Environmental Hearing Board

Adjudications and Opinions

2008
VOLUME II

COMMONWEALTH OF PENNSYLVANIA
Thomas W. Renwand, Acting Chairman

JUDGES

OF THE

ENVIRONMENTAL HEARING BOARD

2008

Acting Chairman and Chief Judge	Thomas W. Renwand
Judge	George J. Miller
Judge	Michelle A. Coleman
Judge	Bernard A. Labuskes, Jr.
Secretary	William T. Phillipy [IV]

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 2008 EHB 1

ISBN NO. 0-8182-0328-5

FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 2008.

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

ADJUDICATIONS

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2008

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OPINION AND ORDER
ON MOTION TO UNCONSOLIDATE

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board denies a motion to unconsolidate where an appellant seeks unconsolidation of certain issues but not its entire appeal.

OPINION

This consolidated appeal relates to the Department of Environmental Protection's (the "Department's") issuance of a series of NDPES permits pursuant to the Department's Chesapeake Bay Tributary Strategy that impose heightened effluent limitations on nitrogen and phosphorous, among other things. On April 1, 2008, we issued an order inviting the parties to submit a proposed case management order ("CMO") to manage approximately two dozen

consolidated appeals. On May 16, 2008, we received a letter from the Department sent on behalf of most of the parties notifying us that an agreement was not reached among all involved, and as a result, the parties were submitting two separate proposed CMOs: one drafted by the Department (with which some but not all of the parties consented) and one drafted by the Lemoyne Borough Municipal Authority ("Lemoyne"). Lemoyne proposed that each appellant would be permitted to litigate issues unique to its permit separately. On May 19, 2008, we issued a CMO setting forth an amended prehearing schedule, but in consideration of Lemoyne's special effort to comply with our April 1 Order, we included an invitation for Lemoyne to propose a more detailed CMO unique to its appeal. On May 30, 2008, Lemoyne responded to our invitation by filing a motion to unconsolidate. The motion does not request unconsolidation of Lemoyne's appeal in its entirety, but rather, only unconsolidation of certain issues that Lemoyne claims are unique to its appeal. The remaining "common" issues, which Lemoyne argues are germane to the Department's implementation of the Chesapeake Bay Tributary Strategy, would seemingly remain on track for a hearing with the other consolidated appeals. The Department filed a response in opposition to Lemoyne's motion. No other parties filed a response.

The Board has broad discretion to manage its cases, specifically with regard to consolidation. 25 Pa. Code § 1021.82; *see FR&S, Inc. v. DER*, 522 A.2d 1190, 1192 (Pa. Cmwlth. 1987); *White Township v. DEP*, 2005 EHB 722, 723; *Columbia Gas of Pennsylvania v. DEP*, 1996 EHB 22, 25; *DER v. Hancher*, 1988 EHB 408, 411. There are many considerations that come into play regarding whether to consolidate appeals. There are the practical considerations of judicial efficiency that run tandem with the desire to reduce the inconvenience

to witnesses who might need to be deposed or testify multiple times in separate proceedings. *See White Township*, 2005 EHB at 724; *Barshinger v. DEP*, 1996 EHB 1021; *Columbia Gas of Pennsylvania*, 1996 EHB at 23. There are also substantive considerations such as whether appeals involve common questions of law or fact, *see* 25 Pa. Code § 1021.82, or whether the possibility exists that the appeals may result in inconsistent outcomes. *White Township*, 2005 EHB at 723-24; *Columbia Gas of Pennsylvania*, 1996 EHB at 23.

Although we appreciate Lemoyne's lone effort to comply in good faith with our Orders, we have serious concerns regarding Lemoyne's motion to unconsolidate. Lemoyne seeks to unconsolidate only certain issues and not its entire appeal. This would seem to be unduly complicated and impractical, even if we understood what issues would be tried separately. To make matters more complicated, Lemoyne states that it would concede certain issues for the limited purpose of addressing the hearing on unconsolidated matters. In Lemoyne's words,

> [i]f the Board grants this motion as to the items in paragraphs 10.a. through 10.f. above, the Lemoyne Authority, *for purposes of the unconsolidated issues only*, will not challenge the legality of the "Strategy" as an unpublished regulation, but will accept the assertion by the Department that the "Strategy" is a public policy statement not establishing binding norms and which the Department and the regulated community are not legally bound to follow.

(Lemoyne Motion to Unconsolidate, ¶ 13) (emphasis added). Presumably, Lemoyne's proposal to concede temporarily a number of issues is an attempt to avoid issue-preclusion disputes that would inevitably arise if the Board decided Lemoyne's appeal, common issues and all, prior to resolving the consolidated appeals. This begs the question, if we were to grant Lemoyne's proposal, would Lemoyne then dispute the issues it now concedes (for purposes of

unconsolidation) when the so-called common issues are litigated in the other consolidated appeals?

We do not view the issues to be as easily separable as Lemoyne suggests. The issues that Lemoyne characterizes as unique are not only quite similar to issues raised in the other appeals, they appear to be inextricably intertwined with the common issues associated with the Department's application of its Chesapeake Bay Strategy. Were we to follow Lemoyne's suggestion, we would be faced with a constant struggle to reign in disputes as supposedly "unique" issues bleed into common ones.

Lemoyne argues that it would be prejudiced by the delay caused by considering its unique issues collectively with the other consolidated appeals. We fail to see how unconsolidation of issues unique to Lemoyne's permit would result in a faster disposition of Lemoyne's appeal. A Department action is not final until a final adjudication by the Board is entered. *See* 35 P.S. § 7514(c). With the common issues in Lemoyne's appeal remaining consolidated with the others, Lemoyne's permit would not be final until the common issues are resolved along with the other consolidated appeals. Further, the current case management schedule for these appeals is not unusual for a complex case before the Board. At this point in time, the hearing is less than a year away.

We have consistently stated that piecemeal litigation before the Board is to be avoided. *CAUSE v. DEP*, 2007 EHB 632, 681; *Hanson Aggregates PMA, Inc. v. DEP*, 2007 EHB 519, 528; *Stout v. DEP*, 2007 EHB 482, 490; *Sechan Limestone Industries v. DEP*, 2004 EHB 185, 187; *Ziviello v. State Conservation Commission*, 1998 EHB 1138, 1139. There is little to be said for carving out ill-defined issues in one of several clearly interconnected appeals. *See Stout*,

2007 EHB at 490. Lemoyne's proposal would almost certainly result in increased inefficiencies, costs, confusion, and delay.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF DANVILLE et al., BOROUGH OF WORMLEYSBURG (Intervenor in 2008-058-L, 061-L), and THE CHESAPEAKE BAY FOUNDATION, INC., Appellant-Intervenor	:	**EHB Docket No. 2008-033-L (Consolidated with 2008-034-L, 043-L, 044-L, 048-L, 054-L, 055-L, 058-L, 059-L, 061-L, 064-L, 065-L, 066-L, 068-L, 075-L, 077-L, 079-L, 080-L, 086-L, 08-113-L, and 08-114-L)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and LOWER ALLEN TOWNSHIP AUTHORITY (Permittee in 2008-080-L	:	

ORDER

AND NOW, this 10th day of July, 2008, it is hereby ordered that Lemoyne Borough Municipal Authority's motion to unconsolidate is denied.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: July 10, 2008

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ILSE EHMANN, THOMAS GORDON, JEANNE GORDON, RICHARD OSBORNE, ELAINE OSBORNE AND JUDY DENNIS	:	
	:	**EHB Docket No. 2007-150-L**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HERBERT KILMER, Permittee	:	**Issued: July 10, 2008**

OPINION AND ORDER
ON MOTION TO DISMISS FOR MOOTNESS

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Department's motion to dismiss a third-party appeal of a surface mining permit as moot is denied where several requirements mandated by the permit remain in effect, and where permitting of the site has evaded Board review in the past, where the Department's permitting decision implicates issues of significant public importance, and where the appellants will continue to suffer a detriment absent a decision from the Board.

OPINION

Ilse Ehmann and others (the "Appellants") filed this appeal from the Department of Environmental Protection's ("the Department's") issuance of Small Noncoal Mining Permit No. 2382-58060874 to Herbert Kilmer for a quarry located in New Milford Township, Susquehanna

County, for a quarry known as the Blueberry Hill Quarry. On March 28, 2008, the Department revoked permits for eight mines operated by Herbert Kilmer for failure to comply with orders and regulations of the Department, including the Blueberry Hill permit. The Department has also denied Kilmer's application to renew his mining license. Kilmer appealed all of the Department's actions and petitioned for a supersedeas. After a hearing we denied Kilmer's petition. Kilmer then withdrew all of his appeals before the Board, including his appeal of the revocation of the permit for the Blueberry Hill Quarry. That prompted the Department to file a motion asking us to dismiss this appeal as moot.[1]

The Department argues that, because the permit for the Blueberry Hill Quarry has been revoked and the revocation is now administratively final, the Appellants' appeal regarding the underlying merits of the permit is moot. It asserts that this Board is without ability to provide the relief requested by Appellants, namely, rescission of the permit, because the permit has been revoked and no longer exists. The Department adds that no exceptions to the mootness doctrine apply.

The Appellants' response in opposition to the Department's motion seems to first argue that this appeal is not moot because the revocation of the permit "does not begin to correct the errors of the Department and their ongoing corrosive impact upon the Blueberry Hill site and hundred upon hundreds of other permitted or to be permitted sites." They point out that at least some of the cases relied upon by the Department in support of its motion involved cases where permittees returned their permits with no regulated activities to follow, whereas in this case, regulated activities must continue. They also contend that, even if the case is technically moot, the exceptions to the mootness doctrine apply.

[1] Kilmer has advised us through counsel that he does not intend to participate in this appeal.

As an initial matter, we need to disabuse the Department from the notion that mootness is a jurisdictional matter. It is not. Mootness is a *prudential* limitation related to justiciability, not jurisdiction. *McCandless v. McCandless Police Officers Ass'n*, 901 A.2d 991, 1002-03 (Pa. 2006); *Dauphin Meadows, Inc. v. DEP*, 2001 EHB 116, 123; *Horsehead Resource Development Co. Inc. v. DEP*, 1998 EHB 1101, 1103-04; *Columbia Gas of Pennsylvania, Inc. v. DEP*, 1996 EHB 1067, 1069. If this Board lacks jurisdiction, it *must* dismiss an appeal. In contrast, where an appeal is moot, the Board has the authority based upon its own measure of prudence to proceed. *Lower Milford Township v. DEP*, 2006 EHB 387, 394-95. Although prudence will often dictate dismissal, this appeal demonstrates that that is not always the case.

We are not entirely convinced that this appeal is moot. Although the Department has revoked Kilmer's authorization to mine at the Blueberry Hill Quarry, he remains liable for reclaiming the site. The site has not been reclaimed, and it appears unlikely that it will be reclaimed any time soon. So long as reclamation is incomplete, Kilmer's bonds remain in place. The Department has exercised its authority in the past to adjust bond amounts at reclamation-only sites. *See, e.g., Youghiogheny Riverkeeper v. DEP*, EHB Docket No. 2008-125-L. If the Department can adjust the bond amounts in such situations, so can we. *See Pequea Township v. DEP*, 716 A.2d 678, 686-87 (Pa. Cmwlth. 1998). The Appellants have alleged that Kilmer's bonding for the quarry is inadequate and the Department has essentially conceded the point.[2] It would appear that effective relief in the form of a bond adjustment is at least arguably available.

Similarly, so long as the site remains unreclaimed, if the Appellants are correct (and for current purposes we must assume that they are), there is a continuing potential for a discharge to High Quality waters that has not been authorized by a permit. Post-mining discharges typically can and should be permitted. *See* 25 Pa. Code § 86.37(a)(3); *Rand Am, Inc. v. DEP*, 1997 EHB

[2] The bond for the site is $3,000. The Department concedes that it should be at least $26,493.

351, 360. It is at least conceivable at this juncture that effective relief is available from the Board in that regard. With or without a permit, if there is a discharge and if that discharge will continue indefinitely, it may be necessary to apply an antidegradation analysis before taking further action. The Board can, of course, order that such an analysis be performed. *Blue Mountain Preservation Association, Inc. v. DEP*, 2006 EHB 589, 621.

Still further, Appellants have challenged the adequacy of the runoff controls at the site. Again, those controls are likely to remain in place for an indefinite period pending reclamation. Aside from their ongoing maintenance, if the controls are in fact inadequate, Kilmer is at least arguably responsible for adjusting them in the absence of reclamation and/or a discharge permit. Notwithstanding the revocation of the authority to mine, the aspect of the permit that created a duty to maintain the site and prevent any discharge remains, perhaps, intact and subject to adjustment. *See Concerned Citizens of Ligonier v. DEP*, 2007 EHB 150, 151.

We will not tarry further on whether the appeal is moot. Instead, we will assume that it is. We nevertheless decline the Department's invitation to dismiss the appeal. It is true that we will often dismiss an appeal when the permit being appealed is no longer viable *absent exceptional circumstances. See Gardner v. DEP*, EHB Docket No. 2007-204-L (Opinion, February 25, 2008). Nonexclusive examples of exceptional circumstances include cases where the disputed conduct is of a recurring nature yet likely repeatedly to evade review, where issues of great public importance are involved, or where a party will suffer a detriment without a decision. *Sierra Club v. Pa. Public Utility Commission*, 702 A.2d 1131, 1134 (Pa. Cmwlth. 1997), *aff'd*, 731 A.2d 1133, 1134 (Pa. 1999); *Tinicum Township v. DEP*, 2003 EHB 493, 495-96. The Department incorrectly asserts in its reply brief that these criteria must be applied

conjunctively. Any one criterion may justify retaining jurisdiction. *Sierra Club*, 702 A.2d at 1134. As it happens, however, this appeal satisfies all three criteria.

We start with the history of the site as described by the Appellants, whose version of events we accept as true for purposes of resolving the Department's motion to dismiss. *See Webcraft, LLC v. DEP*, EHB Docket No. 2007-200-R, slip op. at 4 (Opinion, January 3, 2008); *Neville Chemical Co. v. DEP*, 2003 EHB 530, 531. In 1998, Kilmer acquired the Blueberry Hill site. At that time he was considered to be a forfeited operator and, therefore, unable to obtain a permit in his own name. Instead, he prepared and filed a permit application in the name of Joseph Manzer, which permit was issued on February 9, 2000. The bond amount required by the Department ($3,000) was provided by Kilmer. The Appellants allege that, at all relevant times thereafter, Kilmer actually operated and controlled the site with the knowledge and approval of Department employees. After Manzer's death and the consequent termination of the Manzer permit, Kilmer continued to operate the site without so much as the color of a permit, but with the knowledge and approval of the Department, say the Appellants.

In 2004, the Department issued a transfer permit for the site to Kilmer. In June of 2004, the Appellants appealed issuance of the transfer permit essentially upon the same bases that are the subject of this appeal and engaged in discovery. After a site view and a four-day hearing before then Chief Judge Krancer in the summer of 2006, but just prior to deadlines for the filing of post-hearing briefs, the Department revoked the transfer permit. According to the Appellants, Kilmer nevertheless continued to operate the site without interruption.

In May of 2007, the Department issued the next permit to Kilmer for substantially the same site immediately after Kilmer paid a number of outstanding fines and penalties for violations at various sites. It is this latest permit that is the subject of this appeal. Although the

Department has denied renewal of Kilmer's mining license and revoked his permit, in a memorandum to all counsel Kilmer's counsel wrote: "At this point Mr. Kilmer does not intend to apply for a license. He has used quarrymen in the past and will likely continue to use such men to quarry his property in the future."

At Kilmer's supersedeas hearing, the Department gave us the strong impression that it will be amenable to repermitting the site to another operator. The Department alludes to this possibility in its motion to dismiss, but argues that the Appellants will be able to file a third appeal at that time. We believe that it would be extraordinarily unfair to require them to do so. Whether intentionally or unintentionally, the Department by its course of dealings with this site and Kilmer in general has successfully evaded Board review of its actions and we have no reason to doubt that it will attempt to continue to do so.

The Department would have us believe that the issues in this appeal relate to one small, isolated site and are of no public importance. That claim strikes us as somewhat disingenuous. According to the Appellants, there are more than 50 permitted sites in the Salt Lick Creek drainage area alone. At Kilmer's supersedeas hearing there was testimony that there are more than 1,000 bluestone quarries with many applications for more under review. The issues that the Appellants have raised in this appeal apply to some or even all of those quarries. For example, the Appellants challenge the Department's practice of limiting public participation in the permit reviews, not requiring NPDES permits even though many of the sites are five acres or more, not applying antidegradation analyses for sites in special-protection watersheds, and permitting sites with inadequate bonding. Whether any of these allegations have merit remains to be seen. Regardless, it cannot be gainsaid that they are of significant public importance and it does not

make sense to keep putting off their resolution. *See Lower Milford Township*, 2006 EHB at 394-95.

Finally, the Appellants have persuaded us that there is a high probability that they will suffer a detriment without a decision. It seems likely if not inevitable that this quarry will continue to operate. Other than the Department's informal, nonbinding commitment to require a higher bond, there is little reason to believe that the basic permit requirements will change or that the Department will change the characterization of the quarry as a "nondischarge site." Kilmer has declared his intention to stay involved. The Department has certainly not indicated that it will require public notice of a new application. Indeed, even without a new permit, there is apparently no reclamation in sight, so the allegedly deficient condition of the site will remain in place indefinitely. In short, any detriment currently being suffered will continue into the indefinite future if we dismiss this appeal. The Appellants have a continuing and palpable stake in the outcome of this appeal.

For the foregoing reasons, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ILSE EHMANN, THOMAS GORDON, JEANNE GORDON, RICHARD OSBORNE, ELAINE OSBORNE AND JUDY DENNIS	:	
	:	**EHB Docket No. 2007-150-L**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HERBERT KILMER, Permittee	:	

ORDER

AND NOW, this 10th day of July, 2008, upon consideration of the Department's motion to dismiss for mootness and the Appellants' response thereto, it is hereby ordered that the motion is **denied**.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: July 10, 2008

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

JEFF KILMER, JAMES MATUSINSKI and FRANK KRANTZ	:	
v.	:	**EHB Docket No. 2007-273-MG (Consolidated with 2007-278-MG and 2007-279-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NORTHEAST ETHANOL & RENEWABLE RESOURCES, LTD, Permittee	:	**Issued:** July 15, 2008

OPINON AND ORDER ON MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS

By George J. Miller, Judge

Synopsis:

The Board dismisses the appeal of an individual who failed to file a response to either a motion for summary judgment or a motion to dismiss his appeal filed by the permittee. The Board finds that the appellant has evidenced a lack of intention to pursue the appeal, and therefore grants the permittee's motions.

OPINION

On December 13, 2007, Jeff Kilmer (Appellant) filed a notice of appeal challenging the Department's issuance of an air quality plan approval to Northeast Ethanol & Renewable Resources, Ltd (Permittee). The plan approval authorized the construction and operation of a denatured ethanol production facility in Mayfield Borough, Lackawanna County. The Appellant challenged some of the reporting requirements of the plan approval.

On April 18, 2008, the Permittee filed a motion for summary judgment which sought dismissal of the appeal on the grounds that the reporting requirements of the plan approval comported with both state and federal requirements, therefore there was no legal basis upon which the Appellant might prevail on his objections. The Appellant did not respond to the Permittee's motion within the thirty-day time period required by the Board's rules.[1] Accordingly, on May 23, 2008, the Permittee filed a motion to dismiss the Appellant's appeal, arguing that his failure to respond to the motion for summary judgment evidenced a lack of intent to pursue the appeal and that his appeal should therefore be dismissed. The Appellant also did not respond to the motion to dismiss.[2]

This Board has on several occasions dismissed appeals where the appellants have failed to respond to a motion for summary judgment.[3] Here the Appellant has not responded to either the April 18 motion for summary judgment or the May 23 motion to dismiss. This failure demonstrates that he now lacks the interest in pursuing the appeal and has simply abandoned it. Further, Rule 1021.94a(h), provides the Board with the authority to enter summary judgment against a party who fails to respond to a summary judgment motion.[4] We therefore will grant the motion to dismiss the appeal.

We enter the following:

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[1] Board Rule 1021.94a(f), requires that a response to a motion for summary judgment must be filed within 30 days of service. 25 Pa. Code § 1021.94a(f). A further three days is permitted when the motion is served by mail. 25 Pa. Code § 1021.35.

[2] 25 Pa. Code § 1021.94(b)(requires a response to a motion to dismiss within 30 days of service).

[3] *E.g., Steinman Hauling v. DEP*, 2004 EHB 846; *Pirolli v. DEP*, 2003 EHB 514.

[4] 25 Pa. Code § 1021.94a(h); see also *Pirolli, above.*

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JEFF KILMER, JAMES MATUSINSKI and FRANK KRANTZ	:	
v.	:	**EHB Docket No. 2007-273-MG**
	:	**(Consolidated with 2007-278-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NORTHEAST ETHANOL & RENEWABLE RESOURCES, LTD, Permittee	:	**and 2007-279-MG)**

ORDER

AND NOW, this 15th day of July, 2008, the motion for summary judgment and the motion to dismiss filed by Northeast Ethanol & Renewable Resources, Ltd. in the above-captioned matter are hereby GRANTED. The appeal of Jeff Kilmer at EHB Docket No. 2007-273-MG is **DISMISSED**.

The following caption should be reflected on all future filings with the Board:

JAMES MATUSINSKI and FRANK KRANTZ	:	
v.	:	**EHB Docket No. 2007-278-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NORTHEAST ETHANOL & RENEWABLE RESOURCES, LTD, Permittee	:	**(consolidated with 2007-279-MG)**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: July 15, 2008

c: **DEP Bureau of Litigation**
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SECRETARY TO THE BOARD

BOROUGH OF DANVILLE et al., BOROUGH OF WORMLEYSBURG (Intervenor in 2008-058-L, 061-L), and THE CHESAPEAKE BAY FOUNDATION, INC., Appellant-Intervenor	:	**EHB Docket No. 2008-033-L (Consolidated with 2008-034-L, 043-L, 044-L, 054-L, 055-L, 058-L, 059-L, 061-L, 064-L, 065-L, 066-L, 068-L, 075-L, 077-L, 079-L, 080-L, 086-L, 08-113-L, and 08-114-L)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and LOWER ALLEN TOWNSHIP AUTHORITY (Permittee in 2008-080-L	:	**Issued: July 16, 2008**

OPINION AND ORDER
ON MOTION TO CERTIFY APPEAL

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board denies a motion to certify an order for interlocutory appeal. The order, which did nothing more than deny a request for a stay, did not involve a controlling question of law, and an immediate appeal from the order would hinder, not advance, the ultimate termination of the matter.

OPINION

On June 18, 2008, the Department of Environmental Protection (the "Department") filed a motion to certify for immediate appeal the Board's May 19, 2008 Case Management Order. Our Order, among other things, denied the Department's informal request for a stay. The

Department argued then, as it does now, that the legal issues involved in these consolidated appeals are also the subject of a petition for review that was filed by some, but not all, of the appellants, as well as other petitioners, in Commonwealth Court. *Borough of Bedford, et al., v. DEP*, No. 160 M.D. 2008. The Department argues that the Board's May 19 Order will require it to litigate legal issues before the Board and the Commonwealth Court at the same time. The Department suggests that the Commonwealth Court case should proceed before this Board may do anything.

The Department sought, but failed to obtain, the concurrence of any of the twenty other parties in its motion. The Lemoyne Borough Municipal Authority ("Lemoyne") and Elizabethtown Borough ("Elizabethtown") filed responses in opposition to the Department's motion, arguing that the motion does not meet the proper legal standards and is procedurally incorrect. Lemoyne and Elizabethtown also argue that it is necessary to develop a factual record in order to litigate the legal issues that exist in the consolidated appeals.

In discussing the certification of an interlocutory appeal in *UMCO Energy Inc. v. DEP*, we had this to say:

> Section 702(b) of the Judicial Code provides for the certification of interlocutory orders in certain cases:
>
> > When a court or other government unit, in making an interlocutory order in a matter which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order.

> 42 Pa.C.S. § 702(b). The Pennsylvania Rules of Appellate Procedure provide that, where the governmental unit (in this case, the Board) does not expressly state that there is a controlling question of law at issue, an application may be made to the governmental unit for an amendment of the order, and an order may be amended to include the prescribed statement at any time. Pa.R.A.P. 1311(b). An application for an amendment of an interlocutory order to set forth expressly the statement specified in 42 Pa.C.S. § 702(b) must be filed with the government unit within 30 days after the entry of such interlocutory order, and permission to appeal may be sought within 30 days after entry of the order as amended. Unless the governmental unit acts on the application within 30 days after it is filed, the governmental unit shall no longer consider the application and it shall be deemed denied. *See* Pa.R.A.P. 1311 Official Note.
>
> These provisions essentially create a duty on our part that we owe to the Commonwealth Court to give an honest appraisal of whether we think an immediate appeal would be worthwhile. There are three pertinent criteria that inform our appraisal: (1) whether our order involves (a) a controlling (b) question of law; (2) whether there is substantial ground for difference of opinion on that controlling question of law; and (3) whether an immediate appeal from the interlocutory order may materially advance the ultimate termination of the matter.

2004 EHB 832, 835-36.

Our May 19 denial of the Department's request for a stay does not involve a question of law, much less a controlling one. Interlocutory appeals from Board orders are primarily designed to allow the Commonwealth Court to consider pure questions of law. *See City of Harrisburg v. DER*, 630 A.2d 974, 975 (Pa. Cmwlth. 1993); *DER v. Rannels*, 610 A.2d 513, 515 (Pa. Cmwlth. 1992); *UMCO Energy, Inc.*, 2004 EHB 832, 837. Our May 19 case management order is purely procedural. Even though the consolidated appeals contain many questions of law, as the Department's motion is quick to point out, our decision to deny the Department's request for a stay does not embody any of them. A denial of a request for stay, by itself, does not establish any law or precedent on the merits. *See UMCO*, 2004 EHB at 839.

Although the only action embodied in our May 19 Order is a denial of the Department's request for a stay, the Department rather vaguely seems to also suggest that we certify some of the many underlying legal issues in some of the appeals. This request has no logic or merit because we cannot certify issues for appeal that we have not yet decided. Our May 19 Order does not take a position with regard to the issues the Department seems to request that we certify. We understand the importance and complexity of the issues at stake in these appeals; however, it would be wholly inappropriate to certify an interlocutory appeal based on an order that does nothing more than deny a request for a stay. *Chambers Development Co., Inc. v. DER*, 545 A.2d 404, 407 (Pa. Cmwlth. 1988) (Board certification of interlocutory appeal is inappropriate where at no time did the Board issue any orders taking a position with regard to the certified issues). *Accord, UMCO Energy, Inc. v. DEP*, 2004 EHB 832 (no interlocutory appeal from issuance of a supersedeas); *Clever v. DEP*, 1998 EHB 1259 (same); *Empire Sanitary Landfill v. DER*, 1994 EHB 1419 (same).

Furthermore, both Lemoyne and Elizabethtown are correct that it is necessary to develop a factual record to decide these issues. The issues are as much factual as they are legal. For example, determining whether the effluent limits established in the NPDES permits are legal and reasonable requires an understanding of the limits themselves. Accordingly, a factual record is necessary. These issues can be decided only after the parties develop a full record that will serve as a proper foundation for a Board Adjudication and then a meaningful appeal, if necessary. *UMCO Energy, Inc.*, 2004 EHB at 839. Certification is inappropriate where factual rather than legal disputes predominate or at least play an important part. *UMCO Energy, Inc*, 2004 EHB at

840-41; *Clever v. DEP*, 1998 EHB 1259, 1260-61; *CNG Transmission Corp. v. DEP*, 1998 EHB 548, 551-52; *Chemical Waste Management, Inc. v. DER*, 1982 EHB 512.

Along the same lines, if we were to certify the Department's appeal, it would not materially advance the ultimate termination of these matters. To the contrary, we have established a rigorous schedule for the expeditious resolution of these appeals. A hearing is now less than one year away. Rather than conducting an out-of-context resolution of some but not all supposed "legal" issues, we have scheduled the appeals to proceed in an orderly fashion with discovery followed by motions practice followed by fact-finding hearings. Common issues may be litigated jointly. Putting this process on hold would not only interfere with the Appellants' universal desire to get on with their challenges, it would add months of pointless delay.

Assuming, however inappropriate it may be, that our denial of the request for stay is a legal issue, it is difficult to see how it is controlling. Granting the stay, or in the alternative, certifying the Department's request, would not eliminate the need for future proceedings before the Board. As we stated in *UMCO Energy, Inc.*, "[u]nless the [Commonwealth] Court exercises its discretion to take over the EHB appeal in its entirety, we will *ultimately* be called upon to make factual determinations, give our view of the law, and decide upon an appropriate course of action with respect to the Department's order." 2004 EHB at 842. The same can be said here. In either case, whether we granted or denied the Department's request for a stay, future proceedings before the Board are unavoidable. Thus, our decision to deny the stay cannot be said to be controlling where the end result is the same in either case.

Even if we were to concede that there was a controlling question of law, we do not see substantial ground for difference of opinion. Our denial of the Department's request for a stay

does not involve a matter of first impression or an unsettled area of law. It is within the Board's discretion to manage its cases. *FR&S, Inc. v. DER*, 522 A.2d 1190, 1192 (Pa. Cmwlth. 1987). Where requests to certify appeals turn on issues that lie within the lower court's discretion, appellate courts are generally reluctant to find that there is substantial ground for difference of opinion regarding the decision from below. *Miller v. Krug*, 386 A.2d 124, 127 (Pa. Super. 1978).

Every party except the Department appears to be opposed to the Department's request for a stay. It is not unreasonable to deny a request for stay when other parties are eager to bring their appeals before the Board. Where parties are eager to move forward, we are hesitant to slow the process down and hold in limbo the due process that parties are entitled to before the Board. In addition, it would be particularly unfair to delay the proceedings of all the parties when only some are involved in the Commonwealth Court action. For example, Lemoyne, which is not a party in the Commonwealth Court action, has vigorously opposed the Department's request for a stay. Not even parties who filed the Commonwealth Court case, e.g., Elizabethtown, want our appeals stayed. The NPDES permits under appeal set tight deadlines and may require substantial expenditures of money, so Lemoyne's and Elizabethtown's efforts to move forward and seek a modification of their permit terms from this Board are entirely reasonable. The Department's motion would thwart their administrative appeal rights.

We believe the Department's motion is particularly inappropriate in this case because it tends to inexplicably subvert and bypass the administrative proceedings that the Legislature by statute created within the Executive Branch that are to be exhausted when an agency under the direction of the Governor takes an action *before* the courts get involved. In countless cases

where private litigants have sought to skirt Board review, the Department has successfully argued that interposing interlocutory judicial review offends the administrative review process. The Department fails to explain why it is taking the opposite position here. The Environmental Hearing Board is the proper forum to hear appeals from Department actions. 35 P.S. § 7514(a); *Globe Disposal Co. v. DER*, 525 A.2d 437, 440 (Pa. Cmwlth. 1987); *Stabatrol Corp. v. Metzval Corp.*, 456 A.2d 252, 254 (Pa. Cmwlth. 1983). Where parties seeking relief have failed to exhaust an adequate administrative remedy, the courts generally do not act. *The Mercy Hospital of Pittsburgh v. Pennsylvania Human Relations Commission*, 451 A.2d 1357, 1359 (Pa. 1982); *Pechner v. Pennsylvania Insurance Dept.*, 452 A.2d 230, 232-33 (Pa. 1982); *Stabatrol Corp. v. Metzval Corp.*, 456 A.2d 252, 254 (Pa. Cmwlth. 1983); *St. Joe Minerals Corp. v. Goddard*, 324 A.2d 800, 801-02 (Pa. Cmwlth. 1974). This is rooted in the longstanding notion that, where a statutory remedy exists, it is to be preferred over remedies that exist in equity and at common law. 1 Pa.C.S. § 1504. This is particularly true within the context of proceedings before a quasi-judicial administrative agency. *Nagle v. Pennsylvania Insurance Department*, 406 A.2d 1229, 1237 (Pa. Cmwlth. 1979). Administrative remedies must be strictly pursued to the exclusion of other methods of redress. *Pennsylvania Life Insurance Co. v. Pennsylvania National Life Insurance Co.*, 208 A.2d 780, 782 (Pa. 1965); *Collegeville Borough v. Philadelphia Suburban Water Co.*, 105 A.2d 722, 726 (Pa. 1954). Certifying our Order for interlocutory review would erode the very core of the administrative scheme. *The Mercy Hospital of Pittsburgh*, 451 A.2d at 1359.

The Department's motion is essentially a request for the Commonwealth Court to hear direct appeals from the Department's issuance of NPDES permits. In fact, the permits that the

Department would have the Commonwealth Court review are not yet final actions of the Department, let alone this Board, by virtue of the pending appeals. 35 P.S. § 7514. The Department's motion cannot even be explained as a defense to a legal challenge regarding new regulations. *Compare Arsenal Coal Co. v. DER*, 477 A.2d 1333, 1339 (Pa. 1984). Even in those situations, however, pre-enforcement review is generally discouraged. *See Duquesne Light Co., Inc. v. DEP*, 724 A.2d 413, 417 (Pa. Cmwlth. 1999); *Concerned Citizens of Chestnuthill Township v. DER*, 632 A.2d 1, 3 (Pa. Cmwlth. 1993); *see also Neshaminy Water Resources Authority v. DER*, 513 A.2d 979, 981 (Pa. 1986).

Finally, the Department's motion would have the Commonwealth Court dictate case management to the Board. As long as the Board is dilligently discharging its legislatively prescribed functions, the Commonwealth Court would seem to have little reason to dictate procedure unless it offends due process. *The Mercy Hospital of Pittsburgh*, 451 A.2d at 1359; *see also Pugar v. Greco*, 394 A.2d 542 (Pa. 1978). In sum, the best and most obvious way to advance the ultimate termination of this dispute is to proceed toward a Board Adjudication on the merits. Once a full record has been developed and the Board has been permitted an opportunity to address the issues in the cases, the issues will be positioned for meaningful appellate review by the Commonwealth Court. We see no reason whatsoever to depart from this statutorily prescribed scheme, and every reason not to.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF DANVILLE et al., BOROUGH OF WORMLEYSBURG (Intervenor in 2008-058-L, 061-L), and THE CHESAPEAKE BAY FOUNDATION, INC., Appellant-Intervenor	:	**EHB Docket No. 2008-033-L (Consolidated with 2008-034-L, 043-L, 044-L, 054-L, 055-L, 058-L, 059-L, 061-L, 064-L, 065-L, 066-L, 068-L, 075-L, 077-L, 079-L, 080-L, 086-L, 08-113-L, and 08-114-L)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and LOWER ALLEN TOWNSHIP AUTHORITY (Permittee in 2008-080-L	:	

ORDER

AND NOW, this 16th day of July, 2008, it is hereby ordered that the Department's motion to certify an interlocutory appeal of the Board's May 19 Order is denied.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: July 16, 2008

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

PENNSY SUPPLY, INC.	:	
	:	
v.	:	**EHB Docket No. 2008-076-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and McDERMITT CONCRETE, INC.	:	**Issued: July 25, 2008**

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By: Thomas W. Renwand, Acting Chairman and Chief Judge

Synopsis:

The Pennsylvania Environmental Hearing Board lifts the temporary supersedeas issued on July 3, 2008 and denies Appellant's Petition for Supersedeas. Appellant failed to show by a preponderance of the evidence that it was entitled to a supersedeas.

INTRODUCTION

On February 12, 2008, the Pennsylvania Department of Environmental Protection (Department) issued Plan Approval No. 22-05-053A (Plan Approval) to McDermitt Concrete, Inc. (McDermitt Concrete). The Plan Approval authorizes the construction of a batch asphalt plant in Middletown, Pennsylvania.

Control of the site of the batch asphalt plant, the Kimbob Parcel of the Fiddler's Elbow Quarry, is hotly contested between Pennsy Supply, Inc. (Pennsy Supply) and McDermitt Concrete. Although the parties entered into a lease agreement approximately thirteen years ago and expressly agreed to arbitrate "all disputes at law or in equity" they have failed to arbitrate their claims. (Quarry Lease, Appellant Exhibit No. 5).

Pennsy Supply filed a Notice of Appeal on March 13, 2008 challenging the Department's issuance of the Plan Approval. On the afternoon of July 3, 2008, Pennsy Supply filed with the Board a request for a Temporary Supersedeas and a Petition for Supersedeas. Following a conference call later that afternoon with counsel for Pennsy Supply, McDermitt Concrete, and the Department of Environmental Protection the Board issued a temporary supersedeas.

A supersedeas hearing was held in the Board's Hearing Room Number One in Harrisburg, Pennsylvania on July 8, 2008. On July 10, 2008 the parties submitted comprehensive legal memoranda discussing the testimony, exhibits, and controlling legal precedent.

DISCUSSION

The circumstances affecting the grant or denial of a supersedeas petition are set forth at 25 Pa. Code § 1021.63:

> (a) The Board, in granting or denying a supersedeas, will be guided by relevant judicial precedent and the Board's own precedent. Among the factors to be considered:

(1) Irreparable harm to the petitioner.
(2) The likelihood of the petitioner prevailing on the merits.
(3) The likelihood of injury to the public or other parties, such as the permittee in third party appeals.

