse and the Department's memorandum in opposition thereto, it is hereby ordered that the motion is granted and summary judgment is entered in favor of Community Refuse. The Department is ordered to refund that portion of the recycling fee paid by Community Refuse on the 40,142.9 tons of process residue collected for disposal from July through December 1991.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
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DATED: December 15, 1992

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EDWARD P. McDANNIELS	:	
	:	**EHB Docket No. 88-040-MJ**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 16, 1992

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

By Joseph N. Mack, Member

Synopsis

Where DER represented to an applicant for a water obstruction and encroachments permit that no such permit was required for his fill activity and the applicant proceeds to fill his property in reliance thereon, and where DER subsequently determined that a permit is required for the activity and *sua sponte* "reactivates" the permit application, it was an abuse of discretion for DER to issue a permit denial and, based thereon, to order the applicant to remove the fill material.

BACKGROUND

This appeal was filed by Edward P. McDanniels ("McDanniels") on February 16, 1988 and perfected on March 30, 1988. The appeal is from an "Order and Permit Denial" issued by the Commonwealth of Pennsylvania, Department of Environmental Resources ("Department" or "DER") on January 15, 1988. The permit denial was issued based upon a permit application submitted by McDanniels on or about March 26, 1987 "to continue with ... clean fill

activity" on his property. This application was made by McDanniels after an inspection by the Department and the issuance of a Notice of Violation ("NOV") dated March 2, 1987 (Board Ex. 1)[1] which advised McDanniels that he was in violation of the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.*, for filling a wetland without first obtaining a permit.

On or about March 26, 1987, McDanniels filed an Application for Dam or Water Obstruction Permit indicating the location of the proposed fill activity. Shortly thereafter on or about April 13, 1987, McDanniels received a letter from the Department signed by John L. Shearer of the Division of Waterways and Storm Water Management, referencing the McDanniels application by date and location of the proposed fill. The letter stated that "a Water Obstruction and Encroachment Permit is not required [for the activity referenced by McDanniels] in accordance with the provisions of the Dam Safety and Encroachments Act." Upon the receipt of this letter from the Department, McDanniels proceeded to have a contractor move stockpiled fill into the area described in the permit application.

On April 24, 1987, the Department, by letter signed by Dan R. Grove, Chief, Western Section, Division of Waterways and Storm Water Management, again contacted McDanniels and indicated that a permit would be necessary for any fill to be placed in the McDanniels site. The permit application which had been submitted in March 1987 was then "reactivated".

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[1] Board Exhibits ("Board Ex.") are those submitted with the Joint Stipulation of the Parties on April 16, 1990. Commonwealth, DER Exhibits ("Comm. Ex.") and Appellant McDanniels Exhibits ("App. Ex.") are those introduced at the hearing of this matter.

On January 22, 1988 McDanniels received from the Department an Order and Permit Denial dated January 15, 1988 which denied McDanniels' permit application and ordered McDanniels to submit a plan for removal of the fill material from the wetland and for restoration of the site to its condition prior to the placement of the fill.

A hearing on this matter was held on May 15 and 16, 1990. Post-hearing briefs were filed on August 27, 1990 and reply briefs on September 10, 1990 by McDanniels and on September 17, 1990 by DER.

After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. The Appellant is Edward P. McDanniels, an individual with a mailing address of 3803 East Lake Road, Erie, Pennsylvania 16511. (T. 277, Board Ex. 6, Notice of Appeal)

2. The Appellee in this case is the Commonwealth of Pennsylvania, Department of Environmental Resources, the agency of the Commonwealth with the duty and authority to administer and enforce the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.*; the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510.17 ("Administrative Code"); and the rules and regulations of the Environmental Quality Board ("rules and regulations") adopted under those statutes.

3. McDanniels and his wife own a tract of land of approximately 6.5 acres which is located on Iroquois Avenue in Harborcreek Township, Erie County, Pennsylvania ("Site" or "McDanniels Site"). (T. 277-278, 300)

4. The McDanniels Site is bordered on the North by Iroquois Avenue, and on the South by railroad tracks. A building housing the McDanniels Machinery Shop is located in the eastern corner or edge of the Site. McDanniels constructed the building in 1979 or 1980. (T. 280, Comm. Ex. 5)

5. McDanniels and his wife purchased the Site from the Commonwealth of Pennsylvania in 1970. (T. 278) The Site was zoned light industrial. (T. 279) The Site contained a gravel pit which was grown over with cattails. (T. 279-280)

6. McDanniels began filling the Site with clean fill material in the late 1970's. (T. 281)

7. The McDanniels Site contained a wetland in the northern and western areas of the Site. (T. 22, 27, 28, 32-33)

8. On March 19, 1986 the Site was visited by David Putnam of the United States Fish and Wildlife Service ("U. S. Fish and Wildlife Service"), who was investigating reports of dumping and filling a wetland. (T. 9, 21, 22)

9. The U. S. Fish and Wildlife Service acts as a technical advisor to DER regarding the possible impact of proposed projects on fish and wildlife. (T. 13-14)

10. Putnam observed a large area of cattails and determined that the Site was a wetland. (T. 22, 24) He did not observe any standing water, nor did he conduct any soil testing at the Site. (T. 22, 23)

11. Putnam investigated the Site only 15 minutes and did not conduct any benefits analyses of the wetland. He did not determine any impact on nearby Six Mile Creek or whether the area contained any endangered plants or aquatic life. (T. 37-38, 38)

12. Putnam informed Bill Taylor, an employee of McDanniels, that the area in which fill was being placed was a wetland. (T. 24)

13. By letter dated March 31, 1986 and signed by Mr. Putnam's supervisor, the U. S. Fish and Wildlife Service contacted the U. S. Army Corps of Engineers regarding the McDanniels Site. (Comm. Ex. 7)

14. The Site was visited by James Pabody of the U. S. Army Corps of Engineers on three occasions: May 29, 1986, February 19, 1987, and August 12, 1987. (T. 44, 50, 70, 75)

15. On his first visit to the Site, Mr. Pabody observed the presence of cattails and standing water. (T. 57, 102) At that time, McDanniels verbally agreed to cease filling the wetland area. (T. 61)

16. Pabody again visited the Site on February 19, 1987 in response to another letter from the U. S. Fish and Wildlife Service. On the second visit Pabody observed no further filling of the wetland but did observe the stockpiling of further fill on the already filled area. (T. 70)

17. On Pabody's final visit, August 12, 1987, the entire area of the wetland on McDanniels' property was filled, leveled and planted with grass. (T. 76, 77)

18. Pabody does not remember advising McDanniels that a permit was required for his fill activity. (T. 99) Pabody did, however, speak to DER representative Tom D'Alfonso from the Bureau of Dams and Waterway Management regarding the Site. (T. 109)

19. D'Alfonso visited the McDanniels Site on February 9, 1987 (T. 171) and advised McDanniels that his activity of filling the wetland was illegal and required a permit under state law. (T. 337) D'Alfonso did not describe to McDanniels what is meant by "body of water" under the regulations,

nor did McDanniels recall D'Alfonso explaining what constitutes a wetland. (T. 339)

20. On March 2, 1987 DER's Bureau of Dams and Waterway Management ("Bureau of Dams") Northwest office issued a Notice of Violation ("NOV") advising McDanniels that he was in violation of §§6(a) and 18(1) of the Dam Safety and Encroachments Act, 32 P.S §693.6(a) and §693.18(1), for filling a wetland without first obtaining a written permit from DER. (Board Ex. 1, Stip. Fact No. 5)[2] The NOV was accompanied by a permit application form and a copy of the 25 Pa. Code Chapter 105 regulations ("Chapter 105 regulations"). (Board Ex. 1; T. 289, 338)

21. Following the receipt of the NOV, McDanniels notified DER by letter dated March 18, 1987 that he would submit a permit application. (T. 221, App. Ex. 5)

22. McDanniels' letter was received by the Bureau of Dams' Northwest office in March of 1987 and in the Harrisburg office of the Bureau of Dams' Division of Waterways and Stormwater Management ("Division of Waterways") on April 7, 1987. (T. 223)

23. McDanniels sought help or guidance in filling out the encroachment permit application and contacted Leroy Gross, an employee of the Erie County Conservation District. (App. Ex. 3, 7; T. 287)

24. McDanniels completed the application with some assistance from Leroy Gross. (T. 287-290) Board Exhibit No. 2 is a copy of the permit application.

25. With respect to the question on the application form which asks

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[2] Stipulated facts ("Stip. Fact") are those to which the parties agreed upon in the Joint Stipulation of the Parties submitted on April 16, 1990.

for the stream or body of water involved, McDanniels and Gross determined that no body of water was involved and made the following entry on the application: "No stream or body of water involved". (T. 341)

26. The application was submitted to DER on or about March 26, 1987. (Board Ex. 2)

27. The permit application was assigned to John Shearer, an engineer with DER's Division of Waterways, for review. (T. 164; Board Ex. 3) Mr. Shearer determined that a permit would not be required for the proposed activity. (T. 164)

28. DER notified McDanniels, by letter dated April 13, 1987 and signed by John Shearer, that a Water Obstruction and Encroachment Permit was "not required in accordance with the provisions of the Dam Safety and Encroachments Act". (Board Ex. 3, Stip. Fact 7) The letter also returned McDanniels' uncashed check in the amount of $50.00 previously tendered with the application for the permit. (Board Ex. 3)

29. Upon receipt of the April 13, 1987 letter from DER, McDanniels told the firm of Frye Construction Company to level the site by pushing the stockpiled material into the wetland area. (T. 266-267, 294, 252-253) Frye placed approximately 2500 yards of topsoil on the filled site and leveled it. (T. 268) The work was completed within three days. (T. 267, 270-271)

30. The only part of the area which was wet was one-half acre in the center. (T. 273)

31. On or about April 14, 1987, John Shearer received a copy of the March 2, 1987 NOV which had been issued to McDanniels. Based upon the NOV, Shearer determined that the project impacted a wetland area. (T. 164-165)

32. McDanniels subsequently received a letter dated April 24, 1987

from Dan Grove, Chief of the Western Section of DER's Division of Waterways, stating that based on additional information, a permit would be needed for his proposed activity. The letter stated in relevant part as follows:

> Our letter to you dated April 13, 1987 indicated that, based on the information submitted with your application, a permit would not be required. Since then, we have received additional information which indicates that a Notice of Violation concerning this project was sent to you on March 2, 1987 from our Northwest Area Office. By field investigation, the proposed project area was determined to be located in a wetland.

The letter requested that McDanniels submit cross sections of the project site and an application fee. (Board Ex. 4)

33. McDanniels received Mr. Grove's letter on or about April 30, 1987. (T. 346)

34. When on or about April 30, 1987 McDanniels received the April 24, 1987 letter which advised him that DER would require a permit for the filling of the site, the work of filling and leveling had been completed. (T. 298, 304)

35. DER did not telephone McDanniels nor notify him in any other way that a permit would be required for his fill activity prior to the letter of April 24, 1987. (T. 355)

36. Thereafter, DER on its own initiative "reactivated" the McDanniels permit application. This happened some time after issuance of the April 24th letter. (T. 170)

37. DER began an environmental review of the "reactivated" permit application on or about June 26, 1987. (T. 171) The review was conducted by Richard Shannon, a water pollution biologist in the Environmental Review

Section of DER's Division of Rivers and Wetland Conservation. (T. 113, 146, 171)

38. On July 7, 1987, DER issued a letter to McDanniels which referenced his earlier application. The letter notified McDanniels that his fill had detrimentally affected a wetland and could not be justified because he had failed to explore site alternatives and had failed to provide a public benefit analysis justifying the project. The letter gave him sixty days to reply. (T. 146-148, Board Ex. 8)

39. McDanniels did not respond to the July 7th letter. (T. 148)

40. On January 15, 1988, DER denied the "reactivated" permit application and ordered McDanniels to submit a plan to restore the site as a wetland. ("Order and Permit Denial") (Board Ex. 6)

41. The "reactivated" permit application was denied because DER determined (1) that the application was incomplete and (2) that the net loss of wetland area would result in an adverse environmental impact and it was not proven that alternatives did not exist or that the project was necessary to achieve public benefit. (T. 146-147)

42. The January 15, 1988 Order does not differentiate or distinguish any portion of the Site and by its terms provides for restoration of the entire area owned by McDanniels. (Board Ex. 6)

43. The most easily observable feature of a wetland is the presence of wetland vegetation. (T. 133) Cattails are a common type of wetland vegetation. (T. 20)

44. Richard Shannon, who had conducted the environmental review on June 26, 1987, first inspected the McDanniels Site on March 10, 1988, almost two months after the permit had been denied. (T. 148-149) The purpose of the

inspection was to see if any actions had taken place in response to the Department's Order of January 15, 1988. (T. 149) The Site visit lasted approximately one hour. (T. 182)

45. No aquatic or wildlife surveys of the area were conducted as part of the environmental review, other than Shannon's visual observations on his site view (T. 209-210), nor were any records found of special species of fish or wildlife existing at the Site. (T. 221)

46. Shannon concluded that the fill had a negative environmental impact on the wetlands area at the McDanniels Site by the elimination of fish and wildlife habitats, a decrease in the ability to maintain quality of water flowing to Six Mile Creek, and limiting of the flood control function. (T. 161-162)

47. Excavation of fill material back to the original ground elevation can restore a wetland in a short period of time. (T. 28-29)

48. The Order of January 15, 1988 requires McDanniels to submit a restoration plan for the Site which would require excavation of the Site and disposal of the fill in an approved disposal site. (Board Ex. 6)

49. The cost of removal of the fill in the filled area would be $12.50 per cubic yard, with approximately 13,300 cubic yards, for a total of $166,250. (T. 255, 306)

DISCUSSION

The burden of proof in this appeal of DER's January 15, 1988 Order and Permit Denial is divided. The appellant McDanniels bears the burden with respect to the permit denial, 25 Pa. Code §21.101(c)(1), and DER bears the

burden with respect to the order to restore the alleged wetland to its pre-fill condition, 25 Pa. Code §21.101(b)(3).[3] The burden of proving any affirmative defenses must be borne by McDanniels. 25 Pa. Code §21.101(1).

The scope of our review in this matter is to determine whether DER's action of issuing the permit denial and ordering McDanniels to remove the fill from his Site was an abuse of discretion. Warren Sand and Gravel Co. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975); Penn-Maryland Coals, Inc. v. DER, *supra* note 3; Spang & Company v. DER, 1990 EHB 308. Where we find that DER has abused its discretion, we may substitute our discretion for that exercised by DER. Morcoal Co. v. DER, 74 Pa. Cmwlth. 108, 459 A.2d 1303 (1983); Franklin Township Municipal Sanitary Authority v. DER, 1990 EHB 916, 940.

DER's January 15, 1988 Order and Permit Denial charges McDanniels with placing fill material in a wetland without prior authorization in violation of the Dam Safety and Encroachments Act, 32 P.S. §693.1 *et seq.*, and the regulations thereunder, 25 Pa. Code Chapter 105.