(b) A supersedeas will not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect.

See also 35 P.S. § 7514, to the same effect.

A supersedeas is an extraordinary remedy. Accordingly, one will not be granted absent a clear demonstration of appropriate need. *Tinicum Township v. DEP and PennDot*, EHB Docket No. 2008-084-L (Opinion and Order issued April 21, 2008); *UMCO Energy Inc. v. DEP*, 2004 EHB 797, 802; *Tinicum Township v. DEP*, 2002 EHB 822, 827; *Global Eco-Logical Services v. DEP*, 1999 EHB 649, 651 *Oley Township v. DEP*, 1996 EHB 1359, 1361-1362. The petitioners bear the burden of proof. *Eagle Environmental II, L.P. v. DEP*, 2006 EHB 439, 447: *Pennsylvania Fish & Boat Commission v. DEP*, 2004 EHB 473, 474. The issuance of a supersedeas is committed to the Board's discretion based upon a balancing of the statutory criteria. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 802. The Board, however, will not issue a supersedeas where pollution or injury to the public exists or is threatened during the time a supersedeas would be in effect. 35 P.S. § 7514(d)(2); 25 Pa. Code § 1021.63(b). We find that there would be no pollution or injury to the public here. It is important to remember that our ruling on a supersedeas petition is merely a prediction

about who is likely to prevail at the hearing on the merits. *Neubert v. DEP*, 2005 EHB 598, 608; *UMCO Energy, Inc. v. DEP*, 2004 EHB 832, 839-40.

Both Appellant Pennsy Supply and Permittee McDermitt Concrete are in the asphalt and concrete business. In 1995, Pennsy Supply entered into a lease agreement with the owners of McDermitt Concrete to lease the Fiddler's Elbow Quarry of which the Kimbob Parcel is included. The lease agreement, which was entered into evidence, is very detailed.

The parties included a very comprehensive arbitration provision which evidently someone hoped would afford the parties the opportunity to quickly resolve any disputes arising out of the lease agreement. The provision has failed miserably to accomplish this erstwhile goal. The arbitration provision provides for the arbitration of all disputes by a panel of three arbitrators. The parties are supposed to each select an arbitrator and then the two arbitrators are to select a third arbitrator. "When the third arbitrator has been chosen, the arbitrators shall work with the parties to schedule the arbitration as soon as possible."

Both Pennsy Supply and McDermitt Concrete are claiming breaches of the lease agreement. Nevertheless, although the parties selected their arbitrators in 2005, the two arbitrators have not selected a third arbitrator. Like just about every issue surrounding this case, Pennsy Supply and McDermitt Concrete each blame the other for the failure of the two arbitrators to select the third arbitrator.

In the meantime, rather than arbitrate their disputes before the agreed panel of arbitrators, the parties have engaged in legal battles before the Dauphin County Court of

Common Pleas and the Pennsylvania appellate courts. Their legal bickering has now spilled over into the friendly confines of the Pennsylvania Environmental Hearing Board.

By failing to follow the course of action they themselves established they have expended vast sums of money without resolving their differences. Both Pennsy Supply and McDermitt Concrete point to the lease to justify their positions. However, they both *seem* to argue that the lease provisions should be interpreted by the panel of arbitrators rather than by either this Board or a Common Pleas Court.

Based on the evidence introduced during the supersedeas hearing, the actions of the Department of Environmental Protection in this matter strike us as admirable and intelligent. The Department steered a steady course through these choppy legal waters and issued a Plan Approval in which it focused on the merits of the application without in any way deciding the property dispute.

After listening to the testimony and reviewing the exhibits we are faced with a difficult decision. If Pennsy Supply's interpretation of the lease provisions is correct, then it would have exclusive possession of the property and McDermitt Concrete would not have the required permission of Pennsy Supply to operate its asphalt plant. However, if McDermitt Concrete's interpretation of the lease is correct then they would have the right to be on the property and operate its asphalt plant once it was permitted by the Department.

We find at this point in the litigation that Pennsy Supply has not shown by a preponderance of the evidence that it has met the requirements that it is entitled to a

supersedeas. It mainly argues that if the construction of the asphalt plant is allowed to proceed it will be irreparably harmed because it will not have the use of the Kimbob Parcel of the property for its own operations, it somehow might get saddled with environmental responsibility for McDermitt Concrete's operations if McDermitt Concrete abandons its plant (like it evidently did with some old tires), and someone could be injured by Pennsy Supply's blasting operations. Pennsy Supply also asserted at the hearing that the Plan Approval process was flawed because the Department did not obtain enough compliance information about some used equipment that would be used in the new plant.

At the supersedeas hearing we learned that McDermitt Concrete constructed a concrete plant on this same site in 2005. In fact the concrete plant, which is right next to the asphalt plant under construction, is even closer to the quarry. Although the construction of the concrete plant resulted in a flurry of legal proceedings the parties still have not even selected a third arbitrator to resolve that dispute. Meanwhile, McDermitt Concrete operates the concrete plant with two employees on site daily and six to eight concrete truck drivers frequently on site. In addition, one of McDermitt Concrete's supervisors has an office at the concrete plant and is frequently present. This evidence undercuts Pennsy Supply's argument concerning irreparable harm and the danger to those on the property other than Pennsy Supply employees.

The Court of Common Pleas, in response to the blasting issue, required that Pennsy Supply notify the McDermitt Concrete employees prior to blasting. This procedure seems to

be working to ensure the safety of all those on the premises. In addition, it appears that blasting occurs at most once a week and often only two times a month.[1]

Pennsy Supply's argument that they would be responsible for any environmental problems caused by McDermitt Concrete's operations is too speculative for us to supersede the Plan Approval at this stage of the proceedings. The testimony revealed an established concrete plant and the construction of an asphalt plant. Under Pennsy Supply's hypothetical theory it is difficult for us to envision McDermitt Concrete abandoning these facilities even if McDermitt Concrete loses the arbitration. We doubt whether McDermitt Concrete would simply abandon what appear to be much more valuable and productive assets than a pile of old tires. In addition, if McDermitt Concrete abandoned the plants they also would by definition not be in operation so they would not be causing any air pollution.

McDermitt Concrete has evidently been using this property since the beginning of the lease. Therefore, we fail to see how this is causing irreparable harm to Pennsy Supply. Pennsy Supply appears to be operating a successful quarry operation on the site and in fact renewed its lease for another five years after the conclusion of the initial ten year term.[2] Moroever, if Pennsy Supply prevails before the panel of arbitrators we have no doubt that the panel could compensate Pennsy Supply for any economic harm it has suffered.

Pennsy Supply presented nothing at the supersedeas hearing which leads us to believe

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1 Obviously, Pennsy Supply should take all necessary steps to alert and warn anyone on the premises prior to blasting. This would include employees of McDermitt Concrete, any construction workers, and anyone else on the property.

2 We hasten to add that we are aware that McDermitt Concrete contends that Pennsy Supply did not legally renew its

that the Department was is in error by issuing the Plan Approval. Except for arguing that McDermitt Concrete had no right to be on the property pursuant to the lease agreement and some weak testimony regarding the adequacy of the used air equipment, Pennsy Supply did not specifically challenge the technical aspects of the Plan Approval. Its witness' testimony at this very early stage of the proceedings was speculative and equivocal at best.

Mr. William Weaver is the Air Quality Program Manager for the Department's Southcentral Region. He testified that the Department requires the equipment to meet current air standards. That is because the Department treats the reconstructed plan as a new source that is subject to the various permitting requirements including best available technology. Therefore, it really is not relevant whether the equipment had a great record or a poor record. It will have to be in compliance with the Plan Approval or it will be subject to an enforcement action. In addition, McDermitt Concrete's manager testified that the equipment would be thoroughly overhauled to meet the requirements in the Plan Approval.

McDermitt Concrete failed to convince us that it is being damaged by the temporary supersedeas in place since July 3, 2008. The testimony that McDermitt Concrete put on in this regard was speculative at best. McDermitt Concrete argues they are losing a huge amount of money per day but did not put on any evidence to substantiate these figures. Nor did they advise the Board what their costs of production would encompass.

What is crystal clear to us is that it is in the best interest of all parties that this dispute

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lease. We are not deciding that issue today.

is resolved. Although we are denying the Petition for Supersedeas we are not going to abandon the parties. They have proven that, up until now anyway, they are unable by themselves to amicably resolve their differences. Moreover, as long as we are dependent on a third party, a panel of arbitrators to decide legal issues in the appeal before us, this legal Gordian Knot may remain tightly bound. At the same time, this ongoing dispute will continue to sap the financial resources of the parties and the limited resources of this Board. We do not have the time or inclination at this point to figure out which party is responsible for derailing the arbitration process. However, if the process continues to languish we will know who is responsible as today we will order the parties to proceed with the arbitration process pursuant to their lease agreement.

If the parties continue their current behavior of not selecting arbitrators we will reevaluate our view, and explore whether the actions of one or both parties would constitute a waiver of the arbitration provision. We will not allow this appeal to languish. If necessary in aid of our jurisdiction we will explore at that point whether we need to decide these issues. One thing is certain – either the panel of arbitrators or the Pennsylvania Environmental Hearing Board-is going to untie this Gordian Knot.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNSY SUPPLY, INC.	:	
	:	
v.	:	**EHB Docket No. 2008-076-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and McDERMITT CONCRETE, INC.	:	

ORDER

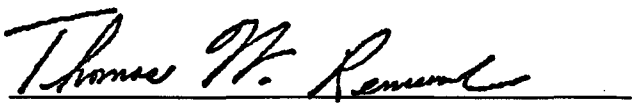
AND NOW, this 25th day of July, 2008, following a Supersedeas Hearing and after reviewing the papers filed in this matter, it is ordered as follows:

1. The temporary supersedeas issued on July 3, 2008 is ***lifted***.
2. McDermitt Concrete's request for a bond is ***denied*** as the evidence they presented as to economic loss is too speculative.
3. Pennsy Supply has failed to show by a preponderance of the evidence that it is entitled to a supersedeas. Therefore, the Petition for Supersedeas is ***denied***.
4. Pennsy Supply shall continue to notify any persons on the property prior to blasting. This notification shall include employees of McDermitt Concrete, construction workers, and anyone else on the

property.

5. McDermitt Concrete shall use its best efforts to develop steps to insure that it can be easily notified of Pennsy Supply's blasting operations. McDermitt Concrete will also use its best efforts to make sure it notifies construction workers and any other people who are on the property on business with McDermitt Concrete.
6. Appellant's Motion to Strike Improper Exhibits and Portions of McDermitt's Brief is ***denied***. At the same time, the exhibits Pennsy Supply objected to in its Motion were not considered by the Board in reaching its decision on the Petition for Supersedeas.
7. On or before **August 25, 2008**, the parties shall file a ***joint status report*** with the Board.
8. In their joint status report the parties shall advise the Board of the name of the third arbitrator, the date of his or her selection, the issues before the panel of arbitrators, the length of the discovery period before the arbitrators, and whether a hearing date has been set.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Acting Chairman and Chief Judge

DATED: July 25, 2008

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

VICTOR KENNEDY	:	
	:	
v.	:	**EHB Docket No. 2008-127-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 31, 2008**

OPINION IN SUPPORT OF ORDER ON
PETITION FOR SUPERSEDEAS

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board denies a petition for supersedeas where the facts are largely undisputed or beyond dispute due to past Board decisions, where pollution is continuing to occur, where the petitioner has continually had serious problems with compliance, and where the petitioner's likelihood of success on the merits is accordingly very low.

OPINION

Victor Kennedy ("Kennedy") owns and operates a mobile home park with twelve occupied sites in Marion Township, Butler County. Kennedy also owns and operates a sewage treatment plant ("STP") that services the mobile home park. On March 18, 2008, the Department of Environmental Protection (the "Department") issued the order under appeal, which required Kennedy to, among other things, cease operating the STP by August 1, 2008 because he does not have an NPDES permit

and because of his demonstrated inability or unwillingness to comply with the law. On July 22, 2008, months after the order was issued and on the eve of the shutdown requirement, Kennedy filed a petition with the Board requesting us to supersede the Department's order. Kennedy does not attempt to explain or justify his long history of noncompliance, but instead relies on the hardship suffered by his tenants and the assertion that he is now ready to accept a settlement offer made long ago by the Department that has since been withdrawn. The Department filed a response in opposition to the petition. For the reasons discussed below, we denied the petition by an Order dated July 28, 2008. This opinion is issued in support of that Order.

A supersedeas is an extraordinary remedy which will not be granted absent a clear demonstration of appropriate need. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 802; *Tinicum Township v. DEP*, 2002 EHB 822, 827; *Global Eco-Logical Services v. DEP*, 1999 EHB 649, 651; *Oley Township v. DEP*, 1996 EHB 1359, 1361-1362. Our rules provide that the granting or denying of a supersedeas will be guided by relevant judicial precedent and the Board's own precedent. 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.63(a). Among the factors to be considered are (1) irreparable harm to the petitioner; (2) the likelihood of the petitioner prevailing on the merits; and (3) the likelihood of injury to the public or other parties. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63(a)(1)-(3); *Neubert v. DEP*, 2005 EHB 598, 601. The issuance of a supersedeas is committed to the Board's discretion based upon a balancing of all of the statutory criteria. *UMCO Energy, Inc.*, 2004 EHB at 802; *Global Eco-Logical Services, supra*; *Svonavec, Inc. v. DEP*, 1998 EHB 417, 420. *See also Pennsylvania PUC v. Process Gas Consumers Group*, 467 A.2d 805, 809 (Pa. 1983). In order for the Board to grant a supersedeas, Kennedy must make a credible showing on each of these three points. *Neubert v. DEP*, 2005 EHB 598, 601; *Pennsylvania Mines Corporation*, 1996 EHB 808,

810; *Lower Providence Township v. DER*, 1986 EHB 395, 397. Further, a supersedeas will not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect. 35 P.S. § 7514(d)(2); 25 Pa. Code § 1021.63(b); *Tinicum Township v. DEP*, EHB Docket No. 2008-084-L, slip op. at 5 (Opinion, April 21, 2008).

The Department's order will no doubt cause irreparable harm to Kennedy because we assume he will not be able to operate the mobile home park. However, we have little sympathy where, as here, the Department's order is a result of Kennedy's own conduct. In a supersedeas analysis, irreparable harm to the petitioner is much less compelling when it is caused in substantial part by the petitioner himself. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 819; *Tire Jockey Services, Inc. v. DEP*, 2001 EHB 1141, 1160; *Nicholas v. DEP*, 1992 EHB 219, 224. Kennedy has an extraordinary and lengthy history of noncompliance. (His undisputed compliance history as outlined by the Department is attached to this opinion as Appendix A.) He has already been before this Board on a number of occasions, which has given us a certain familiarity with the situation. *See* EHB Docket Nos. 2000-168-L; 2005-299-L; 2005-332-L, 2005-333-L; and 2007-177-L. Last year, this Board assessed a $35,500 civil penalty against Kennedy. *Kennedy v. DEP*, 2007 EHB 15, 28. In doing so, we had this to say:

> We acknowledge that $35,500 is a large number for the operator of a small mobile home park, but our assessment is the inevitable result of the fact that Kennedy has had 87 violations. We could have penalized Kennedy for every day his [discharge monitoring reports] were late and his multiple effluent violations in the same month or on the same day, but we did not. The average penalty per violation is actually only $408. Kennedy is not entitled to a discount because he has violated the law so many times, and compassion for the "little guy" (T. 61) only goes so far. Compassion cannot entirely excuse reckless behavior, and any lower penalty for

> reckless behavior would simply not be appropriate or fair to the many permittees who work hard to stay in compliance. [Internal citations omitted.]
>
> When we search the record for any reason why we might want to reduce the penalty, we find nothing. Kennedy has all but ignored our rules during the entire course of this appeal. Although he participated by telephone in a prehearing conference and made something of a surprise appearance at the hearing where he made a brief statement on the record, he never filed a single document with the Board in compliance with our rules.

Id.

Kennedy has consistently shown little desire before both the Department and this Board to comply with the law. Kennedy has violated and continues to violate the Clean Streams Law and the Safe Drinking Water Act, he has failed to fully comply with a consent decree entered by the Commonwealth Court, he has failed to comply with Department orders and continues to discharge unpermitted effluent, he has failed on numerous occasions to submit discharge monitoring reports, he has failed to operate the STP in accordance with his now-expired NPDES permit, and he has impaired an unnamed tributary of McMurray Run. Now, after eight years of noncompliance, almost two years of operating without a permit and multitudinous pollutional discharges, Kennedy asks this Board to step in and supersede the Department's order. This we will not do. This strikes us as too little too late, at least as far as the supersedeas goes.

Kennedy also points to the harm to his tenants. It is extremely unfortunate that Kennedy's tenants will suffer as a result of his actions. That impact weighs heavily on our minds. But the Department has a duty to enforce the laws. As we recently stated, there comes a point where compliance assistance must end and enforcement must begin. *Risingson Farm v. DEP*, EHB Docket No. 2007-079-L, slip op. at 12 (Adjudication, May 7, 2008). The Department has allowed this situation to go on for years, perhaps out of consideration for Kennedy's tenants, but its patience has

run out. We are unwilling at this juncture to say that the Department has acted unreasonably notwithstanding the unfortunate consequences being visited upon the tenants as a result of Kennedy's actions.

Although our ruling on a petition for supersedeas is merely a prediction about who is likely to prevail at the hearing on the merits, *Tinicum Township v. DEP*, EHB Docket No. 2008-084-L, slip op. at 5 (Opinion, April 21, 2008); *Neubert v. DEP*, 2005 EHB 598, 608; *UMCO Energy, Inc. v. DEP*, 2004 EHB 832, 839-40, we are fairly certain that Kennedy's likelihood of success on the merits is quite low. His main argument appears to be that he is ready and able to comply with a settlement offer the Department proposed in November 2007 but has since withdrawn. He suggests that his willingness to comply with the now withdrawn offer highlights the unreasonableness of the Department's current order, particularly given the impacts that compliance with the current order will have. We do not share his view. The Department's November 2007 settlement offer was one of many settlement offers made over the years. It was the second offer made in a period of less than a year. Kennedy did not accept the offers as proposed. The Department withdrew the settlement offers after Kennedy failed to accept them, as it was perfectly entitled to do. Kennedy's petition is little more than a request that we force the Department to reopen a settlement offer. We see no reason for doing so.

Finally, we cannot ignore the fact that the STP has been operating without a permit since October 2006. Although the actual pollution caused by the unpermitted STP effluent appears to be limited, we are reluctant to grant a supersedeas where the petitioner is continuing to discharge unpermitted effluent on a daily basis.

In summary, in light of the largely undisputed facts regarding Kennedy's compliance history

and the meritless legal argument in support of the petition, we cannot grant a supersedeas in this case despite our sympathy for the tenants. Sadly, it is our sense that a supersedeas would only delay the inevitable. Accordingly, we have denied the petition for extraordinary relief. Of course, we are always amenable to expedited proceedings should the parties be interested in such an approach.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: July 31, 2008

c: **DEP Bureau of Litigation:**
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Appendix A

Compliance Chronology
Kennedy Mobile Home Park
Marion Township, Butler County

SEWAGE TREATMENT PLANT

10/19/1995: Mr. Kennedy becomes owner of Kennedy Mobile Home Park ("Kennedy MHP"), which includes a sewage treatment plant ("STP"). Mr. Kennedy does not obtain an NPDES permit for the discharges from the STP.

11/15/2000: DEP inspects Kennedy MHP and determines that Mr. Kennedy has unpermitted discharges of wastewater from the STP.

11/20/2000: DEP issues a Notice of Violation ("NOV") to Mr. Kennedy for discharging without an NPDES permit.

04/11/2001: DEP inspects Kennedy MHP and determines that Kennedy MHP does not have an NPDES permit for the STP.

04/24/2001: DEP inspects Kennedy MHP and determines that samples collected of the STP's effluent show high concentrations of pollutants.

05/16/2001: DEP issues a NOV to Mr. Kennedy for his unpermitted discharges at the STP and to notify him of technical deficiencies with his NPDES permit application.

06/21/2001: DEP transfers and issues WQM Permit No. 1072406 to Mr. Kennedy for the STP.

10/12/2001: DEP issues NPDES Permit No. PA0238490 to Mr. Kennedy for his discharges from the STP ("NPDES Permit"). The NPDES Permit contains a schedule of compliance to bring the STP into compliance with the Clean Streams Law.

10/16/2002: DEP issues a NOV to Mr. Kennedy for his failure to submit Discharge Monitoring Reports ("DMRs") during the time period of January, 2002 through August 2002, as required by the NPDES Permit. The NOV requests all overdue DMRs within 10 days. Mr. Kennedy only submits one DMR for November 2001.

03/24/2004: DEP issues a NOV to Mr. Kennedy for NPDES Permit violations and effluent discharge violations that occurred from December 10, 2001 through August 5, 2003.

12/07/2004: DEP inspects Kennedy MHP and determines that Mr. Kennedy has failed to submit some DMRs, has failed to collect composite samples as required by the NPDES Permit, and has failed to comply with the schedule of compliance contained in the NPDES Permit.

12/29/2004: DEP sends a letter to Mr. Kennedy regarding the violations noted during the DEP's December 7, 2004 inspection.

01/31/2005: DEP receives a letter from Mr. Kennedy's consultant admitting that Mr. Kennedy has not collected effluent samples from the STP, in violation of the NPDES Permit.

10/07/2005: DEP issues an Administrative Order to Mr. Kennedy for his ongoing violations of the Clean Streams Law at the STP.

10/12/2005: DEP files a Complaint for Civil Penalties with the Environmental Hearing Board ("EHB") for Mr. Kennedy's numerous violations of the NPDES Permit.

11/29/2005: DEP receives Mr. Kennedy's Notice of Appeal of the Order. The appeal is docketed at EHB Docket No. 2005-333-L.

08/2005-12/2005: Mr. Kennedy's DMRs show effluent violations for August, October, and December, and do not report flow for the STP for August through December in violation of NPDES Permit.

02/24/2006: DEP issues a NOV to Mr. Kennedy for his ongoing violations of the Order.

03/15/2006: DEP determines that Mr. Kennedy no longer has a Certified Operator for the STP, as required by the WQM Permit, the NPDES Permit, and the Order.

04/11/2006: Mr. Kennedy fails to submit an NPDES Permit renewal application, which is due this day to the Department.

05/10/2006: DEP issues a NOV to Mr. Kennedy for his ongoing violations of the Order and violations of Chapter 92 of the Regulations.

07/26/2006: EHB, at Docket No. 2005-332- L (consolidated with 2005-33-L) dismisses Mr. Kennedy's appeal of the Order. Mr. Kennedy never complies with the Order.

10/12/2006: The NPDES Permit expires. Mr. Kennedy continues to discharge treated sewage form the STP without a permit, in violation of the Clean Streams Law.

01/22/2007: EHB, at Docket No. 2005-229-CP-L, issues an Adjudication on the Complaint for Civil Penalties and assesses a $35,500 civil penalty against Mr. Kennedy for 87 violations of the Clean Streams Law. Mr. Kennedy does not pay the penalty.

07/13/2007: DEP determines that Mr. Kennedy did not submit any DMRs from January 2006 through October 2006, in violation of the NPDES Permit.

11/08/2007: The Department determines that discharges from the STP are impairing the receiving stream.

10/12/2006-current Mr. Kennedy continues to discharge from the STP without a NPDES permit in violation of the Clean Streams Law.

WATER SUPPLY

06/16/1998: DEP inspects the water supply at Kennedy MHP and determines violations of Safe Drinking Water Act.

09/03/1999: DEP issues a NOV to Mr. Kennedy for his failure to submit a permit application to the Department for his water supply.

11/30/1999: DEP issues a NOV to Mr. Kennedy for his unpermitted operation of the water supply in violation of the Safe Drinking Water Act.

01/10/2000: DEP issues a NOV to Mr. Kennedy for his unpermitted operation of the water supply in violation of the Safe Drinking Water Act.

04/17/2000: DEP issues an Administrative Order to Mr. Kennedy for his failure to comply with the Safe Drinking Water Act at the Kennedy MHP.

07/10/2000: DEP issues an Assessment of Civil Penalty to Mr. Kennedy for his violations of the Safe Drinking Water Act.

09/25/2000: DEP files a Petition to Enforce with the Commonwealth Court, at Docket No.444 MD 2000 regarding Mr. Kennedy's noncompliance with the April 17, 2000 Administrative Order.

03/07/2001: DEP issues a NOV to Mr. Kennedy for his failure to monitor the water supply for Total Coliform during the month of January 2001.

05/11/2001: DEP issues a NOV to Mr. Kennedy for his failure to monitor the water supply for Total Coliform during the months of February and March 2001.

06/20/2001: DEP issues a NOV to Mr. Kennedy for his failure to monitor the water supply for Total Coliform during the month of April 2001.

07/05/2001: Commonwealth Court, at Docket No. 444 MD 2000, enters a Consent Decree relating to Mr. Kennedy's violations of the Safe Drinking Water Act, his noncompliance with the April 17, 2000 Administrative Order, and his nonpayment of the July 10, 2000 Assessment of Civil Penalty.

09/17/2001: DEP sends Mr. Kennedy a letter notifying him that he is in violation of the Safe Drinking Water Act for his failure to submit his 2000 Consumer Confidence Report to the DEP for his water supply.

09/18/2001: DEP issues a NOV to Mr. Kennedy for his failure to monitor the water supply for

Total Coliform during the month of May 2001.

09/21/2001: DEP issues a NOV to Mr. Kennedy for his failure to monitor the water supply for Lead and Copper (initial monitoring January 2 – June 30, 2001) during first six months of 2001.

09/27/2001: DEP sends a letter to Mr. Kennedy for his failure to pay civil penalties owed under the July 5, 2001 Consent Decree.

03/12/2002: DEP issues a NOV to Mr. Kennedy for his failure to monitor the water supply for Nitrate in 2001.

07/12/2002: DEP issues a NOV to Mr. Kennedy for his failure to monitor the water supply for Total Coliform for the month of May 2002.

09/17/2002: DEP issues a NOV to Mr. Kennedy for his failure to conduct and report Lead and Copper testing for the water supply for January 1- June 30, 2002.

11/12/2003: DEP issues a NOV to Mr. Kennedy for his failure to submit a copy of the 2002 Consumer Confidence Report to the DEP.

04/9/2003: US EPA issues a NOV to Mr. Kennedy for his violations of the Federal Safe Drinking Water Act.

07/24/2003: US EPA issues a NOV to Mr. Kennedy for his violations of the Federal Safe Drinking Water Act.

12/17/2003: DEP files a Petition for Contempt with the Commonwealth Court at Docket No. 444 MD 2000 for Mr. Kennedy's violations of the July 5, 2001, Consent Decree.

12/19/2003: US EPA issues an Administrative Order to Mr. Kennedy for his monitoring and reporting violations for Lead, Copper, Nitrate, Nitrite, Coliform, and VOC sampling, and for his failure to submit Consumer Confidence Reports for 2001 and 2002.

03/26/2004: Commonwealth Court, at Docket No. 444 MD 2000, enters an Amended Consent Decree to address Mr. Kennedy's noncompliance with July 5, 2001, Consent Decree. The Amended Consent Decree orders Mr. Kennedy to permanently reduce the number of water supply service connections to his water supply to below 15 and to reduce the number of people being served by the water supply to below 25 by September 30, 2004. If he fails to meet the September 30, 2004 deadline, Mr. Kennedy was required to pay the DEP a penalty of $25,000 by October 20, 2004.

09/13/2004: The DEP hand delivers a letter to Mr. Kennedy outlining his ongoing violations at Kennedy MHP and informing Mr. Kennedy that, although he has informed the DEP that he has no intention of honoring the deadlines set forth in the Amended Consent Decree, the DEP expects him to fully comply with the Amended Consent Decree and the September 30, 2004 deadline.

09/30/2004: DEP receives a letter from Mr. Kennedy's counsel informing the DEP that Mr. Kennedy did not meet the September 30, 2004 deadline required by the Amended Consent Decree.

10/15/2004: DEP receives a letter from Mr. Kennedy's counsel admitting that Mr. Kennedy is still in noncompliance with the Amended Consent Decree.

10/20/2004: Mr. Kennedy remains in violation of the Amended Consent Decree for failing to reduce the number of connections to the Water Supply and for failing to pay the $25,000 stipulated penalty under the March 26, 2004, Amended Consent Decree.

11/04/2004: DEP receives a letter from Mr. Kennedy's counsel admitting that Mr. Kennedy is still in noncompliance with the Amended Consent Decree.

1/31/2005: DEP receives a fax from Mr. Kennedy's counsel admitting that there are still 15 connections to the water supply, in violation of the Amended Consent Decree.

01/31/2005: DEP inspects Mr. Kennedy's water supply and determines that only 14 connections exist to the water supply.

2/11/2005: DEP receives a letter from Mr. Kennedy's counsel informing the DEP that Mr. Kennedy has complied with the requirement under the Amended Consent Decree restricting the connections to his water supply to below 15. Mr. Kennedy, however, continues to violate the Amended Consent Decree by failing to pay the $25,000 stipulated penalty.

5/11/2005: DEP sends a letter to Mr. Kennedy informing him that the DEP inspected his water supply in January and as a result of that inspection, Mr. Kennedy's water supply is no longer regulated by the Water Supply Management Program.

10/11/2005: DEP denies Mr. Kennedy's public water supply permit application due to numerous technical deficiencies.

11/28/2005: Mr. Kennedy appeals DEP's denial of his water supply permit application to the EHB at Docket No. 2005-333-L.

07/26/2006: EHB, at Docket No.2005-332-L (consolidated with 2005-333-L), dismisses Mr. Kennedy's appeal of the DEP's denial of his water supply permit application as a sanction for Mr. Kennedy's continuing failure to follow the EHB's rules and orders.

01/24/2007: DEP inspects Mr. Kennedy's water supply and determines that less than 15 trailers are being served by the water supply.

Current: Mr. Kennedy continues to violate the Amended Consent Decree by failing to pay the $25,000 stipulated penalty.

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

UNITED REFINING COMPANY	:	
	:	
v.	:	**EHB Docket No. 2007-100-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 7, 2008**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board rejects a challenge to conditions in a plan approval that authorized process modifications designed to allow a facility to comply with gasoline refining regulatory requirements. The Department did not err in combining projected emissions from two components of one project for purposes of assessing New Source Review applicability. Secondly, the Department and Appellant agree that the demand growth exclusion theoretically applies; it remains to be seen whether it applies to the facts of the Appellant's case.

INTRODUCTION

United Refining Company ("United") filed this appeal from the Department of Environmental Protection's (the "Department's") issuance to United of Plan Approval No. 62-017O (the "Plan Approval"). The parties agreed to submit this appeal on stipulated facts, exhibits, and briefs pursuant to 25 Pa. Code § 1021.112. United has two objections to the Plan Approval. First, United objects to the Department's decision to combine projected emissions

from two of United's process modifications for purposes of determining whether New Source Review ("NSR") or Prevention of Significant Deterioration ("PSD") procedures and requirements potentially apply. Second, United objects that the Department failed to apply the "demand growth exclusion" when it conducted its applicability determination. United contends that the Department's flawed applicability determination resulted in several conditions in its Plan Approval that should either be removed or modified.[1]

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §§ 4001-4015 ("Air Act"); Section 1917-A of the Administrative Code of 1929, Act of April 29, 1929, P.L. 177, *as amended*, 71 P.S. § 510-77 ("Administrative Code"); and the rules and regulations promulgated thereunder. (Joint Stipulation ("J.S.") 1.)

2. United is a Pennsylvania corporation with a business mailing address of 15 Bradley Street, P.O. Box 780, Warren, Pennsylvania 16365-3299. (J.S. 2.)

3. United owns and operates a petroleum refinery in the City and County of Warren, Pennsylvania on approximately 92 acres along the Allegheny River (the "Facility"). (J.S. 3.)

4. The U.S. Environmental Protection Agency ("EPA") published final rules on February 10, 2000 known as the "Tier 2 Standards." The rules were designed to reduce tail pipe emissions from new passenger cars and light trucks. *See* 65 Fed. Reg. 6698 (February 10, 2000). (J.S. 4.)

5. A major component of the Tier 2 Standards was the mandatory reduction in

[1] The conditions are Section C. VII #003, Section C. VII #004 and all of Section E. Group Name: Projected Actual Emissions Requirements, Section C. VII #001, Section D. Source ID: 049 I. #001, Section D. Source ID: 052 I #001, Section D. Source ID: 108 I. #001 and Section D. Source ID: 108A I. #001(8). *See* Joint Stipulation of Facts and Exhibits, Exhibit 13.

gasoline sulfur to enable pollution control devices in motor vehicles to work effectively. In order to meet Tier 2 Standards, petroleum refiners were required to purchase and install equipment to remove sulfur from gasoline during the refining process. (J.S. 5.)

6. In its Tier 2 Standards rulemaking, EPA concluded that certain refiners may face difficulty in raising the capital needed to install new process equipment to reduce sulfur in gasoline. 65 Fed. Reg. 6698 (February 10, 2000). For that reason, EPA included provisions that would temporarily reduce the burden of compliance for "small refiners," refiners that sell gasoline into certain geographic areas and refiners that faced severe hardship. (J.S. 6.)

7. The hardship provision allows EPA to grant temporary relief on a case-by-case basis after a showing by the refiner of circumstances that result in extreme hardship that affect the refiner's ability to comply. 40 C.F.R. § 80.270. (J.S. 7.)

8. United decided it could not meet the sulfur reduction deadlines under the Tier 2 Standards and since it did not meet EPA's definition of "small refiner" it submitted a hardship application to EPA on August 29, 2000, which application was superseded by a second proposal dated April 9, 2001. (J.S. 8, 9; Stipulated Exhibit ("Stip. Ex.") 1.)

9. EPA approved United's hardship request on November 16, 2001 and assumed that United would make its best efforts to timely receive all air related permits. (J.S. 10, 11; Stip. Ex. 2.)

10. In its approval, EPA states that United is fully subject to all requirements of the gasoline sulfur program under 40 C.F.R. Part 80, Subpart H, except where provided in the compliance plan. (J.S. 12.)

11. The EPA approved compliance plan is summarized in the following table:

	PHASE 1				PHASE 2		PHASE 3	
	2003	2004	2005	Thru May 2006	June 2006	2007	2008	Beyond
Gasoline Sulfur Levels (avg/cap) (ppm)	**715**	**330/450**	**330/450**	**330/450**	**250/450**	**250/450**	**30/80**	**30/80** →

12. Plan Approval Application 62-017H was filed with the Department's Northwest Regional office on May 22, 2002 for approval to modify certain air emission sources at the Facility to meet Phase 1 of the compliance plan. The modifications are referred to as the "Low Sulfur Gasoline" or "LSG" Project. (J.S. 14, 15; Stip. Ex. 3.)

13. As described in Plan Approval Application 62-017H, the air emission sources being modified included the (1) Fluid Catalytic Cracking ("FCC") Unit, (2) Distillate Hydrotreater 1 ("DHT1") Unit, and (3) Distillate Hydrotreater 2 ("DHT2") Unit. (J.S. 16.)

14. Plan Approval 62-017H was issued on December 10, 2002. (J.S. 17-21; Stip. Ex. 4, 5.)

15. The physical modifications authorized under Plan Approval 62-017H included: (1) installation of Low Nox Burners on the FCC heater; (2) installation of new heat exchangers, new tower internals and new reboiler pump on DHT2 unit; (3) installation of a new spare feed pump, new overhead liquid pumps, new product pumps, replacement of catalyst, feed filters, a new surge drum and piping modifications to DHT1. (J.S. 22.)

16. In addition to the physical modifications under Plan Approval 62-017H, an increase in emissions was expected at the Sulfur Recover Unit 2 ("SRU2") due to increased demand on that unit to process acid gas and remove sulfur. (J.S. 23.)

17. Under Plan Approval 62-017H, United reconfigured its refinery process so that the "cracked" gasoline from the FCC would be split into lower and higher sulfur streams. The

higher or "light" FCC gasoline was sent directly into the gasoline blending pool. The lower or "heavy" FCC gasoline was desulfurized for the first time with a hydrotreater (DHT1). (J.S. 24.)

18. The modifications made under Plan Approval 62-017H were completed on April 30, 2004 and successfully reduced annual average gasoline sulfur from over 700 parts per million ("ppm") to around 330 ppm. (J.S. 25.)

19. Phase 2 of EPA's approved compliance plan for United was achieved without any further process modifications and did not require a plan approval. It was achieved through more aggressive hydrotreating through DHT1. (J.S. 26.)

20. United's original strategy to meet Phase 3 of EPA's approved plan was to construct a new hydrogen reformer, an FCC feed hydrotreater, and a sulfur recovery plant. That strategy is incorporated into Plan Approval 62-017G referred to as the "Coker Project," which was issued on October 8, 2003. (J.S. 27.)

21. In response to an EPA request, United provided an August 16, 2005 update on its strategy to achieve Phase 3 compliance and it outlined plans for an "interim solution" in the event the Coker Project was not up and running by January 1, 2008. (J.S. 28, 29; Stip. Ex. 6.)

22. In late 2005 it became apparent to United that the Coker Project would not be completed by January 1, 2008 and would not be available to satisfy Phase 3 of EPA's ultra low sulfur gasoline plan. The reason for the delay was United's inability to obtain favorable project financing. (J.S. 30.)

23. Based on pilot test results available in January 2006, United decided at that time to go forward with plans to implement the interim solution for compliance with Phase 3 ultra low sulfur gasoline by January 1, 2008. (J.S. 31.)

24. On May 19, 2006 United filed Plan Approval Application 62-017O with the

Department's Northwest Regional Office in Meadville, Pennsylvania. (J.S. 32.)

25. Plan Approval Application 62-017O requested authority to modify certain existing air sources at the Facility to produce Ultra Low Sulfur Gasoline ("ULSG") in accordance with federal requirements at 40 C.F.R. Part 80 and Phase 3 of EPA's approved low sulfur gasoline compliance plan. (J.S. 34; Stip. Ex. 7.)

26. The Department issued a technical deficiency letter dated June 15, 2006 that requested a response to five issues in five numbered paragraphs. (J.S. 35, 36; Stip. Ex. 8.)

27. United responded to the Department's technical deficiency letter on June 30, 2006 with an amendment to the pending plan approval application. (J.S. 37, 38; Stip. Ex. 9.)

28. On July 13, 2006 the Department sent an email requesting that United respond to another deficiency in the permit application. (J.S. 39, 40; Stip. Ex. 10.)

29. United responded to the July 13, 2006 deficiency notice by letter dated July 26, 2006, which amended the pending application and replaced the applicability determination. (J.S. 41, 42; Stip. Ex. 11.)

30. United amended Plan Approval Application 62-017O again on December 7, 2006 by removing from the ULSG Project the proposal to install flue gas recirculation on the #4 Boiler. Due to that change, the amendment included a new applicability determination. (J.S. 43, 44; Stip. Ex. 12.)

31. Plan Approval 62-017O, which is the subject of this appeal, was issued on March 13, 2007. (J.S. 45, 46; Stip. Ex. 13.)

32. Plan Approval 62-017O authorized physical modifications to the Naptha Hydrotreater ("NHT") unit, including: addition of heat exchangers; modifications to heat exchangers; modifications to the NHT stripper tower; and installation of a new NHT reactor. In

addition to physical modifications and changes in the method of operation of certain air sources, the Plan Approval authorized increased emissions at the Prefractionator 2 unit, East and West Reformer Heaters, and SRU2. (J.S. 47.)

33. The physical modifications authorized under Plan Approval 62-017O were completed on July 18, 2007 when a pilot study was commenced to test the ability to make ultra-low sulfur gasoline to comply with Phase 3 of EPA's approved plan. (J.S. 48.)

34. The Department's review memo for Plan Approval 62-017O summarizes the applicability determination performed by the Department. (J.S. 49-52; Stip. Ex. 14.)

35. The February 6, 2007 version of the Plan Approval memo submitted by the parties to this Board as a stipulated exhibit was actually a draft. The final signed version of the Plan Approval memo was dated March 6, 2007 and is virtually identical to the February version with the exception that the March version also finds that the combined applicability determination for the LSG and ULSG Projects indicated a possible exceedence of the NSR threshold for nitrogen dioxide in addition to the possible sulfur dioxide exceedence that was indicated in the February version. (DEP Brief at 9.)

36. EPA provided comments for the Department to consider before Plan Approval 62-017O was issued. Among those comments was an assertion that the LSG Project and ULSG Project were not independent of each other and as such the applicability analysis for the ULSG Project should be combined with the earlier LSG Project. (J.S. 53, 54; Stip. Ex. 15.)

37. As a result of EPA comments, the Department conducted a new applicability determination that combined emission increases from the LSG Project with emission increases from the ULSG Project because of the relationship between the two projects. (J.S. 55.)

38. The Department's new applicability determination resulted in the imposition of

permit conditions regarding a limit on both SO_x emissions and NO_2 emissions. (J.S 56, 57; Stip. Ex. 16.)

39. There is an implementation agreement between EPA and the Department, signed by James Salvaggio on January 31, 1996, whereby the Department agreed to refrain from issuing aproposed permit if EPA objects to its issuance within 45 days of EPA's receipt. (J.S. 58.)

40. The Department's determination to impose the challenged conditions regarding emission limits was based on the merits of the comments made by EPA. (J.S. 59.)

41. The Department conducted a new applicability determination combining the emission increases from both the LSG and ULSG components of the Tier 2 compliance project to determine whether NSR and/or PSD applied. (Stip. Ex. 14.)

42. The NSR regulations would be triggered for NO_2 and the PSD regulations would be triggered for SO_x if the emissions resulting from the project exceeded 39.9 tons per year ("tpy") each. (Stip. Ex. 14.)

43. Rather than requiring United to comply with NSR, the Department issued a plan approval limiting United's SO_x and NO_2 emissions to 39.9 tons per year, which is just below the level that would have triggered NSR applicability. (Stip. Ex. 13-16.)

44. The existing Title V emission restrictions remain in effect at the Facility. The values in the Plan Approval are not considered enforceable limits, but if United exceeds those values as determined by records and analyses submitted each year for five years, it will become subject to NSR and it will need to apply to amend the Plan Approval and any subsequently obtained operating permit. (Stip. Ex. 13, 14.)

45. The demand growth exclusion provides that emissions that could have been accommodated prior to a project that are unrelated to the post-project increase in emissions may

in some cases be excluded when performing the NSR applicability determination. 40 C.F.R. § 52.21(b)(41).

46. The Department has allowed for the possible application of the demand growth exclusion in a determination of whether United is subject to NSR. The Department has determined that the exclusion can be applied under applicable regulations so long as United can demonstrate that it applies to the facts at its Facility. (Stip. Ex. 13 p. 40, 14.)

47. In determining that NSR *might* be triggered, the Department did not decide whether the demand growth exclusion actually applies to United's project because United agreed to revise its proposed applicability determination to include emissions from debottlenecked sources that might have been excludable under the demand growth exclusion had United attempted to show that the increased emissions were unrelated to the project. (United Brief at 17; Stip. Ex. 10, 11.) United essentially waived the issue due to an overriding desire to obtain the Plan Approval so that ultra-low sulfur gasoline could be produced by January 1, 2008 in compliance with EPA's approved plan. (United Brief at 17.)

48. United has commenced a single, ongoing project since 2002 composed of several different aspects or phases. The project was undertaken from the start to remove sulfur from gasoline to meet EPA's Tier 2 Standards. The overall scope of the project was known in 2002, and each successive element of the project is dependent upon previous or concurrent elements. The project consists of at least the LSG and ULSG projects as detailed in Plan Approvals 62-017H and 62-017O. (Stip. Ex. 14, 15; FOF 4-37.)

49. Selling ultra-low sulfur gasoline directly would not be desirable because it must be used as a blend stock to reduce sulfur in the gasoline produced by the LSG Project. LSG Project gas is too high in sulfur to be sold separately. The LSG Project is dependent upon the

ULSG Project. (United Reply at 2-3.)

50. United broke its Tier 2 compliance project into separate "phases" for financial reasons. (Stip. Ex. 1.) Although the incremental construction associated with this phased pattern of development allowed for compliance with Tier 2 requirements (Stip. Ex. 2) and resulted in separate plan approvals (Stip. Ex. 14, 15), it was not intended as a means for circumventing NSR. (Stip. Ex. 13-15.)

51. The Department acted reasonably, appropriately, and in compliance with the law in including the challenged conditions in the Plan Approval. (FOF 4-50.)

DISCUSSION

Parties are required to obtain a plan approval from the Department prior to the construction, assembly, installation, or modification of a stationary air contamination source. 35 P.S. § 4006.1(a); 25 Pa. Code § 127.11. The Department is generally authorized under 25 Pa. Code § 127.12b to include conditions in plan approvals under 35 P.S. § 4006.1 so long as the conditions are reasonable and otherwise consistent with the law. United's assertions to the contrary notwithstanding, the Department is not necessarily required to point to a specific statutory or regulatory provision expressly authorizing each and every condition in a permit or plan approval.

During the review of an application for a plan approval, the Department must determine whether the NSR and/or PSD regulations apply to the project under review. 25 Pa. Code § 127.211.[2] NSR regulations are set forth at 25 Pa. Code Chapter 127, Subchapter E, and the PSD regulations are found at 25 Pa. Code Chapter 127, Subchapter D and incorporate by reference the

[2] In the Federal Clean Air Act, Congress instructed EPA to establish preconstruction permit requirements for new or modified major facilities. 42 U.S.C. §§ 7470-7492, 7501-7515. Those requirements fall into two separate programs: New Source Review ("NSR") and Prevention of Significant Deterioration ("PSD"). The distinction between the programs depends upon the air quality planning status in the area

entire federal PSD program at 40 C.F.R. §§ 52.2 and 52.241. Determining whether NSR/PSD requirements apply is anything but straightforward, and because the requirements are viewed by some as cumbersome, there is an incentive to avoid them whenever possible.

This is a rather odd appeal in the sense that United is challenging certain aspects of the Department's determination that NSR does *not* apply. Although the Department did *not* require United to comply with NSR requirements,[3] United believes that the Department has made two incorrect decisions in the course of arriving at its conclusion that may inure to United's detriment in the future.[4] To be explained further below, with regard to one decision, we do not agree that the Department actually made the decision that United thinks the Department made. With regard to the other decision, we find ourselves in agreement with the Department's conclusion.[5] We will address what we see as the more significant decision first.

Combining the LSG and ULSG Projects

United's first objection is that the Department erred by deciding that emissions from the LSG and ULSG components of its Tier 2 compliance project should be combined in assessing whether NSR/PSD requirements apply. United argues that the LSG and ULSG projects are

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where the source is located or has a potential to impact.

[3] The Department's determination that NSR does not, at least as of yet, apply is obviously not being challenged in this appeal and we express no opinion on that question. Our Adjudication is in no way intended to opine on the validity of any future decision that NSR actually applies, the imposition of enforceable emission limits, or what effect, if any, the result of United's ongoing testing will have.

[4] The Department argues that United's challenges have no immediate impact and are not ripe for our review, but the Department would undoubtedly have been quick to assert administrative finality had United failed to preserve the issues here.

[5] The Department correctly points out that there is a very tenuous connection between the two decisions at issue and the Plan Approval conditions ostensibly under appeal. The Plan Approval is limited to emission increases up to 39.9 tpy for NO_2 and SO_x. It is important to understand that the 39.9 tpy number is not an enforceable limit. Existing Title V permit limits remain in place at the Facility. The Plan Approval does not change those limits or prohibit United from exceeding 39.9 tpy. The Plan Approval merely articulates the obvious, regulatory standard for applying NSR. If United exceeds that number it will be required to amend its Plan Approval, and that approval will need to be consistent with NSR/PSD requirements. Nevertheless, again because of the doctrine of administrative finality, we see the decisions as appropriately up for review in this context and at this time.

technically distinct and separated by both time and function and should not be combined.

The Department made the correct decision. An operator may not phase, stage, or delay a project or engage in incremental construction to avoid the applicability triggers of the NSR/PSD programs. 25 Pa. Code § 127.216. Fundamentally, it is important to remember that the federal and state legislatures have mandated that major construction projects should at a minimum not detract from the achievement of National Ambient Air Quality Standards ("NAAQS"). To ensure that they do not, certain standards and procedures have been established. The regulatory agencies are tasked with guarding against efforts to disguise major projects as something less to avoid those requirements by breaking up what is in reality a major project into a potentially infinite series of smaller parts.

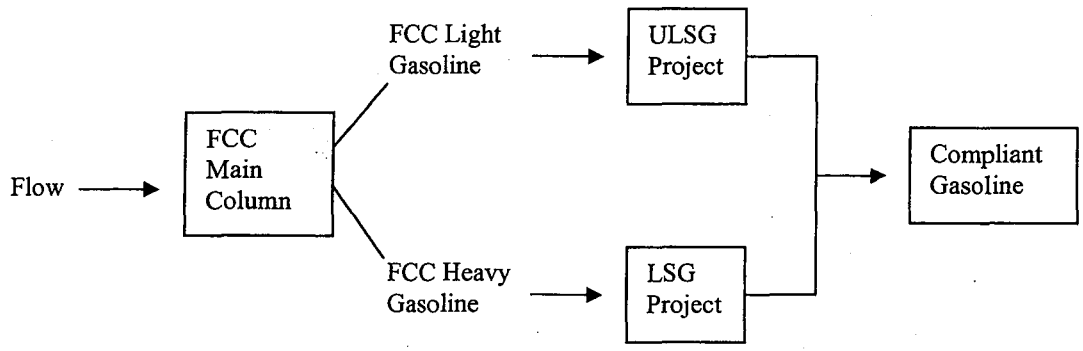
There is obviously considerable room for judgment and discretion in the grouping of possibly related tasks to determine whether they together constitute a major project. United is incorrect in arguing that the Department is required to uncritically "defer" to an applicant's proposed grouping. Instead, the Department must independently consider such factors as the relationship of the various tasks measured in time and space, the tasks' operational, technical, and economic interdependence, whether the tasks are geared toward achieving a shared objective, whether the tasks were conceived originally as part of a common plan, and other relevant considerations.

Here, although years separate the LSG and ULSG projects, they share the common objective of allowing United to produce Tier 2 compliant gasoline. United was required to install the equipment and implement those procedures that were necessary to remove enough sulfur from its final product to meet mandatory reductions in gasoline sulfur content. The fact that United was financially required and eventually authorized by EPA to perform its Tier 2

compliance project in phases over time did not convert the single undertaking into three separate projects. The fact that the details of the project changed over time from the configuration that was originally anticipated (e.g. due to the postponement or cancellation of the Coker Project) also does not change the reality that it was all part and parcel of one project from the beginning.

United's own Tier 2 compliance plan denominated the various steps in the process as separate "phases" leading to a single objective. United does not contend that it would have engaged in any of these expensive measures absent the Tier 2 requirement. It admits that the LSG project is essentially useless in satisfying Tier 2 without the ULSG Project. In United's words, the LSG project is "dependent" on the ULSG Project. Therefore, it would be disingenuous to treat the LSG emissions separately. By the same token, the ULSG project produces gas that is, unnecessarily, virtually sulfur free. In order to make practical and economic sense, the ULSG and LSG project streams must be combined, and that is exactly what United has done.

Given their shared objective, it is not surprising that the LSG and ULSG process changes are operationally interconnected. United's FCC Unit receives a single stream of flow and then subsequently produces two separate streams of gasoline; a light stream and a heavy stream of gasoline. The heavy stream goes through the LSG component and the light stream goes through the ULSG component. The streams are then ultimately combined back together to meet the Low Sulfur Gasoline Requirements. The process may be illustrated as follows:



All of the various steps produce one product: compliant gasoline. United's allegation that the Department "randomly" and "indiscriminately" combined "unrelated" projects is, quite simply, unfounded.[6] The Department's combination of the LSG and ULSG projects was reasonable and in accordance with the anticircumvention requirements.

The Demand Growth Exclusion

United also seeks to avoid immediate and future application of NSR/PSD to its Tier 2 project by arguing that the so called "demand growth exclusion" applies to the project.[7] When we take a close look at what the Department did here, however, we do not see that there is anything for us to decide. The Department agrees with United that the exclusion is legally available, but it has not yet decided one way or the other whether it actually applies to the Tier 2 compliance project.

By way of brief background, determining whether NSR/PSD applies boils down to a comparison between emissions before and after a project to see whether there has been an increase that is regulatorily defined as significant. At the risk of oversimplification, the demand

[6] United complains that the Department's decision was prompted by EPA. To the extent the Department made a correct decision, it does not matter that it took EPA's push to get it there.

[7] The parties switch back and forth between referring to the exclusion as the demand growth exclusion and the growth demand exclusion. We will stick with demand growth exclusion. *See* 71 Fed. Reg. 54, 235 (September 14, 2006).

growth exclusion provides that a source can subtract from its post-project emissions the emissions that a unit could have accommodated preconstruction that are also unrelated to the change. 40 C.F.R. § 52.21(b)(41). "Debottlenecked" or "ripple down" emissions occur when modifications to one piece of equipment increase the output of another piece of equipment that did not itself undergo any physical or operational changes. 71 Fed. Reg. 54, 235 (September 14, 2006). United and the Department agree that emission increases from debottlenecked units may sometimes be subject to the demand growth exclusion. In other words, both parties agree in theory that debottlenecked emissions may under some circumstances be "unrelated" to a new project.

United's initial application for the Plan Approval excluded emissions from what it characterized as debottlenecked units. It argued that if existing permit limits could accommodate projected increases at debottlenecked units, then the increase at those units are not required to be included in the NSR/PSD applicability analysis. The Department responded as follows:

> United has not explained in the application for plan approval how the units emissions for the prefrac 2, the east and west reformer, and the SRU2 [debottlenecked units] are "unrelated to the particular project" as [required by] 40 CFR 52.21(b)(41)(ii)(c). Although these sources are not experiencing a physical change, they are experiencing an operational change by the increased utilization."

(Stip. Ex. 10.) In United words, here is what happened next:

> After making its plea once again in a conference call, United gave up and agreed to revise the applicability determination to include emissions from debottlenecked sources in the applicability determination. J.S. Ex. 11 at p.1. ...The primary reason why United dropped the issue was an overriding desire to obtain the permit so that ultra-low sulfur gasoline could be produced by January 1, 2008 in compliance with EPA's approved plan. J.S. Ex. 2.

Brief at 17.

Thus, the Department specifically provided United with the opportunity to demonstrate that the increased emissions from debottlenecked units were not related to the ULSG. United, however, "gave up." It did not pursue the issue, instead asking the Department to include the alleged debottlenecked emissions in its applicability calculations so as not to hold up the Plan Approval. The Department never made a final decision for us to review on this issue because United never provided the information necessary to make that decision. The issue is waived as it relates to this Plan Approval. *Vesta Mining Co. v. DER*, 1993 EHB 171, 184-85, *aff'd*, 642 A.2d 568, 574 (Pa. Cmwlth. 1994). *See also Bethlehem Steel Corp. v. DER*, 390 A.2d 1383, 1387, 1389 (Pa. Cmwlth. 1978). *Cf. Florence Mining Co. v. DER*, 1991 EHB 1301, 1308.[8]

As with the issue regarding combining the LSG and ULSG projects, while this issue may be technically ripe, it has virtually no practical or immediate impact. First, United has not shown how applying the exclusion would have made any difference in the terms of the Plan Approval. As previously noted, the Department has not determined that the project will trigger NSR, and it has not applied NSR to the Tier 2 project. It has simply limited the scope of the Plan Approval to emissions that will not trigger NSR. Still further, the Department remains open to the prospect that the exclusion may apply if United makes the necessary showing on the facts. The Plan Approval conditions instruct United how the yearly emission increases are to be calculated in future reports. The conditions specifically and expressly allow United to net out any emission increases associated with growth demand when calculating the net emission increases to be

[8] Accordingly, we express no opinion on the substance of the question whether the units in question are debottlenecked, whether the emission increases from the units are subject to the demand growth exclusion, what impact exclusion would have on NSR/PSD applicability, or the application of the exclusion in any future planning or permitting decisions.

reported to the Department over the next five years. Therefore, the Department is allowing United to apply growth demand through the conditions. We are left to wonder how United has been harmed by any of this.

In summary, the Department's decision to allow United to move forward expeditiously with its Tier 2 compliance project by issuing a plan approval conditioned upon emission increases not exceeding NSR/PSD trigger levels subject to ongoing reporting requirements was both reasonable and lawful.

CONCLUSIONS OF LAW

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

2. The Board's scope of review in this matter is *de novo*.

3. United bears the burden of proving by a preponderance of evidence that the Department acted unreasonably or in violation of the law in issuing the Plan Approval. 25 Pa. Code § 1021.122(c)(3); *Groce v. DEP*, 2006 EHB 856, 894, *aff'd*, 921 A.2d 567 (Pa. Cmwlth. 2007).

4. United failed to meet its burden of proving by a preponderance of evidence that the Department acted unreasonably and contrary to law when it included the conditions under review Plan Approval 62-017O.

5. The Department's issuance of Plan Approval 62-017O was reasonable and in accordance of law.

6. The Department did not err in failing to exclude debottlenecked emissions in the applicability determination because United did not provide the information necessary to support such an exclusion.

7. The Department did not err in combining emissions from the LSG and ULSG

projects in its applicability determination because separating the two would have circumvented NSR.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UNITED REFINING COMPANY	:	
	:	
v.	:	EHB Docket No. 2007-100-L
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 7th day of August, 2008, this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: August 7, 2008

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PERKASIE BOROUGH AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2006-269-MG**
	:	**(Consolidated with 2006-270-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, HILLTOWN TOWNSHIP, HILLTOWN TOWNSHIP WATER & SEWER AUTHORITY, Permittees, and DELUCA ENTERPRISES, INC., d/b/a DELUCA HOMES, Intervenor	:	**and 2006-271-MG)**
	:	
	:	**Issued: August 19, 2008**

OPINION AND ORDER ON MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

By George J. Miller, Judge

Synopsis:

The Board denies motions of a permittee-sewer authority and township to dismiss and for summary judgment based on its claims that the Board has no jurisdiction to interpret an inter-municipal agreement among the appellant-sewer authority, the permittee and others, or for absence of need for a revised public notice of the change of the proposed method of sewage disposal from on-lot systems or a package plant to an extension of the permittee's public sewer. Both the Board and the Department have to consider the effect of the inter-municipal agreement on the execution of its duties under the Sewage Facilities Act. The appellant also appears to have evidence that the Department issued the approvals of the modules proposing public sewage in absence of required public notice.

The Board also denies the permittee's motions which contend that claims made by the appellant related to the proposed method of sewage disposal at the permittee's sewage treatment plant are barred by administrative finality and the permittee's motion relating to the claimed inadequacy of the alternatives analysis in the plan revisions.

Finally, the Board denies a fifth motion by the permittee which challenges the appellant's expert reports. The Board has long held that the credibility of expert testimony is clearly inappropriate for resolution by summary judgment and denies that motion as well.

BACKGROUND

Perkasie Borough Authority (Perkasie) has filed these three appeals involving the Department's approval of sewage planning modules submitted by Hilltown Township for two new residential real estate developments known as the Ashland Meadows subdivision and The Preserves. Ashland Meadows is a 49 lot subdivision to be constructed on 93.10 acres. The Preserves is a 24 lot subdivision to be constructed on 50 acres. Both approvals authorize treatment by the Hilltown Township Water and Sewer Authority at its Highland Park waste treatment facility. The approval for The Preserves also authorizes the use of grinder pumps to transport the waste to the elevation of this treatment facility. A central challenge to the Department's actions derives from the claim that these approvals are contrary to an inter-municipal agreement among Perkasie and Hilltown, and others, under which sewage from these areas was planned to be sent to a regional treatment authority known as the Pennridge Water Treatment Authority (PWTA or Pennridge).

Perkasie further claims that these approvals are contrary to the policies and requirements

of the Sewage Facilities Act,[1] its implementing regulations, and of the Clean Streams Law.[2] Perkasie also claims that the approvals fail to provide an adequate treatment system for these developments. Finally, Perkasie claims that the Department failed to give required public notice of the conversion of Hilltown's initial applications for approval of modules for on-lot sewage treatment for Ashland Meadows and for a package treatment plant for The Preserves to modules for both developments proposing public sewage. Perkasie also challenges the Department's issuance of a Water Quality Management Permit for both developments as being contrary to the Sewage Facilities Act and the Clean Streams law.[3]

Hilltown Township and the Hilltown Water and Sewer Authority (collectively, Hilltown) have filed five motions to dismiss and for partial summary judgment. The motion for partial summary judgment claims that neither the Department nor the Board have jurisdiction to interpret the terms of a private agreement and that, even so, the agreement does not require that the waste from these two developments be sent to PWTA rather than to the Hilltown treatment facility. The motion to dismiss claims that the Department provided adequate public notice of the initial applications and was not required to also give public notice of the conversion of Hilltown's applications from approval of modules proposing on-lot sewage treatment to a proposed public sewage treatment at the Hilltown facility for these two residential developments. In any event, Hilltown claims that Perkasie knew well of the intent to convert the applications to

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[1] Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§750.1-750.20a (Sewage Facilities Act).

[2] Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 (Clean Streams Law).

[3] These appeals were consolidated at EHB Docket No. 2006-269-MG. A fourth appeal challenges a letter sent from the Department expressing the view that there is no requirement for a Water Quality Management permit for a proposed diversion valve necessary to route the waste to Hilltown's Highland Park waste treatment facility. This recently filed appeal has not been consolidated with the others. See EHB Docket No. 2008-141-MG.

public sewage and is therefore barred from appealing the Department's actions on grounds of the absence of public notice.

Hilltown has also filed two further motions to dismiss claims by Perkasie related to the adequacy of the plan to dispose of sewage at the Highland Park plant and to dismiss other claims based on administrative finality. Hilltown contends that there is no requirement that the Department consider the PWTA plant as an alternative. Therefore the alternatives analysis in the planning modules was sufficient as a matter of law. Hilltown also claims that large portions of Perkasie's appeal should be dismissed because they involve claims that were resolved in the Department's approvals relating to the planning and construction of the Highland Park plant and another subdivision's unchallenged planning module. Therefore, in Hilltown's view, many of Perkasie's objections are barred by administrative finality.

OPINION

The grant of summary judgment is proper under Rule 1035.2 of the Pennsylvania Rules of Civil Procedure whenever (1) there is no genuine issue of material fact that could be established by additional discovery or expert report, or, (2) after completion of discovery relevant to the motion, the party opposing the motion who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.[4] As we explain more fully below, we find that Hilltown has not met this standard relating to the 2006 consolidated appeals.

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[4] *Jones v. SEPTA*, 772 A.2d 435 (Pa. 2001); *Schreck v. Department of Transportation*, 749 A.2d 1041 (Pa. Cmwlth. 2000). The grant of summary judgment is warranted only in a clear case, and the record must be viewed in the light most favorable to the non-moving party resolving all doubts regarding the existence of a genuine issue of material fact against the grant of summary judgment. *Young v. Department of Transportation*, 744 A.2d 1276 (Pa. 2000); *County of Adams v. DEP*, 687 A.2d 1222 (Pa. Cmwlth. 1997).

The Inter-Municipal Agreement

Hilltown claims that we have no jurisdiction to consider whether the Department's approval of modules was improper because it was contrary to the agreement entered into among Perkasie, Hilltown and others. Perkasie believes this agreement was intended to require that all sewage waste from the territories covered by these developments had to be sent to the PWTA's treatment plant. Hilltown claims, to the contrary, that the agreement applied only to sewage facilities constructed by one of the municipal parties to the agreement. Hilltown asks, in the alternative, that we interpret the agreement to mean that approval of the modules for conveying the waste to the Hilltown treatment plant did not violate this agreement because the waste is to be conveyed through facilities constructed by private developers rather than through facilities constructed by the Township.

It may be that the Board has no jurisdiction to enter a binding interpretation of a private agreement to which the Department is not a party.[5] However, the Board has the power of *de novo* review of Department actions in exercising its authority to regulate the conveyance and treatment of sewage granted it by the Clean Streams Law and the Sewage Facilities Act. The existence of an agreement among the parties with respect to the conveyance and treatment of sewage may be a fact that the Department must consider in the exercise of those regulatory powers.[6] Accordingly, we reject the contention that the Board has no jurisdiction to consider whether or not the Department acted improperly in the consideration it gave to the agreement. According to Perkasie, this agreement was entered into at the behest of the Department in order to solve

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[5] *Perkasie Borough Authority v. Hilltown Township Water and Sewer Authority*, 819 A.2d 597, 602 (Pa. Cmwlth. 2002); *Pond Reclamation v. DEP*, 1997 EHB 468, 474.

[6] See opinions of Acting Chairman and Chief Judge Thomas Renwand in *Stout v. DEP*, 2007 EHB 482, 488-490; *Coolspring Stone Supply, Inc. v.* DEP, 1998 EHB 209, and *Chestnut Ridge Conservancy v. DEP*, 1998 EHB 217.

sewage problems in Hilltown. The interpretation of the agreement is only one of a host of other factors the Department is bound to consider in approving the modules, including its previous approval of the sewage facilities plans for the affected municipalities. The Department might properly conclude that those other factors required approval of the modules despite whatever interpretation should be given to the agreement.

We will also deny Hilltown's motion for summary judgment claiming that the agreement does not require that the waste from these two developments be conveyed to the PWTA treatment plant rather than to the Hilltown treatment facility. The grant of such a summary judgment would be an adjudication of the rights of the parties under the agreement, an adjudication which we may be powerless to issue. Instead, the Bucks County Court of Common Pleas has before it a claim by Perkasie that it is entitled to damages as a result of Hilltown's breach of the inter-municipal agreement. The authoritative interpretation of the agreement should be made by that court.

Administrative Finality

Hilltown claims that Perkasie's challenge to the modules relating to the use of the Highland Park treatment facility is barred by administrative finality. Specifically, Hilltown argues that Perkasie failed to raise proper challenges to the use of the Highland Park plant either in the Act 537 planning process or the subsequent water quality permitting actions related to the construction and operation of the plant. Hilltown claims that in Perkasie's challenge to the Part II water quality permit, the Board held that the construction of the Highland Park plant was a planning decision and therefore was barred by Perkasie's failure to challenge earlier Department plan approval actions. We do not believe that these prior approvals of the Department bar Perkasie's current appeals from the Department's approval of The Preserves and Ashland

Meadows modules. Although those appeals challenge the use of the Highland Park plant, they are not challenges to the operation of the plant itself that could have been raised in an earlier appeal.

Generally speaking, the doctrine of administrative finality forecloses an appellant from challenging an administrative action that could have been challenged in an earlier appeal, but was not.[7] In the context of sewage facilities planning, the Board often holds that the failure to attack a sewage planning decision may foreclose a challenge in subsequent permitting actions or in a subsequent plan revision appeal.[8] Accordingly, in *Perkasie v. DEP*,[9] the Board held that the failure to attack the decision to build the Highland Park plant in the Act 537 planning process, foreclosed an attempt by Perkasie to challenge its construction in the Part II permitting appeal.

We do not necessarily read Perkasie's appeal solely as a challenge to the existence of the Highland Park plant. Perkasie alleges in its response to Hilltown's motion that the Township's Act 537 Plan called for the use of the Highland Park plant in a certain study area of the Township. However, The Preserves and Ashland Meadows are located in the "RR" section of the Township, which is not included in that study area. Accordingly, it appears that the plan revisions at issue here relate to new areas of the Township which are not designated for service by the Highland Park plant in prior Act 537 planning, rather than the areas of the Township for which planning has already occurred.

This proposed module calls for the extension of public sewers into an area of the Township not previously sewered. Whether it was appropriate to direct the sewage from the

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[7] *E.g.*, *Peters Township Sanitary Authority v. Department of Environmental Protection*, 767 A.2d 601 (Pa. Cmwlth. 2001).

[8] *E.g. Winegarderner v. DEP*, 2002 EHB 790.

[9] 2002 EHB 764.

proposed subdivision to the Highland Park plant rather than the PWTA plant may raise factual questions different from those considered by the Department in approving the planning and construction of the Highland Park plant and different from the approval of some other subdivision located elsewhere in the Township. The Board has specifically held that the extension of public sewers into new areas of a municipality is not barred by administrative finality where the appellant did not challenge a former Act 537 plan that included public sewers in other areas of the municipality.[10] Although the current service area of the Highland Park plant was established by earlier Department approvals, administrative finality does not necessarily insulate challenges to the expansion of the services are from review.

Similarly, we are not persuaded that issues relating to the use of the Hillcrest Diversion valve are administratively final because Perkasie could have raised similar objections in the context of a challenge to the approval for a different subdivision located in Hilltown Township, which uses the diversion valve to transport sewage to the Highland Park plant.[11] Certainly the use of the valve in the context of the conveyance of sewage from Ashland Meadows and The Preserves to the Highland Park plant might be relevant to the Department's required review of the proposals and might raise technical matters different from those connected to the use of the valve to serve other areas of the Township. Accordingly, Perkasie's objections appear not to be barred on the record before us now. Accordingly, we will deny Hilltown's motion for summary judgment on basis of administrative finality.

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[10] *Noll v. DEP*, 2004 EHB 712; *Winegardner v DEP*, 2002 EHB 790.

[11] Perkasie has challenged the Department's determination that the Hillcrest Diversion Valve does not require a permit in the appeal docketed at 2008-141-MG. Hilltown has moved to dismiss this appeal because it is not an appealable action of the Department. We deal with that motion by a separate opinion also issued today.

Adequacy of the Alternative Sewage Analysis

Hilltown argues that it is entitled to summary judgment because the alternative sewage analysis for The Preserves and Ashland Meadows was adequate as a matter of law. In Hilltown's view, there is no requirement that it consider the PWTA plant because the 1975 agreement did not require any consideration. To the extent that an analysis of public sewers was required, that analysis is embodied in the evaluation of the Highland Park plant.

Perkasie argues that Hilltown's motion should be denied. In Perkasie's view, the PWTA plant should have been identified and evaluated as a technically feasible alternative method of sewage disposal, but was not. Further, Perkasie contends that there are factual issues related to the technical feasibility of diversion of sewage from the subdivisions to the Highland Park plant via a diversion valve known as the Hillcrest Diversion Valve.

The Department's regulations require sewage modules to include "An analysis of technically available sewage facilities alternatives identified by the municipality and additional alternatives identified by the Department . . . ."[12] and that the selected alternative is the best short term and long term environmentally acceptable alternative.[13] Hilltown argues that it was not required to analyze every sewage disposal alternative, but only those alternatives "identified by the municipality" and those "identified by the Department." According to Hilltown, it was not required to identify and analyze the use of the PWTA facility for The Preserves and Ashland Meadows. Perkasie counters that the PWTA plant was an obvious and viable option that should have been considered.

Clearly, whether the Department was required to identify the PWTA plant as a

[12] 25 Pa. Code § 71.52(a)(3).
[13] 25 Pa. Code § 71.65(a)(1).

technically available alternative and to require Hilltown to develop an alternatives analysis, is a factual inquiry. While we agree with Hilltown that municipalities and the Department have some discretion in choosing which sewage facilities are truly technically available, and which may not be, that discretion cannot be without limits. Given the factual circumstances alleged by Perkasie in responses to Hilltown's motions, it may been reasonable and appropriate for the Department to require an analysis of the PWTA plant, rather than seeming to rely solely on the Township's view of the plant. Indeed, the provisions of the intermunicipal agreement may be relevant in this connection.

Hilltown does not contend that the PWTA plant is not a "technically available alternative." Instead, it argues that the 1975 agreement does not *require* consideration of it as a sewage facilities alternative. While it may be true that the 1975 agreement did not require such an evaluation, it may also be true that a proper application of the sewage facilities regulations in these circumstances *does* require the analysis of the PWTA plant. Perkasie argues that the Department did not give any meaningful consideration of the PWTA plant but blindly deferred to Hilltown that an evaluation was unnecessary. There is nothing in Hilltown's motion which suggests that PWTA was excluded from consideration either because it was not technically feasible or because it was not an environmentally acceptable alternative. Of course, such determinations can be made only on a fully developed factual record. Thus, whether Hilltown and the Department properly exercised their discretion in excluding disposal and treatment of sewage from The Preserves and Ashland Meadows from a fully developed alternatives analysis must be resolved after development of the evidence at a hearing.

Public Notice

Perkasie claims that the Department improperly failed to require publication of public notice of the change in the modules to provide for public sewage through the Hilltown treatment facility; failed to require a 30-day public comment procedure; failed to require proof that appropriate agencies had reviewed and approved the changed proposal; failed to consider whether Hilltown had adequately considered any comments received; failed to assure that PWTA, its member municipalities, including Perkasie, be informed of the diversion of sewage waste to the Hilltown treatment facility; and failed to resolve comments from the Pennsylvania Historical and Museum Commission regarding archeological resources.

Hilltown's motion for partial summary judgment seeks a dismissal of these claims as well as several others that seem to be not wholly related to public notice requirements.[14] Hilltown claims that the initial public notice was required only because of the interest of the Historical and Museum Commission and because of the proposal to construct a private treatment system. Hilltown argues that the conversion of the modules to propose public sewage treatment did not require public notice since none was required for public sewage and notice had already been given to the Historical and Museum Commission. The motion further argues that Hilltown was well aware of the change in the modules so it could not be harmed by the conversion.

Perkasie claims that Hilltown's motion does not meet the standard for summary judgment because Perkasie has evidence that approval of these modules may have violated the consistency requirements of the Department's regulations relating to new land development. As applicable to

[14] The motion also seeks dismissal of paragraph 59 relating to a protocol for diversion of the waste and paragraph 60 which claims that the Department's action was contrary to law.

this appeal, public notice is required under section 71.53(d)(6)[15] of the Department's regulations

[15] This provision provides as follows:

> (6) Evidence documenting newspaper publication. The newspaper publication may be provided by the applicant or the applicant's agent, the municipality or the local agency by publication in a newspaper of general circulation within the municipality affected. When an applicant or an applicant's agent provides the required notice for publication, the applicant or applicant's agent shall notify the municipality or local agency and the municipality and local agency will be relieved of the obligation to publish. The newspaper notice shall notify the public where the plan is available for review and indicate that all comments regarding the proposal shall be sent to the municipality within which the new land development is proposed. The newspaper publication shall meet the requirement of § 71.31(c) and provide notice of the proposed plan adoption action when the proposal involves one of the following:
>
> (i) Construction of a sewage treatment facility.
>
> (ii) A change in the flow at a sewage treatment facility of greater than 50,000 gpd.
>
> (iii) Will result in a public expenditure in excess of $100,000 for the sewage facilities portion of a project.
>
> (iv) Will lead to a major modification of the existing municipal administrative organization or the establishment of new administrative organizations within the municipal government.
>
> (v) A subdivision of 50 lots or more.
>
> (vi) A major change in established growth projections.
>
> (vii) A different land use pattern than that established in the official sewage plan.
>
> (viii) The use of large volume onlot sewage systems.
>
> (ix) Resolution of a conflict between the proposed alternative and the consistency requirements contained in § 71.21(a)(5)(i)—(iii).
>
> (x) The sewage facilities are proposed to discharge into high quality or exceptional value waters.