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[3] On p. 16 and 17 of its post-hearing brief, DER asserts that McDanniels should also bear the burden of proof with respect to DER's order of abatement pursuant to 25 Pa. Code §21.101(d). That section states that whenever the Department issues an order requiring abatement of alleged environmental damage, the recipient of the order shall bear the burden of proof when it appears that the Department has established that some degree of pollution or environmental damage is taking place or is likely to take place and that the party alleged to be responsible for the damage is in possession of the facts. Because DER did not initially establish either of these factors, the burden of proof remains with it pursuant to 25 Pa. Code §21.101(b)(3). See Penn-Maryland Coals, Inc. v. DER, EHB Docket No. 83-188-W (Adjudication issued January 22, 1992), slip op. at 19-21. Moreover, this argument is untimely. If DER sought to have the burden of proof shifted to McDanniels on the issue of the order to restore the Site, it should have raised this matter prior to the start of the hearing since a party's presentation of its case-in-chief depends on the burdens of proof which it must meet. Waiting until its post-hearing brief to raise this argument, DER would have denied McDanniels the opportunity to alter its case-in-chief to meet this burden, had it been shifted.

Section 6(a) of the Dam Safety and Encroachments Act reads as follows:

> (a) No person shall construct, operate, maintain, modify, enlarge, or abandon any dam, water obstruction or encroachment without the prior written permit of the department.
>
> 32 P.S. §693.6(a)

The term "water obstruction" covers a variety of objects, including a fill or any other structure which is located in, along, across or projecting into any body of water. 32 P.S. §693.3. The term "encroachment" covers any structure or activity which changes, expands, or diminishes any watercourse, floodway, or body of water. *Id.*

A "body of water" is defined as "[a]ny natural or artificial lake, pond, reservoir, swamp, marsh or wetland." *Id.* (Emphasis added.) "Wetlands" are defined in the regulations as follows:

> *Wetlands*--Areas that are inundated or saturated by surface water or groundwater at a frequency or duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, including swamps, marshes, bogs and similar areas.
>
> 25 Pa. Code §105.1

Neither party disputes that the McDanniels Site contains a wetland, although they do differ on the particular functions performed by this wetland.[4]

The events leading up to the Order and Permit Denial are as follows. Following visits to the McDanniels Site by James Pabody of the U.S. Army Corps of Engineers and Tom D'Alfonso of DER's Bureau of Dams, the Bureau of Dams' Northwest office notified McDanniels by NOV issued March 2, 1987 that he was in violation of the Dam Safety and Encroachments Act by filling a wetland without a permit. (F.F. 14, 18, 19, 20) A permit application form accompanied the NOV. (F.F. 20) McDanniels responded to the NOV on March 18, 1987, indicating that he would file a permit application for his filling activity (F.F. 21), which he subsequently did on March 26, 1987. (F.F. 26) His response to the NOV was received in the Bureau of Dams' Northwest office in March 1987 and by the Bureau's Division of Waterways' Harrisburg office on April 7, 1987. (F.F. 22)

The permit application was assigned to John Shearer, an engineer in the Division of Waterways. (F.F. 27) Mr. Shearer determined that a permit was not required for the activity proposed in the application and notified McDanniels of such by letter dated April 13, 1987. (F.F. 27, 28) There is no indication as to whether Mr. Shearer or anyone else in the Division of Waterways consulted with any other Divisions or Bureaus within the Department or whether the Division of Waterways checked its own internal records with respect to the McDanniels Site. However, based on the aforesaid chronology of

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[4] It should be noted that the Department conceded during the hearing of this case that the wetlands in question were not "important wetlands" as previously defined at 25 Pa. Code §105.17. (This section now distinguishes between "exceptional value wetlands" and "other wetlands").

events, it is clear that the Division of Waterways had notice that the McDanniels Site contained a wetland at least as early as April 7, 1987 when it received a copy of McDanniels' March 18, 1987 letter indicating that he would file a permit application for his fill activity in response to the NOV.

Immediately upon receipt of the April 13, 1987 letter, McDanniels began filling the Site. The work was completed in three days. (F.F. 29)

In the meantime, on or about April 14, 1987, DER's Mr. Shearer received a copy of the March 2, 1987 NOV which had been issued to McDanniels. Based on the NOV, he determined that the project impacted a wetland and that a permit was in fact needed. (F.F. 31) Ten days later, on April 24, 1987, Dan Grove, Chief of the Western Section of DER's Division of Waterways, sent a letter to McDanniels stating that, based upon additional information obtained from the NOV indicating that McDanniels' proposed activity would impact a wetland, a permit would be required. (F.F. 32) By the time McDanniels received Mr. Grove's letter, the work on his Site had been completed. (F.F. 34)

Sometime after mailing the April 24th letter, DER, *sua sponte*, "reactivated" McDanniels' permit application. (F.F. 36) There is no indication that DER informed McDanniels that his earlier permit application had been "reactivated" until July 7, 1987, when DER notified McDanniels that his fill had detrimentally affected a wetland and could not be justified because he had failed to explore site alternatives and to provide a public benefit analysis. The July 7, 1987 letter gave McDanniels sixty days to reply. He made no response. (F.F. 38, 39) On January 15, 1988, DER denied the reactivated permit application and ordered McDanniels to submit a plan to restore the Site as a wetland. (F.F. 40)

McDanniels raises two arguments. He first contends that the Department denied the permit because it incorrectly evaluated the McDanniels Site according to the criteria for "important wetlands". However, DER stipulated during the hearing that the Site was not an "important wetland" as that term was previously defined at 25 Pa. Code §105.17. Rather, the basis for the denial was that DER had determined that the "reactivated" application was incomplete and that the project would result in an adverse environmental impact. (F.F. 41) Assuming that the application even existed at this point, there is no evidence that the denial was based on DER applying the wrong criteria in its evaluation.

We find, however, that DER's issuance of the permit denial was an abuse of discretion. At the time DER issued the permit denial, there was no permit application pending. DER had notified McDanniels that no permit was required for his proposed activity and had returned the application fee submitted by McDanniels. (F.F. 28) Subsequently, after notifying McDanniels that he was not required to apply for a permit for his proposed activity, and after McDanniels had completed the project, DER advised McDanniels that a permit was necessary and requested that he forward an application fee and cross sections of the project site. (F.F. 32) Sometime thereafter, DER decided to "reactivate" the old permit application. (F.F. 36) There is no indication that McDanniels was notified that the earlier application, which DER had advised was not necessary, was being reinstated, at least not until DER's letter of July 7, 1987 which referred to the earlier application.

We find that it was an abuse of discretion for DER, *sua sponte*, to "reactivate" a prior existing permit application, after advising McDanniels that no permit was necessary for his proposed activity. Since no permit

application existed at this point, it was an abuse of discretion for DER to issue a permit denial to McDanniels.

Secondly, McDanniels asserts that the Department should be estopped from ordering him to remove the fill material from his property because he had completed the fill activity in reliance on the Department's representation in its letter of April 13, 1987 that no permit was needed.

We must address the fact that McDanniels incorrectly stated in his permit application that "[N]o stream or body of water [was] involved." (F.F. 25) As we have noted above, wetlands do constitute a "body of water" within the meaning of the Dam Safety and Encroachments Act. 32 P.S. §693.3. Such an error would appear to eliminate McDanniels' argument if DER's misrepresentation were based on this error. However, as we have discussed above, the Division of Waterways clearly had knowledge at the time the permit application was submitted that the McDanniels Site contained a wetland. The Bureau of Dams, under which it operates, had received reports from James Pabody of the U.S. Army Corps of Engineers and DER representative Tom D'Alfonso as to the condition of the Site and McDanniels' activities thereon, and had issued an NOV to McDanniels indicating that a permit was required for his activities. The NOV was accompanied by a blank permit application. Finally, the Division of Waterways had received notice from McDanniels that he intended to file an application for a permit in order to comply with the NOV. Thus, the Division of Waterways clearly had knowledge that a wetland was involved with the Site at the time it received the permit application. Although the particular individual in the Division of Waterways who reviewed the application may not have been the same individual who had issued the NOV, that does not alter the fact that the Division of Waterways, and therefore

DER, knew or should have known that the Site contained a wetland, and was in a better position than McDanniels to know whether the Site required a permit for the activity in question. Under these circumstances, it was reasonable for McDanniels, upon receiving notice from DER that no permit was required, to rely on this representation.

Moreover, John Shearer, the individual within the Division of Waterways who reviewed the permit application and informed McDanniels by letter of April 13, 1987 that no permit was necessary, received a copy of the NOV the day after he wrote the letter. (F.F. 31) However, nothing was done to notify McDanniels that DER had re-evaluated the situation and determined that a permit would be necessary until Dan Grove's letter of April 24, 1987, more than ten days after Mr. Shearer's letter was sent. (F.F. 32, 35) Thus, even when DER became aware that it had misinformed McDanniels, it did not take any immediate action to correct the situation.

Based on the facts stated herein, we find that it was an abuse of discretion for DER to order McDanniels to remove the fill material from his Site, at a cost of approximately $166,250 (F.F. 49), after advising him that no permit was required for the fill activity. The fact that McDanniels' permit application contained an error does not absolve DER because, as we have stated above, at the time DER advised McDanniels that a permit was not required, it had knowledge that the Site contained a wetland.

In conclusion, we hold that DER abused its discretion in issuing the Permit Denial and Order to McDanniels. Accordingly we sustain the appeal. Because we have found DER's action to be an abuse of discretion, we do not reach McDanniels' argument of estoppel.

We, therefore, make the following conclusions of law:

CONCLUSIONS OF LAW

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

2. The Department bears the burden of proof in an appeal of an order directing a party to take action to abate pollution. 25 Pa. Code §21.101(b)(3) The Appellant bears the burden of proof in an appeal of a permit denial. 25 Pa. Code §21.101(c)(1).

3. The Appellant bears the burden of proof with respect to affirmative defenses. 25 Pa. Code §21.101(a)

4. The scope of the Board's review in this matter is to determine whether DER's issuance of the Permit Denial and Order was an abuse of discretion. Warren Sand and Gravel, *supra*.

5. Where the Board finds that DER has abused its discretion, we may substitute our discretion for that of DER. Morcoal, *supra*.

6. DER abused its discretion by, *sua sponte*, reactivating McDanniels' permit application without notifying him, after DER had advised him that it was not necessary to apply for a permit for his proposed activity and had returned the fee submitted with the application.

7. DER abused its discretion in ordering McDanniels to remove the fill material from his property after advising him that no permit was necessary for the fill activity.

O R D E R

AND NOW, this 16th day of December, 1992, it is ordered that the appeal of Edward P. McDanniels is sustained.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 16, 1992

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M. DIANE SMITH
SECRETARY TO THE BOARD

MONTGOMERY COUNTY	:	
	:	
v.	:	EHB Docket No. 92-419-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: December 17, 1992

OPINION AND ORDER SUR
MOTION TO DISMISS

By: Richard S. Ehmann, Member

Synopsis

A motion to dismiss is granted when the Department of Environmental Resources' (DER) letter challenged by appellant is not an "action" but rather a notice of violation and does not affect the appellant's duties and obligations.

OPINION

This appeal was commenced on September 2, 1992 by Montgomery County (Montgomery) seeking review of a July 24, 1992 letter from the Department of Environmental Resources (DER) which was received by Montgomery on August 3, 1992. This letter was captioned "Notice of Violation" and advised Montgomery that the analysis of a sample for the groundwater pump discharge at Montgomery County Landfill No.1 collected on May 5, 1992 (included with the Notice of Violation) indicated groundwater that was being discharged was contaminated with landfill leachate and was not suitable for discharge to waters of the Commonwealth. The letter further advised Montgomery that such a discharge of a polluting substance to waters of the Commonwealth is a violation of Section

401 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.401, and that such discharge constitutes a discharge of industrial waste which is not authorized either by DER's rules and regulations or a permit from DER, and therefore, that the discharge was a violation of §307 of the Clean Streams Law, 35 P.S. §691.307. The letter went on to state that DER had noted on a July 2, 1992 follow-up visit that the groundwater discharge has been terminated. The letter concluded by requesting Montgomery to not resume this discharge of groundwater and to notify DER in writing by August 3, 1992 of the action it had taken to comply with DER's request.

On October 19, 1992, we received a Motion to Dismiss this appeal and supporting memorandum of law filed on behalf of DER. Montgomery filed its Response to DER's motion and supporting memorandum on November 3, 1992. It is DER's motion which is presently before the Board for review.

DER's motion asserts the Board lacks jurisdiction over Montgomery's challenge to the July 24, 1992 letter because it is not a DER "action" or "adjudication" and does not alter Montgomery's rights, duties, or obligations. Montgomery's response argues DER's July 24, 1992 letter seeks to affect Montgomery's duties, obligations, liabilities, and responsibilities and thus constitutes an appealable action over which we have jurisdiction to review.

As we have explained in previous decisions, our jurisdiction is limited to that which the legislature has authorized, i.e., reviewing "actions" of DER. Kephart Trucking Co. v. DER, EHB Docket No. 91-514-MJ (Opinion issued February 21, 1992) affirmed at No. 635 C.D. 1992 (Slip Op. issued October 23, 1992); Louis Costanza t/d/b/a Elephant Septic Tank Service v. DER, 1991 EHB 1132; and Section 4 of the Environmental Hearing Board Act,

Act of July 13, 1988, P.L. 530, 35 P.S. §7514.[1] We have previously held that notices of violation, without some action affecting the violator's rights or duties, are not appealable. See M.C. Arnoni Co. v. DER, 1989 EHB 27; Perry Brothers Coal Co. v. DER, 1982 EHB 501. It is the content of the letter, however, and not the caption "Notice of Violation", which determines whether the letter is an "action" within the meaning of 25 Pa. Code §21.2(a). Kephart Trucking Co., *supra*; Robert H. Glessner, Jr., v. DER, 1988 EHB 773.

Montgomery's Response points to the following language of DER's July 24, 1992:

> Whereas the Department has found groundwater of this quality unsuitable for discharge to waters of the Commonwealth, the Department requests that Montgomery County not resume this discharge of groundwater. Notify this office in writing by August 3, 1992 of the action you have taken to comply with the above request.

Montgomery contends that the effect of this language was to request that a particular action occur and that DER be notified of the manner in which Montgomery would comply, so that DER's request effectively amounts to an order by DER. We do not agree. The July 24, 1992 letter does not constitute an order to Montgomery to take any corrective action. Rather, it informs

---

[1] The definition of "action" is found at 25 Pa. Code §21.2(a). It is:

> An order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person, including, but not limited to, denials, modifications, suspensions and revocations of permits, licenses, and registrations; orders to cease the operation of an establishment or facility; orders to correct conditions endangering the Commonwealth; orders to construct sewers of treatment facilities; orders to abate air pollution; and appeals from and complaints for the assessment of civil penalties.

Montgomery that DER has determined that discharges of groundwater of the quality found at its Landfill No. 1 to waters of the Commonwealth would be a violation of the Clean Streams Law and it asks that Montgomery not resume discharging groundwater to waters of the Commonwealth. It then asks Montgomery to notify DER in writing of the action it has taken to comply with DER's request by August 3, 1992, but does not direct Montgomery to take any specific action. In this respect, the cases cited by Montgomery are distinguishable. For instance, in Chester County Solid Waste Authority v. DER, 1988 EHB 1173, DER's notice of violation required the recipient to take a specific action, i.e., submit sample results to DER, by a date certain, and in Meadville Forging Co. v. DER, 1987 EHB 782, the challenged letter clearly conveyed that the appellant was expected to submit a well location proposal to DER for approval within a specified time frame. The July 24, 1992 letter challenged in the instant matter, in contrast, is an unappealable Notice of Violation. See Louis Costanza, *supra*.