25 Pa. Code § 71.53(d)(6).

relating to new land development whenever the plan proposes construction of a sewage treatment facility or requires a resolution of a conflict between the proposed alternative and the consistency requirements contained in section 71.21(a)(5)(i)-(iii).[16] This latter subsection of the Department's regulations requires the municipality to evaluate the proposed alternative for consistency between the proposed alternative and the objectives and policies of, among other things, comprehensive plans developed under the Pennsylvania Municipalities Code.[17] However, if a resolution of consistency is required, public notice is also required.

It appears from Perkasie's exhibits that such a consistency determination may have been required for both The Preserves and Ashland Meadows. According to Perkasie, the Project Narrative for The Preserves (Revised February 25, 2004), states that the land is in the Hilltown Township residential district that is classified as a conservation district and zoning requirements for this district have been designed to promote agricultural as the primary use of the land. The narrative further states: "Public service sewer facilities are not to be provided according to the Hilltown Comprehensive Plan."[18] In addition, the module for The Preserves, revised March 7, 2006, and the module for Ashland Meadows, revised June 2006, answers "Yes" to the question relating to a Public Notice Requirement: "Does the project require resolution of a conflict between the proposed alternative and consistency requirements contained in section 71.21.(a)(5)(i)-(iii)."[19] Hilltown's contention in its reply brief that no conflict with Hilltown's comprehensive plan was identified in the modules has to be read in context with these materials.

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[16] 25 Pa. Code § 71.21(a)(5)(i)-(iii).
[17] 25 Pa. Code § 71.21(a)(5)(i)(D).
[18] Perkasie, Ex. 1.
[19] Perkasie Exs. 5 and 6.

The author of these modules may have been thinking of the resolution of a conflict with archaeological resources for which public notice had been given on November 24, 2004, with respect to the previous plan for on-lot sewage and comments received from the Historical Commission.[20] However, it may be difficult to avoid the conclusion that a resolution was also required for a conflict with Hilltown's zoning requirements. In any event, it will be difficult to agree with the Department's position that the public notice with respect to on-site sewage is a sufficient public notice of the later proposed sewer extension. We agree with Perkasie that Section 71.53(e)(6) of the regulations[21] requires that the public notice meet the requirements of Section 71.31(c) of the regulations,[22] including a description of the proposed plan adoption, a list of the sewage alternatives considered and provide for a 30-day comment period. The previous public notice with respect to a plan for on-lot sewage is insufficient to meet those requirements for the revised plans which provide for public sewers. There is a significant difference in impact between constructing on-lot systems and the excavations required for an extension of public sewer that the Historical Commission and members of the public might consider material to their decision making.

We reach a similar conclusion with respect to Perkasie's claim that Hilltown was required to give personal notice to Perkasie and PWTA with respect to the planning modules for a sewer extension. Hilltown's claim that Perkasie's support for this claim is grounded only on Section 750.3(7) of the Sewage Facilities Act[23] turned out to be incorrect. Perkasie's brief asserts that the citation to this section of the Act was an error, and that its real contention is that under

[20] Perkasie Ex. 4.
[21] 25 Pa. Code § 71.53(e)(6).
[22] 25 Pa. Code § 71.31(c).
[23] 35 P.S. § 750.3(7)

Section 750.5(d)(8)[24] official plans and revisions are to be reviewed by official planning agencies within a municipality, including planning agencies with area-wide jurisdiction. Perkasie asserts that PWTA is such an agency and must be given notice. Perkasie also claims that both Hilltown and PWTA are signatories to the inter-municipal agreement and should have been given notice of the proposed extension of Hilltown's treatment system since the proposal runs contrary to the agreement. We conclude that there are too many issues of material fact as to whether personal notice was required as a result of these relationships to grant summary judgment on these claims.

Hilltown also moves for summary judgment on Perkasie's claim that Hilltown did not properly respond to Perkasie's comments. This contention is too factually based to be material for summary judgment. In any event, the comments in issue were directed to the previously proposed plan for a package plant, not the later proposal for extension of sewer lines. The same is true of the motion for summary judgment based on the claim that a republication of notice is not required where Perkasie was well aware of the change in the plan between the time of publication of the first notice and the approval of the plan and where Perkasie is not prejudiced as a result of the change. Perkasie claims that it did not know of the change until November or December of 2006. Hilltown did not approve the modules for an extension of the sewage collection facilities on January 23, 2006, and the modules were approved by the Department in mid-2006. By that time it was too late to make meaningful comment on the adopted proposal. Whether Perkasie was prejudiced as a result of the failure to provide public notice is an intensely factual matter and is not the stuff for a grant of a motion for summary judgment.

We are also concerned that the public notice that was given was for treatment systems that were significantly different from the alternative of public sewage treatment approved by

[24] 35 P.S. § 750.5(d)(8).

Hilltown and the Department for these developments. The failure to make any change in the public notices may have led some of the public, including the Historical Commission, to believe that the preexisting plan requirement for Ashland Meadows to still be on-lot sewage as the Hilltown Official Plan required for both developments. No notice was given to the public that the soils in the Ashland Meadows area were found to be inappropriate for on-lot sewage. Nor was any corrective notice given to the public that some proposal other than a package plant was being considered for The Preserves because its soils were also found to be inappropriate for on-lot sewage. The approval of the alternative for public sewage was controversial even at the meeting of the Hilltown Board of Supervisors and the supervisors considered many comments from other sources.[25]

It may be that a corrective public notice was required under these circumstances. In *Prizm Asset Management Company v. DEP,*[26] Judge Krancer required the Department to re-notice a NPDES permit because the public notice and hearing on the draft permit proposed significantly different discharges than the discharges to an additional watershed that had not be previously noticed in the permit ultimately issued by the Department. Because of this substantial change Judge Krancer issued a supersedeas of the permit requiring re-notice. While the Board has declined to order a re-notice where it appears that an appellant has not been prejudiced,[27] Perkasie strongly contends that it has been prejudiced because it did not have access to the modules for sewage extension. While Hilltown's reply brief casts some doubt on this assertion, we decline to issue a summary judgment where there is this sort of factual dispute.

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[25] Perkasie's Exhibits 21, 18.

[26] 2005 EHB 819.

[27] *Ainjar Trust v.DEP,* 2001 EHB 927; *Green Thornbury Committee v. DER,* 1995 EHB 636.

Expert Opinion

While preparing the opinion disposing of these four motions, Hilltown filed a fifth motion for summary judgment which contends that Perkasie cannot meet its burden of proof because the expert report proffered by Perkasie in discovery is insufficient.

Clearly, this issue of the credibility of an expert or the sufficiency of an expert report is not appropriate for resolution by summary judgment.[28] The Board has so held many times. Indeed, nearly all of the motions filed by Hilltown in this matter would clearly benefit from the development of a full record after a hearing on the merits, as we have held in the opinion above.[29] Further, the Board does not approve of the piecemeal motions practice which has been adopted by Hilltown and would discourage others from similar motions practice in the future.

Accordingly, we enter the following:

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[28] *E.g. Upper Gwynedd Township v. DEP*, 2007 EHB 69; *Solebury Township v. DEP*, 2007 EHB 729.

[29] *E.g. Citizen Advocates United to Safeguard the Environment*, 2007 EHB 101 (holding that summary judgment is only appropriate where there are very few material facts and the matter can be resolved as a question of law); *Borough of Ambler v. DEP*, 2007 EHB 364 (same).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PERKASIE BOROUGH AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2006-269-MG**
	:	**(Consolidated with 2006-270-MG**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 2006-271-MG)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION, HILLTOWN TOWNSHIP,	:	
HILLTOWN TOWNSHIP WATER & SEWER	:	
AUTHORITY, Permittees, and DELUCA	:	
ENTERPRISES, INC., d/b/a DELUCA	:	
HOMES, Intervenor	:	

ORDER

AND NOW, this 19th day of August, 2008, , it is hereby ORDERED that the motions of Hilltown Township Water and Sewer Authority (Hilltown) for summary judgment or to dismiss filed on April 24; May 5; June 16; June 26; and August 12, 2008 are **DENIED**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Judge

DATED: August 19, 2008

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

NORTHAMPTON TOWNSHIP, NORTHAMPTON, BUCKS COUNTY, MUNICIPAL AUTHORITY, AND NORTHAMPTON AREA RESIDENTS FOR REASONABLE SEWERS (NARRS)	:	**EHB Docket No. 2008-184-L (Consolidated with 2008-186-L and 2008-187-L)**
v.	:	**Issued: August 22, 2008**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

OPINION IN SUPPORT OF ORDER ON PETITION FOR SUPERSEDEAS

By Bernard A. Labuskes, Jr., Judge

Synopsis:

A third-party appellant's petition to supersede a Department order directing a township to implement its official sewage facilities plan is denied because of a low likelihood of success on the merits. An appeal of an order requiring implementation cannot be used to challenge the underlying sewage facilities plan.

OPINION

In 1997, the Department of Environmental Protection (the "Department") approved Northampton Township's (the "Township's") official sewage facilities plan (the "Plan"). The Plan provided for installation of public sewers by 2002 in one area of the Township and by 2007 in certain other areas of the Township. The Township has failed to implement the Plan. On

April 30, 2008, the Department issued an order ("Order") requiring the Township to implement its Plan. That Order is the subject of these consolidated appeals. Among other things, the Order requires the Township to begin construction of certain sewage systems by October 1, 2008. We are informed that the Township is moving forward in accordance with the Order.

Meanwhile, on July 28, 2008, Northampton Area Residents for Reasonable Sewers ("NARRS") filed a petition asking the Board to supersede the Order. After a conference call on August 5, 2008, we directed the Department to respond to the supersedeas petition by August 8. We permitted the other parties to reply to the Department's response on or before August 15. After reviewing the parties' submissions,[1] we issued an Order on August 19, 2008 denying the petition for supersedeas. This opinion is issued in support of that Order.

The standards governing the grant or denial of a supersedeas petition are set forth at 35 P.S. § 7514(d)(1) and 25 Pa. Code § 1021.63(a). Among other things, the petitioner must demonstrate a likelihood of success on the merits. *See generally Global Eco-Logical Services, Inc. v. DEP*, 1999 EHB 649, 651. Here, we have denied NARRS's petition because it is clear on the face of the petition that NARRS is unlikely to succeed on the merits of its appeal as a matter of law. Although ostensibly an appeal from the Department's April 30 Order, NARRS's appeal, and in particular the arguments it makes in support of its petition for supersedeas, in reality challenge the Plan itself. For example, NARRS argues that the Plan is out of date, that it was adopted without input from a majority of residents, that the Department did not make sufficient factual findings in approving the Plan, that the Department did not comply with statutory requirements for approval by the Authority, and that it did not consider species identified on the Pennsylvania Natural Diversity Inventory. NARRS adds that, even if the Plan was lawful in

[1] Neither the Township nor Northampton, Bucks County, Municipal Authority support the petition for a supersedeas.

1997, it has exceeded its shelf life and become "invalid" with the passage of time. NARRS then reasons that "[a]ny Order based on an invalid plan is, itself, invalid."

Although NARRS's arguments are creative and sincere, they fly directly in the face of a long line of cases which hold that a sewage facilities plan cannot be challenged by appealing an order requiring its implementation. *See Carrol Twp. v. DER*, 409 A.2d 1378, 1381 (Pa. Cmwlth. 1980); *Kidder Twp. v. DER*, 399 A.2d 799, 802 (Pa. Cmwlth. 1979); *Gilmore v. DEP*, 2006 EHB 679, 687; *Dickinson Twp. v. DEP*, 2002 EHB 267, 269; *Jefferson Twp. v. DEP*, 1999 EHB 837, 843. As we stated in *Dickinson Township*, an appeal before this Board from an order requiring implementation of an official plan "is not intended to serve as a *de facto* substitute for the plan revision process provided for under the Sewage Facilities Act." 2002 EHB at 269.

NARRS attempts to distinguish *Kidder Township* and its progeny by arguing that those cases involved attempts by municipalities to disregard or modify their own plans. Those cases, however, did not turn on the identity of the appellant. They turned on the availability of a statutory remedy for changing a plan; namely, 35 P.S. § 750.5 (official plans). The statutory remedies are available to third parties such as NARRS as well as the municipality itself. 35 P.S. § 750.5(b) (private request). The members of NARRS are, and always have been, free to submit a request to the Township to alter the Plan. 35 P.S. § 750.5(b); *McGrath Construction, Inc. v. Upper Saucon Township Board of Supervisors*, No. 1358 C.D. 2007, slip op. at 2 n.1 (Pa. Cmwlth. June 11, 2008); *Pequea Township v. DEP*, 716 A.2d 678, 681 n.4 (Pa. Cmwlth. 1998); *Jefferson Township Supervisors v. DEP*, 1999 EHB 837, 840-41. If the Township were to refuse such a request, the members could submit a private request to the Department. 35 P.S. § 750.5(b). Any decision made by the Department on a private request is appealable to this Board. 35 P.S. § 750.16(b); *McGrath Construction, Inc*, No. 1358 C.D. 2007, slip op. at 2 n.1 (Pa. Cmwlth. June 11, 2008). In short, it would appear that NARRS's failure to exhaust an

administrative remedy renders this Board's review of the 1997 Plan inappropriate at this juncture. *See generally Borough of Danville v. DEP*, EHB Docket No. 2008-033-L, slip op. at 7 (Opinion, July 16, 2008) (failure to exhaust administrative remedies); *see also The Mercy Hospital of Pittsburgh v. Pennsylvania Human Relations Commission*, 451 A.2d 1357, 1359 (Pa. 1982); *Pechner v. Pennsylvania Insurance Dept.*, 452 A.2d 230, 232-33 (Pa. 1982); *Stabatrol Corp. v. Metzval Corp.*, 456 A.2d 252, 254 (Pa. Cmwlth. 1983); *St. Joe Minerals Corp. v. Goddard*, 324 A.2d 800, 801-02 (Pa. Cmwlth. 1974).

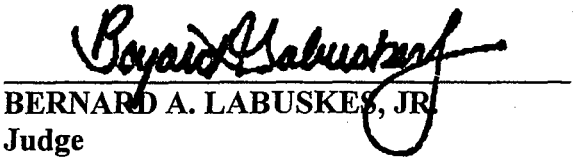
Speaking more fundamentally, a party cannot challenge one Department action by appealing another. *Grimaud v. DEP,* 638 A.2d 299, 303 (Pa. Cmwlth. 1994); *CAUSE v. DEP*, 2007 EHB 632, 680; *Winegardner v. DEP*, 2002 EHB 790, 793. If NARRS had filed an appeal from the 1997 Plan in 2008, the appeal would have been summarily dismissed as ten years too late. Instead, NARRS is attempting to use the 2008 Order as a mechanism or vehicle, if you will, to do the same thing. The reality is that the Department's approval of the 1997 Plan and its issuance of the 2008 Order, while related, are separate and distinct actions. Purported defects related to the Department's action ten years ago are simply not relevant. *Winegardner*, 2002 EHB at 793. The Department does not consider the "validity" of an approved plan when issuing an implementation order, and neither should we.[2] *Id.* at 793-94; *see Pequea Township v. DEP*, 716 A.2d 678, 686-87 (Pa. Cmwlth. 1998); *Ehmann v. DEP*, EHB Docket No. 2007-150-L, slip op. at 3 (Opinion, July 10, 2008).

All of this is not to say that there can be no appeal from an implementation order. To the contrary, arguments directed at the terms of the order itself are perfectly appropriate. For example, a challenge that an order sets inappropriate deadlines, or was issued to the wrong party,

[2] Contrast the situation where the Department is charged with reexamining the propriety of an operation in the context of a permit renewal based upon the passage of additional time. *Wheatland Tube Co. v. DEP*, 2004 EHB 131. *See also Angela Cres Trust of June 25, 1998 v. DEP*, 2007 EHB 595, 599; *Tinicum Township v. DEP*, 2002 EHB 822, 835-36; *Riddle v. DEP*, 2002 EHB 321, 327.

or is otherwise unreasonable with respect to the implementation requirements in the order itself might very well be appropriate. NARRS's petition for supersedeas, however, is not based upon such arguments. Accordingly, we have denied the petition and we will proceed to a hearing on the merits in due course.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: August 22, 2008

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PDG LAND DEVELOPMENT, INC.	;	
	:	
v.	:	**EHB Docket No. 2007-041-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and CITIZENS FOR	:	
PENNSYLVANIA'S FUTURE (PennFuture)	:	
Intervenor	:	**Issued: August 25, 2008**

OPINION AND ORDER ON APPELLANT'S MOTION FOR RECONSIDERATION

By Thomas W. Renwand, Acting Chairman and Chief Judge

Synopsis:

The Pennsylvania Environmental Hearing Board denies Appellants' Motion for Reconsideration as high government officers who have little or no personal involvement in a matter should not be deposed absent extraordinary circumstances.

OPINION

Presently before the Pennsylvania Environmental Hearing Board is Appellant PDG Land Development Inc.'s (PDG) Motion requesting the Board to reconsider our Opinion and Order granting in part the Pennsylvania Department of Environmental

Protection's Motion for Protective Order. Earlier this year, PDG served Notices of Depositions seeking to depose Department Secretary Kathleen A. McGinty and Deputy Secretary J. Scott Roberts. On April 17, 2008 the Department filed a Motion for Protective Order seeking to preclude the depositions. By Opinion and Order dated May 21, 2008 the Board granted in part the Department's Motion. We allowed PDG to depose Deputy Secretary Roberts and further allowed PDG to serve interrogatories to be answered by Secretary McGinty.

PDG contends that Secretary McGinty's resignation effective July 18, 2008 warrants a reconsideration of our earlier ruling since she no longer is responsible for running the Department and her deposition would not pose any undue burden on the Department. PDG also points to deposition testimony following the issuance of our decision which it contends supports its request to depose her.

The Department, in its Response, argues that our Protective Order was appropriate for a variety of reasons. The Department indicates our Protective Order was the right decision because of Secretary McGinty's lack of personal knowledge about the permit application; her lack of direct personal involvement in the decision to deny the application; the new deposition testimony does not justify reconsideration of the Board's Order; PDG's arguments and contentions do not constitute the "extraordinary circumstances" required to justify the reconsideration of an interlocutory order, 25 Pa. Code Section 1021.151(a); and PDG never directed interrogatories to Secretary McGinty as allowed and set forth in the Board's earlier Order.

Although we certainly are empathetic to PDG's argument, we deny its Motion for

Reconsideration. The underlying rationale of our Opinion and earlier cases is that high government officials who have no or little direct knowledge or involvement with a matter "should not, absent extraordinary circumstances be called upon to give depositions." *PDG Land Development, Inc. v. Department of Environmental Protection and Citizens for Pennsylvania's Future*, (Opinion and Order issued May 24, 2008, p.5). Nothing PDG has filed leads us to reverse our earlier ruling. Moreover, PDG has not availed itself of sending interrogatories to Secretary McGinty. In light of the above, and for the reasons advanced by the Department, we deny the Motion for Reconsideration.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

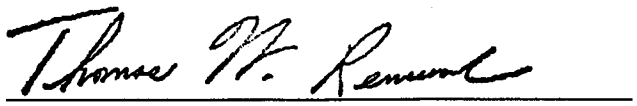
PDG LAND DEVELOPMENT, INC.	:	
	:	
v.	:	**EHB Docket No. 2007-041-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and CITIZENS FOR	:	
PENNSYLVANIA'S FUTURE (PennFuture)	:	
Intervenor	:	

ORDER

AND NOW, this 25th day of August, 2008, following review of PDG's Motion for Reconsideration, it is ordered as follows:

1. PDG's Motion for Reconsideration is ***denied***.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Acting Chairman and Chief Judge

DATE: August 25, 2008

See next page for service listing

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PERKASIE BOROUGH AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2008-141-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARFTMENT OF ENVIRONMENTAL PROTECTION and HILLTOWN TOWNSHIP, Permittee	:	**Issued: August 25, 2008**

OPINION AND ORDER ON MOTION TO DISMISS

By George J. Miller, Judge

Synopsis:

The Board grants a motion to dismiss an appeal from a Department letter stating that no permit was required for the operation of a sewage diversion valve. The Board finds that the letter itself did not affect the appellant's rights in any way nor did the appellant seek timely relief from the permittee's operation of this valve.

OPINION

On April 24, 2008, Perkasie Borough Authority (Perkasie) filed an appeal from a Department letter advising Hilltown Township that no permit was required for the continued operation of the Hilltown Diversion Valve. This valve was installed in 2003 to enable sewage flows to be directed from an existing sewage interceptor to the Highland Park treatment plant. This letter was written by the Department in response to a March 23, 2008 letter from Hilltown that sought a concurrence from the Department that no Water Quality Management Part II Permit

was required for the continued operation of this diversion valve. This letter was prompted by contentions made by Perkasie in litigation surrounding the Department's approval of sewage modules which proposed to utilize the Hilltown Diversion Valve.[1] The Department promptly responded by letter dated March 25, 2008. That letter states that the diversion valve qualifies for an exception from a Water Quality Management Permit as provided for under Section 207(b) of the Clean Streams Law.[2] The letter required no action from Hilltown or any other party.

Hilltown has moved to dismiss this appeal on the ground that the Department's letter is not appealable because it directs no action and therefore affects no ones rights. In addition, Hilltown contends that the appeal is untimely, even if otherwise proper, because Perkasie knew of the operation of the valve for years before the filing of an appeal.

Perkasie responds that the letter indeed affects its rights because it permits Hilltown to divert sewage flows to Hilltown's Highland Park treatment plant that should go to the Pennridge Water Treatment Authority (PWTA) plant at Hilltown's unfettered discretion. Perkasie also responds that the letter is appealable because there is no other forum in which its rights may be asserted.

We will dismiss this appeal because the Department's letter directs no action from anyone and is merely an interpretation of the law.[3] The Board has long held that we only have the power to consider final actions of the Department which have an adverse effect on personal or property rights, privileges, immunities, duties, liabilities or obligations of a person. While

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[1] *Perkasie Borough Authority v. DEP,* EHB Docket No. 2006-269-MG (cons.). The Board has issued an opinion today denying motions to dismiss and for summary judgment in those appeals.

[2] Act of June 22, 1937, P.L. 1987, *as amended,* 35 P.S. § 691.207(b).

[3] *E.g., HJH, LLC v Department of Environmental* Protection, 949 A.2d 350 (Pa. Cmwlth. 2008); *Polites v. DEP,* 2007 EHB 604, 607, *affirmed* 2148 C.D. 2007 (Pa. Cmwlth Ct. filed July 25, 2008).

Perkasie argues that this decision will harm the rights of PWTA in the operation of its sewage treatment plant, Perkasie is not PWTA. Moreover, to the extent that the operation of the valve in connection with the sewage modules for the new subdivisions appealed at EHB Docket No. 2006-269-MG raises questions of the propriety of the Department's approval of those modules, those challenges are being made and will be resolved in Perkasie's other appeals. Alternatively, if Perkasie or PWTA have been harmed by the operation of this valve, they have been free to seek an order from the Department or the Commonwealth Court prohibiting its operation. They did not seek such an order.

Perkasie's reliance on *The Nature Conservancy v. DER*,[4] is misplaced. That decision was substantially repudiated by the Board in its later opinion.[5] Our more recent opinions in *Associated Wholesalers, Inc. v. DEP*[6] and *Gordon-Watson v. DEP*,[7] hold that that letters from the Department which concluded that a permit was not necessary did not constitute an appealable action because, in part, there was no evidence that the appellants were harmed or were otherwise affected by the Department's conclusion.

Stern v. DEP,[8] raised a unique set of factual circumstances, and the Board held that the letters from the Department which specifically granted an exemption for sewage planning and permit requirements were appealable actions. We held that the appellant may have been harmed as a result of the Department determination that no permit is necessary, and the appellant made a timely attack on that letter. Therefore the Board assumed jurisdiction over the appeal [9]

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[4] 1985 EHB 737.
[5] 1986 EHB 1030, 1034.
[6] 1997 EHB 1174.
[7] 2005 EHB 812.
[8] 2000 EHB 628.
[9] *See also Del-Aware Unlimited v. DER*, 183 EHB 427. Perkasie's reliance on *Soilair v. DEP*, is also misplaced. In that case the letter to the sewage enforcement officer adversely

Here, the Department's letter was written in response to a letter from Hilltown which was written for the purpose of explaining Hilltown's conclusion that the diversion valve did not require a permit. The Department's letter in response merely agreed with Hilltown, stating that the valve "qualifies for an exemption" and listed five reasons why it qualified. The Department did not require Hilltown to apply for an exemption, nor did the letter place any obligations upon Perkasie.

Hilltown also points out in its briefs that Perkasie did not appeal the Department approval of the diversion valve when it approved the diversion of sewage in connection with the approval of the sewage modules for Hilltown Chase in 2002. Further, Perkasie was aware of the diversion valve and objected to its use when it filed its appeals from subsequent sewage modules in 2006. Accordingly, it does not appear that Perkasie's challenge is timely.

We therefore enter the following:

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affected the Perkasie in marketing its technology and its appeal was timely.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PERKASIE BOROUGH AUTORITY	:	
	:	
v.	:	**EHB Docket No. 2008-141-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARFTMENT OF ENVIRONMENTAL PROTECTION and HILLTOWN TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 25th of August, 2008 upon consideration of Hilltown's motion to dismiss the appeal in the above-caption matter relating to the Department's determination that no permit is required for the operation of the Hilltown diversion valve is **GRANTED**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: August 25, 2008

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JAMES MATUSINSKI AND FRANK KRANTZ	:	
v.	:	**EHB Docket No. 2007-278-MG (Consolidated with 2007-279-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NORTHEAST ETHANOL & RENEWABLE RESOURCES, LTD, Permittee	:	**Issued: September 12, 2008**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

By: George J. Miller, Judge

Synopsis:

The Board dismisses two *pro se* appeals. In response to motions for summary judgment by a permittee, neither appellant responded with any admissible evidence from the record which supports the contentions made in their notices of appeal. Therefore, we must conclude that the appellants will not be able to sustain their burden of proving that the Department improperly granted an air quality plan approval for the construction of an ethanol production plant.

OPINION

James Matusinski and Frank Krantz (collectively, Appellants) each file an appeal from the Department's issuance of an air quality plan approval to Northeast Ethanol Renewable Resources (Permittee). The plan approval authorizes the Permittee to construct and conduct initial operations of a new fuel-grade ethanol production plant located in the Borough of

Mayfield in Lackawanna County, Pennsylvania. Mr. Matusinski's notice of appeal challenges some of the underlying assumptions used in the air quality monitoring that was done in connection with the plan approval application. Specifically, he challenges the use of air quality data from the Wilkes-Barre Scranton Airport monitoring device and certain weather data that was used. He also expresses his concern about the elevation of the stacks in relation to homes located in Mayfield Heights, the location of the facility in proximity to sensitive populations, and exposure to hazardous air pollutants.

Mr. Krantz' notice of appeal is more lengthy and raises a number of technical issues related to the facility. He is concerned about odors and visible emissions. Mr. Krantz contends that the plan approval's provisions for recordkeeping and reporting are deficient and that the plan approval has insufficient provisions restricting the storage of certain constituents of the ethanol distilling process which may result in increased odors and other emissions.

The Permittee has moved for summary judgment on the grounds that neither of these Appellants will be able to support his claims at a hearing because neither has identified any expert witness or any other evidence which would establish a *prima facie* case. Both Appellants have filed responses to the Permittee's motions. Neither response includes any evidence from the record, or otherwise, which might support his objections, nor do either of the Appellants make a legal argument upon which the Board might base a denial of the Permittee's motion. Accordingly, as we explain more fully below, we have no choice but to grant the Permittee's motion and dismiss the Appellants' appeals.

Standards for Motions for Summary Judgment and Responses

The purpose of summary judgment is to challenge the sufficiency of the evidence that the

opposing party has to support his claim at hearing.[1] Accordingly, the Board will grant summary judgment only where the evidentiary materials which support the motion demonstrate that the moving party is entitled to judgment as a matter of law.[2] Evidentiary material in support of a motion or response must be admissible at a hearing in accordance with the Pennsylvania Rules of Evidence.[3] Such materials may include pleadings, depositions, answers to interrogatories, admissions of record and affidavits based on personal knowledge.[4] Documentary evidence outside of the record must be presented by means of a properly sworn affidavit or one of the other materials from the record.[5]

A party opposing a motion for summary judgment may not rest on mere denials of the averments in the moving party's motion:

> [T]he opposing party must do more than allege unsupported allegations. Bald allegations are insufficient to create an element necessary for a prima facie case. Neither can bald, conclusory allegations create genuine issues of material fact.[6]

As third-party appellants, Mr. Matusinski and Mr. Krantz bear the burden of proving at the hearing that the Department improperly approved the air quality plan at issue in the appeals.[7] Accordingly, in order to resist a properly supported motion for summary judgment their response must demonstrate that they can proffer admissible evidence which supports the claims made in

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[1] *Scalice v. Pennsylvania Benefits Trust Fund,* 883 A.2d 429 (Pa. 2005); *Jones v. SEPTA*, 772 A.2d 435 (Pa. 2001); *Jackson v. DEP*, 2005 EHB 496.

[2] *E.g. Global Ecological Services, Inc. v. Department of Environmental Protection,* 789 A.2d 789 (Pa. Cmwlth. 2001); *Barra v. DEP*, 2006 EHB 198.

[3] Pennsylvania Rule of Civil Procedure (Pa. R.C.P. No.)1035.2(1); *Jackson,* 2005 EHB at 499.

[4] *See* Pa. R.C.P. No. 1035.1; 25 Pa. Code § 1021.94a(2)(d).

[5] *Farmer v. DEP*, 1998 EHB 1306; *City of Scranton v. DEP*, 1997 EHB 985.

[6] *Golaschevsky v. Department of Environmental Resources*, 683 A.2d 1299, 1302 (Pa. Cmwlth. 1996), *affirmed,* 720 A.2d 757 (Pa. 1998)(citations omitted.).

[7] 25 Pa. Code § 1021.122(c)(2).

their notices of appeal.[8]

We turn now to the Permittee's motions.

Matusinski Appeal

The crux of Mr. Matusinski's appeal is to challenge the air quality dispersion modeling. Specifically, the objections in the notice of appeal attack the underlying weather and air quality data used to develop the risk assessment modeling. He also claims that the proposed stack heights pose a risk to residents of the Mayfield Heights section of the community, and that the site chosen for the facility was inappropriate.

In the motion for summary judgment, the Permittee contends that Mr. Matusinski cannot support the claims made in his notice of appeal because he has not proffered any expert testimony or other evidence. The Permittee also states that as a "minor source," dispersion modeling was not required by the air quality regulations, but the Permittee voluntarily performed the modeling analysis at the request of the Department.[9] The protocol for the analysis conformed to EPA and DEP guidance on such analyses, which has not been challenged by the Appellant.[10] The plan approval incorporates the results of the analysis and requires the Permittee to perform the analysis again with actual emission data from the shakedown period before obtaining an operating permit for the facility.[11]

In response, Mr. Matusinski essentially restates the objections in his notice of appeal. He "objects" to the Permittee's motion "due to errors in their presentment that my appeal does not

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[8] P. R.C.P. No. 1035.3(a).
[9] Summary Judgment Motion, Ex. C.
[10] Summary Judgment Motion, Exs. F, K.
[11] Summary Judgment Motion, Exs. C, D, I.

contain any issues of material fact" and complains that the motion "is simply a legal ploy [the Permittee] is attempting to use to deny me my legal rights to a fair and impartial hearing on my objections to their air quality permit."[12]

Clearly, in order to support a challenge to the air quality monitoring, the Appellant must rely on expert testimony. Neither his responses to the Permittee's discovery requests nor his response to the motion for summary judgment suggest that he either possesses the requisite technical or scientific knowledge himself, or that he intends to proffer a properly credentialed individual to testify on his behalf. Simply making unsupported assertions in his response to the motion that different weather data should have been used is insufficient to rebut the Permittee's claim that the air quality modeling was properly performed using appropriate data, which the Permittee supports by affidavits from witnesses and other evidence.[13] Our rules of practice and procedure require a response to a motion for summary judgment "to set for *specific* facts showing there is a genuine issue for hearing." These specific facts must be supported by the affidavits of witnesses or with other admissible evidence from the record.[14] The Appellant's response points to no admissible evidence that may be used in support of his claims at a hearing. Accordingly, we have no choice but to grant the Permittee's motion and dismiss the Appellant's appeal.

Krantz Appeal

Mr. Krantz' appeal objects to the plan approval because it lacks appropriate recordkeeping and monitoring controls for odors, opacity and fugitive particulate emissions. He further complains that the emissions limits in the plan approval are unclear or imprecise, that the

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[12] Appellant's Objection to the Permittee's Motion for Summary Judgment.
[13] *Golaschevsky*; *Pekar v. DEP*, 2007 EHB 291.
[14] 25 Pa. Code § 1021.94a(h).

Permittee should not be allowed to transport ethanol by rail, and that the facility is inappropriately located. Finally, Mr. Krantz contends that the storage requirements for distillers dry grain with solubles (DDGS) and wet distillers grain with solubles (WDGS)[15] are insufficient and will result in increased odors and emissions.

The Permittee's motion for summary judgment addresses each of the claims made by the Appellant and asserts that the odor and emissions controls, monitoring and recordkeeping are all addressed by the plan approval or the plan approval application which is incorporated by reference into the plan approval. The Permittee attaches numerous exhibits which explain the controls, monitoring and recordkeeping requirements and how they comply with the Department's air quality regulations. The Permittee further contends that there are ample permit conditions and restrictions in the plan approval which control the storage of both DDGS and WDGS and that neither poses a risk for the generation of malodors or VOC (volatile organic compound) emissions. The Permittee also argues that the plan approval authorizes the use of rail to transport ethanol and that there is no evidence that the plan approval application contained inaccurate or incomplete information on this point. In his notice of appeal the Appellant contends that the Permittee said at a public meeting that it was primarily going to use trucks to transport ethanol.

Similar to Mr. Matusinski, Mr. Krantz does not attack the Permittee's factual assertions point by point, but "generally dispute[s] the Motion for Summary Judgment . . . ." He contends that the Permittee's motion overgeneralizes his objections, but does not offer any specifics. He does articulate four "material disputes":

1) Ethanol plants produce odors, visible emission and fugitive particulate matter.

---

[15] These substances are byproducts of the ethanol distilling process. See Permittee's Motion for Summary Judgment ¶¶ 23-39.

2) I have an eyewitness as indicated in my supplemental response who can testify to that fact.

3) I can obtain an affidavit and/or testimony from this witness (Joseph Rossi, Delaware St. Mayfield).

4) There is no way that Northeast Ethanol and Renewable Resources LTD can prevent these odors, visible emissions, and fugitive particulate matter from escaping the boundaries of the property.[16]

However, Mr. Krantz does not attach any affidavit from Mr. Rossi, nor does he attach any expert information in support of his technical and scientific claims that ethanol plants produce odors, etc. and that the restrictions in the plan approval are insufficient to control odors and emissions.[17] Further, evidence of possible toxicity is not sufficient to create an issue of fact without supporting expert testimony concerning the likely adverse effects related to the emissions from the proposed plant.[18] Although the Appellant identifies facts "in dispute," his response fails to point to evidence from the record that might prove those facts at a hearing on the merits. As we explained above, merely making statements of denial in a response to a properly supported motion for summary judgment is insufficient to demonstrate the existence of a material fact in dispute. Rather, the non-moving party must make at least *some* demonstration that he can come forward with admissible evidence that might support his objections. As to transportation of the ethanol by rail, although the Permittee may have said that it would primarily use trucks in a public meeting, the Appellant has offered no expert to testify that the difference in the mode of transportation is of any risk to anyone. Thus, the Appellant's failure to properly

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[16] Brief of Frank Krantz in Response to the Motion for Summary Judgment at p.2.

[17] In reply, the Permittee contends that these objections were not raised in the notice of appeal. Because of our disposition of this matter, we need not reach this issue.