We accordingly enter the following order dismissing Montgomery's appeal.

O R D E R

AND NOW, this 17th day of December, 1992, it is ordered that DER's Motion to Dismiss the appeal of Montgomery County at EHB Docket No. 92-419-E is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 17, 1992

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BO

NEW MORGAN LANDFILL COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 92-267-E**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 21, 1992**

OPINION AND ORDER SUR
EVERGREEN ASSOCIATION'S PETITION TO INTERVENE

By: Richard S. Ehmann, Member

Synopsis

Because the concept of intervention is designed to prevent multifarious proceedings, a Petition To Intervene in a permittee's appeal from DER's imposition of conditions in its permit will be denied to the extent it seeks to raise issues in this appeal identical to those raised by the Petitioner in its own separate third party appeal from DER's permit issuance decision.

Where Petitioner fails to timely raise an issue in its own appeal from DER's permit issuance decision and attempts to raise that issue in a parallel appeal by a subsequently filed Petition To Intervene, the Petition, if granted, would allow intervenor to circumvent the time constraints on an appeal to this Board and must therefore be denied as to such issues.

Where Petitioner seeks to intervene as to the issues raised in this appeal by the permittee, however, the Petition will be granted where the

Petitioner establishes its members' interests on those issues are substantial, immediate and direct.

OPINION

On July 24, 1992, New Morgan Landfill Company, Inc. ("New Morgan") filed an appeal from the imposition of certain conditions in Solid Waste Management Permit No. 101509 issued to it by the Department of Environmental Resources ("DER") for a landfill to be located in New Morgan Borough, Berks County, Pennsylvania. Simultaneously, it appealed the NPDES permit issued for the discharge of waste water from the landfill at Docket No. 92-266-E. On October 9, 1992 we ordered the consolidation of these appeals at Docket No. 92-267-E.

On November 18, 1992, Evergreen Association filed a Petition to Intervene in this proceeding. Its petition recites that it has filed its own separate appeal from issuance of this permit to New Morgan (Docket No. 92-257-E). In that appeal, Evergreen challenges DER's decision to issue both this solid waste permit and the NPDES permit. Evergreen's Petition suggests it has the right to intervene not only because of its own separate appeal but also because it wishes to challenge the need in Pennsylvania for the disposal capacity represented by this landfill and it asserts DER failed to adequately address the issue. Finally, it asserts that it should be allowed to intervene because the potential for mine subsidence in this area has not been adequately addressed by DER. Evergreen's petition then asserts that its members live near the landfill and have an interest in protecting the area's ground and surface waters and that it has an interest in protecting the environmental amenities for its members' benefit. The Petition also suggests Evergreen has an interest in protecting the environment from an

unneeded landfill site and has "a direct, immediate and substantial interest as adjacent property owners".

Evergreen says if it is allowed to intervene, it offers testimony on a lack of need for the landfill, the potential for water pollution if waste is disposed of on this site because of site instability, and the possibility of subsidence in Area II of the site. It concludes by alleging its interests might be inadequately represented because DER could agree to settle this appeal on unsatisfactory terms, because it disagrees with DER on the issues of need and capacity, and because DER is unable to represent the adjacent property owners.

New Morgan has filed a Response To Petition To Intervene opposing same. DER has made no response thereto.

In responding to the Petition, New Morgan points out the unique nature of Evergreen's request. According to New Morgan, Evergreen is seeking to intervene and assert a position hostile to all parties in this appeal, i.e., it neither sides with New Morgan nor DER but seeks to assert that DER erred in issuing New Morgan this permit, even conditioned in the fashion now challenged by New Morgan. Moreover, New Morgan points out that Evergreen's Petition seeks to raise issues on its behalf in this appeal which are not currently before this Board by virtue of New Morgan's appeal. New Morgan asserts that such a Petition is an attempt to take an untimely appeal from DER's issuance of this permit and that assertions of grounds for appeal have jurisdictional time constraints which preclude such action. New Morgan concludes that to the extent the issues raised in Evergreen's Petition are raised in Evergreen's own appeal, they should be decided there and are not properly for consideration via intervention here.

Our review of Evergreen Association and Alma Ames, et al. v. DER and New Morgan Landfill Company, Inc., Docket No. 92-257-E, shows that Evergreen has indeed appealed DER's decision to issue this permit. As initially filed the Notice Of Appeal raises issues of:

1. potential for groundwater contamination[,]
2. proximity to mine subsidence area[,]
3. question of statement of need.[1]

Thus, at least arguably, most of the issues which Evergreen states it wishes to raise here are raised in that appeal where it, DER and New Morgan (as permittee) are already parties. Because those issues are raised there and all of the parties here are parties there, no valid purpose is served by allowing intervention by Evergreen to raise them here. According to 3 Standard Pennsylvania Practice 2d §14.228, "Intervention is utilized to prevent multifarious actions...." Here, multifarious actions already exist. Moreover, adding issues of "subsidence" and "need" to this proceeding, with both of them already raised in the Evergreen appeal proceeding, will only make for this Board hearing the same evidence twice. Intervention's purpose is not served on these issues if this Petition is granted; rather, the reverse is true. Accordingly, we must deny it as to same.[2]

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1 On September 1, 1992, an Amendment To Appeal was filed by Evergreen reciting violations of specific regulations and Article I Section 27 of Pennsylvania's Constitution. On December 3, 1992, Evergreen filed another Amendment To Appeal raising an alleged violation of Section 503(c) of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, No. 97, as amended, 35 P.S. §6018.503(c). We have not been asked by any party to that appeal to test this filing against 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) as yet.

2 The Petition To Intervene is not a Motion To Consolidate these two (footnote continues)

Evergreen did not raise surface water contamination issues in its Notice Of Appeal at Docket No. 92-257-E, although in the first Amendment To Appeal it states that DER exceeded its discretion in issuing a permit which will cause "surface and/or groundwater pollution, in contravention of 25 Pa. Code §271.201". Evergreen also did not raise the protection of "environmental values for the benefit of its own members" issue in its Notice of Appeal at that docket number. 25 Pa. Code §21.52(a) requires appeals to be filed within thirty days of the DER action challenged for us to have jurisdiction over same. Amendments of Notices of Appeal adding grounds for appeal are governed by the Commonwealth Court's decision in Pennsylvania Game Commission v. Commonwealth, DER, *supra*, which decision clearly does not allow amendment at the discretion of the appellant. We note further that Evergreen has not attempted to comply with this decision's dictate's to add these issues to that appeal.

Thus, we are faced with the unique situation where Evergreen, as a potential intervenor, is attempting to raise issues in this appeal which it has not and apparently now may not raise in its own appeal. In essence, as to these issues, Evergreen is thus seeking to circumvent 25 Pa. Code §21.52(a)'s time constraints by raising these issues through intervention here rather than through timely filing in its own appeal. While Section 4(e) of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7514(e) provides that any interested party may intervene, it is also clear

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(continued footnote)
appeals although perhaps it should have been. Though tempted, we have refrained from treating it as such because this is not what Evergreen sought and we have not sought from opposing counsel their respective clients' positions on consolidation. Thus, we lack any evidence of the parties' positions on such an action by this Board.

that we retain some discretion as to whether to allow intervention or not. Borough of Glendon, et al. v. Department of Environmental Resources, ___ Pa. Cmwlth. ___, 603 A.2d 226 (1992); Wheelabrator-Pottstown, Inc. v. Department of Environmental Resources, __ Pa. Cmwlth. ___, 607 A.2d 874 (1992); Concord Resources Group Of Pennsylvania, Inc. v. DER, et al., Docket No. 92-416-W (Opinion issued December 3, 1992). We believe a proper exercise of that discretion is to read Section 4(e) the aforesaid opinions and 25 Pa. Code §21.52(a) together to bar intervention on these issues in this proceeding. See Avery Coal Company, Inc. v. DER, 1991 EHB 662.

Despite the above, we allow Evergreen to intervene in this proceeding. Its members, as adjacent property owners, stand to be directly affected by the outcome of New Morgan's appeal of the 19 specific permit conditions and one other paragraph in the solid waste permit issued to New Morgan by DER, the challenged conditions of NPDES Permit PA 0055328 and the operation of this landfill. However, intervention is limited in the instant appeal to the issues raised by New Morgan and we enter the following order.

O R D E R

AND NOW, this 21st day of December, 1992, it is ordered that the Petition To Intervene filed on behalf of Evergreen is granted, but Evergreen is prohibited from raising in this appeal the issues set forth in its Petition To Intervene and is limited to offering evidence on the issues raised by New Morgan's consolidated appeal. Finally, it is ordered that the caption of this appeal is amended to read:

NEW MORGAN LANDFILL COMPANY and EVERGREEN ASSOCIATION	:	
v.	:	EHB Docket No. 92-267-E (Consolidated)
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	

and Evergreen is directed to comply with Pre-Hearing Order No. 1 on the same schedule as New Morgan.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: December 21, 1992

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

WESTTOWN SEWER COMPANY	:	
	:	
v.	:	**EHB Docket No. 92-116-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 22, 1992**

OPINION AND ORDER SUR MOTION FOR RECONSIDERATION

By: Richard S. Ehmann, Member

Synopsis

Reconsideration of a fully executed consent adjudication because of a dispute between the parties over the legal impact of the settlement is denied. Where a party executes a Consent Adjudication settling an appeal before this Board and the settlement is approved by this Board, subsequent disputes over the ramifications of settlement are beyond this Board's powers to adjudicate and are for adjudication when, and if, any terms of this Consent Adjudication are breached and enforcement thereof is sought by one of the parties thereto.

OPINION

On February 20, 1992, the Department of Environmental Resources ("DER") issued an administrative order to Westtown Sewer Company ("Westtown"), and on March 25, 1992, Westtown appealed from this order to the Board. This appeal then wound its way through trial preparation and was originally scheduled for hearing on August 12, 13 and 14, September 29 and 30 and October 1, 1992. The August hearings were cancelled by the Board because of the

Stipulation Of Settlement submitted to us by the parties, providing a partial resolution of their dispute and a mechanism for them to resolve the remainder of the dispute prior to the remaining uncancelled dates for the merits hearing.

On September 29, 1992 the parties advised the Board of their settlement of this dispute and advised that they would be forwarding us a Consent Adjudication for entry by this Board. Accordingly, by Notice dated September 30, 1992, the Board cancelled the hearings in this matter.

In mid-October we received from counsel for DER a proposed Consent Adjudication signed by both parties and their counsel. It was transmitted to us under a letter from counsel for DER which provides in part:

> While it is the Department's intention that the settlement document be submitted to the Board for approval, I must, regrettably, inform you that I was told yesterday by Mr. Sugarman, counsel for Westtown Sewer Company, that Westtown Sewer Company is now considering taking the position that they wish to attempt to withdraw their agreement to this Consent Adjudication.
>
> Mr. Sugarman stated in our conversation yesterday that he would be writing to you to inform you of his client's position with respect to this agreement, and, at that time, would request a conference call to discuss this situation.

Since we had no communication from counsel for Westtown, the letter said only that Westtown was now contemplating the possibility of attempting withdrawal, and the settlement appeared reasonable, we approved the Consent Adjudication by Order dated October 16, 1992.

Thereafter, on October 22, 1992 we received a letter from Westtown's counsel stating in part that he was bringing to our attention a problem with the settlement concerning a DER interpretation of the Consent Adjudication. According to Westtown's October 22, 1992 letter, DER had told Westtown that by

withdrawing its appeal, DER believed that Westtown agreed that all the factual assertions in DER's Order are "unchallengeable, i.e., judicially true for all future purposes[,]... a finalization, for collateral estoppel and other purposes, of its statements in the Order, on the ground that it now becomes a final and unappealed order." Westtown's letter also says that Westtown "will not approve the finalization of all the Department's charges" and that it would not have approved the settlement if it had felt this understanding existed. Lastly, the letter indicates that DER will now decide "whether to attempt to enforce its interpretation."

On October 29, 1992, this Board docketed receipt of Westtown's Motion For Reconsideration, which itself is dated October 26, 1992. On November 9, 1992 we received DER's Response To Motion For Reconsideration.

After reciting some of the above and a provision in the Consent Adjudication stating that Westtown reserves all rights, which Westtown says negates DER's assertions, Westtown asserts that this disagreement over interpretation between it and DER renders the Consent Adjudication null and void. It then asserts our approval came with knowledge of Westtown's objections and imposes settlement without agreement, and, thus, is invalid. Westtown further asserts that DER's lack of good faith is proof of its denial of Westtown's civil rights and that our approval of the settlement risks implicating this Board in DER's "actions and agenda violating the civil rights of the appellant." Westtown offers no citations to any authority to support its contentions, however.

In response DER asserts the Consent Adjudication should be read differently from and contrary to Westtown's position on what it provides. It

disagrees that the Consent Adjudication is null and void, that settlement is imposed invalidly, or that DER is denying Westtown's civil rights.

Reconsideration, after we issue an adjudication or final opinion and order which terminates an appeal proceeding, is governed by 25 Pa. Code §21.122. This rule says we will grant reconsideration only for compelling and persuasive reasons generally limited to situations where our decision rests on legal grounds not considered by the parties or where crucial facts in the application for reconsideration are not only not as stated in the decision but are such that they require a reversal of the decision. See J.C. Brush v. DER, et al., 1991 EHB 258. Obviously, this standard is inapplicable to this proceeding. It applies in the scenario where we write an opinion in a contested proceeding rather than when settlement occurs. Clearly, here material facts from a merits hearing upon which we base an opinion are not at variance with those alleged by Westtown (no hearing was held) and we have not based our order on any legal theory on grounds not briefed by the parties.

There remains the question, however, as to whether a compelling or persuasive reason to reconsider exists. We find it does not. What Westtown now seeks is reconsideration of our order approving its settlement of its appeal. It appears that Westtown is unhappy with the settlement, not because of its terms but because DER contends there are certain ramifications flowing from execution of this agreement which Westtown disputes and which it says would have caused it not to have approved settlement had it been aware DER might make those assertions. Within the terms of this statement as set forth in Westtown's letter is the crucial admission that Westtown settled this appeal. This admission, though unnecessary since it is obvious the Consent Adjudication document is executed by Westtown and its counsel, could also end

our inquiry into the merits of Westtown's Motion. If Westtown executed the Consent Adjudication as it admits, it was a "done deal" at that instant.

Moreover, we point out that we received a document signed by Westtown settling this appeal which Westtown was not compelled to sign. It might have held out and negotiated better terms or have gone to a hearing on the merits and taken its chances on prevailing there. Nevertheless, it entered into this agreement. It does not assert we should reverse our approval of its settlement because it was coerced into signing, duress caused its execution, or a fraud was perpetrated on it (although it asserts a lack of good faith.) Nor does Westtown assert this Board had notice of a decision by Westtown to try to reject this settlement prior to our approval thereof. DER's counsel advised us that Westtown was contemplating whether or not to try to pull out of its agreement with DER, but we were not told of any decision on this issue by Westtown, and, more importantly, Westtown failed to communicate its concerns to us until on October 22, 1992, when we received its letter dated October 19, 1992. Even in that letter Westtown's counsel phrases Westtown's concern around whether DER will attempt to enforce its interpretation of this document's language in a future (as yet unfiled?) proceeding against Westtown. In short, Westtown has failed to show any reason we should not have acted as we did. It has failed to show cause for us to reconsider our order.

There are other good reasons why we will not grant this Motion. Firstly, insofar as Westtown seeks reconsideration of our approval of this Order, its request is premised on interpretation of the Consent Adjudication's language as regards some potential future proceeding to be commenced by DER. Thus, it seeks from us a declaratory judgment on how the document is to be read in the future. This Board is not empowered to issue declaratory

judgments. Louis Costanza t/d/b/a Elephant Septic Tank Service v. DER, 1991 EHB 780, affirmed ___Pa. Cmwlth. ___, 606 A.2d 645 (1992).

Secondly, as a Board, we lack the power to enforce the terms of agreements between DER and other parties. Westinghouse Electric Corporation v. DER, 1990 EHB 515; Empire Sanitary Landfill, Inc. v. DER, 1990 EHB 1270. As to this case, this means we cannot enforce any provision of this Consent Adjudication or find it controlling over any other interpretation of provisions thereof. The courts do have this power, have expertise in this field and deal with such "enforcement" regularly. As the special expertise of this Board is not required to address such issues, we should leave it to the courts when and if at some point in the future this issue is raised between these parties. Francis Nashotka v. DER, 1991 EHB 1900.

Accordingly, we enter the following order.

O R D E R

AND NOW, this 22nd day of December, 1992, Westtown's Motion For Reconsideration of our Order of October 16, 1992, approving the Consent Adjudication executed by the parties, is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
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DATED: December 22, 1992

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M. DIANE SMIT
SECRETARY TO THE E

ROLAND SPIVAK	:	
	:	
v.	:	EHB Docket No. 92-295-E
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and SOIL REMEDIATION OF PHILADELPHIA, INC., Permittee	:	Issued: December 22, 1992

OPINION AND ORDER
SUR MOTION FOR PROTECTIVE ORDER
AND CROSS MOTION TO COMPEL

By: Richard S. Ehmann, Member

Synopsis

A *pro se* appellant's motion for protective order, alleging violations of Pa.R.C.P. 4011 and seeking to bar a further deposition for the reason that he may allegedly reveal privileged information because of his role as his own counsel (including his theory of his case and mental impressions), is denied. The motion is also denied where it is alleged the deposition is sought in bad faith, is an unreasonable investigation of appellant, and is oppressive, burdensome and expensive.

OPINION

Roland Spivak ("Spivak") appealed to this Board on August 3, 1992 from the Department of Environmental Resources' ("DER") issuance of Permit No. 301220 to Soil Remediation of Philadelphia, Inc. ("SRP"). The permit is for a residual waste processing facility to be located in Philadelphia. It was issued pursuant to the Pennsylvania Solid Waste Management Act, Act of July 7,

1980, P.L. 380, No. 97, as amended, 35 P.S. §6018.101 *et seq.* Spivak's Notice of Appeal contains a six-page list of the reasons why he challenges this DER action. It alleges misrepresentation by SRP, psychological distress to Spivak and his neighbors, violation of the Pennsylvania Environmental Protection Act, a significant violational history of this company's predecessor entities, lack of capitalization of SRP for bonding purposes, SRP will haul hazardous and toxic wastes to the facility for disposal if it is operated, and raises other objections including air pollution concerns, compliance monitoring enforcement capabilities, vehicular traffic concerns, noise and siting concerns.

On October 28, 1992, over SRP's objections, we granted Spivak's request for additional time for discovery.

On November 23, 1992, Spivak filed his Motion For Protective Order Denying Additional Depositions. The motion, apparently filed under Pa.R.C.P. 4012, alleges that counsel for SRP deposed Spivak on September 14 and September 17, 1992, and indicates that SRP's counsel now wants a third day of depositions of Spivak. Spivak's Motion says it is unreasonable and improper to depose him about documents he obtained from DER. Spivak alleges this deposition seeks to go beyond the scope of proper discovery under Pa.R.C.P. 4011(c), although he says he will make the documents he has available to SRP to review. He also alleges he cannot be deposed because he is his own counsel and counsel's theory of his case and mental impressions are not discoverable. Finally, he contends that a third deposition would violate Pa.R.C.P. 4011(a),(b), and (e).

On December 7, 1992, SRP filed its Motion To Compel. It seeks an Order compelling Spivak's attendance at this deposition. SRP also filed a response to Spivak's Motion. It says Spivak attempts to use his *pro se* status as an affirmative weapon in that he is trying to block SRP from gathering

basic information on the nature of the basis of his appeal. SRP says Spivak agreed to this deposition, then withdrew his agreement thereto. According to SRP, Spivak indicated that he did not have information as to a basis for some of his claims when deposed by SRP because he had not completed discovery from DER and, as a result, he agreed to a further deposition when his discovery was completed but then withdrew his agreement. Attached to SRP's Response To Motion For Protective Order are copies of pages of SRP's deposition of Spivak and SRP's Motion To Compel recites much of the same. It includes allegations that Spivak had reviewed DER's documents but not copied them and that Spivak claimed that without access thereto he could not be specific on the basis for some of his claims in the appeal.

The deposition transcript pages reveal Spivak's response to several questions on deposition are at best hedged on the basis that he is still trying to secure documents from the City of Philadelphia and DER on air pollution issues, air monitoring issues, permit compliance history, and enforcement capabilities. They also reflect an agreement by Spivak to further depositions after he secures these documents and Spivak's withdrawal from that agreement. The deposition pages further reflect that Spivak's deposition on two separate days was in fact a single deposition scheduled in pieces to accommodate Mr. Spivak's schedule and that on the second day of the deposition that Spivak asserted:

> Last time we were here, Mr. Sugarman mentioned that he wanted to have additional depositions to discuss discovery documents I get from the DER, and I feel that to discuss those documents would be unreasonable and not permissible in discovery, since those would only be obtained as part of my case and would have to reflect my theory of the case and mental impressions.

Persons who elect to proceed *pro se* before this Board always have the right to do so, but frequently the decision to make that choice brings the *pro se* party no satisfaction. R. H. Maney Coal Company v. DER, EHB Docket No. 89-019-M (Opinion issued April 21, 1992). Moreover, we have made it clear that in our treatment of a *pro se* appellant like Spivak, we may not impair the rights of the other parties to this appeal. Michael F. and Karen L. Welteroth v. DER, et al., 1989 EHB 1017 (citing Appeal of Ciaffoni, 124 Pa. Cmwlth. 407, 556 A.2d 504 (1989)). Though Spivak may not wish to be put to the inconvenience of being deposed for a portion of a third day, he fails to state cause for us to grant his Motion For Protective Order. Indeed, to sustain his Motion (and deny SRP's) would unfairly impair the right of SRP to discovery in accordance with our rules therefor.

One of the purposes of discovery is to allow one side in litigation to discover the factual basis for the assertions made by his opponent. This includes learning of factual underpinnings of the allegations through depositions taken before and, where necessary, after the opponent has engaged in review of files of third persons (whether or not those persons are parties), as when the opponent says he cannot give definite answers until after review of those documents. If we were to approve Spivak's conduct, we would be allowing the deponent to control the scope of discovery of his own contentions.

Where depositions are spread over two days to accommodate the deponent, the fact that a third day of depositions is necessary does not in itself make the deposition unreasonably oppressive or burdensome contrary to Pa.R.C.P. 4011(b). We must look at the circumstances of the particular proceeding. Where the deponent's answers to questions are hedged by saying in

essence: "This is all I know now on this issue because I am still gathering information to formulate the basis for my assertions", a third day of depositions, after the information gathering is completed, is not oppressive and burdensome.

We likewise reject the notion that in circumstances like this the fact that the deposition runs over to a third day is an unreasonable expense under Pa.R.C.P. 4011(b). These depositions are occurring in Philadelphia where Spivak resides. Moreover, SRP has shown a willingness to schedule the depositions around Spivak's other commitments, which is a reasonable accommodation to offer. Further, Spivak merely asserts it is unreasonably expensive in conclusory fashion without saying why. Such a why is important in light of his prior agreement to the deposition. Its omission provides cause to reject this contention in these circumstances.

We can understand that for a deponent, any deposition may be an annoyance, but considering that this deponent is a party with a six-page list of reasons for appeal, discovery could not be expected to be of an hour's duration. Under all the circumstances here, any annoyance to Spivak from this deposition does not rise to the unreasonable level identified in Pa.R.C.P. 4011(b).

Spivak also asserts these depositions are sought in bad faith contrary to Pa.R.C.P. 4011(a). He might make a case for this assertion if the facts were different and he had provided full and unequivocal responses to SRP's questions in the prior depositions. He did not. Two examples demonstrate this. On page 35 of the deposition transcript is the following exchange:

Q. Which of the substances that are in the City of Philadelphia have you verified with any sources that the City is unable to monitor?

A. I'm in the process of discovery right now.

On page 77 is the following exchange:

Q. Now, in Paragraph 5 of your appeal you state that; "Pennsylvania DER did not act with required due diligence or within prescribed permitting regulations in accepting, considering and issuing a permit under appeal."

In what regard or regards do you contend that DER did not act with required due diligence?

A. I cannot give you a complete answer right now because discovery is still ongoing with DER[.]

In situations like these it is not bad faith for SRP to seek a deposition in which it can get a better idea of the factual basis for Spivak's contentions. Thus the requested deposition is not a violation of Pa.R.C.P. 4011(a) as Spivak asserts.

Spivak also seeks to shield revelation of the basis for his appeal behind Pa.R.C.P. 4011(c) by asserting that since he is *pro se*, he is his own counsel and counsel's mental impressions and theory of his case are privileged from disclosure. Were Spivak trained in the law, admitted to the Bar and representing a client before us, his mental impression of the case would be protected. If, as a lawyer, he felt a witness was less than candid, that impression would not be discoverable and neither would the theory of how he plans to make his client's case. Further, SRP would not have the right, if Spivak objected to the discovery, to use depositions to find out how Spivak's lawyer planned to try the case or what his impressions of this matter might be, but, insofar as that lawyer's involvement goes beyond such protected trial preparation activities, even lawyers may be compelled to attend depositions as

a witness. New Hanover Corporation v. DER, et al., 1991 EHB 1185. Here Spivak is not a lawyer and has no counsel, so this argument really has no substance. Moreover, it is clear that Rule 4011(c) is not intended to bar all discovery on the contentions of *pro se* litigants. Here there is no objection by Spivak to a particular question on such a basis; Spivak rather objects to the entire deposition. While possibly creative, under these circumstances this argument lacks any merit and thus is rejected.

O R D E R

AND NOW, this 22nd day of December, 1992, it is ordered that Spivak's Motion For Protective Order is denied and SRP's Motion To Compel is granted. As the time for completion of discovery has expired while these opposing motions were pending, it is ordered that the period for completion of discovery is extended until **January 8, 1993** and that the deposition by SRP of Spivak be conducted before that date.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: December 22, 1992

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

ARTHUR C. PEFFER, GAS & GO MARKET	:	
	:	
v.	:	**EHB Docket No. 92-486-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 22, 1992

OPINION AND ORDER SUR PETITION FOR SUPERSEDEAS

Synopsis

A petition for supersedeas is denied without a hearing where the petition, as supplemented by a supporting brief and affidavit, fails to establish that the public will not be harmed while a supersedeas is in effect and further fails to allege that the petitioner will suffer irreparable harm if the supersedeas is not granted. Finally, an affidavit which merely reiterates the allegations contained in the Notice of Appeal does not adequately support the factual allegations contained in the petition and brief.

OPINION

This matter was initiated with the filing of a Notice of Appeal by Arther C. Peffer, Gas & Go Market on October 23, 1992 from an October 8, 1992 order of the Department of Environmental Resources ("Department"). The order charged Peffer and another individual, Jane M. Alexanian, with causing soil and groundwater contamination in violation of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, and the Storage

Tank and Spill Prevention Act ("Storage Tank Act"), Act of July 6, 1989, P.L. 169, 35 P.S. §6021.101 *et seq.*[1]

The Department's order named Alexanian as the owner of property on which is situated a general store and gas station known as the Gas & Go Market. The order further named Alexanian as the owner of five registered underground storage tanks, two of which contain kerosene and the remaining three, unleaded gasoline. Peffer operated the Gas & Go Market and leased the premises on which it is located at least up to the date of the Department's order. The order charges that a release occurred from an underground storage tank which caused soil contamination at the site of the Gas & Go Market and groundwater contamination affecting the water supply of adjoining property owned by Mr. and Mrs. Glenn Carey. The order requires Peffer and Alexanian to define the extent of contamination emanating from the Gas & Go Market site, to perform tank tightness tests, to close all out-ofservice underground storage tanks on the site, to test the water supplies of residents within 2500 feet of the Gas & Go Market site, and to provide a potable water supply to the Careys and any other affected residents within 2500 feet of the Gas & Go Market.

On November 9, 1992, Peffer filed a petition for supersedeas, which he supplemented on November 25, 1992. The Department responded to the petition, first, on November 20, 1992 and, then, to the supplemented petition on December 7, 1992.

In determining whether a supersedeas is warranted, the Board considers the likelihood of the petitioner prevailing on the merits, whether the petitioner will suffer irreparable harm if the petition is not granted, and the likelihood of injury to the public or other parties if the petition is

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[1] An appeal of the order was also filed by Jane Alexanian on November 6, 1992. A motion to consolidate the two appeals is pending before the Board.

granted. Section 4(d)(1) of Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514(d)(1); 25 Pa. Code §21.78(a). The burden is on the petitioner to demonstrate that the standards for granting a supersedeas are present. Eugene Nicholas t/d/b/a Nicholas Packing Company v. DER, EHB Docket No. 92-025-MR (Consolidated) (Opinion and Order Sur Request for Supersedeas issued March 6, 1992). However, no supersedeas shall be issued where pollution or injury to public health, safety, or welfare exists or is threatened during the period when the supersedeas would be in effect. 35 P.S. §7514(d)(2); 25 Pa. Code §21.78(b).

The Department's order recites that a tank tightness test performed by Peffer disclosed leakage of a kerosene tank, that a soil test performed by the Department showed high levels of petroleum within a 500 feet radius of the Gas & Go Market, and that a water sample at the Carey property showed the presence of various components of unleaded gasoline in the water. In both its order and its response to Peffer's petition, the Department contends, *inter alia*, that petroleum products continue to be discharged from the Gas & Go Market into waters of the Commonwealth in violation of §§301 and 307 of the Clean Streams Law, 35 P.S. §§691.301 and 691.307. This discharge, contends the Department, has rendered the Careys' water supply non-potable and threatens further contamination of soil and groundwater. The Department argues that this existing pollution and the threat of further pollution prohibit the grant of a supersedeas in this mater.