[18] *See Mazze v. DEP*, 2002 EHB 921 (denying a petition for supersedeas where the petitioner failed to adduce testimony that proposed biosolid application would cause her

respond to the Permittee's motion requires us to grant the motion and dismiss his appeal.[19]

This Board certainly understands the difficult situation that *pro se* appellants have in appealing Department actions to the Board, especially in cases such as this one which requires expert testimony to prove the scientific and technical objections made by the Appellants. However, we and other courts of the Commonwealth have cautioned those who choose to proceed without the benefit of counsel that they do so at their peril.[20] The Appellants' lack of expertise is more than evidenced by their complete failure to follow any of the procedural requirements of the Board concerning summary judgment. While we may wish to give the Appellants their "day in court" it is not fair to the other parties involved to simply overlook these rules and the Appellants' lack of evidence.[21]

That said, we reject the Permittee's contention that the "Board should see this and the other appeals in this case for what they are – frivolous ones designed to delay the project that have been filed by parties without any good faith basis in law or fact to support their claims."[22] It is the purpose of the Board to provide a forum for citizens to challenge actions of the Department. The appeal period is relatively short. It may well be that if the Appellants had been able to secure the assistance of counsel they may have been able to support their challenge to the plan approval. We do not have any reason to believe that these appeals were filed for any improper purpose, but rather are a manifestation of the concerns of these individuals relating to a

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irreparable harm.)

[19] 25 Pa. Code § 1021.94a(h).

[20] *E.g., Peters Creek Sanitary Authority v. Welch*, 681 A.2d 167, 171 n.5 (Pa. 1996); *Fraisar v. Gillis*, 892 A.2d 74, 77 (Pa. Cmwlth. 2006)("the burden to comply with all procedural rules lies with the plaintiff who chose to initiate the suit, *pro se*."); *Perrin v. DEP*, EHB Docket No. 2007-118-R (Opinion issued February 5, 2008). The Board sent a letter to each of the Appellants warning them of the risks of proceeding without counsel on December 20, 2007.

[21] *Id.*

[22] Permittee Reply brief at 3.

new air pollution source in their community, which the Air Pollution Control Act gives them a right to challenge.

We enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES MATUSINSKI AND FRANK KRANTZ	:	
	:	
v.	:	**EHB Docket No. 2007-278-MG**
	:	**(Consolidated with 2007-279-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NORTHEAST ETHANOL & RENEWABLE RESOURCES, LTD, Permittee	:	

ORDER

AND NOW, this 12th day of September, 2008, upon consideration of the motions for summary judgment filed in the above-captioned appeals, the motions are GRANTED. The appeals of James Matusinski and Frank Krantz are DISMISSED.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: September 12, 2008

c: **DEP Bureau of Litigation**
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DENNIS S. SABOT SR.	:	
	:	**EHB Docket No. 2007-158-L**
v.	:	**(Consolidated with 2007-255-CP-L)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 12, 2008**

ADJUDICATION (WITHDRAWN UPON RECONSIDERATION)

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses an appeal from a compliance order and assesses a civil penalty of $10,000 for violations of the Dam Safety and Encroachments Act. The defendant, among other things, modified an existing seawall and backfilled a small area containing exceptional value wetlands without a permit. The defendant's obligation to pay the civil penalty is suspended pending compliance with the attached Board Order.

INTRODUCTION

The Department of Environmental Protection (the "Department") issued an order to Dennis S. Sabot ("Sabot") directing him to restore about 0.07 of an acre of wetlands that he had filled on his property on the shore of Canadohta Lake in Bloomfield Township, Crawford County. We docketed Sabot's appeal from that order at EHB Docket No. 2007-158-L. Thereafter, the Department filed a complaint for civil penalties, which we docketed at EHB Docket No. 2007-255-CP-L. We eventually consolidated the two actions.

When Sabot did not answer the complaint, the Department moved for default judgment in the civil penalty action. Sabot did not respond to that motion. We granted the Department's motion. We held that the facts set forth in the Department's complaint were deemed to be admitted and that Sabot's violations were established. We held a hearing to address Sabot's appeal from the administrative order and the amount of civil penalties to be assessed. Although Sabot appeared *pro se* throughout most of these proceedings, he retained an attorney to prepare his post-hearing brief. The matters are now ripe for final adjudication.

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1-693.27, Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17, and the rules and regulations promulgated pursuant to those statutes. (Complaint Paragraph ("Comp. ¶") 1.)

2. Sabot owns property located on Canadohta Lake in Bloomfield Township, Crawford County (the "Site"). (Comp. ¶¶ 3, 4.)

3. When Sabot purchased the property in 1999, most of the site was composed of wetlands. (Comp. ¶ 5; Commonwealth Exhibit ("C.Ex.") 2-A, 2-B, 2-C, 9; Sabot Exhibit ("S.Ex.") 4, 5; Notes of Transcript page ("T.") 60-64, 66, 114-16.)

4. In March 2000, Sabot constructed a new seawall off of a pre-existing wall. He used rip-rap rock-type material to build the wall, and he placed driftwood behind it to keep it in place. Sabot did not have a permit for this activity. (Comp. ¶ 6; T. 8, 12, 14; C.Ex. 1, 2.)

5. On April 11, 2000, the Department issued a notice of violation ("NOV") requesting

Sabot to remove the new seawall and restore the Site. (T. 16; C.Ex. 3.)

6. Sabot completed the removal of the expanded seawall and restoration of the Site by Spring 2001. (Comp. ¶ 7; T. 18.)

7. In March 2002, the Crawford County Conservation District issued a general permit to Sabot for a boat dock extending from his property into the lake. (T. 49, 51, 113-13; C.Ex. 7.)

8. On November 22, 2004, the Department responded to a complaint that Sabot was building an addition to the seawall. (T. 40.) The inspection revealed that Sabot had again built up the seawall and again placed fill in the area that was previously restored in 2001. Sabot did not have a permit to perform this work. (Comp. ¶ 8; T. 42, 149, 155; C.Ex. 4-D, 4-F, 4-M, 4-N, 5-A.)

9. On December 9, 2004, the Department issued another NOV to Sabot requesting that he restore the Site. (Comp. ¶ 9; T. 43; C.Ex. 5-B.)

10. The Department inspected the Site again in February 2007 and discovered that Sabot had conducted additional encroachment activity by adding additional stones behind the seawall, and that he had not restored the Site. (Comp. ¶ 11; T. 46-48; C.Ex. 4-D.)

11. The Department returned to the Site on April 2, 2007 and observed additional unpermitted encroachments. (T. 48.) These included a mooring post (I-beam) for Sabot's boat, more bricks behind the sea wall, and tires, plastic and a pallet placed under Sabot's dock. (T. 48-49; C.Ex. 4-L, 4-M.)

12. On April 20, 2007, the Department issued its third NOV to Sabot, indicating that he was still encroaching within a wetland without a permit. (Comp. ¶ 12; T. 54; C.Ex. 8-A, 8-B.) The NOV included a suggested restoration plan the Department prepared as a result of the April 2, 2007 inspection. (T. 58.)

13. Sabot did not restore the Site in accordance with the restoration plan. (T. 58.)

14. On May 22, 2007, the Department issued the order that is the subject of this appeal (the "Order") requiring Sabot to restore the Site. (Comp. ¶ 13; T. 58; C.Ex. 9.)

15. The Order required Sabot to cease and desist all filling of the wetlands and construction of water obstructions, submit a site restoration plan (including a revegetation plan), implement the plan upon Departmental approval, and submit a site restoration report and annual monitoring reports until the Site was shown to be successfully revegetated. (T. 59; C.Ex. 9.) As of the date of the hearing, Sabot has not done any restoration work and he has otherwise failed to comply with the Order. (Comp. ¶ 13; T. 59; C.Ex. 4-O, 4-P.)

16. The Site may be substantially restored by removing the unpermitted fill and materials from the Site and revegetating the area with wetland plants. (T. 66-70.)

17. The restoration plans attached to the Department's NOV's are conceptual and suggestive only; Sabot is responsible for submitting his own restoration plan. (T. 43, 58; C.Ex. 9.)

18. It is possible that a restoration plan could be approved that allows continued access to Sabot's dock. (T. 92; C.Ex. 5-A.)

19. Sabot's violations of the law have been willful. He has repeatedly and despite warnings caused extensive, long-lasting, albeit reparable, damage to a relatively small area of exceptional wetlands. He has been and remains uncooperative. (T. 121-39.) The Department has incurred considerable costs in enforcing the law against Sabot, and Sabot has enjoyed considerable cost savings by failing to obtain the necessary permits and/or restoring the Site in a timely manner. (T. 135-39; C.Ex. 11, 12.)

DISCUSSION

The Administrative Order

In our Opinion and Order granting the Department's unopposed motion for default judgment on the Complaint, we held that all of the material facts in the Complaint were admitted and that Sabot had, based upon those facts, violated the Dam Safety Act. The material facts and the violations of the Dam Safety Act set forth in the Complaint include the same material facts and violations that are the basis for the Order. Accordingly, the facts supporting the Order are beyond dispute at this point, and Sabot concedes as much in his post-hearing brief. (Brief pp. 6-10.)

Sabot, however, argues that he retains the ability to contest the *reasonableness* of the Order notwithstanding his default on the facts, and on that point he is entirely correct. In order to prevail in an appeal from an order, the Department bears the burden of proving by a preponderance of the evidence that (1) the facts support the order, (2) the order is authorized by law, and (3) the order constitutes a reasonable exercise of the Department's discretion. *Schaffer v. DEP*, 2006 EHB 1013, 1025; *Rockwood Borough v. DEP*, 2005 EHB 376, 384; *Strubinger v. DEP*, 2003 EHB 247, 252-53. In other words, even if an order is supported by the facts, authorized and otherwise lawful, this Board must still decide whether it embodies a reasonable exercise of discretion.

Here, the Department's Order is entirely reasonable. We fail to see how the Department's action could be considered unreasonable. Sabot complains that the Order necessarily deprives Sabot of all access to his dock, but we do not interpret the Order that way. The so-called restoration plans attached to the Department's NOVs were conceptual and suggestive only. Sabot is responsible for designing his own plan. Walkways and access ramps are not necessarily incompatible with wetlands, and we fail to see why a reasonable accommodation cannot be designed at this Site. We

discern nothing unreasonable in the Department's Order.

The Civil Penalty

The Board's role in a civil penalty complaint case is to make an independent assessment of the appropriate penalty amount. *DEP v. Angino*, 2007 EHB 175, 190-91, *aff'd*, No. 664 C.D. 2007 (Pa. Cmwlth., June 26, 2008). Although the Department makes a recommendation as to what it thinks the amount should be, the Department's suggestion is purely advisory. *Id.* at 191; *DEP v. Leeward Construction*, 2001 EHB 870, 885-86, *aff'd*, 821 A.2d 145 (Pa. Cmwlth. 2003). In determining the penalty amount pursuant to the Dam Safety Act, the Board considers the willfulness of the violation, damage or injury to the waters of the Commonwealth, cost of restoration, the cost to the Commonwealth of enforcing the provisions of the Dam Safety Act against such person, and other relevant factors. 32 P.S. § 693.21. The deterrent value of the penalty is also a relevant factor. *DEP v. Angino*, 2007 EHB at 209.

An automatonic application of the statutory criteria in this matter could quite easily result in a civil penalty in the range of the $40,000 requested by the Department. Sabot has willfully violated the law and steadfastly refused to make things right. Sabot's stubbornness has resulted in cost savings to himself, excessive enforcement costs to the Department, and an unsuccessful end to numerous settlement talks. There is no doubt that he should be penalized if he continues with this course of conduct.

Although Sabot's obstinate behavior obviously engenders frustration on the part of all concerned, and the Department cannot be faulted for enforcing the law, a sense of proportionality must ultimately prevail. Sabot affected less than a tenth of an acre of wetlands. The damage caused by Sabot is confined and reparable, and reasonable accommodation will allow the continued use of

both a dock and the restoration of the natural wetlands that existed before Sabot's destructive measures. The most important thing is that the Site be restored.

Accordingly, we believe that Sabot should be given one last chance to come into compliance. Although we assess a civil penalty of $10,000, we will suspend Sabot's obligation to pay the penalty if he complies with the Order that follows this Adjudication.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this complaint. 32 P.S. § 693.21.

2. The modification of the seawall and addition of fill on Sabot's property constitute "water obstructions" as that term is defined in the Dam Safety and Encroachments Act. 32 P.S. § 693.3.

3. 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.

4. The Department has the authority to issue orders that are necessary to aid in the enforcement of the Dam Safety and Encroachments Act. 32 P.S. § 693.20

5. The Department's May 22, 2007 order was reasonable.

6. Pursuant to Section 21 of the Dam Safety and Encroachments Act, 32 P.S. § 693.21, Sabot's violations, as described herein, subject him to the assessment of civil penalties of up to $10,000 per violation, plus $500 for each day of continued violation.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DENNIS S. SABOT SR.	:	
	:	**EHB Docket No. 2007-158-L**
v.	:	**(Consolidated with 2007-255-CP-L)**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW, this 12th day September, 2008, it is hereby ordered as follows:

1. Sabot's appeal from the Order (2007-158-L) is dismissed.

2. Sabot is hereby assessed a civil penalty of $10,000. Sabot's obligation to pay the civil penalty is **suspended** pending compliance with the following schedule:

   a. Sabot shall submit an acceptable restoration plan to the Department on or before October 14, 2008. The plan may allow for limited, reasonable access to Sabot's dock;

   b. The Department shall act upon the restoration plan within 20 days;

   c. Sabot shall submit a site restoration report to the Department in accordance with Paragraph 3 of the Order within 180 days of the Department's approval of his restoration plan.

3. Within 14 days of the site restoration report, the Department shall report to the Board whether it is satisfied with the restoration project. If the Department submits a report that it is not satisfied, Sabot shall have 14 days to submit a response. The Board will then decide whether there has been adequate compliance with this Order.

4. If Sabot fails to timely comply with any one of the deadlines set forth in paragraph 2 of this Order, the civil penalty shall become due and payable immediately and without further notice. The Board will, if appropriate, issue an order finalizing the civil penalty.

5. Jurisdiction is retained.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: September 12, 2008

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

UPPER GWYNEDD TOWNSHIP	:	
	:	
v.	:	
	:	**EHB Docket No. 2007-124-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HORGAN RECYCLING, INC., Permittee	:	**Issued: September 12, 2008**

OPINION AND ORDER ON MOTION TO HAVE APPEAL MARKED WITHDRAWN WITH PREJUDICE

By Bernard A. Labuskes, Jr., Judge

Synopsis

In accordance with the Board's revised procedural rules, the Board denies a motion to mark an appeal as withdrawn "with prejudice."

OPINION

Upper Gwynedd Township (the "Township") filed this appeal from the Department of Environmental Protection's (the "Department's") issuance to Horgan Recycling, Inc. ("Horgan") of an air quality plan approval. The Township withdrew its appeal on August 4, 2008.[1] We issued an Order on August 5 stating: "The appeal in the above matter having been withdrawn, the docket will be marked closed and discontinued." Horgan has now filed a motion asking us to issue a new order specifying that the appeal is withdrawn "with prejudice." The Department

[1] Horgan incorrectly asserts that a party must state its reasons for withdrawing its appeal. Appeals before this Board ordinarily may be withdrawn by praecipe for any reason or no reason at all.

concurred in the motion. The Township opposes it.

This Board's prior rule codified at 25 Pa. Code §1021.120(b) contained a default presumption that any withdrawn appeal was withdrawn with prejudice unless otherwise indicated by the Board: "When a proceeding is withdrawn prior to adjudication, withdrawal shall be with prejudice as to all matters which have proceeded the action unless otherwise indicated by the Board." That approach was replaced in 2002 by our current rule codified at 25 Pa. Code §1021.141(a)(1). Under the new rule, the Board no longer marks an appeal as withdrawn "with prejudice." The Comment which accompanies the new rule explains: "The prior rule at §1021.120(b) authorizing dismissal with and without prejudice was deleted because the Board thought it more appropriate to determine this matter by case law rather than by rule."

Horgan would have us disregard the clear meaning and intent of the new rule because "this entire proceeding will have been a wasteful travesty" if we do not issue an order stating that it is withdrawn "with prejudice." Horgan does not explain what it thinks the term "with prejudice" means, and it does not explain why it thinks "this entire proceeding will have been a wasteful travesty." Apparently, Horgan believes or at least suspects that our routine dismissal order in this appeal will not support a bar based upon administrative finality in any future appeals unless we add the words "with prejudice" to the order.

Horgan's failure to explain why marking the appeal "dismissed with prejudice" makes any difference is quite telling. The reason that the Board no longer marks appeals as withdrawn "with prejudice" is that nobody was quite sure what the phrase meant in the context of a voluntary withdrawal. The phrase did not seem to be directed at the right to file another appeal from the same Departmental action within the Board's short 30-day appeal period because the time for refiling an appeal from the same Departmental action has long since expired in most withdrawal

situations. Therefore, the term presumably had something to do with the application of administrative finality in future appeals that are somehow alleged to be related to the appeal that is being withdrawn. Assuming that to be the case, the Board upon the recommendation of the Rules Committee determined that matters of administrative finality would be better and more appropriately addressed on a case-by-case basis in the later appeals, rather than attempting to legislate the issue in advance by a one-size-fits-all rule.[2]

There is no conceivable reason why we would want to disregard our considered rule change at Horgan's behest. To the contrary, application of the new approach unequivocally embodied in our rule makes perfect sense in this case. The extent to which anything that transpired in this appeal has any effect in any future appeal will be decided in that future appeal, not here.

Accordingly, we issue the Order that follows.

[2] We will continue to honor and encourage settlements wherein the parties *mutually* agree that the appeal is withdrawn "without prejudice." We take such settlements to mean that a party may not assert administrative finality as a defense in future proceedings alleged to be related to the withdrawn appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UPPER GWYNEDD TOWNSHIP	:	
	:	
v.	:	
	:	**EHB Docket No. 2007-124-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HORGAN RECYCLING, INC., Permittee	:	

ORDER

AND NOW, this 12th day of September, 2008, Horgan Recycling's motion to have its appeal marked withdrawn with prejudice is **denied**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: September 12, 2008

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SUSAN FOX and JEFF VAN VOORHIS, et al.	:	
	:	**Docket No. 2007-280-C**
	:	**(Cons. w/ 2007-283-C,**
	:	**2007-284-C, 2007-289-C,**
v.	:	**2008-003-C, 2008-013-C,**
	:	**2008-015-C, 2008-023-C,**
	:	**2008-031-C, and 2008-032-C)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and SYNAGRO	:	**Issued: September 17, 2008**
MID-ATLANTIC, INC., Permittee	:	

OPINION AND ORDER
ON PERMITTEE'S MOTION TO DISMISS

By Michelle A. Coleman, Judge

Synopsis:

The Board denies Permittee's motion to dismiss. Pursuant to Department regulations, a party intending to spread sewage sludge must provide at least 30 days notice to adjacent landowners prior to the first land application of sewage sludge. In reviewing the parties' submissions, in a light most favorable to the nonmoving party, the Board finds that a genuine issue remains as to whether the Appellants were provided notice, thereby possibly depriving Appellants' rights to due process.

Opinion

Factual Background

Before the Board is Synagro Mid-Atlantic, Inc.'s (Synagro or Permittee) motion to dismiss the ten consolidated appeals for lack of jurisdiction. The Department joins Synagro's motion. After review of the submissions by both Synagro and the Appellants, the Board questions whether the Appellants were afforded their right to due process.

Factual Background

Synagro is a biosolids and residual management company located in Whiteford, Maryland. The Appellants are landowners adjacent to agricultural land owned by George Phillips (Phillips Farm) located in Shrewsbury Township, York County. Synagro alleges that on August 24, 2005 it submitted to the Department, York County Conservation District, Shrewsbury Township Supervisors and the adjacent landowners a thirty day notice of first land application of non-exceptional quality and exceptional quality biosolids to be applied to the Phillips Farm. Synagro Memorandum in Support, p. 2-3, ¶ 3. Synagro also alleges that after the Department's comments and Synagro's responses, including a site inspection conducted by the Department, DEP issued a letter on November 23, 2005 approving general permits for the use of twenty nine sources of non-exceptional and exceptional quality biosolids from permitted wastewater treatment facilities. Synagro Memorandum in Support, p. 3, ¶¶ 5-8. The Department's approval was published in the *Pennsylvania Bulletin* on December 10, 2005. No appeals were filed objecting to the Department's approval.

On November 6, 2007, Synagro sent a letter notifying the Department and adjacent landowners that it intended to apply biosolids from two additional permitted wastewater treatment facilities to the Phillips Farm: New Oxford Municipal Authority WWTP and New

Freedom Borough Authority WWTP. Beginning December 2007 through February 2008, the Board received letters from ten individual appellants objecting to the use of the biosolids at the Phillips Farm. On March 12, 2008, the Board consolidated the individual appeals.

This motion to dismiss was filed by Synagro on July 31, 2008 arguing that the consolidated appeals fail to appeal a DEP action. Additionally, Synagro argues that these appeals should be dismissed as untimely since the Appellants are objecting to the general permits issued in December 2005.

Standard of Review

The standard of review for motions to dismiss is well established by the Board. Accordingly, "[t]he Board evaluates motions to dismiss in the light most favorable to the non-moving party. A motion to dismiss may only be granted where there are clearly no material factual disputes and the moving party is entitled to judgment as a matter of law." *Neville Chemical Co. v. DEP,* 2003 EHB 530, 531 (citations omitted); *see also Cooley v. DEP,* 2004 EHB 554, 558. "As a matter of practice, when a motion to dismiss puts the Board's jurisdiction at issue the Board has permitted the motion to be determined on undisputed facts outside those stated in the notice of appeal." *Barra et al. v. DEP,* 2004 EHB 276, 281. Based on that standard discussed above, we are unable to grant the Permittee's motion.

Discussion

Chapter 271 of the Department's regulations govern the use of sewage sludge for beneficial use. The general operating requirements are contained in 25 Pa. Code § 271.913 which includes the notification requirement to adjacent landowners prior to land application of sewage sludge. Specifically, it provides:

(g) Notification requirements are as follows:

> (1) A person who prepares sewage sludge that is land applied at a location and a person who land applies residential septage at a location for agricultural, forest or land reclamation purposes shall send or otherwise provide written notification to the adjacent landowner, the county conservation district and the Department at least 30 days prior to the first application of the sewage sludge at that location. The notification shall:
>
> (i) Include a brief description of the operation, any site restrictions, the name of the person land applying the sewage sludge and the applicable permit number.
>
> (ii) Be sent by personal delivery or first class mail and, for an adjacent landowner, shall also be given by posting at the property line in a manner sufficient to notify the adjacent landowner of the items in subparagraph (i).

25 Pa. Code § 271.913 (emphasis added). According to the section above, Synagro was required to provide at least thirty days notice prior to the first application of the sewage sludge. This notification is required to be either done by personal delivery or first class mail, as well as postings at the property. From the material facts provided by Synagro in its motion to dismiss, we are not convinced that sufficient notice was provided to the Appellants at least 30 days prior to first land application.

Synagro's motion states that it sent notice of first land application to neighboring landowners and others pursuant to 25 Pa. Code § 271.913 on August 24, 2005. Synagro Memorandum in Support, p. 2-3, ¶ 3; Synagro Exhibit A. In response to Synagro's statement of material facts the Appellants provide: "Appellants lack the requisite knowledge in order to admit or deny Synagro's . . . material fact contained in paragraph #3. By way of further response, Appellants admit the existence of Synagro's 30 day Notice of First Land Application (as identified as Exhibit 'A' in Synagro's Motion.)" Appellant's Memorandum in Response, ¶ 3. The Appellants' response disputes Synagro's contention that adjacent landowners were put on notice of first land application of sewage sludge, thereby raising a genuine issue of material fact.

In trying to determine whether notice was provided to the Appellants, we turn to Synagro's Exhibit A. Exhibit A contains four notification letters, each carbon copies of the other, dated August 24, 2005. The first letter in Exhibit A is addressed to Thomas Sweeney, an employee with DEP's Water Management Program. The second letter is addressed to Mark Flaharty at the York County Conservation District. The third letter is addressed to Shrewsbury Township Supervisors. The last letter is simply the form letter of the other letters that reads:

> <<FirstName>> <<LastName>>
> <<Address1>>
> <<Address2>>
>
> Dear Mr. <<LastName>>,
>
> . . . .

Synagro's Exhibit A. In Exhibit A there are no copies of the letter addressed to any of the Appellants or other adjacent landowners. Thus, we have no indication that the Appellants were in receipt of this August 24, 2005 letter providing notice of first land application.

In deciding a motion to dismiss, we must look at the motion in the light most favorable to the non-moving party. The facts before us include: a statement by Synagro that a notification letter was sent to the adjacent landowners on or about August 24, 2005; denial by the Appellants of Synagro's allegation that a notification letter was sent to the them; a response by the Appellants that they are aware of the existence of the letter as it is attached as an exhibit to the pending motion; and Synagro's exhibit that does not provide any support that a letter was actually sent to the Appellants. Taking this into account, we determine that an issue remains as to whether notice, pursuant to Department regulations, was ever provided to the adjacent landowners. As a matter of law, the Appellants are entitled to notice prior to spreading of sewage sludge to the Phillips Farm, without this notice the Appellants are deprived of their right

to due process. We have nothing in front of us at this time to suggest that sufficient notice, according section 271.913, was provided. Therefore, a dispute of genuine issue remains and we must dismiss Synagro's motion to dismiss.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SUSAN FOX and JEFF VAN VOORHIS, et al.	:	
	:	**Docket No. 2007-280-C**
	:	**(Cons. w/ 2007-283-C, 2007-284-C,**
v.	:	**2007-289-C, 2008-003-C,**
	:	**2008-013-C, 2008-015-C,**
	:	**2008-023-C, 2008-031-C,**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 2008-032-C)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and SYNAGRO	:	
MID-ATLANTIC, INC., Permittee	:	

ORDER

AND NOW, this 17th day of September, 2008 upon consideration of Synagro Mid-Atlantic, Inc.'s motion to dismiss the appeals in the above-captioned matter is hereby **DENIED.**

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Judge

DATED: September 17, 2008

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

HUBERT J. and BARBARA L. BREWSTER and HIGHWAY MATERIALS, INC.	:	
v.	:	**EHB Docket No. 2008-196C**
	:	**(Consolidated w/ 2008-211-C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 18, 2008**

OPINION AND ORDER
ON PETITION FOR SUPERSEDEAS

By Michelle A. Coleman, Judge

Synopsis:

Highway Materials argues that the Board does not have jurisdiction, and, therefore cannot consider the supersedeas petition of the Department's June 2, 2008 letter allowing blasting to occur within 25 feet of the Brewster's property line. The Board finds that we do have jurisdiction because the Department's regulations and, in this matter, the Noncoal Surface Mining Conservation and Reclamation Act preempt the local ordinance allowing blasting in such a close proximity to the Brewster's residence. We supersede the Department's June 2, 2008 letter.

Opinion

The Appellants, Hubert J. Brewster and Barbara L. Brewster (Brewsters or Petitioners) reside adjacent to Perkiomenville Quarry owned and operated by Highway Materials, Inc (Highway Materials). The Brewsters filed their appeal on June 13, 2008 objecting to the

Department of Environmental Protection's (DEP or Department) June 2, 2008 letter approving the Quarry's Blast Plan of May 28, 2008. Highway Materials filed an appeal on June 25, 2008 also objecting to the June 2, 2008 letter. These two appeals were consolidated by the Board on July 10, 2008.

Prior to the above consolidated appeals being filed, Highway Materials filed a petition for preliminary injunction to the Court of Common Pleas of Montgomery County. The Court, relying on local zoning, issued an order on May 23, 2008 permitting blasting within 25 feet of the Brewster's property and directing the Brewsters to refrain from occupying certain areas of their property during blasting. Petition for Supersedeas, ¶ 13. This order by the Court of Common Pleas is on appeal to the Superior Court. *Id.* at ¶ 14.

On June 26, 2008, the Brewsters filed a petition for supersedeas with the Board requesting that the Board supersede the Department's decision to allow Highway Materials to blast and surface mine pursuant to the June 2, 2008 letter. The Brewsters argue that the Department does not have authority to issue the June 2 letter and as a result will cause irreparable harm to the Brewsters. Petition for Supersedeas, ¶ 32. A supersedeas hearing was held on July 17, 2008 in Norristown, Pennsylvania before the Honorable Michelle A. Coleman. An order denying the petition for supersedeas was issued on July 24, 2008, however, after further consideration, the Board now grants the supersedeas. This Opinion follows:

There seems to be one issue on which all the parties agree: Marlborough Township allows blasting within 25 feet of a property line. (N.T. 51). [1] How each party has reacted to this fact is the basis of this consolidated case. While no party has raised the blasting ordinance as a specific issue, the appeal by the Brewsters and the subsequent appeal by Highway Materials are each brought in opposition to the June 2, 2008 letter.

[1] Citations to the transcript will be designated as "N.T.".

The Brewsters properly took the issue of the inadequacy of the 25 foot setback to the Montgomery County Court of Common Pleas. In the interim, DEP issued modifications to Highway Material's blasting permit which were embodied in the June 2, 2008 letter. The modifications are a direct result of the decision from the Montgomery County Court of Common Pleas allowing blasting within 25 feet of the Brewster's property and placing restrictions on the Brewster's behavior during blasting. DEP also required more restrictions on how and when the blasting could occur. However, the Brewsters contend that these restrictions are not enough to protect them from harm of dust and dirt and the inconvenience of having to leave their home while blasting is taking place.

Arguments made by the Brewsters at the supersedeas hearing seem to suggest that DEP should impose setbacks on Highway Materials and overrule any municipal ordinance. The Noncoal Surface Mining Conservation and Reclamation Act provides,

> Except with respect to ordinances adopted pursuant to the act of July 31, 1968 (P.L. 805, No. 247) known as the Pennsylvania Municipalities Planning Code, all local ordinances and enactments purporting to regulate surface mining are hereby superseded. The Commonwealth by this enactment hereby preempts the regulation of surface mining as herein defined.

52 P.S. § 3316. Thus, based on that section of the Act the setbacks imposed on Highway Materials fall under the Department's authority. In *Fontaine v. DEP*, it was stated that,

> [t]his Board repeatedly has held that it does not have jurisdiction to consider local zoning ordinances . . . and that the Department's permitting decisions are not required to take into account local zoning. *Hanover Twp. v. DER*, 1992 EHB 119. In addition, the issuance of a permit by DEP does not in any way infringe on the exercise of the township's zoning powers.

1996 EHB 1333, 1353; *see also Hanover Twp. v. DER*, 1992 EHB 119, 121 (citing *Borough of Taylor v. DER,* 1998 EHB 237, the Board held that "[w]hile issuance of a permit for the

operation of a . . . facility does not excuse the permittee from complying with local zoning ordinances, that is a separate matter from DER's review under [environmental statutes].). Additionally, the Commonwealth Court has held that a township's blasting ordinance was preempted by the Non-Coal Surface Mining Conservation and Reclamation Act. *Tinicum Twp. v. Del. Valley Concrete, Inc.*, 812 A.2d 758 (Pa. Commw. 2002).

Consistent with *Fontaine*, we are not considering any local zoning ordinance in this matter, nor have any of the parties provided a specific reference to the local ordinance. What is most important here is the language of Section 3316 and the fact that the Department's regulations preempt local zoning. There is no indication that the Court of Common Pleas considered the Department's regulations, nor was the Department a party to that action. Independent of any local zoning ordinance and Section 3316, we find that the Department does have authority to impose setback limitations on the blasting by Highway Materials and that we have jurisdiction over this appeal. Disposing of that issue leads us to the merits of the supersedeas.

In order for the Board to grant a supersedeas, the Board's rules provide that factors to be considered include: irreparable harm to the petitioner, likelihood of the petitioner to prevail on the merits, and the likelihood of injury to the public or other parties. 35 P.S. § 7514(d)(1), (2); 25 Pa. Code § 1021.63(a); *Tinicum Township v. DEP*, 2002 EHB 822. The Board assesses the supersedeas by balancing the factors and the interests of the parties and public. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797.

The Department's letter, under appeal here, allows the blasting to occur within 25 feet of the Brewster's property line and within 300 feet of the Brewster's residence. The Brewster's primary argument in this matter is that blasting by Highway Materials is too close to the

Brewster's property on which a house, barn and shed now stand. The people and animals, the Brewsters contend, are subjected to dust and dirt which blow into the property after blasting. (N.T. 41)

Highway Materials contends that the only issue in this case is whether Highway Materials current blasting is a violation of any ordinance, Department regulation or statute. The Department's counterargument is that it has inspected and reviewed both the quarry and its operations. The quarry's permit has been reviewed according to both DEP regulations and the Order of the Court of Common Pleas. Where DEP thought that corrections or changes would benefit the operations of the quarry or safety of the Brewsters, these changes were made.

The Brewsters argue that less damage would be done if the blasting area setbacks in DEP regulations were adhered to by the Department. According to Mr. Brewster's testimony at the hearing he stated,

> When they're getting ready to blast, I have to leave the property and stay 300-foot away. I leave part of the house to stay back until they can blast. I know my house is 250-foot from the property line and that another 50-foot would be there. So, basically, they're allowed to blast within 225 feet, according to the Judge's order, and the DEP regulations is 300-foot.

N.T. 29. The Department regulations provide that,

> A person may not conduct noncoal surface mining activities, other than borrow pits for highway construction purposes, as follows:
>
> . . .
>
> (2) Within 300 feet (91.44 meters) of an occupied dwelling house or commercial or industrial building, unless released by the owner thereof.

25 Pa. Code § 504.

Considering the fact that when blasting is occurring within 25 feet of the property line the

Brewsters must leave part of their house because their house is 250 feet from where blasting is allowed to occur. In essence, blasting is occurring less than 300 feet from their residence, in violation of the above cited Department regulation.

When reviewing the factor of the likelihood of the petitioner to prevail on the merits, we determine that this factor heavily outweighs the other two factors to be considered in this matter. From first blush, it appears that the Department has abused its discretion when issuing the June 2, 2008 letter consistent with the common pleas court order, allowing blasting to occur within 25 feet of the Brewster property line.

The other two factors are not as convincing, but we do find some support that there is a possibility of irreparable harm. The Brewsters argue that they are harmed by dust, dirt and the inconvenience of having to leave their home. However, the evidence presented at the hearing in support of these arguments was not enough to show irreparable harm. The Department's witness, blasting expert, Richard Lemkie, who was consulted on the plan and the decision by the Department to add specific conditions for different distances, could not guarantee that the blasting, as currently conducted, is completely safe. He stated that the methods used are good, effective and up-to-date, but could not guarantee safety. (N.T. 266-73) Mr. Lemkie also did not dispute Mr. Brewster's testimony that dust and dirt would be driven onto the Brewster property at times. Mr. Lemkie was a very credible witness. We agree, however, that there are no guarantees in blasting and are not willing to gamble on this issue.

Given the undisputed evidence of fugitive dust entering the property and the Department being unable to guarantee complete safety of the blasting conditions, the Board finds that there may be irreparable harm and the possibility of injury to the public. Alone, these factors would not tip the scale in the Brewsters' favor. However, these two factors coupled with the fact that

blasting is occurring so close to the Brewsters' residence, in violation of the Department's regulations, is enough for us to supersede the letter of June 2, 2008. We, therefore enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HUBERT J. and BARBARA L. BREWSTER and HIGHWAY MATERIALS, INC.	:	
v.	:	**EHB Docket No. 2008-196C**
	:	**(Consolidated w/ 2008-211-C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 18th day of September 2008, upon consideration of Petition for Supersedeas and subsequent hearing, IT IS ORDERED as follows:

1.) The Order issued July 24, 2008 denying the supersedeas is withdrawn and this Order shall be issued in its place.

2.) The Petitioner's request to supersede the Department's June 2, 2008 letter is **granted**.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Judge

DATED: September 18, 2008

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

EMERALD COAL RESOURCES, LP	:	
	:	
v.	:	
	:	**EHB Docket No. 2006-165-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SAMUEL R. BARCLAY, Recipient	:	**Issued: October 1, 2008**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board rescinds the registration of a gas well because the Department improperly registered it after the deadline for registering wells had passed under the terms of the Oil and Gas Act.

Introduction

We issued a Partial Adjudication in this appeal on June 17, 2008, in which we held that Emerald Coal Resources, LP ("Emerald") filed this appeal in a timely manner. We directed the parties to submit post-hearing briefs on the merits, and the matter is now ripe for final adjudication.

FINDINGS OF FACT

Findings From Our Partial Adjudication

1. The Department of Environmental Protection (the "Department") is the agency

with the duty and authority to administer and enforce the Oil and Gas Act, 58 P.S. §§ 601.101 – 601.605; the Coal and Gas Resource Coordination Act, 58 P.S. §§ 501– 518; and Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17; and the rules and regulations promulgated under those statutes.

2. Samuel R. Barclay ("Barclay") is an individual who owns and resides on roughly 60 acres in Whitely Township, Greene County. (Stipulation.)

3. In 1975 Barclay connected an unused gas well located on his property (the "Well" or the "Barclay Well") to his residence as a fuel source for home heating and other domestic purposes. (Stipulation.)

4. The Well was drilled in the early 1900s. (Stipulation.)

5. From the time he connected the Well to his residence until the commencement of activities to plug the Well in 2006, Barclay used the gas from the Well for his residential heating and energy needs. (Board Exhibit ("B. Ex.") 1.)

6. Emerald is a Delaware limited partnership in the business of mining coal by the underground method in Pennsylvania. (Stipulation.)

7. Emerald leases from Pennsylvania Land Holdings Corporation, its affiliate, the coal comprising the Pittsburgh seam of coal that underlies the Barclay property. (Stipulation.)