Peffer does not address the issue of pollution or injury to public health and safety in his petition for supersedeas, except on page 2 of his brief where he contends that this issue is not relevant since his lease of the Gas & Go Market has terminated. He makes no attempt to counter the Department's finding that there is ongoing pollution to the Careys' water

supply and the threat of further contamination to other water supplies in the vicinity. Because the Board may not grant a supersedeas where the public health, safety or welfare are threatened and because Peffer's petition makes no attempt to dispute the Department's findings of ongoing pollution, on this basis alone the petition may be denied.

Moreover, Peffer has not even alleged in his petition, much less demonstrated, that he will suffer irreparable harm if a supersedeas is not granted. The only mention of irreparable harm is on page 3 of Peffer's brief where he states that irreparable harm does not exist if Peffer is not likely to prevail on the merits.

Finally, although Peffer was given an opportunity to supplement his petition for supersedeas which, as originally filed, failed to comply with any of the requirements of 25 Pa. Code §§21.77 and 21.78, the supporting brief and affidavit which Peffer filed as a supplement to the petition failed to correct all of the deficiencies. As noted above, the brief does not address the issues of irreparable harm or danger of pollution. In addition, a number of the factual allegations made in the brief are not adequately supported, as required by 25 Pa. Code §21.77(c). For instance, Peffer makes the claim that the location of the tanks is not on the property which was covered by his lease, yet provides no support for this claim, such as a lease description. Peffer also makes the claim that he exercised no control over the tanks, yet paragraph K of the Department's order states that a tank tightness test was performed by Peffer and that "he intended to take both kerosene tanks out of service." The affidavit signed by Peffer, rather than providing support for the factual allegations contained in the petition and brief, merely reiterates, almost word for word, the objections contained in the Notice of Appeal.

As noted previously, the burden is on the petitioner to demonstrate that a supersedeas is warranted. Because Peffer's petition, as supplemented, does not state grounds sufficient for the granting of a supersedeas, as set forth in 25 Pa. Code §21.78(a) and, further, because the factual allegations of the petition and brief are not adequately supported as required by 25 Pa. Code §21.77(c), the petition is denied without a hearing. Because the petition is deficient on the bases set forth above, we need not address the final factor of 25 Pa. Code §21.78(a), the likelihood of success on the merits. See Eugene Nicholas, *supra*.

O R D E R

AND NOW, this 22nd day of December, 1992, it is hereby ordered that the Petition for Supersedeas filed by Arthur C. Peffer, Gas & Go Market at Docket No. 92-486-MJ is denied without a hearing.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 22, 1992

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M. DIANE SMITH
SECRETARY TO THE BD.

JOSEPH BLOSENSKI, JR., et al.	:	
	:	
V.	:	EHB Docket No. 85-222-M
	:	(consolidated)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: December 23, 1992

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

By Robert D. Myers, Member

Synopsis

The Board reduces but sustains the assessment of civil penalties under the Solid Waste Management Act (SWMA), for processing municipal waste without a permit and for threatening a DER employee, against the owner of a municipal waste collection business. The Board dismisses the assessment against the owner's spouse, a co-owner of the real estate and the secretary/bookkeeper of the business, because of the lack of evidence of her knowledge and participation in the violations. In reaching its decision, the Board finds the evidence sufficient to establish the unpermitted processing of municipal waste on 5 of the 6 days alleged by DER and to establish the threat against a DER employee. The Board approves the rationale used by DER in calculating the penalties but reduces the amounts calculated for unpermitted processing because only 5 days were proven. Since DER offered no evidence to explain how it calculated the penalty for threatening the DER employee, the Board substitutes its own discretion.

Procedural History

On June 5, 1985 Joseph M. Blosenski, Jr., individually and trading as Blosenski Disposal Service (Blosenski), filed a Notice of Appeal from a Civil Penalty Assessment in the total amount of $86,648 made by the Department of Environmental Resources (DER) on May 14, 1985. The appeal was docketed at 85-222-M. On June 12, 1985 Ada Blosenski (Ada) filed a Notice of Appeal from the same Civil Penalty Assessment, which appeal was docketed at 85-236-M. On July 18, 1985 the two appeals were consolidated at 85-222-M.

Discovery disputes began almost from the outset and occupied the parties, the Board[1] and the appellate courts[2] until July 30, 1990. After two unsuccessful attempts, the Board was able to bring the appeals to hearing in Harrisburg on October 22, 23 and 24, 1991, before Administrative Law Judge Robert D. Myers, a Member of the Board. All parties were represented by legal counsel.

At the conclusion of DER's case-in-chief, legal counsel for Ada and for Blosenski each moved for an order sustaining the appeal. Blosenski's motion was denied. Ada's motion, in the opinion of Judge Myers, was appropriate but could not be granted by him alone, since final action by the Board requires the concurrence of a majority of its members. He nonetheless recommended to Ada's legal counsel that he not present a case-in-chief, and allowed Ada to withdraw from further participation in the hearing.

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[1] Prior Opinions and Orders issued in this proceeding may be found at 1986 EHB 883, 1989 EHB 946, 1989 EHB 1067 and the slip opinion issued March 3, 1992.

[2] Appeals to Commonwealth Court, filed by Appellants at 2781 C.D. 1986, 1746 C.D. 1989 and 365 C.D. 1990, were all dismissed. A Petition for Allowance of Appeal, filed with the Supreme Court at 1177 E.D. Allocatur Docket 1986, was denied.

To avoid the necessity for lengthy testimony about voluminous documents produced by Blosenski in response to DER's discovery requests for business records, Judge Myers approved the following procedure during the hearing. DER, subsequent to the hearing, would prepare and serve on Blosenski requests for admission concerning specific documents, to which Blosenski would file answers and objections. After the objections had been disposed of by Judge Myers, DER and/or Blosenski could request an additional hearing for purposes of eliciting further testimony on the documents.

In an Order dated January 16, 1992 Judge Myers, *inter alia*, (1) sustained all of Blosenski's objections, (2) admitted into the record the requests for admission and the answers thereto with respect to the remaining documents (as well as the documents themselves), and (3) set a time limit by which either party could request an additional hearing. Blosenski made such a request but it was denied by Judge Myers on April 1, 1992 because, in his opinion, the documents had so little probative value that an additional hearing was not warranted. Accordingly, the record was closed on that date.

DER's post-hearing brief was filed on May 1, 1992; Blosenski's post-hearing brief was filed on May 28, 1992. Ada was excused from filing a post-hearing brief. Issues not raised in the post-hearing briefs are deemed waived: *Lucky Strike Coal Co. and Louis J. Beltrami v. Commonwealth, Dept. of Environmental Resources*, 119 Pa. Cmwlth. 440, 546 A.2d 447 (1988). The record consists of the pleadings, a hearing transcript of 521 pages and 62

exhibits[3]. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. Blosenski is an individual residing at Lippitt Road, R.D. #1, Honey Brook (Chester County) Pa. 19344. During the time pertinent to this proceeding (1980-84) he engaged in business as a sole proprietor under the name Blosenski Disposal Service with the same address as is set forth above (Notice of Appeal; N.T. 305-306; Exhibit A-2).

2. Ada, Blosenski's spouse, is an individual residing at the same address set forth in Finding of Fact No. 1 (Notice of Appeal).

3. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Solid Waste Management Act (SWMA), the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, and the regulations adopted pursuant to the SWMA.

4. Blosenski Disposal Service was a trash collection business. Part of the business involved the use of compactor trucks to make street collections of municipal waste. Another part of the business involved the placement of stationary compactors in plants and factories. Contents of the

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[3] The number of exhibits is deceptive because many of them are multi-page documents, including depositions; testimony and reproduced records in criminal cases arising out of the same events that gave rise to the Civil Penalty Assessment; and business documents numbering in the hundreds. Needless to say, reviewing this record for the purposes of this Adjudication was a daunting task. Appellate decisions on the criminal cases are reported at 97 Pa. Cmwlth. 489, 509 A.2d 978 (1986); 110 Pa. Cmwlth. 194, 532 A.2d 497 (1987); 116 Pa. Cmwlth. 315, 543 A.2d 159 (1988), allocatur denied, 522 Pa. 579, 559 A.2d 40 (1988), certiorari denied, 110 S.Ct. 145 (1989); 523 Pa. 274, 566 A.2d 845 (1989). There is an unreported opinion of Commonwealth Court, dated January 9, 1991, at No. 897 C.D. 1990.

compactor trucks and stationary compactors ultimately were taken to municipal waste landfills where Blosenski was charged by the cubic yard or by the ton (N.T. 305, 436-440).

5. On or about 1980 Blosenski and Ada became joint acquisition lease purchasers from the Central and Western Chester County Industrial Development Authority of a tract of land on Chestnut Tree Road, West Nantmeal Township, Chester County (N.T. 314-315).

6. On or about 1980 Blosenski constructed a building (compactor building) on this tract of land and installed a compactor in it (N.T. 316).

7. The compactor building is a two-story cinderblock structure. The upper story has a vehicle ramp leading to it and is equipped with a floor opening where the compactor hopper is located and with a compactor control booth. The lower story is equipped with the compactor and with an access area for a transfer trailer (N.T. 73-74; Exhibit C-1).

8. Buildings similar to the compactor building typically are used as transfer stations. Trash collection vehicles back into the upper story, dump their loads which are then fed into the compactor where a hydraulic ram pushes them into a transfer trailer for transportation to a disposal site. The volume of trash is usually reduced by this operation and fewer vehicles are necessary to haul the trash to the disposal site (N.T. 42, 74-75; Exhibit 17G, pages 50a-51a).

9. Early in 1981 Blosenski filed an application with DER for a permit to operate the compactor building as a transfer station. No permit was ever issued (N.T. 39-40, 316).

10. On July 7, 1981 DER Solid Waste Specialist Frank Holmes entered the Blosenski tract and saw a Blosenski compactor truck backed into the upper story of the compactor building. Upon entering the building he observed that

the rear of the truck was open and positioned over the compactor hopper. Green trash bags and loose trash were in the truck and the hopper. Two individuals at the rear of the truck entered and sat in the cab of the truck while Holmes was there. A third individual, in the control booth, did nothing. After Blosenski arrived (10 to 15 minutes later), Holmes left (N.T. 90, 117; Exhibit 17G, pages 21a, 41a - 70a; Exhibit 20A).

11. On September 28, 1981 criminal complaints were filed by DER against Blosenski in Magisterial District No. 15-3-06, District Justice Carl Henry (Honey Brook, PA), docket numbers S-252-81 and 5-253-81, based on Holmes' observations on July 7, 1981. The complaints charged that Blosenski was operating a solid waste processing facility without a permit, contrary to §§201 and 610 of the SWMA, 35 P.S. §§6018.201 and 6018.610, and to 25 Pa. Code §75.21(a) (Exhibits 1A, 1C and 1D).

12. Blosenski was found guilty of the offenses charged in the criminal complaints by the District Justice and, after a trial *de novo*, by the Court of Common Pleas of Chester County (Nos. 183-82 and 184-82). The verdicts were affirmed on appeal by Commonwealth Court (832 C.D. 1987), 116 Pa. Cmwlth. 315, 543 A.2d 159 (1988). A Petition for Allowance of Appeal to the Supreme Court (780 E.D. Allocatur Docket 1988) was denied on December 30, 1988. Blosenski's Application for Reconsideration was denied on January 9, 1989, and his Petition for a Writ of Certiorari to the United States Supreme Court also was denied, 110 S.Ct. 145 (1989) (Exhibits 17D, 17G, 17H, 19A, 19B and 19C).

13. On October 19, 1981 Holmes and his supervisor, Bruce D. Beitler, inspected the Blosenski tract and found a load of mixed municipal and commercial waste on the floor of the upper story of the compactor building. An individual present in the building (who Holmes believed identified himself

as Jim McCready) stated that he worked in the building running the compactor. He stated further that the trash on the floor had come from Bell Telephone. In addition, he stated that 20 to 30 loads of trash come in 5 days a week and that 4 to 5 transfer trailers go to a landfill each day (N.T. 92-98; Exhibit 20B).

14. Blosenski acknowledged that he had an employee named McCreary who worked in and around the compactor building in a variety of capacities (N.T. 333-335).

15. On August 17, 1982 Holmes was driving down Chestnut Tree Road following a green-colored compactor truck with green trash bags and loose trash visible from the rear. The truck pulled into the Blosenski tract. Holmes waited 5 minutes before entering the tract himself. He saw the truck backed into the upper story of the compactor building and observed Blosenski's name on the side. Men were preparing to open the back of the truck and the trash bags and loose trash that had been visible at the rear of the truck now appeared to be in the compactor hopper. When Holmes approached, the men secured the back of the truck, got in, drove it out of the compactor building and parked it on another part of Blosenski's tract (N.T. 98-100; Exhibit 17I, pages 158a-174a, and Exhibit 20G).

16. On August 27, 1982 and October 19, 1982 criminal complaints were filed by DER against Blosenski in Magisterial District No. 15-3-06, District Justice Susann Welsh (Haney Brook, Pa.), docket numbers S-362-82 and S-448-82, based on Holmes' observations on August 17, 1982. The complaints charged that Blosenski was operating a solid waste processing facility without a permit, contrary to §§201 and 610 of the SWMA, 35 P.S. §§6018.201 and 6018.610 and to 25 Pa. Code §75.21(a) (Exhibits 1H and 1K).

17. Blosenski was found guilty of the offenses charged in the criminal complaints by the District Justice and, after a trial *de novo*, by the Court of Common Pleas of Chester County (Nos. 54-83 and 55-83). Subsequently, on a motion for reconsideration, the Court of Common Pleas reversed its original decision and suppressed Holmes' testimony. This decision was later reversed by Commonwealth Court (205 C.D. 1986), 110 Pa. Cmwlth. 194, 532 A.2d 496 (1987). Blosenski's Application for Reargument was denied. The Supreme Court affirmed Commonwealth Court (139 E.D. 1988), 523 Pa. 274, 566 A.2d 845 (1989), and the case was remanded to Chester County for sentencing. This occurred on April 4, 1990 and Blosenski's appeal therefrom to Commonwealth Court (897 C.D. 1990) was dismissed in an unreported opinion dated January 9, 1991 (Exhibits 4, 5, 17B, 17C, 17E, 17I, 17J, 18A, 18B and 18C).

18. On November 3, 1982 Holmes was driving on Chestnut Tree Road and saw a Blosenski compactor truck backed into the upper story of the compactor building. He entered the Blosenski tract and, upon entering the compactor building, saw municipal waste on the floor and in the compactor hopper. The truck pulled away as Holmes approached and began to take photographs. At that point, Mr. Irons (a Blosenski employee) operated the compactor and compacted the waste in the hopper. He then mounted a front-end loader and pushed into the hopper the waste piled on the floor. He then activated the compactor again. About 10 minutes later a Blosenski truck hauling a roll-off container pulled up and got into position to back into the compactor building. After a short discussion between Irons and the driver, the truck was driven to another part of the Blosenski tract (N.T. 84-85, 87-89, 104-106, 336; Exhibits C-2(a) through C-2(e) and 20H).

19. Several minutes later, as Holmes was standing on the ramp leading to the compactor building, Blosenski drove onto the tract at a high rate of

speed and skidded to a halt next to Holmes. He got out of his vehicle, obviously angry, and told Holmes: "You state people are going to push me too far someday and I'm going to shoot someone." Holmes was annoyed and upset by Blosenski's statement but remained calm in an effort to defuse the situation. Blosenski calmed down somewhat but was still very angry when he left. He did not order Holmes off the property or interfere with his activities, but Holmes felt intimidated by the incident. When he inspected the Blosenski tract on the next occasion (May 26, 1983), Holmes took State Police protection with him (N.T. 85-87, 148, 160-163, 199-201; Exhibit 10, pages 17-22, and Exhibit 20H).

20. On November 15, 1982 criminal complaints were filed by DER against Blosenski in Magisterial District No. 15-3-06, District Justice Susann Welsh (Honey Brook, Pa.), docket numbers S-487-82 and S-488-82, based on Holmes' observations on November 3, 1982. The complaints charged that Blosenski was operating a solid waste processing facility without a permit, contrary to §§201 and 610 of the SWMA, 35 P.S. §§6018.201 and 6018.610, and to 25 Pa. Code §75.21(a) (Exhibits 8A and 8B).

21. Blosenski was found guilty of the offenses charged in the criminal complaints by the District Justice and appealed to the Court of Common Pleas of Chester County (Nos. 56-83 and 65-83). This court quashed the criminal complaints on November 6, 1984, because of DER's failure to issue citations to Blosenski on the spot. DER appealed to Commonwealth Court (3570 C.D. 1984) which reversed the lower court on May 25, 1986, 97 Pa. Cmwlth. 489, 509 A.2d 987 (1986). Blosenski's Application for Reargument was denied and his Petition for Allowance of Appeal to the Supreme Court also was denied. On remand, the Court of Common Pleas on June 25, 1987 found Blosenski not guilty

because of a lack of evidence showing the source of the trash being compacted on November 3, 1982 (Exhibits 6, 7, 8A, 8B, 9, 10, 11, 12, 13, 14, 15, 16, 17A and 17F).

22. When Holmes inspected the compactor building on May 26, 1983, a truck was present and some trash was present in the compactor (N.T. 106-107, 142, 196).

23. Under the SWMA (in the form in which it existed during the time pertinent to this proceeding), Blosenski's compactor building could have been used legally, without a permit, under the following circumstances:

(a) the compaction of source-separated cardboard and newspapers not mixed with any other waste;

(b) the compaction of on-site generated waste, including that generated by tenants in a multi-tenant complex; and

(c) the compaction of recyclable items (as later defined in Act 101 of 1988, 53 P.S. 4000.101 *et seq.*) if not mixed with other waste (N.T. 42, 46-50, 53-62, 256-262).

24. On December 11, 1981 DER advised Blosenski that cardboard boxes constituted the only waste he could handle in the compactor building without a permit (N.T. 44, 431-432; Exhibit 21A).

25. During the period pertinent to this proceeding, there were several tenants occupying buildings on the Blosenski tract. The lease agreements provided that Blosenski would collect the trash for the tenants and he did so (N.T. 436).

26. Some of the waste observed by Holmes during his inspections was cardboard, but most of the waste was unsegregated municipal waste (N.T. 92, 121, 123, 135-136, 188, 189, 419-421; Exhibits C-2(a) through C-2(e), 17I, pages 158a-160a, 20A, 20B, 20G and 20H).

27. No evidence was introduced by any party concerning the source of the waste Holmes observed during his inspections.

28. Ada served as Blosenski's secretary/bookkeeper, handling receivables and payables and keeping the books. She wrote out checks at Blosenski's direction and entered them into a one-write check system. She had no control or management powers over Blosenski Disposal Service or the compactor building. She visited the compactor building 6 or 7 times but had no knowledge or understanding of what took place there (N.T. 313-314, 327-331, 348-350, 354-372).

29. On May 14, 1985 DER made a Civil Penalty Assessment against Blosenski (including Blosenski Disposal Service) and Ada for the following violations on March 11, 1981, July 7, 1981, October 19, 1981, August 17, 1982, November 3, 1982 and May 26, 1983.

(a) storing, collecting, disposing of and/or processing municipal waste without a permit: section 201(a) of the SWMA, 35 P.S. §6018.201(a) - Blosenski;

(b) allowing the Blosenski tract to be used as a solid waste processing, storage and/or disposal area without a permit: section 501(a) of the SWMA, 35 P.S. §6018.501(a) - Blosenski and Ada;

(c) using the Blosenski tract as a solid waste processing, storage and/or disposal area without a permit: section 501(a) of the SWMA, 35 P.S. §6018.501(a) - Blosenski;

(d) operating and/or utilizing the Blosenski tract without a permit: section 610(2) of the SWMA, 35 P.S. §6018.610(2) - Blosenski; and

(e) using and continuing to use their land as a solid waste processing and/or disposal area: 25 Pa. Code §75.21(a) and section 610(9) of the SWMA, 35 P.S. §6019.610(9) - Blosenski and Ada

(Notice of Appeal)

30. The Civil Penalty Assessment also included a separate assessment against Blosenski for obstructing and threatening Holmes on November 3, 1982: section 610(7) of the SWMA, 35 P.S. §6018.610(7) (Notice of Appeal).

31. The Civil Penalty Assessment was put together by Beitler with input from Holmes and a DER compliance specialist named Bonner. The penalties making up the assessment were calculated pursuant to guidelines that, at the time, represented a draft policy but that since have become final. They take into account the willfullness of the violations; the damage to air, water, land or other natural resources of the Commonwealth or their uses; and the costs to the Commonwealth of investigating the incidents (N.T. 82, 227-228, 233-234, 238-240; Notice of Appeal).

32. The calculation for each penalty making up the assessment was performed as follows:

(a) for March 11, 1981 a penalty of $6,664 was calculated by assessing $1,000 for severity (the lowest severity amount recommended in the guidelines since there was no environmental harm), $5,000 for willfullness (the third willfullness category, since DER had warned Blosenski previously not to operate without a permit), and $664 for costs to the Commonwealth (determined by adding up all the costs and dividing by the number of violation days);

(b) for July 7, 1981 a penalty of $7,664 was calculated by assessing the same amounts for severity ($1,000) and costs to the Commonwealth ($664) but increasing the willfullness assessment by $1,000 to $6,000 because it was a repeat violation;

(c) for October 19, 1981 a penalty of $8,664 was calculated following the same procedure used previously but increasing the willfullness assessment to $7,000 because it was a repeat violation;

(d) for August 17, 1982 a penalty of $14,164 was calculated following the same procedure used previously but the violation was moved to the next higher willfullness category ($12,500) because of the continued operation of the facility without a permit;

(e) for November 3, 1982 a penalty of $15,164 was calculated following the same procedure used previously but increasing the willfullness assessment to $13,500 because it was a repeat violation; and

(f) for May 26, 1983, a penalty of $16,164 was calculated following the same procedure used previously but increasing the willfullness assessment to $14,500 because it was a repeat violation (N.T. 241-245; Notice of Appeal).

33. No evidence was presented to show how the penalty of $18,164 was calculated for the assessment referred to in Finding of Fact No. 30.

34. Although DER could have assessed penalties for each separate violation on each of the days, Beitler treated each day's activities as constituting only one violation, except for November 3, 1982 for which separate assessments were made for processing without a permit and for threatening Holmes (N.T. 247-248).

35. No probative evidence was presented to show what savings Blosenski realized through the processing of municipal waste in the compactor building.

DISCUSSION

DER has the burden of proof in civil penalty assessments: 25 Pa. Code §21.101(b)(1). To carry its burden, DER must prove by a preponderance of the

evidence that violations of the SWMA were committed and that the amount of the assessment is reasonable and an appropriate exercise of its discretion.

We have no hesitancy in concluding at the outset that DER has failed to carry its burden of proof with respect to Ada. Giving the evidence every possible inference in favor of DER, we find that her involvement never went beyond being a co-owner of the Blosenski tract and being the secretary/bookkeeper for Blosenski Disposal Service.

Liability for violation of the SWMA does not attach simply by reason of ownership of the land on which the violations took place: *Commonwealth, Dept. of Environmental Resources v. O'Hara Sanitation Company*, 128 Pa. Cmwlth. 47, 562 A.2d 973 (1989). Some affirmative participation in the violations must be shown: *Lawrence Blumenthal v. DER*, 1990 EHB 187. This is true where corporate officers are concerned: *Kaites v. Commonwealth, Dept. of Environmental Resources*, 108 Pa. Cmwlth. 267, 529 A.2d 1148 (1987); *Newlin Corporation et al. v. DER*, 1989 EHB 1106, and is beyond serious argument where the targeted person is simply an employee. Ada's motion for an order sustaining her appeal will be granted.

To sustain its burden against Blosenski, DER must prove by a preponderance of the evidence that he (a) stored, collected, disposed of and/or processed municipal waste without a permit (SWMA §201(a)); (b) used, and allowed to be used, the compactor building as a solid waste processing, storage and/or disposal area without a permit (SWMA §501(a) and §610(9), 25 Pa. Code §75.21(a)); and (c) operated and utilized the compactor building as a transfer station without a permit (SWMA §610(2)), on March 11, July 7 and October 19 of 1981, on August 17 and November 3 of 1982, and on May 26 of 1983. In addition, DER must prove that on November 3, 1982 Blosenski obstructed and threatened Holmes (SWMA §610(7)).

DER claims that its burden is fulfilled with respect to July 7, 1981 and August 17, 1982 by Blosenski's convictions in criminal proceedings for the same violations based on the same facts. *Folino v. Young*, 523 Pa. 532, 568 A.2d 171 (1990), cited by DER, carved out an exception to the general rule that criminal convictions in summary proceedings cannot be used to establish the underlying conduct in subsequent civil proceedings. The facts in *Folino* are distinguishable but the Supreme Court's rationale would seem to apply here. Although the criminal proceedings were summary in nature at the start, Blosenski appealed and had trials *de novo* in the Court of Common Pleas where he again was convicted. These convictions were then appealed to Commonwealth Court and affirmed. Certainly, Blosenski has had his "day in court" on these charges and should not have the right to relitigate them.

Nonetheless, we have heard the testimony, considered the evidence and reached our own conclusion that Blosenski violated the above-cited provisions on July 7, 1981 and August 17, 1982. The position of the Blosenski compactor trucks in the building, the opening of the backs of the trucks and the presence of municipal waste in the trucks and in the compactor hopper is sufficient evidence to make out a *prima facie* case against Blosenski. The inference that Blosenski was using (and allowing the use of) the building to process municipal waste for transportation to a disposal site is inescapable. The fact that he had no permit to engage in these activities is undisputed.

We find the evidence pertaining to October 19, 1981 to be equally compelling. Even though a Blosenski compactor truck was not in the building on that day, municipal waste was piled on the floor of the upper story and was being pushed into the compactor hopper. These facts plus the admissions of

the Blosenski employee on duty are sufficient to convince us that Blosenski was processing municipal waste for transportation to a disposal site without a permit.

Blosenski was acquitted of the criminal charges brought against him with respect to November 3, 1982. Even though the acquittal is not binding upon us (*Commonwealth, Penna. State Police v. Swaydes*, 504 Pa. 19, 470 A.2d 107 (1983)), we have examined the Common Pleas Court's reasoning. As set forth on page 99 of the transcript of June 25, 1987 (Exhibit 13), the Court entertained a reasonable doubt about Blosenski's guilt because the Commonwealth had not shown that the municipal waste had not come from a source for which no permit is required. This point, if applicable to this civil penalty proceeding, would invalidate the assessments for all of the dates because there is no evidence concerning the source of the municipal waste.

We mean no disrespect for the Court of Common Pleas of Chester County, but observe that Blosenski's earlier convictions for July 7, 1981 and August 17, 1982 were not supported by such evidence. Moreover, Commonwealth Court, in disposing of Blosenski's final appeal from his conviction for August 17, 1982, held that the source of the trash was a matter of defense. As such, it was incumbent upon Blosenski to submit evidence on the point. The decision, being unreported, has no precedential value; but we reach the same conclusion here because it is reasonable and practical.

Examining the evidence presented to us with respect to November 3, 1982, we are satisfied that it proves the violations charged for that date. Not only was a Blosenski compactor truck in the compactor building in a position to dump, Holmes observed Mr. Irons pushing municipal waste piled on the floor into the compactor hopper and operating the compactor. The photographs taken on that day are graphic evidence confirming Holmes'

observations. Blosenski clearly was using the compactor building as a transfer station where municipal waste was processed prior to transportation to a disposal site.

The two remaining dates - March 11, 1981 and May 26, 1983 - pose something of a problem for us because Holmes provided no detailed testimony with respect to those dates and none of the parties offered into evidence Holmes' inspection reports for those dates. Since no criminal proceedings were instituted, we have no transcripts of hearings in the Court of Common Pleas. Holmes' testimony on direct reads as follows (N.T. 106-107):

> Q Calling your attention to the events of March 11, 1981, and May 26, 1983, was there any change of the essential story of what you observed on those times?
>
> A No.

Then, on cross-examination (N.T. 111-114), Holmes testified that on March 11, 1981 he saw no trash present on the site, saw no trash coming in or going out, saw no dumping of trash and saw no operation of the compactor. After careful consideration, we are unable to discern what was happening on March 11, 1981 that was a violation of the SWMA. A civil penalty assessment for that date, therefore, is unwarranted.

Supplemental testimony on May 26, 1983 indicates that a truck and some trash were present on that date, although Holmes saw no dumping (N.T. 142) and that trash was present in the compactor (N.T. 196). Taken together, this testimony is sufficient (but just barely so) to find that Blosenski was processing municipal waste on that date without a permit.

We turn next to Blosenski's alleged threat to Holmes on November 3, 1982. Holmes testified that, while inspecting and photographing activities at the compactor building, Blosenski drove onto the tract at a high rate of speed

and skidded to a halt next to Holmes. Clearly angry, Blosenski got out of the vehicle and said, "You state people are going to push me too far someday and I'm going to shoot someone." He didn't stay around, but, still angry, drove away. Blosenski testified that he had no recollection of the incident but denied ever having an angry confrontation with Holmes or hindering him in any way (N.T. 440-443).

In our opinion, the preponderance of the evidence supports DER. Holmes' version of the incident is corroborated by a written memorandum dated November 18, 1982 (Exhibit 20H) and by the fact that he took a state police officer with him on his next trip to the site on May 26, 1983. We are not inclined to overlook this incident. While Blosenski made no effort to hinder or interfere with Holmes' activities on November 3, 1982, his words would suggest that attempts at future inspections might be met with violence. Holmes, who was not a neophyte, had experienced previous angry confrontations in his job. Yet, he was annoyed and upset by Blosenski's words and demeanor and took them seriously - to the point of having police protection on his next visit. This evidence overcomes Blosenski's efforts to downplay the event. We find that Blosenski threatened Holmes in violation of §610(7) of the SWMA, 35 P.S. §6018.610(7).