8. The Oil and Gas Act, 58 P.S. §§ 601.101–601.605, is designed to cover the Department's responsibility for oil and gas wells from cradle to grave. (Notes of Transcript page ("T.") 21.)

9. A person may register a gas well with the Department as either an operator or a surface property owner. (T. 26-27.)

10. The purpose behind registering wells is to have an inventory of wells and to make

sure that the wells are operated in compliance with the Oil and Gas Act. (T. 21, 24, 28, 31, 82.) Additionally, well registrations allow the Department to assign responsibility to registrants for previously unpermitted and unregistered wells because they provide some evidence of ownership or operation. (T. 28, 73, 75.)

11. The Department only registers wells that have not been previously registered or permitted. (T. 21.)

12. As long as a well has not been previously registered or permitted, the Department will register the well. (T. 86.)

13. The Department does not register wells as "active," "abandoned," "plugged," or with any other classification. (T. 38-39.) Whether a well is being operated is not relevant to the issue of registration. (T. 39.)

14. Once a well registration form is received, the Department checks its records to determine whether the well had been previously registered or permitted. (T. 32.) If it has not, the Department assigns the well a number using the American Petroleum Institute's numbering system ("API number"). (T. 32.)

15. The Department writes the API number and the well location on the well registration form. (T. 39.) The Department also marks the location of the well on its master maps. (T. 32.)

16. The registration form is then sent back to the registrant with a cover letter with instructions for the registrant to place the API number on the well. (T. 33.)

17. Well registrations are not published in the Pennsylvania Bulletin. (T. 139.)

18. On October 28, 2003, The Department received a well registration form from Barclay for the Barclay Well. (Stipulation; B.Ex. 2; T. 139.)

19. The Well had not been previously permitted or registered. (Stipulation; T. 144.)

20. Barclay identified himself on the well registration form as the operator of the Well and provided information about the Well. He included a $15.00 registration fee with the form that was mailed to the Department. (Stipulation.) Barclay also included a map depicting the location of the well along with the registration form. (T. 139.)

21. Barclay did not supply all the information requested on the well registration form. Barclay placed question marks in the boxes requesting the date drilled, casing record, type and amount of cement, the size, type, setting and depth of packers, and the Well's producing horizons. (B.Ex. 2; T. 140, 149.)

22. By letter dated November 3, 2003 to Barclay, the Department registered the Well by returning the well registration form and map as accepted, stamped, and marked by the Department during processing, and advised Barclay that an API number had been assigned to the Well. (B.Ex. 2.)

23. Prior to registering the Well, the Department did not inspect the Well or inquire into whether the Well was abandoned or was operating as a producing well by Barclay. (Stipulation.)

24. Emerald performed a search of the IRIS network on or about June 2005. IRIS is an online imaging system maintained by the Topographic and Geologic Survey of the Department of Conservation and Natural Resources that stores scanned images of various oil and gas documents, among other things. (T. 37-38.) Emerald viewed the well registration form submitted by Barclay on IRIS, which was marked and stamped by the Department. (Commonwealth Exhibit ("C.Ex.") 1; T. 167.) The only information available on IRIS is an electronic image of the completed registration form. That form does not show on its face

whether a registration has been accepted. (A copy of Barclay's processed well registration form as it appeared on IRIS was attached as Appendix A to our Partial Adjudication.) The Department's November 3, 2003 letter was not posted on IRIS. (T. 37-38, 58, 205.)

25. Emerald did not receive actual notice of the Department's November 3, 2003 letter registering the Well until June 6, 2006. (T. 153, 166, 203, 205; C. Ex. 1.)

Additional Findings

26. The Emerald Mine is an underground bituminous coal mine operated by Emerald. Portions of the mine underlie the Barclay Property. (B.Ex. 3.)

27. Neither Emerald nor Barclay is the owner or lessee of the gas underlying the Well. (T. 216; B.Ex. 1, 7.)

28. In 2002, Emerald received Department approval to expand its underground coal mining activities to areas that included the Barclay property. (T. 170-71; B.Ex. 1.)

29. In 1984 when the Oil and Gas Act was passed, many thousands of oil and gas wells existed in Pennsylvania that had not been previously permitted by the Department. (T. 21.)

30. Between 10,000 and 12,000 wells were registered during the first full year that well registration was authorized. (T. 40.)

31. The Department has registered wells continuously since well registration was authorized in 1984. (T. 40, 111.) The Department, however, now registers only a handful of wells a year. (T. 40, 114; C.Ex. 16.)

32. The Department's registration of wells is a ministerial process that involves no exercise of discretion by the Department. (T. 31-34.)

33. The Department does not inspect wells as part of well registration. (T. 34, 65.)

34. The Department does not check whether or not a well is producing gas or oil as

part of well registration. (T. 30-31.)

35. The Department does not evaluate the ownership rights to the oil or gas underlying a well proposed to be registered as part of the well registration process. (T. 30.)

36. The Department does not notify other parties of a well registration. (T. 30.)

37. As long as a well has not been previously permitted or registered, the Department will register the well, no questions asked. (T. 30-31, 86.)

38. Barclay's submission of the one-page well registration form, a map identifying the location of the Well, and the $15.00 registration fee satisfied the requirements for well registration. (T. 28, 33, 223.)

39. Emerald sued Barclay in the Court of Common Pleas of Greene County because, instead of agreeing to plug the Well, Barclay offered to sell the Well to Emerald on the condition that it pay for all costs associated with plugging the Well. (T. 159-160, 186, 196.)

40. The lawsuit was settled, with Barclay agreeing to sign the Notice-of-Intent-to-Plug form that needed to be filed with the Department in advance of plugging the Well and pay Emerald $25,000 towards the cost of plugging the Well. (T. 160, 186-189.)

41. Emerald plugged the Well at a cost of approximately $600,000. (T. 160-62; B.Ex. 11.)

DISCUSSION

Emerald filed this appeal from the Department's registration of the Barclay Well. It argues among other things that the registration must be rescinded because the Department has wrongfully continued to register wells long after the statutory deadline for registration has passed. The Department counters that it may register wells in perpetuity if it so chooses.

Emerald bears the burden of proving that the Department erred. 25 Pa. Code §

1021.122(c)(2). This appeal is a rather unusual instance where the Departmental action under appeal was ministerial. There was no exercise of discretion, and therefore, we do not review for an unreasonable exercise of that discretion. Rather, "if DE[P] acts pursuant to a mandatory provision of a statute or regulation, then the only question before the Board is whether to uphold or vacate DE[P]'s action." *Warren Sand & Gravel Co. v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975).

Mootness

Before turning to the merits, we dispense with the Department's argument that this appeal should be dismissed as moot. As we recently explained in *Ehmann v. DEP*, EHB Docket No. 2007-150-L (Opinion and Order, July 10, 2008),

> [m]ootness is a *prudential* limitation related to justiciability, not jurisdiction. *McCandless v. McCandless Police Officers Ass'n*, 901 A.2d 991, 1002-03 (Pa. 2006); *Dauphin Meadows, Inc. v. DEP*, 2001 EHB 116, 123; *Horsehead Resource Development Co., Inc. v. DEP*, 1998 EHB 1101, 1103-04; *Columbia Gas of Pennsylvania, Inc. v. DEP*, 1996 EHB 1067, 1069. If this Board lacks jurisdiction, it *must* dismiss an appeal. In contrast, where an appeal is moot, the Board has the authority based upon its own measure of prudence to proceed. *Lower Milford Township v. DEP*, 2006 EHB 387, 394-95.

Slip op. at 3.

A matter becomes moot when there is no effective relief that this Board is able to grant. *Commonwealth v. One 1978 Lincoln Mark V*, 415 A.2d 1000 (Pa. Cmwlth. 1980); *Earthmovers Unlimited, Inc. v. DEP*, 2004 EHB 575, 577; *Tinicum Township v. DEP*, 2003 EHB 493, 496. An appeal can become moot at any point in the proceeding when facts change or develop and there is no longer any effective relief available. *Paradise Materials, Inc. v. Paradise Township*, 676 A.2d 1314 (Pa. Cmwlth. 1996.) The Department carries the burden of proving that the appeal is moot. 25 Pa. Code § 1021.122(a); *Rakoci v. DEP*, 2002 EHB 590, 591; *Davison Sand*

& Gravel Co. v. DEP, 1997 EHB 972, 973.

The Department argues that the only relief that was potentially available in this appeal was an order to plug the Barclay Well. Because the Barclay Well has already been plugged and Emerald has developed its mine in the area of the well, the Department continues, there is no effective relief that this Board can grant.

The Department's argument runs counter to the better argument elsewhere in its brief that there is no immediate nexus between well registration and the availability of a plugging order. Whether a well must be plugged turns on whether a well is abandoned, not whether it is registered. 58 P.S. §§ 502, 513(c). Thus, whatever action we take with respect to the Barclay Well's registration has no connection to the plugging of the well. Conversely, the plugging of the well appears to have no impact on its registration. The only relief that was *ever* available in this appeal related to the well's registration, not its operating status. That relief continues to be available so long as the registration remains on the books. There has been no suggestion in this case that Barclay's registration is anything other than extant. Although it has been plugged, it is still a registered well.

It is not unheard of that a plugged well may require further plugging or maintenance over time. (T. 64.) *Cf. Ehmann, supra* (appeal not moot because of continuing obligations associated with an unreclaimed mine); *Concerned Citizens of Ligonier, et al. v. DEP*, 2007 EHB 150, 151 (same). The scant record before us does not allow us to simply assume that there will be no further activity regarding the well or that retaining its status as a registered well will have no ongoing significance. The Department has failed to carry its burden of proof on this point. At a minimum, rescinding the registration will certainly establish that Barclay is no longer authorized to operate or utilize the well or deal with other parties such as Emerald, or parties who may have

a claim to the well, in a capacity as its authorized operator.

Assuming for purposes of argument that this appeal is moot, we nevertheless decline to dismiss it on that basis. Again, as we explained in *Ehmann*,

> [i]t is true that we will often dismiss an appeal when the permit appealed is no longer viable *absent exceptional circumstances. See Gardner v. DEP*, EHB Docket No. 2007-204-L (Opinion, February 25, 2008). Nonexclusive examples of exceptional circumstances include cases where the disputed conduct is of a recurring nature yet likely repeatedly to evade review, where issues of great public importance are involved, or where a party will suffer a detriment without a decision. *Sierra Club v. Pa. Public Utility Commission*, 702 A.2d 1131 (Pa. Cmwlth. 1997), *aff'd*, 731 A.2d 1133, 1134 (Pa. 1999); *Tinicum Township v. DEP*, 2003 EHB 493, 495-96.... Any one criterion may justify retaining jurisdiction. *Sierra Club*, 702 A.2d at 1134.

Slip op. at 4-5.

Here, as we will discuss below, the Department continues to accept well registrations in clear contravention of the law. There are apparently hundreds of unpermitted and unregistered wells across the Commonwealth. The Barclay scenario will certainly be repeated. Emerald has shown that the program is having a significant deleterious impact in regions of the Commonwealth that have both coal and oil or gas resources. The parties and this Board have already devoted substantial resources to this matter. The tension between well registrations and mining operations has largely evaded review for many years, and would have been likely to continue to do so. Whether the Department is exceeding its lawful authority on a programmatic basis across the entire Commonwealth in this era of increasing energy demands is obviously a matter of great public importance. For these reasons, we decline the Department's invitation to dismiss this appeal as moot.

The Authority to Register Wells has Expired

Emerald argues that the Department's authority to register wells expired in 1994.

Emerald is correct. Section 203(a) of the Oil and Gas Act provides in the pertinent part as follows:

> Within one year of the effective date of this amendatory act, every person who was the owner or operator of a well in existence prior to April 18, 1985, which well has not been registered with the department and for which no drilling permit has been issued by the department, shall register such well with the department.

58 P.S. § 601.203(a). Section 203(b), which addresses the Department's implementation of Section 203(a), states:

> The department may extend the one-year time period provided in subsection (a) for good cause shown. **However, such extension shall not exceed a period ending two years from the effective date of this act.** The department may adopt and promulgate guidelines designed to insure a fair implementation of this section which recognizes the practical difficulties of locating unpermitted wells and complying with the reporting requirements of this act.

58 P.S. § 601.203(b) (emphasis added).

"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. § 1921(b). *See also Seneca Landfill, Inc., et al. v. DEP*, 948 A.2d 916, 923 (Pa. Cmwlth. 2008); *Joseph J. Brunner, Inc. v. DEP*, 869 A.2d 1172, 1176 (Pa. Cmwlth.), *pet. allowance of appeal denied*, 884 A.2d 44 (2005); *Eagle Environmental, L.P. v. DEP*, 833 A.2d 805, 808 (Pa. Cmwlth. 2003), *pet. allowance of appeal denied*, 854 A.2d 968 (2004). Here, the legislature could hardly have been more clear: The Department may extend the one-year time period for registering wells; "[h]owever, such extension shall not exceed a period ending two years from the effective date of this act." 58 P.S. § 601.203(b). The effective date of the Act was in 1992. Therefore, the Department's authority to register wells expired in 1994.

The Department argues that there is no plain intention manifested in the Act to "divest"

or "take away" the Department's authority to register wells. This argument is inconsistent with one of the most basic tenets of administrative law; namely, an agency charged with administration of a statute can only act within the express or necessarily implied limits set forth in a statute. *Susquehanna Area Regional Airport Authority v. PUC*, 911 A.2d 612, 617 n.8, (Pa. Cmwlth.), *app. denied*, 923 A.2d 412 (2006). "[A]n administrative body cannot, by mere usage, invest itself with authority or powers not fairly or properly within the legislative grant; it is the law which is to govern rather than departmental opinions of it." *In re Estate of Leitham*, 726 A.2d 1116, 1119 (Pa. Cmwlth. 1999). Thus, we do not examine a statute to assess whether it "divests" the Department of some inherent power that it would otherwise possess. We look to the statute to see whether a power has been expressly or by necessary implication conferred. Here, a power was indeed conferred, but it came equipped with a very clear limit on how long the power was to last. By ignoring the perfectly clear language of Section 203(b), the Department has done nothing less than invest itself with authority and power to accept registrations long after the statutory deadline for doing so has passed. This it cannot do.

The Department has fashioned several other arguments to support its actions but we do not find any of them to be persuasive. The Department argues that the registration deadline "is directed to well owners and operators of existing wells, not to the Department." The Department's argument might have had some merit if Section 203 stopped with Subsection (a), which says within one year of the Act every owner and operator shall register such well. However, Subsection (b) is expressly directed to the Department and no one else: "The *department* may extend the one-year time period provided in subsection (a) for good cause shown. However, such extension shall not exceed a period ending two years from the effective date of this act." 58 P.S. § 601.203(b). Subsection (b) is the legislature speaking directly to the

Department. The Department is the sole focus of Subsection (b), not well registrants.

The Department delves into a semantical discussion of "shall," and argues that "shall" sometimes means "should" where time is not the essence of the statutory provision. The Department relies on *PUSH v. DEP*, 2000 EHB 1309, *aff'd*, 792 A.2d 1 (Pa. Cmwlth. 2001), in which we refused to shut down a large underground mining operation because the operator had failed to submit its renewal application to the Department at least 180 days before the expiration date of its existing permit as required by 25 Pa. Code § 86.55(c) (removal applications "shall be filed with the Department at least 180 days before the expiration date of the particular permit in question"). Unlike Subsection 203(b) of the Oil and Gas Act, however, the mining regulation at issue in *PUSH* did not speak directly to the Department. It did not give the Department the discretion to extend the time period, but then go on to specifically put a limit on the length of that extension. The verb "shall" in the regulation at issue in *PUSH* related directly to the duty to file a renewal application. Here, the operative "shall" relates directly to the Department's right to extend the deadline. It is important to understand that the use of the word "shall" in Subsection 203(b) refers to an entirely separate object or point than the use of "shall" in Subsection 203(a). Subsection (a) addresses the duties of registrants; Subsection (b) speaks directly to the Department. *PUSH* is simply not on point.

Still further, in cases where "shall" has been interpreted to be "directory" as opposed to "mandatory," time was not of the essence. *See, e.g., Delaware County v. DPW*, 383 A.2d 240, 242-43 (Pa. Cmwlth. 1978). Thus, in *PUSH* there was no suggestion that the 180-day requirement, a requirement directed at administrative convenience, was of critical importance to permitting the continued lawful operation of a particular mine. In contrast, time is of the essence in Section 203(b). The section does not relate to an individual operation. The deadline refers

back to the effective date of the statute, not, for example, the date of a particular permit. Section 203 did not create a period of limitation to be applied indefinitely to individual situations over time. Rather, it stated one, specific, across-the-board date (two years from the effective date of the Act). The statute created a state-wide expiration date for an entire program. We cannot agree that timing was a minor concern of the legislature in drafting Section 203(b).

The Department seems to suggest that it has the discretion to accept late well registrations (T. 68), but no discretion to reject a registration once it has been accepted. This position is, to be blunt, nonsensical. If the registration process is ministerial as the Department argues and we agree, there is no room for any discretion. Section 203(b) provided the Department with discretion to extend the registration for good cause shown *within* the two-year period after the effective date of the Act, but not *after* that period. Where, as here, there is no legal authority to act, discretion never comes into play.

The Department's interpretation would render an entire sentence in the Act meaningless. The sentence that reads: "However, such extension shall not exceed a period ending two years from the effective date of this Act" becomes superfluous. This is anathema when it comes to statutory construction. 1 Pa.C.S. § 1922(2) ("the General Assembly intends the entire statute to be effective and certain").

We disagree with the Department's argument that it is necessary to ignore the Oil and Gas Act's clear deadline to avoid absurd results. The Department contends that it must ignore Section 203(b) so that "all of the benefits flowing to an operator of an existing well by being able to lawfully operate the well by registering it" are not lost. (Brief p. 30.) First, where the legislature has spoken, the fact that the Department wishes it were otherwise is irrelevant. Second, it is not clear why the Department cares so deeply about unpermitted operators as

compared to the hundreds of operators who have undergone the scrutiny and expense of permitting. Third, the Department's argument is based upon the unsupported premise that permits are not available for operating wells. It is true that the Act specifies that a permit is required to drill or alter a well, 58 P.S. § 601.201(a), but Section 509 of the Act provides that it is unlawful to "drill, alter, *operate* or *utilize* an oil or gas well" without a "permit *or* registration." 58 P.S. § 601.509 (emphasis added). Similarly the implementing regulation states that a permit is necessary to drill or alter a well, but it also states that a permit, registration, or permit issued under a preexisting statute is necessary to *operate* a well. 25 Pa. Code § 78.11. We see nothing in these provisions to necessarily preclude the issuance of permits for preexisting wells now that the time for the registrations has expired. To the contrary, it would seem to be unreasonable to conclude that the statute and regulations require a permit to operate a well and simultaneously conclude that no such permits are available. Although we are not called upon in this appeal to define the limits of well permitting, if the Department is correct that some old wells may fall through the cracks because neither permits nor registrations are available, that is a problem for the legislature to correct, not us or the Department by disregarding a clear statutory deadline. *See Brunner*, 869 A.2d at 1174-75 (ambiguity can be corrected by the Legislature).

Abandoned wells, of course, may be classified as orphan wells, and the Act expressly states that such classifications are available if a well is not registered in time. 58 P.S. § 601.203(a.1). Indeed, the statutory language creating this option provides further support for our conclusion that the Section 203 registration program was not intended to go on permanently.

Well registration strikes us as roughly akin to an amnesty program. Anyone who owned or operated a well without a permit was given an opportunity to obtain legal authorization to operate the well. It was a tremendous help in locating the thousands of wells that preexisted the

Act's permitting requirements. By authorizing the continued use of the wells without the need to comply with all of the statutory and regulatory permitting requirements by paying fifteen dollars, it provided an incentive to persons associated with those wells to reveal them to the regulators. At the same time, it helped the Department identify owners and operators who could ultimately be held responsible for plugging the wells.[1] There are undoubtedly any number of reasons why it is beneficial to generate the most complete database possible regarding the location of oil and gas wells, and registration provided one of several mechanisms for meeting that objective.

Yet, as Emerald points out, a well registration is far from inconsequential. A well registration constitutes all the authorization that a person needs to operate a well as far as the Department is concerned. 58 P.S. § 601.509; 25 Pa. Code § 78.11. Registration authorizes a person to operate the well indefinitely and without any restrictions, beyond presumably the duty to comply with applicable operating regulations. *E.g.* 25 Pa. Code §§ 78.51-.66. It appears for all intents and purposes to be the same as a permit as it relates to the operation of a well.

Yet, unlike a permit, the registration process, in the Department's words, is a "simple and uncomplicated ministerial process." All that is required to register a well is to provide the operator's name and address, the well's name, a map showing the rough location of the well, and the payment of a small fee. 58 P.S. § 601.203. (T. 26-28, 33, 140.) The Department acknowledges in its post-hearing brief that it has no discretion to reject a registration. (Brief at 22-24.) The Department does little more than apply a rubber stamp--literally--to a one-page registration form. (The stamped Barclay Well form was attached to our Partial Adjudication.)

[1] The Department witnesses who testified that well registration in and of itself allows the Department to hold a person responsible for plugging a well (T. 21, 23) were not entirely accurate as a legal matter. To be more precise, a registration helps the Department *identify* owners and operators, and it serves as an admission that a person believes himself to be an owner or operator, but registration by itself does not actually transform the person into an owner or operator.

The Department does not inspect wells as part of the registration process to determine whether they are safe or otherwise in compliance with regulatory and industry standards. The Department does not concern itself with property rights or with how a registration as a practical matter may affect the rights of others. A well registrant has no need to show that it has a lawful right to use the well. There is ordinarily no notice to neighbors, holders of underground estates, or the public. No consideration is given to nearby wells, water supplies, mines, or anything else for that matter. Registration of wells allows the Department and the operator to skirt some of the provisions in the Oil and Gas Act and other statutes that deal with potentially conflicting interests of mine and well operators. *See, e.g.*, 58 P.S. § 601.202; Coal and Gas Resource Coordination Act, 58 P.S. §§ 501-518. In other words, the well registration program has none of the substantive or procedural safeguards typically associated with modern environmental programs. Safety, property rights, public participation, and regulatory oversight are all irrelevant.[2] We have no difficulty understanding why the legislature put a time limit on registering wells.

Emerald has shown that registrations are so easy and inexpensive to obtain that their availability has encouraged "sharp practices" in the coal fields. The Department has not disputed that these events are occurring. A person who may or may not have a colorable right to use a well registers the well, perhaps when he knows that underground mining is proceeding in his direction. The mine operator gets no notice or opportunity to object to the registration. Although the legal rights associated with a registration may be limited, Emerald has shown that a registration can have significant *practical* impacts. (Findings of Fact 39-41.) We find it difficult

[2] Furthermore, one might also reasonably question the fairness of requiring some operators to go through detailed permitting while allowing some of their competitors who obtain access to a preexisting well to simply register it. Regulations should ordinarily avoid favoritism and create a level playing field. *Shenango Inc. v. DEP*, 2006 EHB 783, *aff'd*, 934 A.2d 135 (Pa. Cmwlth. 2007).

to believe that the legislature intended such a result, particularly when other provisions of the Oil and Gas Act and other statutes such as the Coordination Act envision an orderly, rational coordination of drilling and mining rights.

In sum, we cannot agree with the Department that the Section 203(b) deadline is in any way absurd. To the contrary, it seems perfectly reasonable and justified. The statute is very clear: The ability to register a well expired in 1994. Accordingly, the Department erred by registering the Barclay Well many years after the program expired.

In light of our holding that registration of the Barclay Well was time-barred, we have no need to address the other arguments that Emerald has presented in support of its claim that the registration was improper. Among other things, we need not decide whether the well was an "abandoned well" as that phrase is defined in the Oil and Gas Act, 58 P.S. § 601.103. It follows that we need not decide whether the well, alleged to be "abandoned," should have been plugged.

CONCLUSIONS OF LAW

1. This Board has jurisdiction. 35 P.S. § 7514.

2. Emerald bears the burden of proving that the Department erred in registering the Barclay Well. 25 Pa. Code § 1021.122(c)(2).

3. This appeal is not moot.

4. Even if this appeal were technically moot, the exceptions to the mootness doctrine would justify our review of the Department's action.

5. The Department erred by registering the Barclay Well because the Department's authority to register wells (as opposed to permit wells) expired in 1994.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EMERALD COAL RESOURCES, LP	:	
	:	
v.	:	
	:	**EHB Docket No. 2006-165-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SAMUEL R. BARCLAY, Recipient	:	

ORDER

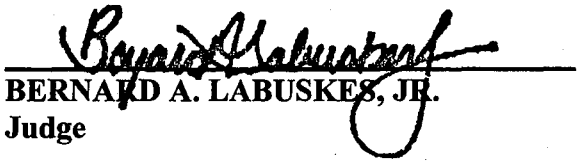
AND NOW, this 1st day of October, 2008, it is hereby ordered that the Department's registration of the Barclay Well is rescinded.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

DATED: October 1, 2008

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

TOLL BROTHERS, INC.	:	
	:	
v.	:	**EHB Docket No. 2007-163-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BUSHKILL TOWNSHIP, Intervenor	:	**Issued: October 1, 2008**

ADJUDICATION

By George J. Miller, Judge

Synopsis

The Board dismisses the appeal of a developer which objected to the Department's refusal to order a municipality to provide public sewers to the developer's proposed residential development. The developer failed to demonstrate that the Department's interpretation of the municipality's official sewage plan was unreasonable or that the Department's conclusion that the municipality's refusal to provide public sewer was consistent with its official sewage plan was otherwise erroneous. Accordingly, the Board finds that the Department's determination that the municipality was properly implementing its official sewage plan was appropriate.

Background

Before the Board is an appeal from the Department's refusal to grant a private request to the Appellant, Toll Brothers. The Appellant sought to compel Bushkill Township, Northampton County, to provide public sewers for a residential development proposed by the Appellant. In the Township's view, the Official Plan provides that the area of the Township where the parcel is

located is designated to be served by on-lot sewage disposal and not public sewers. The Appellant sought relief from the Department, contending that the Township was failing to implement the Official Plan. The Department found that the Township was properly interpreting its sewage facilities plan and denied the Appellant's request. The Appellant filed an appeal with the Board on June 22, 2007, objecting to the Department's action on the grounds that the Department failed to require the Township to implement it sewage facilities plan. The Appellant made no argument that the plan was inadequate to meet its sewage disposal needs.

A hearing was held before the Honorable George J. Miller on May 14, 2008. The parties have submitted post-hearing memoranda which consist of proposed findings of fact and conclusions of law. The record consists of these memoranda, a transcript of 168 pages and 22 exhibits. After full consideration of these materials we make the following:

FINDINGS OF FACT[1]

1. The Department is the agency with the duty and authority to administer and enforce the Pennsylvania Clean Streams Law,[2] the Sewage Facilities Act[3] and the regulations promulgated thereunder.

2. The Appellant, Toll Brothers, Inc., is a residential real estate developer.

3. Bushkill Township is a legally incorporated second class township located in Northampton County, Pennsylvania.

4. The Appellant is the equitable owner of a parcel of land located in the Township that the Appellant intends to develop as a residential subdivision. The development consists of

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[1] The transcript is noted as "N.T.__"; the Appellant's exhibits are defined as "Ex. A-__"; the Township's as "Ex. T-__"; and the Department's as "Ex. DEP-__."

[2] Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001 (Clean Streams Law).

[3] Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20a (Sewage Facilities Act).

30 lots and is located in an area of the Township zoned for high density residential use. (Majewski,[4] N.T. 18; Ex. A- 1)

5. The Township's Official Plan was adopted by the Township in June, 1973. It consists of an "Engineering Study and Feasibility Report" submitted by Gilbert Associates Inc. Although it includes a narrative and some maps, it does not include any map with metes and bounds descriptions of which areas of the Township call for public sewers and which call for on-lot sewage disposal. (Ex. A-3)

6. On October 30, 2006, the Appellant submitted a "planning exemption" to the Township, requesting to be served by public sewers and to be exempt from sewage facilities planning. The Appellant did not submit a planning module to the Township. (N.T. 67; Ex. A-2)

7. In November, 2006, the Appellant submitted a preliminary subdivision plan for the property showing 30 lots to be served by public sewage. (Ex. A-1; Majewski, N.T. 17-18)

8. On November 17, 2006, the Township denied the Appellant's planning exemption because there is no provision for public sewers in the area where the property is located. (Ex. A-6)

9. By letter dated January 4, 2007, the Appellant submitted a private request to the Department which essentially asserted that the Township was not properly implementing its Official Plan and requested, among other things, that the Township be ordered to implement its Plan by allowing public sewer service to the Appellant's property. (Ex. A-7)

10. The request included a letter from the Nazareth Borough Municipal Authority that there was sufficient capacity in the Authority's sewage treatment plant to accommodate the Appellant's proposed subdivision and the property was not in an area of the Township which

[4] James Majewski is a divisional Senior Vice President for the Appellant. (N.T. 16-17).

was covered by an existing franchise agreement. Therefore an additional agreement would have to be executed. (Ex. A-5)

11. After reviewing the request and soliciting comments from relevant agencies, including the Lehigh Valley Planning Commission and the Township, the Department determined that the property was not located within the Official Plan's designated sewer service area and that the Township's denial to provide sewer service to the property was consistent with the Plan. Accordingly, the Department denied the Appellant's private request. (DEP Ex. 11)

12. Larry Turoscy, P.E. testified on behalf of the Appellant. A licensed engineer, he served as the project engineer on the project. (N.T. 30)

13. He largely relied upon the sewage collection map included in the Township's Official Plan and believed that the map demonstrated that the Appellant's parcel was included in the area for public sewer rather than on-lot sewage disposal. (N.T. 42-43)

14. Mr. Turoscy testified that it was his assumption that the property was in an area to be included in a proposed collector sewer line contemplated by the Official Plan. (N.T. 42)

15. However, this line is not directly adjacent to the Appellant's property, but is adjacent to homes on Schoeneck Avenue which existed at the time the Plan was developed. He acknowledged that the collector line would have to be extended to accommodate the Appellant's property. (N.T. 40-42)

16. He also testified that a pump station would be required in order to connect the property to the existing sewer system. (Turoscy, N.T. 49-50)

17. Although he conceded that the narrative portion of the Official Plan described a proposed public sewer system only for "developed" areas of the Township, he did not know what "developed" meant. (N.T. 37, 43)

18. Both Mr. Majewski and Mr. Turoscy admitted that the Township supervisors have consistently interpreted the Official Plan to provide for on-lot sewers for the area of the Township where the Appellant's property is located and not public sewers. (Majewski, N.T. 27-28; Turoscy, N.T. 41)

19. Darryl Fritz is a Sewage Planning Supervisor for the Department. He has worked for the Department since 1980. (N.T. 58-61)

20. He reviewed the Appellant's private request to order the Township to implement its Official Plan. He considered the relevant regulations, especially Section 71.14,[5] comments from the Township, the Appellant and the Lehigh County Planning Commission. He also reviewed the Official Plan and the Township's file with the Department. (N.T.73-74; 94-95)

21. The Township's plan has no map with metes and bounds which clearly identifies which areas of the Township are designated for public sewer and which are designated for on-lot sewage disposal. Although most modern plans are more precise and include such a map, it was not unusual for earlier plans to not include such a map, but rely instead on narrative descriptions. (N.T. 109, 113, 127-28)

22. Accordingly, in order to determine whether the Appellant's property was in an area of the Township designated for public sewers, he had to read what the plan was describing, how the

plan was put together and discern the intent of the plan and how that reflected in the conclusions and

recommendations of the plan. (N.T. 113)

23. Mr. Fritz concluded that the property was not within an area designated for public

[5] 25 Pa. Code § 71.14.

sewers.

24. Read in context, the Plan was clear about sewering "developed" areas within the Village of Cherry Hill, but the "remaining" areas of the Township were not intended for public sewers. If there were new land development, they would have to follow through with a further feasibility study to revise existing plans. (N.T.87-88)

25. In Mr. Fritz's view, "developed" meant existing houses. (N.T. 88-89)

26. Which conclusion was bolstered by the discussion in the Plan concerning federal and state funding programs which would only apply to existing development, and not future development. (N.T. 84-86)

27. The drainage map shows that any sewage plan for the southern portion of the Township should ideally flow by gravity through the developed area. The Appellant's proposal would require construction of a gravity collector sewer. (N.T. 83-84)

28. Additionally, the plan proposes a collection line along Schoeneck Avenue to serve existing development. (Fritz, N.T. 116-17)

29. In Mr. Fritz' view, although the property is admittedly in the vicinity of Schoeneck Avenue, the property was not intended to be served by the proposed collection line because it was not developed at the time the study was drafted. (N.T. 117-18)

OPINION

In this appeal from the Department's denial of the Appellant's private request, it is the Appellant who bears the burden of proof.[6] Accordingly, the Appellant must show by a preponderance of the evidence that the Department improperly denied its request to order the Township to implement its sewage plan by providing public sewers for the Appellant's property

[6] 25 Pa. Code § 1021.122(c).

and entering into a franchise agreement with a neighboring municipality.

Our review is *de novo*.[7] Therefore we may consider not only the evidence reviewed by the Department in making its decision, but also evidence which was presented to the Board at the hearing.[8]

As we analyze the facts of this case, it is important to keep in mind the limits of the challenge raised by the Appellant in making a private request to the Department to order the Township to provide public sewer to the Appellant's property. The *only* argument made by the Appellant is that the Township was not implementing its Official Plan within the meaning of Section 750.5(b) of the Sewage Facilities Act.[9] The Appellant did *not* contend that the plan was inadequate to meet the sewage disposal needs of the proposed development. The Appellant did not argue or present evidence that on-lot sewage disposal was not a feasible method of sewage disposal for the property. Accordingly, the sole question that the Board must answer is whether the Department properly interpreted the Township's Official Plan when it determined that the Appellant's property was not located in an area designated for public sewers, and the Township was therefore properly implementing its Official Plan in refusing the Appellant's request to provide public sewers.

We find that the Department's interpretation of the Township's Official Plan was reasonable. Although something less than "concise," the Plan does describe the area of the Township which is intended for public sewers and which is not. A significant portion of the Plan is devoted to a discussion of the funding programs which were available to the municipality in

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[7] *Pennsylvania Trout v. Department of Environmental Protection,* 863 A.2d 93 (Pa. Cmwlth. 2004); *Browning-Ferris Industries, Inc. v. DEP,* 819 A.2d 148 (Pa. Cmwlth. 2003); *Leatherwood, Inc. v. DEP,* 819 A.2d 604 (Pa. Cmwlth. 2003).

[8] *Pequea Township v. Herr,* 716 A.2d 678 (Pa. Cmwlth.1998).

[9] 35 P.S. § 750.5(b)

1973 under the Federal Water Pollution Control Act, and it is clear that the sewering options were discussed from the that frame of reference.[10] Because those funding programs only applied to projects which would serve properties which were "developed" at the time the Plan was written, it is most likely that the Township did not intend to provide sewers to new developments. Under this scenario, in the vicinity of the Appellant's property, only the developed areas of the "Village of Cherry Hill" and an area along Schoeneck Avenue where there were existing houses, are included in the area designated for public sewers.

The Appellant argues that the term "developed" is not defined by the Township's Plan. This is true. The Department took the term to mean homes which were in existence at the time the Plan was drafted because the Township would not have been able to secure funding for future development under the federal sewer grant program which was in effect at the time. The Appellant has not offered any definition which would include its property within any understanding of "developed." The Appellant offered no evidence that there were any structures or other improvements to the property in 1973, when the Plan was drafted. We fail to comprehend any commonly understood definition of "developed" which would have described this parcel as it existed in 1973.

Next, the Appellant points to other references within the Plan which suggest that the property is meant to be included within the area designated for sewers. Specifically, there are sections of the Plan which refer to the "vicinity of Schoeneck Avenue" and the "southeast section of the Township," which, in the Appellant's view, might be read to include the property. Although these references, read in isolation, may provide a basis for an alternative interpretation of the Plan, this evidence is not sufficient to prove that the Department's interpretation was

[10] See Ex. A-3 at Sections IX.D. and XII.

unreasonable or contrary to any regulation.

The Appellant also argues that, to the extent that the Plan is ambiguous, the Plan is like a zoning ordinance, and must be construed in favor the Appellant.[11] The Appellant offers no legal precedent to support this proposition. The court cases which apply this principle to zoning ordinances are predicated on land use law, and the principle that "the widest use of land is the rule and not the exception, unless the use is specifically restrained in a valid and reasonable exercise of the police power."[12] By contrast, official plans are created by the authority of the Sewage Facilities Act as such an exercise of the Commonwealth's police power in order to protect health and environment.[13] The Department interprets Official Plans based upon the provisions of that Act and the Department's regulations which are promulgated under the authority of the Act. Our review of the Department, in turn, is governed by the Environmental Hearing Board Act.[14] To the extent a regulation may be unclear, we rely upon the Department's interpretation of the regulation, unless it is unreasonable or contrary to the language of the authorizing statute.[15] As we read the sewage facilities regulations, they do not necessarily authorize the Department to construe an "ambiguous" plan in favor of the landowner. Indeed, as a whole, the Sewage Facilities Act might be read to favor municipal interpretation, because it is local municipalities that create official plans which embody local development choices. Further, in this case, the Department did not view the Township's Plan as ambiguous. Rather, it concluded that the Township was properly interpreting its plan to exclude the Appellant's

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[11] *See Tobin v. Radnor Township Bd. of Commissioners*, 597 A.2d 1258 (Pa. Cmwlth. 1991).

[12] *Mt. Laurel Racing Ass'n v. Zoning Hearing Bd.*, 458 A.2d 1043, 1045 (Pa. Cmwlth. 1983).

[13] 35 P.S. § 750.3.

[14] Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7514.

[15] *Department of Environmental Protection v. North American Refractories,* 791 A.2d 461 (Pa. Cmwlth. 2001).

property from the area designated for public sewers based upon the language of the Plan itself, the review of the comments from other local agencies and the Township's consistent historical treatment and interpretation of the Plan. The Department considered each of the factors required by Section 71.14(d) of the regulations.[16] As explained above, we cannot say that the Department's conclusion is unreasonable or contrary to any regulatory provision, nor has the Appellant offered a sufficient basis to impose upon the Township an interpretation of the Plan which is contrary to the weight of the testimony offered at the hearing.

We therefore make the following:

CONCLUSIONS OF LAW

1. The Board's scope of review is *de novo.*

2. The Department properly concluded that the Township's denial of the Appellant's request to provide public sewer for its proposed residential development was consistent with the provisions of the Township's Official Plan. 35 P.S. § 750.5.

3. The Department properly concluded that the Township was implementing its Official Plan and denied the Appellant's request to order the Township to provide public sewers for its property. 35 P.S. § 750.5(b).

4. The Department's review of the Appellant's private request was consistent with 25 Pa. Code § 71.14.

We enter the following order:

[16] 25 Pa. Code § 71.14(d).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TOLL BROTHERS, INC.	:	
	:	
v.	:	**EHB Docket No. 2007-163-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BUSHKILL TOWNSHIP, Intervenor	:	

ORDER

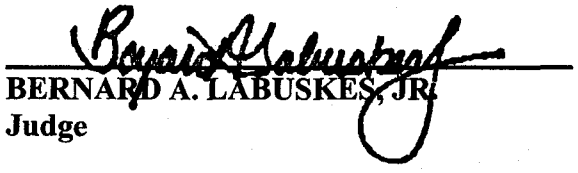
AND NOW, this 1st day of October 2008, the appeal of Toll Brother's in the above-captioned matter is hereby DISMISSED.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

DATED: October 1, 2008

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

NORTHAMPTON TOWNSHIP, NORTHAMPTON, BUCKS COUNTY MUNICIPAL AUTHORITY AND NORTHAMPTON AREA RESIDENTS FOR REASONABLE SEWERS (NARRS)	:	**EHB Docket No. 2008-184-L (Consolidated with 2008-186-L and 2008-187-L)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Dated: October 14, 2008**

OPINION AND ORDER
ON MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Department's motion to dismiss consolidated appeals for lack of jurisdiction is denied. To the extent the appellants raise arguments related directly to the Department's order mandating compliance with an Act 537 plan as opposed to the Plan itself, and seek relief that only implicates the order as opposed to the Plan, their appeals may proceed.

OPINION

On April 30, 2008, the Department of Environmental Protection (the "Department") issued an order to Northampton Township (the "Township") requiring it to implement its official sewage facilities plan (the "Plan"). The Township, in addition to the Northampton, Bucks County Municipal Authority (the "Authority") and Northampton Area Residents for Reasonable

Sewers ("NARRS"), appealed the order. NARRS thereafter filed a petition asking the Board to supersede the order. The Department opposed the petition and requested that the Board dismiss the consolidated appeals in their entirety. We denied NARRS's petition for supersedeas on August 19, 2008,[1] and in the same order gave the parties an opportunity to respond to the Department's motion to dismiss. We are now in a position to rule on that motion.

The Department argues that the Board lacks jurisdiction to hear the consolidated appeals because the appellants seek changes to the Plan, which is administratively final. The Department relies on several cases discussed in our Opinion and Order on Petition for Supersedeas, including *Jefferson Township Supervisors v. DEP*, 1999 EHB 837, in which we dismissed an appeal of an enforcement order requiring compliance with an Act 537 plan for lack of jurisdiction. Although the appellants are unhappy with the Plan, they respond to the Department's motion by arguing that part of the remedy they seek relates to the order itself. They point out that at least some of their objections are specific to the terms and conditions of the order.

As an initial matter, we must emphasize that there is a difference between this Board having jurisdiction to review Department actions pursuant to 35 P.S. § 7514(a), otherwise known as subject-matter jurisdiction, and this Board being divested of that jurisdiction because of an appellant's failure to exhaust its administrative remedies. This Board clearly has subject-matter jurisdiction to hear the consolidated appeals. Our delegating statute provides the Board with jurisdiction over "orders, permits, licenses or decisions" of the Department. 35 P.S. § 7514(a). An appeal from a Department order requiring compliance with an Act 537 plan clearly falls within that jurisdiction.

[1] We issued an opinion in support of the order denying NARRS's petition for supersedeas on August 22, 2008. *Northampton Township v. DEP*, EHB Docket No. 2008-184-L.

At times, however, our subject-matter jurisdiction is divested by an appellant's failure to exhaust administrative remedies. Although the doctrine of failure to exhaust administrative remedies is often bundled up in the discussion of jurisdiction, the doctrine is not jurisdictional in the strictest sense. *DER v. Bethlehem Steel Corp.*, 367 A.2d 222, 225 n.2 (Pa. 1976); *see also Terminato v. Pennsylvania National Insurance Co.*, 645 A.2d 1287, 1291 (Pa. 1994). The Pennsylvania Supreme Court has addressed the interplay between subject-matter jurisdiction and the doctrine of exhaustion of administrative remedies: "Frequently it is said that the failure to exhaust administrative remedies divests the court of 'jurisdiction.' This is not subject-matter jurisdiction, however, but rather the judge-made rule that exhaustion of administrative remedies is a prerequisite to the court's exercise of subject-matter jurisdiction." *Jackson v. Centennial School District*, 501 A.2d 218, 221 n.5 (Pa. 1985). Given that distinction, it is important to "refrain from committing the fundamental error of confusing the judge-made rule of exhaustion of administrative remedies with subject-matter jurisdiction conferred by the legislature ..." *Shenango Valley Osteopathic Hospital v. Department of Health*, 451 A.2d 434, 437 n.7 (Pa. 1982).

Whereas our focus in determining subject-matter jurisdiction homes in on the action under appeal, *Borough of Kutztown v. DEP*, 2001 EHB 1115, our focus in determining whether the doctrine of exhaustion of administrative remedies comes into play is the remedy sought. *Feingold v. Bell of Pennsylvania*, 383 A.2d 791, 793-94 (Pa. 1977); *see also Terminato v. Pennsylvania National Insurance Co.*, 645 A.2d at 1291-92. As it is often described, the doctrine requires a party to exhaust all adequate and available administrative remedies before seeking relief elsewhere. *Empire Sanitary Landfill, Inc. v. DER*, 684 A.2d 1047, 1053 (Pa. 1996). In other words, if an administrative remedy exists, it should be pursued first. *DER v.*

Bethlehem Steel Corp., 367 A.2d 222, 230 n.28 (Pa. 1976). Therefore, when a party invokes the doctrine, we must look to the remedy sought and determine whether the Board is the administratively prescribed avenue to provide it.

To the extent that the appellants seek a remedy from us that relates to the Plan itself, they have failed to exhaust their administrative remedies. *Carroll Twp. v. DER*, 409 A.2d 1378, 1381 (Pa. Cmwlth. 1980); *Kidder Twp. v. DER*, 399 A.2d 799, 802 (Pa. Cmwlth. 1979); *Gilmore v. DEP*, 2006 EHB 679, 687; *Dickinson Twp. v. DEP*, 2002 EHB 267, 269; *Jefferson Twp. v. DEP*, 1999 EHB 837, 843. The Township, of course, can revise or update its Plan. *See, e.g., Dickinson Twp. v. DEP*, 2002 EHB 267. Likewise, the Authority and NARRS can pursue a private request. *See, e.g., Toll Brothers, Inc. v. DEP*, EHB Docket No. 2007-163-MG (Adjudication, October 1, 2008). As we explained in our supersedeas opinion in this appeal,

> [t]he statutory remedies are available to third parties such as NARRS [or the Authority] as well as the municipality itself. 35 P.S. § 750.5(b) (private request). The members of NARRS are, and always have been, free to submit a request to the Township to alter the Plan. 35 P.S. § 750.5(b); *McGrath Construction, Inc. v. Upper Saucon Township Board of Supervisors*, No. 1358 C.D. 2007, slip op. at 2 n.1 (Pa. Cmwlth. June 11, 2008); *Pequea Township v. DEP*, 716 A.2d 678, 681 n.4 (Pa. Cmwlth. 1998); *Jefferson Township Supervisors v. DEP*, 1999 EHB 837, 840-41. If the Township were to refuse such a request, the members could submit a private request to the Department. 35 P.S. § 750.5(b). Any decision made by the Department on a private request is appealable to this Board. 35 P.S. § 750.16(b); *McGrath Construction, Inc*, No. 1358 C.D. 2007, slip op. at 2 n.1 (Pa. Cmwlth. June 11, 2008).

EHB Docket No. 2008-184-L, slip op. at 3 (Opinion, August 22, 2008). It is only after the Department acts on the plan revision, update, or private request that we are in a position to act.[2] If this sounds harsh, it is important to remember that sewerage planning is a municipal function.

[2] Even in such appeals, our review will be limited to the precise action in question, not the plan as a whole. *Winegardner v. DEP*, 2002 EHB 790, 793.

Bear Creek Township Board of Supervisors v. DEP, EHB Docket No. 2006-222-MG, slip op. at 8 (Opinion, February 7, 2008); *Gilmore v. DEP*, 2006 EHB 679, 690. The Department functions in an oversight capacity, somewhat analogous to the role of the federal government in other environmental programs where the Commonwealth has obtained primacy. Neither the Department nor this Board function as überplanners, and we must be wary of any scheme that would have us make planning choices in lieu of the municipality. That is why it is important to insist that parties utilize the statutory remedies for changing plans whenever they are available.

That said, changing the plan is not a remedy that would be effective in solving any defects unique to an order enforcing that plan. The clearest example of this is the Township's argument that the compliance deadlines in the order itself are unreasonable. Similarly, in what the Department has characterized as a "festival of finger-pointing," the Authority argues that the Department issued the order to the wrong party. Putting the merits (or lack thereof) of these claims aside for another day, it is clear that the claims do not go to the Plan itself. A plan revision or private request could not address these alleged defects in the order as a distinct Departmental action. There is no remedy available other than an appeal to the Board potentially resulting in our amendment or other action relating exclusively to the order. Accordingly, the Department's contention that we have been entirely divested of jurisdiction over these consolidated appeals is incorrect.

Another way of coming at this problem is to remember that "[o]ur role is necessarily circumscribed by the Departmental action that has been appealed .... Our responsibility is limited to revising the propriety of *that action.* We may not use an appeal from one Departmental action as a vehicle for reviewing the propriety of prior Departmental actions.... It follows that only objections that relate to the propriety of the action under appeal are directly

relevant. Objections to a different Departmental action are beside the point of our inquiry." *Winegardner v. DEP*, 2002 EHB 790, 793 (citations omitted).

As we explained in our Supersedeas Opinion,

> a party cannot challenge one Department action by appealing another. *Grimaud v. DEP,* 638 A.2d 299, 303 (Pa. Cmwlth. 1994); *CAUSE v. DEP*, 2007 EHB 632, 680; *Winegardner v. DEP*, 2002 EHB 790, 793. If NARRS had filed an appeal from the 1997 Plan in 2008, the appeal would have been summarily dismissed as ten years too late. Instead, NARRS is attempting to use the 2008 Order as a mechanism or vehicle, if you will, to do the same thing. The reality is that the Department's approval of the 1997 Plan and its issuance of the 2008 Order, while related, are separate and distinct actions. Purported defects related to the Department's action ten years ago are simply not relevant. *Winegardner*, 2002 EHB at 793. The Department does not consider the "validity" of an approved plan when issuing an implementation order, and neither should we. [Footnote omitted] *Id.* at 793-94; *see Pequea Township v. DEP*, 716 A.2d 678, 686-87 (Pa. Cmwlth. 1998); *Ehmann v. DEP*, EHB Docket No. 2007-150-L, slip op. at 3 (Opinion, July 10, 2008).

EHB Docket No. 2008-184-L, slip op. at 4 (Opinion, August 22, 2008).

In the immediate context, it is easy to use semantics to elevate form over substance. We must guard against such attempts. Since the Township's Plan cannot be challenged at this late date, we must accept the Plan as valid and enforceable. We take the Plan as a given. It is background. Just as we cannot alter the Plan in any way, we cannot consider its merits. Our analysis starts from the irrefutable antecedent that the Plan is beyond reproach in this appeal. With that antecedent in place, we are free to consider whether there is anything in or about *the order* that is unreasonable or unlawful, but nothing more. Admittedly, this is a narrow area of inquiry, but it is not, as the Department suggests, nonexistent. It may be difficult to paint a bright line between areas within and outside of our appropriate area of inquiry in an appeal from an enforcement order, but that is not to say the effort should be avoided.

NARRS argues in several differently phrased but essentially identical ways that the order is invalid because the Plan is invalid. Indeed, this is the sum and substance of its appeal. NARRS's notice of appeal, petition for supersedeas, motion responses, and affidavits read like an appeal from the Plan itself. NARRS argues, for example, that there are better alternatives to sewerage than those outlined in the Plan. It argues that the Plan fails to cover the entire Township, and it goes so far as to aver that the Plan was approved without proper public notice and comment back in 1997. NARRS claims that it is only challenging the order, but the framing of its objections necessarily requires us to delve into the merits of the Plan. This we cannot do. Therefore, we are not in a position to address those objections even though they ostensibly relate to the order. Any objection that is only meaningful if we examine the merits of the Plan is off limits.

Whether anything survives scrutiny in NARRS's appeal is a close call. Giving NARRS the benefit of the doubt to which it is entitled at this stage of the proceedings, *Richmond Township v. DEP*, 2007 EHB 755, 757 n.6, we cannot definitively conclude that none of its objections relate to the order as a distinct action. For example, objection 7 complains that the order "is not based on factual or legal support, and given the development, the order requirements are unreasonable, unsupported by law and excessive." Thus, there is at least one valid objection in its appeal that requires us to deny the Department's motion to dismiss the appeal in its entirety.

The Township's objection asserting that the deadlines for compliance *in the order* are too short does not require us to judge the merits of anything in the Plan. There are deadlines in the Plan, but we take those deadlines as reasonable and lawful. Our focus is not on the deadlines in the Plan, it is on the deadlines in the order. This is an appropriate area of inquiry and it does not

require us to reevaluate the Plan itself. Similarly, the Authority's contention about the order being issued to the wrong party does not implicate anything in the Plan and it is also an appropriate area of inquiry.

Finally, a motion to dismiss will be granted only where there are no material factual disputes and the moving party is clearly entitled to judgment as a matter of law. *Blue Marsh Laboratories, Inc. v. DEP*, EHB Docket No. 2006-266-C, slip op. at 2 (Opinion, June 16, 2008); *Soilair of PA, LLC v. DEP*, 2007 EHB 760, 762; *Beaver v. DEP*, 2002 EHB 666, 671. Motions to dismiss will only be granted when a matter is free from doubt. *Emerald Mine Resources, LP v. DEP*, 2007 EHB 611, 612; *Kennedy v. DEP*, 2007 EHB 511. As the moving party, the Department has the burden of proof. 25 Pa. Code § 1021.122(a).

To the extent that the Department's reply to its motion goes beyond claims that this Board lacks jurisdiction, we find that material factual disputes exist. For example, the appellants argue that the deadlines in the order are unreasonable because they give them little time to implement the requirements of the Plan. The current record contains virtually no information on the factual considerations that made up the Department's selection of those deadlines. We cannot rule on the reasonableness of a Department action with the scant record before us. Our uncertainty over these key factual considerations prevents us from granting the Department's motion. *Richmond Township v. DEP*, 2007 EHB 755, 757; *Emerald Mine Resources, LP v. DEP*, 2007 EHB 611, 612; *Solebury Township v. DEP*, 2003 EHB 208, 214.[3]

For the reasons stated above, we issue the Order that follows.

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[3] In support of its motion to dismiss, the Department attached as an exhibit the deposition of a representative of the Authority. NARRS filed a motion to strike the Department's motion to dismiss in its entirety or at least the transcript excerpts because the Department did not provide NARRS's counsel with notice of the deposition. Although the Department did not respond to NARRS's charges, we have denied the Department's motion in its merits, we have not relied in any way on the deposition transcript, and there is nothing to our knowledge precluding further deposition of the individual in question. We will deny the motion to strike as essentially a moot point, but caution the Department to ensure proper notice in the future.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NORTHAMPTON TOWNSHIP, NORTHAMPTON, BUCKS COUNTY MUNICIPAL AUTHORITY AND NORTHAMPTON AREA RESIDENTS FOR REASONABLE SEWERS (NARRS)	:	
v.	:	**EHB Docket No. 2008-184-L (Consolidated with 2008-186-L and 2008-187-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 14th day of October, 2008, it is hereby ordered that the Department's motion to dismiss is **denied**. NARRS's motion to strike is also **denied**.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: October 14, 2008

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

RANDY J. SPENCER	:	
	:	
v.	:	**EHB Docket No. 2008-251-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Dated: October 14, 2008**

OPINION AND ORDER ON MOTION TO DISMISS AND PETITION TO FILE NUNC PRO TUNC APPEAL

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board dismisses an appeal for lack of jurisdiction because it was filed one day too late. The Board also denies the appellant's petition for *nunc pro tunc* consideration where there is no evidence of fraud, a breakdown in Board operations, or other unique and compelling circumstances.

OPINION

On July 10, 2008, the Department of Environmental Protection (the "Department") issued an order to Randy Spencer ("Spencer") pursuant to the Clean Streams Law and the Dam Safety and Encroachments Act for activities conducted at a site in Cranberry Township, Venango County. The Board received Spencer's notice of appeal on August 12, 2008. On August 18, 2008, the Department filed a motion to dismiss Spencer's appeal for lack of jurisdiction, arguing that Spencer's appeal arrived at the Board outside the 30-day appeal period. In response to the

Department's motion, Spencer filed a petition asking this Board to consider his appeal *nunc pro tunc*.

The Board will grant a motion to dismiss where there are no material facts in dispute and the moving party is clearly entitled to judgment as a matter of law. *Beaver*, 2002 EHB 666, 671; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282. As a matter of practice, where there are no facts at issue that touch jurisdiction, a motion to dismiss may be decided on the facts of record without a hearing. *Beaver v. DEP*, 2002 EHB 666, 671 n.4; *Florence Township v. DEP*, 1996 EHB 282, 301-03; *Felix Dam Preservation Association v. DEP*, 2000 EHB 409, 421 n.7; *see also Grimaud v. DER*, 638 A.2d 299, 303 (Pa. Cmwlth. 1994).

Here, the parties do not dispute the relevant facts, of which there are only a few. Spencer received the Department's order on July 10, 2008. On August 9, 2008, Spencer mailed copies of his appeal to both the Department and the Board. Although the Department received Spencer's appeal on August 11, 2008, the Board did not receive it until August 12, 2008.

We will grant the Department's motion to dismiss because Spencer's appeal is untimely. Our regulations state that the Board's jurisdiction will not attach to an appeal from a Department action unless a written appeal is filed with the Board within 30 days from notice of the Department's action, unless a different time period is provided by statute. 25 Pa. Code § 1021.52; *Olympic Foundry, Inc. v. DEP*, 1998 EHB 1046, 1048. Neither statute at issue here provides a different time period: the Clean Streams Law defers to the Board's regulations, 35 P.S. § 691.7(b), and the Dam Safety and Encroachments Act provides for a similar 30 day appeal period. 32 P.S. § 693.24(a). Therefore, in order to be timely, Spencer's appeal had to be received by the Board within 30 days of his receipt of the order.

The Board computes time in accordance with the general rules of administrative practice and procedure. 1 Pa. Code § 31.1; 1 Pa. Code § 31.12. In doing so, time shall be computed to exclude the first day but include the last. 1 Pa. Code § 31.12; *York Resources Corp. v. DER*, 1985 EHB 899, 901. Whenever the last day falls on a Saturday, Sunday or legal holiday, such day shall be omitted from the computation. *Id.* Thirty days from July 10, 2008 was August 9, 2008, a Saturday. Accordingly, Spencer's appeal period expired on August 11, 2008, the following Monday. The Board's receipt of Spencer's appeal on August 12, 2008 makes it untimely. The untimeliness of the filing, although only by a single day, deprives the Board of jurisdiction over the appeal. *Pedler v. DEP*, 2004 EHB 852, 854 (appeal dismissed for being one day late); *Burnside Township v. DEP*, 2002 EHB 700, 703 (same). Accordingly, we lack jurisdiction over this appeal unless Spencer meets the Board's standards for filing an appeal *nunc pro tunc* as set forth in 25 Pa. Code § 1021.53a. *Pedler v. DEP*, 2004 EHB 852, 854; *see Pennsylvania Game Commission v. DER*, 509 A.2d 877, 886 (Pa. Cmwlth. 1986), *aff'd*, 555 A.2d 812 (Pa. 1989).

We recently explained that *nunc pro tunc* appeals will be allowed only where there has been fraud, a breakdown in the Board's operations, or other unique and compelling circumstances. *Pickford v. DEP*, EHB Docket No. 2007-266-L, slip op. 4 (Opinion, May 2, 2008); *see also Bass v. Commonwealth*, 401 A.2d 1133, 1135 (Pa. 1979); *Pedler*, 2004 EHB at 854. Spencer contends that he should be able to file his appeal *nunc pro tunc* because: (1) his appeal is postmarked August 9, 2008, (2) the Department received his appeal on August 11, 2008, (3) the post office assured him that his appeal would be delivered to the Board by August 11, 2008, and (4) he has no control over the postal service or the Board's mail room. None of these reasons constitute legally sufficient excuses for failure to file an appeal in a timely manner.

25 Pa. Code §§ 1021.32(b), 1021.52(a); *Barr v. DER*, 1992 EHB 1453, 1455 (it is the date on which an appeal is received by the Board, not the date on which it is postmarked, that is determinative); *Falcon Oil Co., Inc. v. DER*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992) (timely service on Department does not excuse untimely service on Board); *Getz v. Pennsylvania Game Commission*, 475 A.2d 1369, 1371 (Pa. Cmwlth. 1984) (absent evidence of unique or compelling circumstances, late delivery by post office does not excuse untimely appeal); *Kayal v. DER*, 1987 EHB 809, 812 (same). The averment that a verbal assurance from an employee behind the counter at the Meadville post office that a first-class mail envelope will arrive by a date certain is not enough to establish that *nunc pro tunc* consideration is warranted. *See Greenridge Reclamation LLC v. DEP*, 2005 EHB 390, 395-96. Notwithstanding Spencer's well-intentioned efforts, his error was that he never checked to see whether his appeal had actually been timely received by the Board. As we stated in *Greenridge*, "even if we assume that [the appellant] exercised reasonable care to ensure that its appeal was *sent* to the Board, it has not shown that it took reasonable care to ensure that its appeal was *received* by the Board." *Id.* at 395 (emphasis in original). If Spencer had simply faxed his appeal to the Board on August 11, 2008, or sent it by express mail and confirmed its delivery rather than sending it by first-class mail, it would have been timely filed. 25 Pa. Code § 1021.32(g); *Greenridge*, 2005 EHB at 395; *Pedler v. DEP*, 2004 EHB 852, 855.

For these reasons, we deny Spencer's petition for *nunc pro tunc* consideration. For the sake of a clean record, we note that on September 19, 2008, Spencer filed his own motion to dismiss alleging that the Department's order was heavy handed. However, because we find that Spencer's appeal was untimely, we need not address the merits of that motion. We, therefore, issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RANDY J. SPENCER	:	
	:	
v.	:	**EHB Docket No. 2008-251-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 14th day of October, 2008, it is hereby ordered that the Appellant's petition to appeal *nunc pro tunc* is **denied**. The Department's motion to dismiss is **granted**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: October 14, 2008

c: **DEP Bureau of Litigation**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

KEVIN J. KRUSHINSKI	:	
	:	
v.	:	**EHB Docket No. 2007-168-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RALPHO TOWNSHIP, Permittee	:	**Issued: October 24, 2008**

ADJUDICATION

By Michelle A. Coleman, Judge

Synopsis:

The Board dismisses an appeal of the Department's denial of a private request to order a Township to revise its Official Sewage Facilities Plan. The Appellant failed in its burden of proving that the Official Plan was not being implemented or was inadequate to meet his sewage disposal needs for purposes of the Sewage Facilities Act.

Background

Kevin J. Krushinski (Krushinski or Appellant) filed a private request with the Department by letter dated January 2, 2007 requesting that the Department of Environmental Protection (Department or DEP) order Ralpho Township to revise its Act 537 Sewage Facilities Plan because it is inadequate to meet his disposal needs. Krushinski requested that the full gravity sewer service to his residence also be available for service in his basement. The Department

found the plan to be adequate and denied Krushinski's private request in a letter dated June 11, 2007. Krushinski filed this appeal on July 2, 2007 and proceeded as a *pro se* appellant. A one day hearing was held on July 7, 2008 before the Honorable Michelle A. Coleman.

At the close of Krushinski's case-in-chief the Department orally made a motion for directed verdict. N.T. 72.[1] A motion for directed verdict is uncommon before the Board because such a motion is normally directing the judge to remove the case from the jury's consideration. Since we do not have juries at Board hearings, such a motion is traditionally referred by the Board as "directed adjudications". *See Byler v. DEP*, 1994 EHB 874, 876, n. 1; *Ron's Auto Service v. DER*, 1991 EHB 711, 720-21. The Department with concurrence by the Township, argued that Krushinski failed, at the close of his case-in-chief, to establish a prima facie case.[2] N.T. 72; 75. The Department stated that despite its motion it would proceed with its case knowing that our rules disallow a single judge to rule on such a motion.[3] N.T. 72-76. For that reason, the Department and Township both proceeded with their cases and would address the motion in their respective post hearing briefs.

According to the post hearing schedule, orally agreed upon by all parties at the hearing, the Appellant filed its post hearing memorandum on August 8, 2008. The Department filed its response on September 9, 2008, which included arguments to support its motion for directed adjudication made orally at the hearing. The Permittee filed its post hearing brief on September 19, 2008 supporting the argument that Krushinski failed to establish a prima facie case, as well as asking for attorney's fees. The Appellant's reply brief did not address the oral motion for a directed adjudication, nor the request for attorneys fees. The Appellant did request the Board to

[1] References to the hearing transcript will be cited as "N.T."
[2] According to Board Rules the party with the burden of proof is required to have established a prima facie case by the close of its case-in-chief. 25 Pa. Code § 1021.117(b).
[3] An order on a directed adjudication is a final order requiring the full Board to grant the motion. *Ron's Auto Service v. DER*, 1991 EHB 711, 727.

reopen the record to allow a string of emails to be placed into evidence.

We will not make a ruling on the motion for directed adjudication in this matter because we are dismissing this appeal based on the merits. The Board has stated in the past that in order for a moving party to prevail on its motion for directed adjudication it would also have to prevail on the adjudication of the merits. *Charles E. Brake*, 1999 EHB at 968. Specifically, "when ruling on a motion for a directed adjudication, the Board considers all of the evidence submitted by all the parties – the same evidence it would consider if adjudicating the merits." *Id. at* 967, *citing Ron's Auto Service v. DER*, 1992 EHB 711, 722. Therefore, based on the merits of this appeal the Appellant has not shown by a preponderance of the evidence that the Department erred when it denied its private request. 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 Sewage Facilities Act and the regulations promulgated thereunder. Sewage Facilities Act, the Act of January 24, 1996, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20a (Sewage Facilities Act).

2. The Appellant, Kevin J. Krushinksi is an adult who owns a residence located on Emworth Avenue, Ralpho Township, Northumberland County, Pennsylvania.

3. Ralpho Township submitted a Component 3m Sewage Facilities Planning Module for Minor Act 537 Plan Update Revision to the Department on June 27, 2002 (Module). Stip. ¶ 1.[4]

4. The Module indicated that the proposed project would provide sewer service to

[4] The parties stipulated to all but four of the statement of facts in the Department's Prehearing Memorandum. The stipulated facts will be referenced by "Stip."

160 EDU's in the Sunnyside/Overlook area of Ralpho Township, Northumberland County. Stip.¶ 2.

5. The Module also indicated that the proposed collection and conveyance facilities would consist of "approximately 2,136 feet of 6" and 19,093 feet of 8" gravity sanitary sewer, 732 feet of 4" and 10,240 feet of 6" force main and a pump station." Stip.¶ 3.

6. The Module went on to state that "[l]ines will be laid in public road right of way where possible." Stip.¶ 4.

7. The Municipal Authority of Sunnyside/Overlook (MASO) made the decision to implement the second ranked alternative, providing sewage treatment at the Ralpho Township Municipal Authority Treatment Plant. Stip. ¶ 5.

8. By letter dated December 10, 2002, the Department approved the Module.Stip. ¶ 7.

9. The gravity sewer main was in fact constructed; however, not at a depth which would allow the basement of Mr. Krushinski's residence on Emworth Avenue to be connected to the sewer main by a gravity sewer lateral. Stip. ¶ 8.

10. On December 1, 2006, Mr. Krushinski requested the Ralpho Township Board of Supervisors to revise its official plan to provide his residence on Emworth Avenue, including the basement, with full gravity sewer service. Stip.¶ 9.

11. On December 14, 2006, Ralpho Township denied Mr. Krushinski's request to the Ralpho Township Board of Supervisors to provide full gravity sewer service to the Residence. Stip. ¶ 10.

12. Mr. Krushinski filed a private request with the Department on January 5, 2007 requesting that the Department order Ralpho Township, Northumberland County, to revise its

Act 537 Sewage Facilities Plan to adequately meet his basement living space sewage disposal needs by requiring the Township to provide full gravity sewer service to the Residence including the basement. Stip.¶ 11.

13. The first and second floor of the Residence are hooked into the main gravity sewer line. Stip.¶ 13.

14. Mr. Krushinksi has a working shower and toilet, and can convey kitchen wastewater from the Residence into the public sewer. N.T. 48-9.

15. Installing a pump to convey sewage into gravity sewer lines is an adequate means for sewage disposal for a private residence. N.T. 87-8.

16. Krushinski has access to the sewer lateral from the basement in the Residence. N.T.49-50.

17. Krushinski never proved that he was unable to connect to the sewer lateral in his basement.

18. The connection of residences to the sewer main is controlled by local municipalities through ordinances. N.T. 90

19. The Department's Domestic Wastewater Facilities Manual is used for design standards of public sewage facilities in Water Quality Management Part II Permits, not sewage facilities planning and creating Act 537 Plans. N.T. 92.

20. On June 11, 2007 the Department denied Mr. Krushinski's private request because the module does not provide that basements or low levels of residential structures will be served by gravity sewers and Mr. Krushinski's basement can be served by a pumping system. N.T. 91; C-8.

Discussion

The Practice and Procedure Rules of the Environmental Hearing Board provide that "a party appealing an action of the Department shall have the burden of proof in the following cases: (1) When the Department denies a license, permit, approval or certification." 25 Pa. Code §§ 1021.122(a); 1021.122(c)(1). Here, the Appellant must show by a preponderance of the evidence that the Department abused its discretion by failing to approve his private request pertaining to the Sewage Facilities Act and the regulations thereunder. 35 P.S. § 750.5(b); 25 Pa. Code § 71.14. We find that Krushinski did not establish by a preponderance of the evidence that the Department acted contrary to the law when it denied his request.

The Department's role under the Sewage Facilities Act is to ensure that municipalities are submitting plans and revisions for review, approve or deny plans and revision, and ensure that such plans are being implemented. *Morton Kise, et al. v. DER*, 1992 EHB 1580, 1605. The Department must oversee the proposed sewer system, and make sure that it is in conformity with local planning and consistent with statewide water quality management.

In December of 2002 the Department approved Ralpho Township's module that proposed gravity sewers to be installed in the Overlook/Sunnyside area where Krsuhinski's residence is located. That plan, as approved by the DEP, was implemented and constructed.[5] On January 5, 2007 Krushinski sent a request to the Department to review Ralpho Township's Act 537 Plan

[5]Krushinski focused his appeal on the design of the sewer system and that it is flawed because the Township did not install the lateral at a lower depth. If the lateral was installed at a lower depth, Krushinski argues, he could use the gravity sewer in his basement without a pump. Since the Department found that Ralpho Township's 537 Plan met the criteria for approval in December 2002, it was implemented and constructed. The issue of design of the system is a part of the Water Quality Management Permit Part II and that is not reviewable by the Board as that issue was administratively final years ago. Here, we are reviewing whether the Department erred when it denied the private request and found the gravity flow system to be adequate to meet Krushinski's needs.

and order the Township to revise the plan so that it adequately met his needs. The Department denied the request for the following reasons:

> The plan does not provide assurance or in any other way guarantee that basements or lower levels of the residential structures will be served by gravity sewers.
>
> The Department's Domestic Wastewater Facilities Manual does not require residential structures to be served by gravity collection.
>
> Sewer service for your basement is available to you through the installation of a pumping system approved by the Ralpho Township Board of Supervisors.

Ex. C-2.

In order for a private request to be approved by the Department it must be shown that the township is not implementing its Act 537 Plan or that the existing plan is inadequate to meet the resident's sewage disposal needs. *Yoskowitz v. DEP*, 2006 EHB 342, 250; *James Gilmore v. DEP, et al.*, 2006 EHB 679. Specifically, section 5(b) of the Pennsylvania Sewage Facilities Act provides:

> Any person who is a resident or legal or equitable property owner in a municipality may file a private request with the department requesting that the department order the municipality to revise its official plan if the resident or property owner can show that the official plan is not being implemented or is inadequate to meet the resident's or property owner's sewage disposal needs.

35 P.S. § 750.5(b). The Department's regulations further require that a private request include a list of reasons why the official plan is inadequate, as well as contain evidence that the plan is not being implemented. 25 Pa. Code § 71.14(a); *Yoskowitz v. DEP*, 2006 EHB 342, 350.

For Krushinski to prevail on his appeal he must establish by a preponderance of the evidence that the Department erred when it denied his request. The Appellant has the burden of proof here and did not offer any evidence to indicate how the current gravity sewer line in his residence is inadequate to meet his needs. The evidence offered by the Appellant consisted of

fact testimony from the Appellant, himself, and Joseph Krushinski, his father.

The Appellant's testimony provided that two floors of the residence were currently connected to the gravity sewer line that runs along the basement ceiling out to the sewer main. N.T. 48-49. The Appellant also testified that the gravity sewer serviced both a bathroom and the kitchen in the residence, however he focused on the basement not being connected to the gravity lateral. He does admit that he could access the lateral line in the basement with the use of a pump if he chose to do so.[6] N.T. 87; 98; 501. For that reason, he argues that the plan is inadequate to meet his needs. We disagree. The evidence before the Board overwhelming establishes that the Department acted reasonably and in accordance with the law when it denied the private request: Krushinski has sewer service to his residence; the Act 537 Plan does not specifically provide for basement service (there is no requirement that it do so); and he has a feasible alternative for his basement wastewater by installing a pump. Together these facts not only prove that Krushinski failed to establish his case by a preponderance of the evidence, but also indicate that Krushinski's disposal needs are being adequately met.[7]

Attorneys Fees

Ralpho Township seeks attorneys fees and costs to recover expenses associated with this appeal under 42 Pa.C.S. § 2503 specifically. However, the Board has stated, that it:

> has no authority to award attorneys' fees under that provision. The Commonwealth Court analyzed the applicability of § 2503 to

[6] A pumping system is a common method used to convey wastewater from private residences. N.T. 87. Krushinski did not show how installing a pumping system would not be a reasonable alternative to him, but continued to focus on the fact that the lateral line should have been installed lower by the Township. The design of the system is not at issue in this appeal. Further, neither the Department, nor the Board are the responsible parties to pick a reasonable sewage system design for the township. *James Gilmore v. DEP*, 2006 EHB 679, 690.

[7] This Board has held that "the question of the allocation of costs for the connection to the public sewer system is a local government issue over which the Department has no power under the Sewage Facilities Act." *John and Lisa Force v. DEP*, 1998 EHB 179, 188. Although, we will not discuss the cost associated with Krushinski's basement being connected to the public sewer, we are aware of the great difference in cost and burden placed on the Township and expenditure of public money if the Township were to drop the gravity lateral line, as opposed to the cost upon the Appellant for installing a pumping system in his residence.

> administrative agencies in *Pennsylvania Board of Probation and Parole v. Baker*, 82 Pa. Cmwlth. 86, 474 A.2d 415 (1984). It was held there that the Judicial Code applies only to the components of the unified judicial system unless the term "tribunal" is used in the language of a specific section of the Code. Because tribunals are not specifically mentioned in § 2503, that section does not give them the authority to award counsel fees. *Duquesne Light Company v. Pennsylvania Public Utility Comission*, 117 Pa. Cmwlth. 28, 543 A.2d 196 (1988); *Pleasant Valley School District v. Commonwealth Department of Community Affairs*, 127 Pa. Cmwlth. 85, 560 A.2d 935 (1989).