Having concluded our discussion on the violations, we now consider the reasonableness of the civil penalties assessed for them. As noted, we have found no violation for March 11, 1981. Therefore, we strike the assessment of $6,664 for that date. For the other 5 dates for which penalties were imposed for processing without a permit, DER assessed $7,664 - July 7, 1981; $8,664 - October 19, 1981; $14,164 - August 17, 1982; $15,164 - November 3, 1982; and $16,164 - May 26, 1983. The guidelines used to calculate these amounts and the rationale behind them have been before us

previously and approved: *A.C.N., Inc. v. DER*, 1991 EHB 1587; *Robert K. Goetz, Jr. v. DER*, 1991 EHB 1433. In addition, since the amounts assessed for each day are less than the $25,000 maximum set by §605 of the SWMA, 35 P.S. §6018.605, the assessments satisfy the technical requirements of the SWMA.

The calculations all utilized $1,000 for severity and $664 for costs incurred by DER.[4] We find these amounts to be minimal and reasonable. Willfullness was gauged at $5,000 for the first violation and increased by $1,000 each for the second and third violations. It was jumped to $12,500 for the fourth violation and increased by $1,000 each for the fifth and sixth violations. Beitler justified the $5,000 placed on the first violation by referring to prior admonitions to Blosenski that he needed a permit to operate. There is little testimony to support this. However, since Blosenski applied to DER for a permit early in 1981, it is obvious that he was aware of the need for one. Consequently, we agree that the willfullness factor for the first violation rises to the $5,000 level. The $1,000 increases for the second and third violations also are warranted.

The jump to the next higher willfullness category for the fourth violation is justified by Blosenski's flagrant disregard of the SWMA and its regulations after more than a year of DER enforcement activities. During that time, criminal complaints had been filed against Blosenski by DER and he had been found guilty at the District Justice level. Even though he believed he

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[4] During the hearing, Blosenski moved to prohibit Holmes from testifying and moved for sanctions against DER for failure to disclose how the penalties were calculated. A motion to strike Beitler's testimony was made on the same basis. We have reviewed the pertinent discovery materials and find the motions to be without foundation. Accordingly, they are denied.

was innocent, his continued processing of municipal waste without a permit was done with full knowledge of the possible consequences. The $1,000 increase for each violation after that also is reasonable.

Since we have found no violation for March 11, 1981, the violation for July 7, 1981 must be considered the first rather than the second. As a result, the willfullness figures for that violation and all subsequent violations must be reduced. The revised calculations are as follows[5]

Violation Date	Severity	Costs	Willfullness	Total
July 7, 1981	$1,000	$664	$ 5,000	$ 6,664
October 19, 1981	$1,000	$664	$ 6,000	$ 7,664
August 17, 1982	$1,000	$664	$ 7,000	$ 8,664
November 3, 1982	$1,000	$664	$12,500	$14,164
May 26, 1983	$1,000	$664	$13,500	$15,164
				$52,320

We were provided with no evidence explaining how DER calculated the $18,164 assessed for Blosenski's threat to Holmes on November 3, 1982. While we appreciate the seriousness of Blosenski's actions from the standpoint of effective DER enforcement activities, we are unwilling simply to approve the amount of the assessment without any evidence to support it. We will substitute our discretion for DER's in this instance. Apparently, November 3, 1982 was the first instance in which Blosenski made any threats. Since it was done then in the heat of anger, we cannot ascribe a high degree of willfullness to it. Nonetheless, Holmes took it seriously and we have to

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[5] These amounts, as noted above, consider only severity, willfullness and costs to the Commonwealth. While DER urged us to consider savings to Blosenski, we were presented with no probative evidence. Blosenski's prior violations of the SWMA also were not considered since they dealt with a totally different site and at an earlier time.

consider the effect such threats post to DER enforcement activity. Weighing these factors and the element of deterrence, we find that a civil penalty of $10,000 is warranted.

DER's total assessment of $86,648 will be reduced to $62,320.

In his post-hearing brief, Blosenski's makes the following statement at page 3:

> Blosenski renews each and every of his motions and objections made during the hearings.

This is not an adequate method of preserving issues that have not been specifically argued elsewhere in the brief: *Blosenski Disposal Service v. Commonwealth, Dept. of Environmental Resources*, 116 Pa. Cmwlth. 315, 543 A.2d 159 (1988) at page 165. Accordingly, they are waived.

CONCLUSIONS OF LAW

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

2. DER has the burden of proving by a preponderance of the evidence that violations of the SWMA were committed and that the amount of the civil penalty assessed is reasonable and an appropriate exercise of discretion.

3. DER did not carry its burden of proof with respect to Ada and her motion for an order sustaining her appeal will be granted.

4. Blosenski processed municipal waste without a permit on July 7, 1981, October 19, 1981, August 17, 1982, November 3, 1982 and May 26, 1983 in violation of §§201, 501(a) and 610(2) and (9) of the SWMA, 35 P.S. §§6018.201, 6018.501(a) and 6018.610(2) and (9), and of 25 Pa. Code §75.21(a).

5. Blosenski threatened Holmes on November 3, 1982 in violation of §610(7) of the SWMA, 35 P.S. §6018.610(7).

6. The guidelines used by Beitler in calculating the civil penalty and the rationale behind them are appropriate.

7. The $1,000 assessed for severity and the $664 assessed for costs to the Commonwealth for each of the violations for processing without a permit are reasonable.

8. The assessments for willfullness, beginning with $5,000 for the first violation and increasing for each subsequent violation are reasonable.

9. Since no violation was found for March 11, 1981, the willfullness assessments for the subsequent violations must be correspondingly reduced.

10. In the absence of evidence explaining how DER calculated the civil penalty assessed for Blosenski's threat to Holmes, we substitute our own discretion and assess a penalty of $10,000.

11. The total civil penalty assessment is $62,320.

ORDER

AND NOW, this 23rd day of December, 1992, it is ordered as follows:

1. Ada's appeal is sustained.

2. Blosenski's appeal is sustained to the extent that the civil penalties are reduced to $62,320 and dismissed as to the remainder.

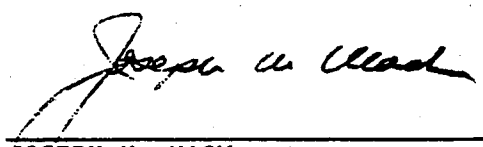
ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

Board Member Richard S. Ehmann is recused.

DATED: December 23, 1992

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M. DIANE SMITH
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NEW HANOVER TOWNSHIP and PARADISE WATCH DOGS	:	
v.	:	**EHB Docket No. 88-119-W (Consolidated Docket)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and NEW HANOVER CORPORATION, Permittee	:	**Issued:** December 23, 1992

OPINION AND ORDER SUR MOTION TO LIMIT EXPERT TESTIMONY

Synopsis:

A motion to limit expert testimony is denied. Although Permittee expanded the scope of its experts' testimony after it had answered Appellant's expert interrogatories, Appellant will not suffer any prejudice from such expanded testimony if Permittee is ordered to provide Appellant with supplemental answers to its expert interrogatories and make two of its experts available for additional depositions by Appellant.

OPINION

This motion to limit expert testimony arises from a March 29, 1988, appeal by New Hanover Township (Township) of the Department of Environmental Resources' (Department) March 8, 1988, issuance to New Hanover Corporation (Corporation) of various approvals to construct and operate a municipal waste landfill, including Solid Waste Permit No. 101385, National Pollutant Discharge Elimination System (NPDES) Permit PA 0052345, and a water quality certification under §401 of the Clean Water Act, 33 U.S.C. §1241. In an opinion at 1991 EHB 1234, the Board granted partial summary judgment in favor

of Corporation, limiting the number of issues to be contested in hearings on the merits; those hearings are scheduled to commence on January 19, 1993.

In its interrogatories, Township asked Corporation:

> 4. For each expert, state:
>
> (a) the substance of the opinion(s) to which the person is expected to testify;
>
> (b) a summary of the grounds for each such opinion;
>
> (c) a specific description of each test performed, experiment conducted or field investigation conducted by each expert in connection with the expert's testimony or preparation thereof; and,
>
> (d) the identity by name, author, title of publication, education, and page of any textbooks, publications, or reports upon which each expert will rely in his or her testimony.

In response to this interrogatory, Corporation provided Township with the names of its experts, including Elly K. Triegel, Ph.D.;, Richard Bodner, P.E.; Jeffrey Peffer, P.E.; and M. Ramanathan, Ph.D. Corporation also provided Township with a list of its experts' proposed testimonies and their bases.

Township deposed Richard Bodner in September 1988, Jeffrey Peffer on October 28, 1988, and Dr. Ramanathan on April 23, 1992. Township took Dr. Triegel's deposition on April 15, 1992. During the course of the deposition, Township agreed to limit that day's questioning to the issue of wetlands. And, Township and Corporation agreed that Dr. Triegel would be made available for further deposition if, based on Township's pre-hearing memorandum, Corporation wanted Dr. Triegel to expand the scope of her testimony to other issues. (Exh.C, p.130, Corporation's Answer to Township's Motion to Limit Expert Testimony).

Township filed its pre-hearing memorandum on May 21, 1992, and Corporation filed its answering pre-hearing memorandum on June 15, 1992. In its pre-hearing memorandum, Corporation once again identified Bodner, Peffer, Ramanathan, and Triegel as its experts and described the scope of their expected testimony.

Presently before the Board for disposition is Township's motion to limit the scope of these four experts' testimony to the scope of their testimony outlined in Corporation's June 26, 1989, answers to interrogatories. Township contends Corporation's pre-hearing memorandum expanded the scope of testimony of Triegel, Bodner, Peffer, and Ramanathan beyond the scope previously identified in Corporation's answers to interrogatories. Township argues that Corporation may not expand the scope of expert testimony beyond the scope identified in its answers to interrogatories and that, if Corporation does so expand its experts' testimony, Township will suffer prejudice because it cannot prepare to cross-examine these experts on new material while also preparing for trial.

Corporation counters that the testimony described in its answers to interrogatories was merely an estimate of the testimony it would have to elicit at hearing and that the exact scope of its experts' testimony could only be determined after the filing of Township's pre-hearing memorandum setting forth its case-in-chief. Furthermore, Corporation contends Township will not suffer any prejudice from the scope of expert testimony outlined in Corporation's pre-hearing memorandum because Township has had ample opportunity since June 15, 1992, to conduct additional discovery of Corporation's experts.

The first issue to resolve is whether Corporation may expand the scope of its experts' testimony beyond the scope of testimony listed in Corporation's answers to interrogatories. Because neither the Board's rules

of practice and procedure, 25 Pa. Code §21.1 *et seq.*, nor the general rules of administrative practice and procedure, 1 Pa. Code Part II, cover this issue, we turn to the Pennsylvania Rules of Civil Procedure, particularly Rule 4003.5, for guidance.

The relevant part of Rule 4003.5, for purposes of resolving this controversy is subsection (c):

> (c) To the extent that the facts known or opinions held by an expert have been developed in discovery proceedings under subdivision (a)(1) or (2) of this rule, his direct testimony at the trial may not be inconsistent with or go beyond the fair scope of his testimony in the discovery proceedings as set forth in his deposition, answer to an interrogatory, separate report, or supplement thereto. However, he shall not be prevented from testifying as to facts or opinions on matters on which he has not been interrogated in the discovery proceedings.

On its face, Rule 4003.5(c), would apparently prevent Corporation's experts from testifying beyond the scope outlined in Corporation's answers to interrogatories. However, despite this relatively clear language, the courts have consistently required that the party against whom the expert is testifying be prejudiced in some way by the expert's expanded scope of testimony. "The relevant inquiry in any case involving the interpretation of Rule 4003.5, such as this, is whether there has been surprise or prejudice to the party which is opposing the proffered testimony of the expert, based upon any alleged deviation between the matters disclosed during discovery, and the testimony of such expert at trial." Trent v. Trotman, 352 Pa. Super. 490, ___, 508 A.2d 580, 587 (1986) (reviewing the exclusion of expert testimony under Rule 4003.5(c)). Once the Trent court found that the expanded expert testimony did not prejudice appellant, it held that such expanded testimony was permissible under Pa.R.C.P. 4003.5(c).

The Board, therefore, must first determine whether Corporation attempted to expand the scope of its experts' testimony. If it did, the Board must then determine whether Township will be prejudiced by such testimony.

Corporation admits that it expanded the scope of Dr. Triegel's testimony in its pre-hearing memorandum. In its answers to interrogatories, Corporation had stated that Triegel's testimony would be limited to wetlands. This scope of testimony was clearly expanded in Corporation's pre-hearing memorandum.

As for Mr. Bodner, in its answers to interrogatories, Corporation stated Bodner would testify: that the landfill design met technical requirements and reduced the environmental incursion to a minimum; that the landfill could have been constructed in compliance with applicable regulations; that stream diversions were designed to comply with the waiver requirements of the DSEA; that Corporation received authority from the U.S. Army Corps of Engineers to fill wetlands on the site; that the 401 certification was proper because the landfill will not adversely affect water quality; and that condition number four of permit number 101385 requires the elimination of underdrains for the regional groundwater table.

In determining whether Corporation expanded the scope of its experts' testimony, we are again guided by the language of Pa.R.C.P. 4003.5(c), 42 Pa.C.S., which states that an expert's testimony at hearing "may not be inconsistent with or go beyond the fair scope" of the expert's testimony outlined in discovery proceedings. After reviewing Corporation's pre-hearing memorandum, it is clear that Corporation seeks to expand the scope of Bodner's testimony. Bodner is now expected to testify on the operation of the landfill, as well as its design and construction. In particular, Bodner will testify how the operational plan complies with all applicable statutes and

regulations and how the operational plan controls the handling of waste sludge and municipal waste incinerator residue.

After reviewing Corporation's answers to interrogatories and pre-hearing memorandum, the Board finds that Corporation did not attempt to expand the scope of testimony of either Jeffrey Peffer or M. Ramanathan. In Peffer's case, Corporation merely described his testimony in a different way. Instead of referring to surface and ground water, the pre-hearing memorandum discussed geology and hydrogeology, which determine the landfill's effects on surface and ground water. In Ramanathan's case, Corporation explained his testimony in greater detail, with an emphasis on why Dr. Ramanathan reached the opinions outlined in Corporation's answers to interrogatories.

Because Corporation did not expand the testimony of Jeffrey Peffer or M. Ramanathan, they may testify to the extent outlined in Corporation's pre-hearing memorandum. Before the Board can decide to what extent Dr. Triegel and Mr. Bodner may testify, we must resolve whether Township will suffer any prejudice if their testimony reflects the issues listed in Corporation's pre-hearing memorandum. Even if there is prejudice, the Board may order additional discovery to cure the prejudice and facilitate a full exposition of the issues. See, Keystone Coal Mining Corp. v. DER, 1991 EHB 1655, 1658; BethEnergy Mines, Inc. v. DER, 1991 EHB 847, 849.

We find that Township would be prejudiced if Triegel and Bodner testify as outlined in Corporation's pre-hearing memorandum and Township cannot depose them on their additional opinions. If Corporation makes Triegel and Bodner available for deposition, Township would no longer be prejudiced. Township cannot claim to be prejudiced because it must conduct these depositions between the date of this order and the time of the experts' testimony. Township has known since April 15, 1992, that Corporation may call

Dr. Triegel to testify on more issues than are indicated in Corporation's answers to interrogatories. Township has also known the exact scope of intended testimony of both Triegel and Bodner since June 15, 1992. Furthermore, to expedite the Township's additional discovery efforts, the Board will require Corporation to submit to Township supplemental answers to question number four of Township's second set of interrogatories.

O R D E R

AND NOW, this 23rd day of December, 1992, it is ordered that:

1) New Hanover Township's motion to limit expert testimony is denied;

2) New Hanover Corporation shall, within seven days of the date of this order, submit to New Hanover Township supplemental answers to question four of New Hanover Township's second set of interrogatories. These answers will cover: Elly Triegel's testimony as it was outlined in New Hanover Corporation's pre-hearing memorandum, except for her testimony about wetlands; and Richard Bodner's testimony on the operational plan of the landfill; and

3) New Hanover Corporation shall make Elly Triegel and Richard Bodner available for deposition by New Hanover Township before they are scheduled to testify in this case. The scope of these depositions may not exceed the scope of New Hanover Corporation's supplemental answers to interrogatories.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: December 23, 1992

cc: See following page for service list

EHB Docket No. 88-119-W
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M. DIANE SMITH
SECRETARY TO THE BOARD

AL HAMILTON CONTRACTING COMPANY	:	
	:	
v.	:	EHB Docket No. 88-113-W
	:	(Consolidated)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: December 24, 1992

OPINION AND ORDER SUR
MOTION TO SUSTAIN APPEAL

By Maxine Woelfling, Chairman

Synopsis

In an appeal of a Department of Environmental Resources (Department) compliance order, a motion to sustain appeal must be granted if the Department fails, in its case-in-chief, to establish a *prima facie* case of Appellant's liability for the violations cited in that order.

Appellant's motion is granted only in part because the Department established a *prima facie* case for Appellant's liability for a groundwater discharge emanating from the breastwork of an erosion and sedimentation control pond. Under the Department's regulations, an erosion and sedimentation control pond is deemed to be located within Appellant's permitted area. Because the Department failed to prove that the other discharges are either located within Appellant's permitted area or hydrogeologically connected to Appellant's mining operations, it did not establish a *prima facie* case of Appellant's liability for those discharges.

The Department has not established a *prima facie* case that Appellant failed to adequately monitor groundwater discharges because the Department provided no evidence on the relationship between adequacy of monitoring and the existence of the discharges. Finally, even if two of the four violations, which are the subject of the matter are *de minimis* and Appellant has taken steps to correct them, the Department still must provide evidence of these violations in order to establish a *prima facie* case of Appellant's liability. Absent such evidence, a motion to sustain appeal must be granted with respect to these two violations.

OPINION

Presently before the Board for disposition is Al Hamilton Contracting Company's (Hamilton) motion to sustain appeal, the fourth and final of a series of motions filed by Hamilton and the Department.[1]

Hamilton contends the Department failed, in its case-in-chief, to provide sufficient evidence to establish that it did not abuse its discretion in issuing Hamilton Compliance Order No. 88-H-008 and the Administrative Order of October 21, 1988. The Department counters that it has established Hamilton's liability for the unlawful discharges emanating from the six Discharge Areas (DAs) at issue, and, therefore, that it did not abuse its discretion.

Standard of Review.

In the present appeal, the Department bears the burden of proving that it did not abuse its discretion in issuing to Hamilton the compliance and

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[1] The facts and procedural posture of this matter were outlined in the Board's August 27, 1992, opinion concerning Hamilton's motion to strike expert testimony. Subsequent to the issuance of that opinion, the Board ruled that Department Exhibit C-10 was not admissible into evidence. Al Hamilton Contracting Co. v. DER, EHB Docket No. 88-113-W, (Opinion Issued October 29, 1992).

administrative orders. 25 Pa. Code §21.101(b)(3). To satisfy this burden, the Department must prove that Hamilton is liable for the violations cited in both orders.

Hamilton's motion to sustain appeal[2] will be granted if the Department, in its case-in-chief, failed to establish a *prima facie* case of Hamilton's liability. See, Solomon Run Community Action Committee v. DER, EHB Docket No. 90-483-E (Opinion Issued January 24, 1992). A party fails to establish a *prima facie* case "if[it] has not introduced sufficient evidence to establish the elements necessary to maintain an action." Morena v. South Hills Health System, 501 Pa. 634, 639, 462 A.2d 680, 682 (1983) (discussing the requirements for a "compulsory nonsuit"). In deciding whether the Department established these elements, the Board must view the evidence in a light most favorable to the Department, giving the Department the benefit of all inferences arising from that evidence and resolving all evidentiary conflicts in favor of the Department. See, Stevens v. Commonwealth, Department of Transportation, 89 Pa. Cmwlth 309, 312, 492 A.2d 490, 492 (1985).

The original compliance order cited Hamilton for four violations at its Caledonia Pike mine site. Violations one and two concerned acid mine drainage (AMD) emanating from six DAs that the Department contends are either on or hydrogeologically connected to the mine site. Violation three related to Hamilton's alleged "[f]ailure to properly maintain sedimentation ponds," Exhibit C-1, and violation four pertained to Hamilton's "[f]ailure to design, construct, and maintain adequate treatment ponds and facilities ...." *Id.*

Hamilton argues that the Board must sustain its appeal of violations

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2 When a motion for nonsuit is brought against the Department and the Department bears the burden of proof on the underlying appeal, the motion is properly entitled a motion to sustain appeal. Swistock Associates v. DER, 1989 EHB 1346, 1351.

three and four because the Department presented no evidence in support of these violations and, therefore, did not establish a *prima facie* case. The Department contends these are minor violations and Hamilton has already undertaken adequate measures to correct them.

Even though violations three and four are relatively minor, the Department must still present sufficient evidence to establish a *prima facie* case. Because the Department presented no evidence to prove these violations, Hamilton's appeal of violations three and four must be sustained.

The Discharge Violations.

As stated above, the Department alleged in its compliance order that mine drainage in excess of the applicable effluent limitations in 25 Pa. Code §87.102 was emanating from six distinct DAs and that the discharge violations were caused by Hamilton's operations on the area encompassed by Surface Mining Permit (SMP) No. 17773155. The Department subsequently issued the administrative order, which stated the discharge violations were caused by Hamilton's operations on the area circumscribed by the SMP "and/or" Mine Drainage Permit (MDP) No. 4577SM8. Exhibit C-3. Because the MDP covers a greater area, including all of the SMP, the Board will examine only whether the Department established a *prima facie* case that Hamilton's operations on the MDP caused the discharge violations.

Liability for discharge violations from surface mining activities is founded in §315(a) of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.315(a). To establish liability under §315(a), the Department must prove that the discharges emanating from the six DAs violated the effluent limitations of 25 Pa. Code §87.102 and that Hamilton's mining operations caused the discharges. The Department can prove Hamilton caused the discharges if it shows that the discharges are either located on

Hamilton's MDP or hydrogeologically connected to Hamilton's mining activities. See, Penn-Maryland Coals, Inc. v. DER, EHB Docket No. 83-188-W (Adjudication issued January 22, 1992).

The Department has provided *prima facie* evidence that the discharges emanating from the six DAs violate the effluent limitations of 25 Pa. Code §87.102. The Board admitted into evidence laboratory analyses of water samples taken from each of the DAs. Department Exhibits C-12 through C-28; N.T. 749. The Board also heard testimony from Nancy Rieg, Department Mining Inspector, and John Berry, Department Hydrogeologist, who both correlated the laboratory results on Exhibits C-12 through C-28 with the DAs from which the samples were taken. N.T. 174-190, 324-329.

The most strongly contested issue, however, is not whether AMD emanates from the six DAs, but rather whether Hamilton is liable for this AMD. The Department contends it has shown through Exhibit C-10 that DAs one through four are located within the boundaries of the MDP. Since the Board has already ruled that C-10 is not admissible into evidence, Al Hamilton, *supra*, Exhibit C-10 cannot be used to prove the relationship between the DAs and Hamilton's MDP boundary.

The Department further asserts that the physical location of DAs three, four, and six proves they are located within Hamilton's MDP. The Department argues Berry testified that DA three "extended up to 150 feet from the western branch stream" and DA six "extended about 140 feet from the southern branch stream."[3] The Board is to infer from this information that DAs three and six lie within Hamilton's MDP because they are outside the "100

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3 The Department obviously meant to write that DA three extended up to 150 feet from the southern tributary of Grimes Run and DA six extended about 140 feet from the western tributary of Grimes Run. N.T. 349-350; see, Exh. C-11.

foot stream barrier" and must, by definition, be within the MDP. This argument is without merit. Without any evidence of the location of Hamilton's MDP, the Board will not presume that it surrounds or even borders the southern and western tributaries of Grimes Run. The relationship of DAs three and six to these tributaries is not dispositive of their relationship to the MDP boundary, for it is entirely possible that a surface mining operation would have a stream barrier in excess of the statutory minimum. Accordingly, the physical location of DAs three and six does not prove they are located within Hamilton's MDP.

The Department also argues Berry testified that DA four is located on the breastwork of the sediment pond. N.T. 356-57. From this testimony, the Board is to infer that DA four is located within Hamilton's MDP. Under 25 Pa. Code §87.108(a), "[a]ll surface drainage from the disturbed area, including areas which have been graded, seeded or planted, shall be passed through a sedimentation pond or series of sedimentation ponds before leaving the permit area." Sediment ponds, therefore, must be located within the permit area. Although the Department presented no evidence of the location of this sediment pond, under §87.108(a) it is deemed to be within Hamilton's MDP. The Board can infer from the location of DA four on the breastwork of the sediment pond that DA four is located within the boundaries of Hamilton's MDP. Because the discharge from DA four exceeds the effluent limits of 25 Pa. Code §87.102 and the location of DA four is deemed to be within Hamilton's permit area the Department has established a *prima facie* case that Hamilton is liable for that discharge.

The Department lastly asserts that all of the DAs, except DA three, are located within the MDP boundary because they are found on areas affected by surface mining. This argument is without merit. It assumes that all areas

affected by surface mining are located within Hamilton's MDP. The Board will not make such an assumption. If the Department had offered evidence that all affected areas are within the boundary of Hamilton's MDP, the Board could then infer that all DAs located on affected areas are also within the MDP. Absent such proof, the Board will not accept the Department's argument.

The Department may still establish a *prima facie* case of Hamilton's liability for the AMD emanating from DAs one, two, three, five, and six if it proves that these DAs are hydrogeologically connected to Hamilton's mining operations. Berry based this connection on his personal observations of the Caledonia Pike mine site and his knowledge of hydrogeology.[4] He testified that he visited the mine site 10 to 12 times during his investigation to observe the relationship between the discharge areas and the topography, and to get a "feel for the lay of the land." N.T. 314-315. In Berry's opinion, all of the DAs are topographically lower than the mine site, N.T. 332-34, and DAs two through six are down dip from the mine site, N.T. 380-382.[5] The Department argues Hydrogeologist Berry's testimony establishes such a

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[4] The Department argues that C-10 proves the DAs are down dip from the mine site and, therefore, structurally connected. As stated above, the Board has already ruled that C-10 is not admissible into evidence. The Department must rely exclusively on Berry's testimony for proof of a hydrogeologic connection.

[5] Although C-10 has not been admitted into evidence, Berry may rely on the structure contours represented on C-10 as the basis for his opinion. See, Kearns by Kearns v. DeHaas, 377 Pa. Super. 200, 209, 546 A.2d 1226, 1231 (1988), appeal denied, 522 Pa. 584, 559 A.2d 527 (1989).

Because C-10 is not in evidence, the Board will not look at the structure contours marked on C-10, but will rely exclusively on Berry's oral testimony to determine whether a structural connection exists. See, f.n. 3, *supra*.

Normally, the Board would give Berry's testimony on structural connection very little weight because the Department did not establish the reliability of the structure contours on C-10. However, because we are deciding a motion to sustain appeal, we must view Berry's testimony in a light favorable to the Department.

hydrogeologic connection.

Berry's testimony establishes a hydrogeologic connection between the DAs and areas that are topographically higher and structurally up dip from them. This does not establish a connection between these DAs and Hamilton's mining operations. The Department provided no evidence that the topographically higher, structurally up dip areas are the areas on which Hamilton conducted its surface mining operations. In fact, the Department provided no evidence at all describing the location of Hamilton's operations. The Board will not assume that Hamilton conducted its surface mining on areas that are topographically higher and structurally up dip from these DAs. Without proof of the location of Hamilton's activities, the Department cannot establish a hydrogeologic connection between DAs one, two, three, five, and six and Hamilton's mining activities.

The Department failed to prove that DAs one, two, three, five, and six are either located within Hamilton's MDP or hydrogeologically connected to Hamilton's operations at the Caledonia Pike mine site. Accordingly, the Department failed to establish a *prima facie* case that Hamilton is liable for the unlawful discharges emanating from these DAs. The Board, therefore, must sustain Hamilton's appeal of violation one with respect to the discharges emanating from DAs one, two, three, five, and six. Because the Department established a *prima facie* case of Hamilton's liability for the AMD emanating from DA four, the Board must deny Hamilton's motion to sustain its appeal of violation one with respect to DA four.

The last violation to consider is violation two, which cited Hamilton for "[f]ailure to monitor groundwater in a manner adequate to determine the effects of mining activities on the groundwater in the permit and adjacent areas." Exhibit C-1. The Department contends it is logical to infer that

Hamilton did not monitor because AMD emanated from each of the six DAs, and Hamilton would have taken steps to correct this prior to the February 22 compliance order had it been monitoring.

It is virtually impossible to conclude that Hamilton was not adequately monitoring groundwater simply because of the existence of six DAs. The Department offered no evidence to substantiate its contention that groundwater monitoring by Hamilton would have revealed that there would be six DAs of AMD. The crux of the cited violation is the adequacy of Hamilton's monitoring, and we have no evidence as to the nature and extent of Hamilton's monitoring. Furthermore, the Department sampled these discharges on February 9 and 18, 1988, and the results of this sampling were not reported until February 25 and 29, 1988. Exhs. C-12 through C-28. The Department offered no evidence to prove that these discharges existed prior to February 9 or 18, or that these discharges violated the effluent limits of 25 Pa. Code §87.102 prior to February 9 or 18. In any event, it is unreasonable to assume that even if Hamilton sampled these discharges on February 9, it could have known that they violated the effluent limits of 25 Pa. Code §87.102 any sooner than the Department.

The Board, therefore, cannot hold that Hamilton failed to adequately monitor groundwater merely because it did not take steps to correct the discharge from DA four prior to the Department's compliance order. Nor can the Board hold that Hamilton failed to monitor the discharges emanating from the other five DAs because even if Hamilton was aware of them, it was under no duty to correct them. Hamilton's appeal of violation two must be sustained.

ORDER

AND NOW, this 24th day of December, 1992, it is ordered that Hamilton's motion to sustain appeal is granted in part and denied in part:

1) Hamilton's motion is granted with regard to its liability for DAs one, two, three, five, and six;

2) Hamilton's motion is denied with regard to DA four: and

3) Hamilton's motion is granted with regard to violations two, three, and four in the compliance and administrative orders.

ENVIRONMENTAL HEARING BOARD

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DATED: December 24, 1992

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