Stop, Inc. v. DER, 1992 EHB 207, 210-11. In addition, our rules provide that a request for attorneys fees be in the form of an application authorized by either the Costs Act or another statute and filed within 30 days of the date of the final order. 25 Pa. Code §§ 1021.171-1021.174; 1021.181-1021.184; 1021.191. For these reasons we will not discuss the request for attorneys fees at this time.

Reopening the Record

The Appellant requested that we reopen the record to allow a string of emails pertaining to financing of the public sewer project in Ralpho Township to be admitted into the record. A request to reopen the record prior to an adjudication is governed under rule 25 Pa. Code § 1021.133. We find, however, that these emails are inadmissible hearsay under Pennsylvania Rule of Evidence 801, and fail to "conclusively establish a material fact of the case or would contradict a material fact which had been assumed or stipulated by the parties to be true." 25 Pa. Code § 1021.133. We will not allow the record to be reopened in this matter for irrelevant and inadmissible evidence. We therefore make the following:

Conclusions of Law

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

2. The Appellant bears the burden of proof in an appeal of the Department's denial of a private request to order a township to revise its official plan. 25 Pa. Code § 1021.122(c)(1).

3. The Appellant failed to establish by a preponderance of the evidence that the Department acted contrary to the law when it denied his private request under the Sewage Facilities Act, 35 P.S. § 750.5(b).

4. The Department's decision to deny the Appellant's private request was reasonable, supported by the facts, and in accordance with the law.

5. The Ralpho Township Act 537 Plan is adequate to meet the Appellant's disposal needs.

6. The Appellant has feasible disposal alternatives available to him for service to his basement.

7. The Board does not have the authority to grant attorneys fees under 42 Pa.C.S. § 2503.

8. The Appellant's petition to allow emails to be a part of the record is denied because they are not relevant, nor admissible.

We enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KEVIN J. KRUSHINSKI	:	
	:	
v.	:	**EHB Docket No. 2007-168-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RALPHO TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 24th day of October 2008, the appeal of Kevin J. Krushinski in the above captioned matter is hereby **DISMISSED**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: October 24, 2008

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SUSAN FOX and JEFF VAN VOORHIS, et al.	:	
	:	**Docket No. 2007-280-C**
	:	**(Cons. w/ 2007-283-C, 2007-284-C,**
v.	:	**2007-289-C, 2008-003-C,**
	:	**2008-013-C, 2008-015-C,**
	:	**2008-023-C, 2008-031-C,**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 2008-032-C)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and SYNAGRO	:	**Issued: October 31, 2008**
MID-ATLANTIC, INC., Permittee	:	

OPINION AND ORDER
ON PERMITTEE'S PETITION FOR RECONSIDERATION

By Michelle A. Coleman, Judge

Synopsis: The Board denies Permittee's Petition for Reconsideration because there is no compelling reason to grant reconsideration of the Board Order denying Permittee's motion to dismiss. There remain issues of material fact in this matter that need to be presented at a hearing on the merits.

Opinion

On September 17, 2008, the Board issued an Opinion and Order denying Synagro Mid-Atlantic, Inc.'s (Synagro or Permittee) motion to dismiss because a genuine issue remained as to whether the Appellants were given proper notice at least 30 days prior to the spreading of sewage sludge on neighboring agricultural land. *Susan Fox & Jeff Van Voorhis, et al. v. DEP*, EHB Docket No. 2007-280-C (Opinion & Order issued September 17, 2008). We determined in that

opinion that there remained issues of whether Synagro complied with the notice requirements in 25 Pa. Code § 271.913. Now before the Board is the Permittee's Petition for Reconsideration (Petition) asking the Board to reconsider its decision on the motion to dismiss. In this Petition Synagro attempts to show that letters dated August 24, 2005 were mailed to each adjacent landowner in compliance with the notice requirement.

The Board's Rules provide criteria for both reconsideration of interlocutory orders and reconsideration of final orders. The Petition requests reconsideration of an interlocutory order. When reconsidering an interlocutory order the petitioner "must demonstrate that extraordinary circumstances justify consideration of the matter by the Board", as well as satisfy the criteria for reconsideration of a final order. 25 Pa. Code § 1021.151(a); *see also* 25 Pa. Code § 1021.152; *DEP v. Angino*, 2005 EHB 905, 907. The Board has stated in the past that when deciding a petition for reconsideration "we generally consider the criteria for granting reconsideration of final orders as a floor for considering reconsideration of interlocutory orders." *Robachelle, Inc. v. DEP*, 2006 EHB 373, 375, *citing Earthmovers Unlimited, Inc. v. DEP*, 2003 EHB 577, 578.

Reconsideration of final orders will be granted only for "compelling and persuasive reasons", such as:

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

25 Pa. Code § 1021.152(a).

Synagro asserts that the Board's order does not rest on a legal ground proposed by any party. We find that Synagro in its motion to dismiss, referenced the issue of notice. In its memorandum of law in support of its motion to dismiss it provided, "on August 24, 2005 pursuant to 25 Pa. Code § 271.913(g), Synagro provided the required 30 day Notice of First Land Application on non-exceptional quality and exceptional quality of biosolids on a piece of agricultural property owned by George Phillips . . ." Permittee's Memorandum in Support of Motion to Dismiss, p. 2, ¶ 3. Reviewing that statement made in the motion to dismiss by the Permittee and the exhibit Synagro attached to the motion to dismiss, we determined that a question remained as to whether notice was actually given in compliance with the regulations. Therefore, the order denying the motion to dismiss rested on the issue of proper notice that was discussed in the Permittee's memorandum of law.

The Permittee argues in this Petition that the facts, now provided, justify reversal of the order denying the motion to dismiss. We disagree. In support of its current argument Synagro provides copies of individual letters that Mark Reider of the Pennsylvania Technical Services Director of Synagro sent to each adjacent landowner on August 24, 2005. Exhibit C. An affidavit by Mark Reider is also attached that provides he personally wrote, addressed and mailed the letters to each adjacent landowner. Exhibit B. Synagro provides that the letters were created via mail merge and were not maintained in their physical form. Synagro stated that when it submitted Exhibit C with this Petition, Reider used the list of the recipients retained on his hard drive and printed out copies of all the letters. Synagro Memorandum in Support, p. 6.

The Board's review of Exhibit C, specifically the letters, does not justify reversal of our previous order. An issue of material fact with respect to notice still remains. We find that

Exhibit C does not contain letters addressed to at least four of the Appellants in this appeal. Additionally, the Appellants point out that four of the letters provided in Synagro's Exhibit C do not contain the numeric street address. This, too, raises an issue of whether these letters were received by these particular residents. The Appellants ask us to deny this Petition for reconsideration because issues of material fact remain that require further discovery, such as discovery of the electronically stored data on Mr. Reider's hard drive. We agree with the Appellants. There are no crucial facts presented by Synagro in its Petition that are inconsistent with the Board's decision on the motion to dismiss and the question remains whether notice was provided. We find that Synagro has not provided compelling and persuasive reasons to grant its Petition and reverse our decision on the motion to dismiss. Therefore, we deny the Petition and enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SUSAN FOX and JEFF VAN VOORHIS, et al.	:	
	:	**Docket No. 2007-280-C**
	:	**(Cons. w/ 2007-283-C, 2007-284-C,**
v.	:	**2007-289-C, 2008-003-C,**
	:	**2008-013-C, 2008-015-C,**
	:	**2008-023-C, 2008-031-C,**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 2008-032-C)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and SYNAGRO	:	
MID-ATLANTIC, INC., Permittee	:	

ORDER

AND NOW, this 31st day of October 2008, the Petition for Reconsideration filed by Synagro Mid-Atlantic, Inc. is hereby DENIED.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: **October 31, 2008**

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

CUMBERLAND COAL RESOURCES, L.P. :
:
v. : **EHB Docket No. 2006-234-R**
:
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION : **Issued: November 10, 2008**

ADJUDICATION

By: Thomas W. Renwand, Acting Chairman and Chief Judge

Synopsis:

The presumption of liability set forth in 52 P.S. Section 1396.4b(f)(2) and 25 Pa. Code Section 87.119(b) applies where diminution of a water supply is allegedly caused by coal exploration activities within one thousand feet of the domestic water supply. Cumberland Coal Resources, L.P., conducted coal exploration activities which consisted of the drilling of a four inch core hole and the construction of an access road. However, the coal company rebutted the presumption as it proved by a preponderance of the evidence that the diminution occurred as a result of some cause other than the surface mining activities. Cumberland Coal further proved by a preponderance of the evidence that its coal exploration activities were not the cause of any water diminution

loss. Stated another way, the Pennsylvania Department of Environmental Protection was unsuccessful in establishing by a preponderance of evidence that the coal exploration activities of Cumberland Coal were the cause of any water diminution or water loss.

Introduction

This is an appeal from an order of the Pennsylvania Department of Environmental Protection (Department) dated September 28, 2006. The Department found that Cumberland Coal Resources, L.P. (Cumberland Coal), as a result of coal exploration activities-consisting of the construction of a temporary access road and the drilling of a four inch core exploration borehole-was responsible for replacing or restoring a domestic water supply on the property of George and Ruth Ann Flenniken (Mr. and Mrs. Flenniken) in Greene County, Pennsylvania. Cumberland Coal timely appealed the Department's Order.

We earlier issued an Opinion on the application of the rebuttable presumption of liability found in the Surface Mining Conservation and Reclamation Act. *Cumberland Coal Resources, L.P. v. Department of Environmental Protection*, 2007 EHB 495. Under the applicable law, a coal company is presumed liable for affecting a water supply, if the water supply is within one thousand feet of mining activities, subject to the coal company's opportunity to rebut the presumption at trial. *See* 52 P.S. Section 1396b(f)(2) and 25 Pa. Code Section 87.119(b).

The Board conducted a five day trial in May 2008 in Pittsburgh, Pennsylvania. Following the trial, at the request of the parties and pursuant to 25 Pa. Code Section 1021.115, the Board conducted a site view of the property of Mr. and Mrs. Flenniken.

Cumberland Coal filed its Post-Hearing Brief on July 29, 2008. The Department filed its answering comprehensive and detailed Post-Hearing Brief on September 2, 2008. Appellant's concise Reply Brief was filed with the Board on September 10, 2008.

FINDINGS OF FACT

1. The Pennsylvania Department of Environmental Protection (the "Department") is the executive state agency with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, No. 418, as amended, 52 P.S. § 1396.1 *et seq.* (the "Surface Mining Act"), the Clean Streams Law, Act of June 22, 1973, P.L. 1987, as amended, 35 P.S. § 691.1 *et seq.*, Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, amended, 71 P.L. § 510-17 ("Administrative Code") and the rules and regulations promulgated under these statutes. (Board Exhibit-1)

2. Cumberland Coal Resources, L.P. ("Cumberland Coal") is an affiliate of Foundation Coal Resources Corporation with a business address of 158 Portal Road, P.O. Box 1020, Waynesburg, Pennsylvania 15370, whose business includes the underground mining of bituminous coal in the Commonwealth of Pennsylvania. (Board Exhibit-1)

3. Cumberland Coal operates the Cumberland Mine in Greene County, Pennsylvania pursuant to Permit No. 30831303. (Board Exhibit-1)

4. George and Ruth Ann Flenniken (the "Flennikens" or "Mr. and Mrs. Flenniken") reside at 527 Stewart Run Road in Waynesburg, Pennsylvania. (Board Exhibit-1)

5. Mr. and Mrs. Flenniken are the private water supply users whose domestic water supply spring is the subject of the Department's action at issue in this appeal. (Board

Exhibit-1)

6. Mr. and Mrs. Flenniken, although invited by the Pennsylvania Environmental Hearing Board by our Order dated October 18, 2007 to intervene as "parties" to this appeal, declined to do so because of the legal fees involved. (T. 472-473)

7. Water is supplied to the Flennikens' property by a spring developed by Mr. and Mrs. Flenniken in 1962. The spring box is built out of a series of cement blocks (the bottom row of the cement blocks is turned sideways to allow groundwater to enter). A one-inch plastic pipe leads from the spring box to a 500-gallon concrete reservoir. A one-inch plastic pipe, placed approximately one foot from the bottom of the reservoir, supplies water by gravity to their residence. The overflow from the 500-gallon reservoir drains through a one-inch plastic pipe to a 1,000-gallon concrete reservoir. Overflow from the 1,000-gallon reservoir is directed by a buried plastic pipe and culvert toward their pond which is located across the road from the Flennikens' house. (Board Exhibit-1)

8. On June 30, 2004 and August 25, 2004, Michael Baker Engineering (Baker Engineering) conducted a water resources inventory for Cumberland Coal which was submitted to the Pennsylvania Department of Environmental Protection as part of the Permit Application for the Cumberland West mine on August 8, 2005, and which included an inventory of the Flennikens' water resources and supplies. Baker Engineering did not observe the Flennikens' domestic water supply on either occasion and took no measurements of the flow. The results of the inventory, as certified by Mr. George Flenniken, stated that their domestic water supply spring was sufficient for the Flennikens' daily needs and that the water supply had never gone dry or been severely

depleted. The rate of flow for the Flennikens' domestic water supply spring was originally listed on Form 8.4A Background Monitoring Report as 1.00 gallon per minute but later amended to indicate that it was "unknown." (Board Exhibit-1)

9. The Flennikens' property has not been undermined by Cumberland Coal and the underground removal of coal is not alleged to have been a potential cause of the alleged diminution of flow in the case. (Board Exhibit-1)

10. On January 3, 2005, pursuant to Subchapter E, Cumberland Coal submitted a Notice of Intent to Explore/Permit Waiver Request (NOI) to the Pennsylvania Department of Environmental Protection for coal exploration "mining activities" on the Flennikens' property. The Department acknowledged receipt of the NOI by letter dated January 11, 2005. (Board Exhibit-1; Cumberland Coal Exhibit 14)

11. In June of 2005, Cumberland Coal constructed a temporary access road, drilling pad and sump for drilling of Exploration Core Hole GM-05-08 on the Flennikens' property. Some trees and brush were cleared to construct the road. Portions of this temporary access road were located within 1,000 feet of the Flennikens' domestic water supply. (Board Exhibit-1; T. 128)

12. The purpose of the drilling of the core hole was to identify the thickness and the quality of the Pittsburgh coal seam. (T. 157)

13. Mr. Scott Peterson, a geologist employed by one of the affiliate companies of Cumberland Coal, testified that there was a sandstone channel in the area "and we were trying to determine if the Pittsburgh Seam was washed out or non existent." (T. 159) 14.

From June 28, 2005 to July 6, 2005, the core hole was drilled to a depth of 854 feet.

The core hole was geophysical logged on July 7, 2005. The core hole was drilled within 1,000 feet of the Flennikens' domestic water supply. (Board Exhibit-1; Cumberland Coal Exhibit-2)

15. At no time during the period when Cumberland Coal was engaged in surface mining activities on the property of Mr. and Mrs. Flenniken did either Mr. or Mrs. Flenniken complain of a reduction of water flow from their spring. (T. 174)

16. On August 1, 2005, the Flennikens informed Mr. Peterson that they were experiencing problems with their domestic water supply. Cumberland Coal immediately contacted Higgins Hauling Company, and a temporary water supply was established the same day. (Board Exhibit-1; T. 174-175, 398)

17. On September 9, 2005, Ms. Michelle Anderson, an environmental specialist with an affiliate of Foundation Coal, transmitted a Mine Operator FaxReport form and several other related documents to the Pennsylvania Department of Environmental Protection's California District Mining Office. These documents provided the Department with notice of the Flennikens' water loss complaint and of the establishment of a temporary water supply. Cumberland Coal also stated that it "does not believe that the drilled exploration core hole is the cause of the spring's diminished flow." (Board Exhibit-1; Commonwealth Exhibit-2; T. 331)

Initial Department Investigation

18. The Department assigned Mr. Joseph Matyus, a geologist specialist, to investigate the Flennikens' water loss claim. Mr. Matyus visited the Flennikens' property on: (1) September 22, 2005 (when he observed the spring box to be dry); (2) October 27, 2005

(when he observed wetness in the spring box, but no flow); (3) December 1, 2005 (when he observed flow at the overflow from the 1,000-gallon reservoir); and (4) December 27, 2007 (when he observed the bottom of the spring box to be wet, but no flow). (Board Exhibit-1; T. 87, 91, 93, 129-131, 138)

19. Mr. Matyus has more than thirty years experience having worked for both private industry, U.S. Steel Mining, Inc. and Consolidation Coal Company, as an environmental geologist, and the Pennsylvania Department of Environmental Protection, as a geologist/hydrogeologist. Most of his work during this period of time was focused on the Appalachian Coal fields generally with particular attention to Western Pennsylvania. (T. 84)

20. Representatives from Cumberland Coal visited the Flennikens' property on the following occasions in December of 2005: (1) December 5, 2005 (when a flow of 0.25 gallons per minute was recorded as the overflow of the 1,000 gallon reservoir); (2) December 8, 2005 (when a flow of 0.072 gallons per minute was recorded at the overflow of the 1,000-gallon reservoir); and (3) December 12, 2005 (when a flow of 0.094 gallons per minute was recorded at the overflow of the 1,000-gallon reservoir). (Board Exhibit-1)

21. On January 27, 2006, Mr. Joseph Leone of the Pennsylvania Department of Environmental Protection's California District Mining Office informed the Flennikens that "after reviewing [Cumberland's] rebuttal; the Department's investigating hydrogeologist agrees that the exploration hole drilled about 150 feet from your spring did not affect your water supply." The letter also advised Mr. and Mrs. Flenniken that

they had the right to request an "informal review" if they disagreed with the Department's findings. (Board Exhibit-1)

22. By letter dated February 7, 2006, the Flennikens indicated that they indeed did disagree with the Department's findings and requested that the Department's Central Office conduct an "informal review" of the findings of the California District Mining Office. (Board Exhibit-1)

The Department Takes a Second Look at the Issue

23. The Department assigned Mr. Martin Edwards, a professional geologist in the Department's Bureau of Mining and Reclamation, to perform the "informal review" and further investigate the Flennikens' water loss. (Board Exhibit-1)

24. Mr. Edwards visited the Flennikens' property on March 10, 2006, where he interviewed Mr. and Mrs. Flenniken regarding their water loss claim and the historical use and operation of their spring. (T. 501)

25. During his visit to the Flenniken property on March 10, 2006, Mr. Edwards observed the access road and the trees which had been torn down. Upon further investigation of the access road, Mr. Edwards discovered several seeps located along the upper edge of the access road that were spreading water over the access road. (T. 503-504)

26. During his visit on March 10, 2006, Mr. Edwards also investigated Stewart Run and the various tributaries to Stewart Run located on the same hillside as the Flenniken Spring, and found them dry also. (T. 506)

27. Cumberland Coal retained Penn Environmental and Remediation, Inc. ("Penn E&R") to investigate the Flennikens' water loss complaint. On March 24, 2006 and April 11,

2006, representatives from Cumberland Coal and Penn E&R visited the Flennikens' property. As a result of these site visits and additional research, Cumberland Coal submitted additional information to the Department on May 11, 2006. Cumberland Coal reiterated that Cumberland Coal's coal exploration "mining activities did not cause the Flennikens' domestic water supply problems." (Board Exhibit-1)

28. On June 5, 2006, Mr. Edwards visited the Flennikens' property to evaluate the findings set forth in the Penn Environmental & Remediation Report and gather additional field information. Mr. Edwards made three measurements of spring flow, which averaged 0.32 gallons per minute. (Board Exhibit-1)

29. Mr. Edwards visited the Flennikens property again on July 10, 2006 (when he took three measurements of the spring flow which averaged 0.12 gallons per minute) and August 15, 2006 (when he observed approximately one inch of water in the bottom of the spring box and no flow of water from the spring box into the reservoir). (Board Exhibit-1)

30. On September 22, 2006, the Department's Central Office forwarded the results of the "informal review" to the Flennikens. Based upon the results of Mr. Edwards' investigation, the Department concluded that Cumberland Coal failed to rebut the presumption of liability established by statute and was therefore responsible for restoring or replacing the Flennikens' domestic water supply. (Board Exhibit-1)

The Department Order Under Appeal

31. Shortly thereafter, on September 28, 2006, the Department's California District Mining Office issued an Order which required Cumberland Coal to restore or replace the

Flennikens' domestic water supply. (Board Exhibit-1)

32. Cumberland Coal filed a timely appeal of the Order on October 26, 2006. (Board Exhibit-1)

33. Cumberland Coal has provided the Flennikens with temporary water since August 1, 2005. (Board Exhibit-1)

Mr. Jerry L. Tuttle and the Construction of the Temporary Access Road

34. Mr. Jerry L. Tuttle is a neighbor of the Flennikens and built the access road to the core hole site. (T. 16-17)

35. He used a John Deere 650 Dozer to build the access road. (T. 17)

36. He removed trees and brush and no more than 2½ feet of soil to construct the access road. (T.18, 22)

37. It took him 4 to 5 hours to build the access road. (T. 20)

38. He estimated that the access road was 8 feet wide and approximately 500 feet long. (T. 17, 23, 33)

39. The access road was not paved. (T. 33)

40. Mr. Tuttle believes he knocked down 10-15 trees which were 8-14 inches in diameter. Some of the trees were 30-35 feet high. (T. 24-25)

41. He did not encounter any water when he constructed the access road. (T. 18-19)

42. When the drilling was completed he put the dirt and material back on the access road and planted seed to reclaim the access road. (T. 19, 31)

43. The weight of the John Deere 650 Dozer is 26,000 pounds (or 13 tons). (T. 37)

Mr. John Higgins Sets Up the Water Buffalo

44. Mr. John Higgins owns Higgins Hauling Company which delivers water. (T. 38)

45. Mr. Higgins set up a water buffalo on the property of Mr. and Mrs. Flenniken. The water buffalo is a 1,550 gallon water tank. (T. 40)

46. Mr. Higgins installed a line from the water buffalo to the water tank of Mr. and Mrs. Flenniken. He also installed a float in the Flennikens' tank so that when the water in their tank dropped it would open the water line to the water buffalo. (T. 40)

47. When the water comes up to the float, the float shuts off the water coming from the water buffalo. (T. 41)

48. Mr. Higgins originally delivered water to Mr. and Mrs. Flenniken twice a week. (T.43)

49. Shortly after setting up the water buffalo, Mr. and Mrs. Flenniken ran out of water. This continued over a two to three week period. (T. 43)

50. Mr. Higgins was directed by Cumberland Coal to go out and inspect the system. Mr. Higgins found a leak in the Flennikens' line running from their water tank to their home. Mr. Higgins repaired the line. This leak was not related in any way to Cumberland Coal's mining activities. (T. 43)

51. After a period of time, Mr. Higgins cut back the delivery of water to one day per week. (T. 43-44)

52. In the Spring of 2008 Mr. Higgins cleaned out the Flennikens' 500 gallon tank and spring box. (T. 45-46)

53. In April 2008, Mr. Higgins was directed by Mrs. Flenniken to disconnect the spring box from the reservoir system so now the spring box discharges to the ground. (T. 47)

54. Mrs. Flenniken asked Mr. Higgins to disconnect the one-inch plastic pipe leading from the spring box to the 500 gallon reservoir because she claimed the water from the spring had a bad taste and smell and was not fit to drink. (T. 383-384, 475, 562)

55. The one thousand gallon reservoir serves a hunting cabin and a garage on the Flennikens' property. (T. 50)

56. Mr. Higgins charges a flat rate per delivery – not by gallonage of water. (T. 65)

57. Prior to disconnecting the spring box to the reservoir he was delivering approximately 200 to 400 gallons of water per week to the Flennikens. Since April 2008, he has been delivering an average 600 gallons of water per week. (T. 70)

58. In April 2008 water was running "full steam" from the spring box to the 500 gallon tank. (T. 72)

59. Mr. Higgins charges $80 per water delivery. This amount is paid by Cumberland Coal. (T. 80, 384, 389)

Mr. Scott Blauvelt Disagrees with the Department's View

60. Mr. Scott Blauvelt is employed by Penn Engineering and Remediation. (T. 43-44, 61)

61. Mr. Blauvelt graduated with honors from Allegheny College with a degree in Geology. (Cumberland Coal Exhibit 21).

62. Mr. Blauvelt has wide and varied experience in geology, hydrogeology, and drilling over the course of his professional career. (T.231-236)

63. He has been appointed to two statewide committees (or study groups) as the hydrogeologist. These appointments were made by Governor Ridge and Governor

Rendell, respectively. (T. 237)

64. The Board recognized Mr. Blauvelt as an expert in the areas of geology and hydrogeology. (T. 238)

65. Mr. Blauvelt made four site visits to the Flenniken property. These visits occurred in March, April, and October 2006 and December 2007. (T. 239)

66. There is an approximate distance of 300 feet from the Spring Box to the Flenniken house. (T. 242)

67. The Spring is surrounded by mature trees on the Flennikin property. (T. 241)

68. In March 2006, Mr. Blauvelt examined and photographed the Spring Box. (Cumberland Coal Exhibits 25-26)

69. The photographs and examination at this time show leaves and mud in the Spring Box. (Cumberland Coal Exhibits 25-26)

70. The Spring Box itself is located in a depression approximately 1½ - 2 feet below the surface. (T. 249)

71. It is constructed of standard cement foundation blocks. Beneath the blocks is gravel and natural materials. (T. 249-250)

72. There is a "collar" of gravel around the cement block. (T. 250)

73. The Spring Box was constructed in approximately 1962. (T. 251)

74. The Spring Box is about 26 inches high. (T. 251)

75. The Spring Box is 3½ - 4 feet below grade. (T. 251)

76. It picks up water in the soil that is approximately 2½ - 3 feet below the surface. (T. 251)

77. He believes the approximate Spring Recharge area is 4 acres. (T. 253)

78. He believes this is a fairly typical recharge area for a domestic spring. (T.253)

79. The spring recharge area extends through the access road. (T. 253)

80. The 500 gallon reservoir makes the water supply more reliable. This is especially important if the water source is sporadic or low yield. (T. 253-254)

81. On all four visits he observed the Spring Box. (T. 254)

82. In March and April of 2006 he observed abundant leaves, sediment, and other debris in the Spring Box. It was apparent to him that it had not been cleaned in some time. (T. 255)

83. In December 2007 he still observed fine grain sediment in the Spring Box. (T. 255)

84. The depth of the Dormont soils in the area of the access road (and right beneath the road) was eleven feet. (T. 256)

85. Adjacent to the Spring Box the Dormont soil was a minimum of 4 feet deep. (T. 257)

86. The Spring Box is constructed in the Dormont soil and water infiltrates the soil unit and discharges to the Flenniken Spring Box. It overlies the Greene Formation. (T. 257)

87. The Dormont soils have low permeability. (T. 257)

88. The Flenniken Spring is a contact spring. (T. 258)

89. A contact spring is a geologic unit which permeates downward to the underlying Greene Formation. (T. 258-259)

90. The source of inflow to the Flenniken Spring is perched shallow ground water. (T. 259)

91. Base flow is below the Flenniken Spring. (T. 259)

92. He believes the Flenniken Spring is perched 37 feet above the water table. (T. 259)

93. The perched water system is separated from the water table. (T. 263)

94. The watershed for Stewart Run is larger than the watershed for the Spring. (T. 265)

95. A purpose of his field work in December 2007 was to determine if the access road had become a dam or barrier to the movement of water to the Flenniken Spring. (T. 267)

96. Mr. Blauvelt conducted field tests in the vicinity of the access road and concluded that the access road was not acting as a dam or barrier as water was moving in the soil under the road. (T. 269)

97. Mr. Blauvelt concluded that ground water was not mounded on the upslope side of the access road and was moving under the road down the hill toward the Flenniken Spring. (T. 269)

98. The flow in the Flenniken Spring would be highly variable depending on weather conditions. (T. 272-273)

99. Static water flow in the core hole was 42 feet below surface. (T. 274)

100. Mr. Blauvelt concluded that the core hole drilled on behalf of Cumberland Coal did not have an impact on the quantity of ground water discharging to the Flenniken Spring. (T.275)

101. Mr. Blauvelt bases his opinion on:

1) The presence of the 20 foot casing which would have isolated the ground water from the core hole. (T. 275)

2) The static water level of 42 feet would show it was not in connection with the water recharging the Spring. (T. 275-276)

3) The core hole is outside the recharge area of the Spring. (T. 276)

4) The core hole was properly plugged with thirty sacks of cement. (T.201, 276)

5) He concluded that the radius of influence of the core hole was too distant to dewater or lower the water table in the vicinity of the Spring. (T. 276-277)

102. If a core hole dewatered a recharge system the effect is immediate and continuing. (T.277-278)

103. The spring is located in a grove of trees which will also remove some of the water in the recharge area. (T. 278)

104. The removal of trees in the vicinity of the haul road would not diminish the available water from reaching the recharge area. The removal of roots would "fluff" the soil and loosen the soil thus increasing the infiltration rate. (T. 279-280)

105. Mr. Blauvelt concluded that the construction of the access road, the removal of some trees, and the trucks and vehicle traffic on the access road, and reclamation of the road, did not negatively impact the quality of the ground water available to the Flenniken Spring. (T. 281-282)

106. It did not impact the flow to the Spring. (T. 281)

107. The use of these vehicles would be very ineffective in compacting the soil in a significant manner. (T.282)

108. If there was any impaction, it would be measured in inches and it would not impact the movement of ground water. (T. 282)

109. Mr. Blauvelt believes the dewatering of the Spring was brought about by very low rainfall in the months prior to August 1, 2005 combined with the design of the Spring Box which is located at a very shallow depth. (T. 283)

110. Sediment also helped stop the flow of the water through the gravel collar to the Spring Box due to improper maintenance. (T. 283-284)

111. The dewatering of the Flenniken's well was thus caused by low precipitation, design, and poor maintenance and not by the mining activities of Cumberland Coal. (T. 284)

112. The most accurate way to measure water flow from the Spring Box would be to take the measurements daily for a year. (T. 285-286)

113. The Flenniken spring is a sensitive spring which can be easily impacted from a quality standpoint. (T. 310-311)

Michelle Lee Anderson

114. Michelle Lee Anderson oversees environmental issues including permitting. (T. 326)

115. She has a B.S. in Biology and an M.S. in Environmental Science. (T. 326)

116. She became aware of a diminution of water loss on August 1, 2005. (T. 327)

117. She interfaced with the California District Office of the Pennsylvania Department of Environmental Protection regarding the Flenniken's claim. (T. 328-329)

118. She arranged for Cumberland Coal to provide the Flennikens with a temporary water supply. (T. 328)

119. Cumberland Coal retained Higgins Hauling Company to repair a leak to the

Flennikin's water line. (T. 338)

120. Since Cumberland Coal filed its appeal with the Pennsylvania Environmental Hearing Board, she has had difficulty getting on the property. (T. 338-339)

Mrs. Ruth Ann Flenniken

121. Ruth Ann Flenniken lives at 527 Stewart Run Road in Waynesburg, Pennsylvania. (T. 365)

122. She and her husband have lived on this property since 1962. (T. 366)

123. They are served by a gravity flow spring. It is 365 feet from the house. (T. 367)

124. She and her husband developed the Spring in 1962. (T. 370)

125. They built a Spring Box to capture the water from the Spring. (T. 370)

126. Overflow from their 500-gallon concrete reservoir goes into a 1,000 gallon tank which goes to service a hunting cabin. (T. 372)

127. The hunting cabin is used by four to six individuals from Ohio. (T. 372)

128. They come for two weeks during deer season and they also come in the Spring during turkey season. (T. 372)

129. The cabin is also used by these hunters and relatives during the summer. (T. 373)

130. The 1,000 gallon reservoir was constructed in 1970. (T. 374)

131. Mrs. Flenniken testified that they never had problems prior to August 2005 with their water. (T. 379-380)

132. They would clean out the Spring Box and reservoir once a year. (T. 380)

133. It would take one to two hours to clean the Spring Box and reservoir. (T. 382)

134. Mrs. Flenniken claims the sediment never interfered with the flow of the water from

the Spring Box to the reservoir. (T. 383)

135. Cumberland Coal paid Mr. Higgins to fix the leak in their line. (T. 384, 389)

136. The Flennikens have had water delivered to their hot tub. (T. 391)

137. Mrs. Flenniken never had Mr. Higgins haul water to their house to fill their reservoir. (T. 394)

138. On July 8, 2005 they noticed there was no overflow. (T. 396)

139. On August 1, 2005 they ran out of water. (T. 397-398)

140. She observed no water in the reservoir and no water in the Spring. (T. 399)

141. Trees bulldozed by Mr. Tuttle are approximately 40 feet from the Flenniken's Spring. (T. 401)

142. There would never be a great deal of water in the Spring Box because the outlet pipe to the reservoir is near the bottom of the Spring Box. (T. 403)

143. Aside from the cleaning, Mr. and Mrs. Flenniken have never done any other maintenance on the Spring Box. They have never replaced the filter on the Spring Box. (T. 433, 462)

144. Mr. Edwards replaced the filter when he cleaned the Spring Box.

145. The top of the Spring Box was replaced several years ago. Mrs. Flenniken thinks it was replaced after August 1, 2005. (T. 437)

146. After receiving mailings from the Pennsylvania Environmental Hearing Board, Mr. and Mrs. Flenniken consulted an attorney who told them that it would cost them $20,000 for her to represent them as a party in the case. The Flennikens then decided that they could not afford these legal fees so they did not become parties to the case. (T. 472-473)

Mr. Martin J. Edwards

147. Mr. Martin J. Edwards works for the Pennsylvania Department of Environmental Protection in Harrisburg, Pennsylvania. (T. 479)

148. He works for the Bureau of Abandoned Mine Reclamation. (T. 479)

149. Prior to that he worked in the Bureau of Mines and Reclamation. (T. 480)

150. Mr. Edwards graduated from the University of Illinois in 1977 with a B.S. in Geology, with distinction. (T. 485)

151. Mr. Edwards graduated from West Virginia University in 1980 with a M.S. in Mining Geology. (T. 485)

152. Mr. Edwards has drilled hundreds of core holes in several states. (T. 483, 488-489)

153. Mr. Edwards is a licensed professional geologist in Pennsylvania since approximately 2003. (T. 485-486)

154. Mr. Edwards was certified by the Pennsylvania Environmental Hearing Board as an expert in the areas of geology and hydrogeology in the area of mining. (T. 492)

155. He has been involved in 10 informal reviews. Four of these involved Cumberland Coal. (T. 495)

156. Nine of the 10 informal reviews were from the California District Office. (T. 496)

157. In two of the ten cases he disagreed with the District Offices. (T. 496)

158. In February and March 2006 he began his informal review in this case. (T. 497-498)

159. He initially thought that Mr. Matyus' report was reasonable except for the core hole level and his conclusion concerning the plugging information. (T. 499-500)

160. He also did not agree that the Spring had reestablished itself. (T. 500)

161. The date of his first visit to the Flennikens was March 10, 2006. (T. 501)

162. On March 10, 2006 the Spring Box was not flowing to the reservoir. (T. 502)

163. After visiting the site, he was immediately concerned about the access road and its effect on the ground water that would recharge the Spring. (T. 506-507)

164. He cleaned the Spring Box and cleaned the pipe from the Spring Box to the reservoir. (T. 512)

165. After much investigation and research, he concluded that Cumberland Coal had caused the water loss in this matter. (T. 523)

166. Mr. Edwards claims that an engineering map by Blue Mountain Engineering, a firm retained by Cumberland Coal, indicates various seeps on the Flenniken property, including 6 seeps on the access road. (T. 534-536)

167. He concluded that when Cumberland Coal built the road and uprooted the trees they opened up water ways in the soil which disrupted the hydrology of the hillside. (T. 536-537)

168. He believes that the access road functions as a dam and a barrier. (T. 537)

169. At the core of the access road near the core hole he discovered a new spring near the core hole. (T. 538)

170. He believes this new spring was caused by the exploration activities by Cumberland Coal. (T. 538)

171. After Mr. Higgins cleaned the Spring Box and Reservoir the flow rate remained at 3 gallons per minute. (T. 551)

172. On May 12, 2008, he measured the flow around 1:30 p.m. He took 4 flow

measurements and came up with 8.9 gallons per minute. Earlier in the day, the coal company had measured 14 gallons per day. (T. 564)

173. He no longer believes that the core hole was a contributing factor to the water loss at the Flenniken property. (T. 579)

174. He believes the runoff from the road is a contributing factor to flow loss to the Flenniken Spring. (T. 632-633)

175. He believes the increase in sediment in the Spring Box was caused by Cumberland Coal exploration mining activities. (T. 636-637)

176. Prior to the mining activities in June 2005 the water that flowed to the Spring came from fractures and the overburden overlying the bedrock and the interrelationship that the fractures and the bedrock are supplying. (T. 644-645)

177. He estimates the recharge area of the Flenniken Spring is approximately 4½ acres. (T. 658)

178. He saw bubbling water in three seeps on the access road. (T. 669-670)

179. Diminution is different from a total loss. (T. 704-705)

Mr. Harold Miller

180. Mr. Harold Miller is the Chief of the Underground Mining Section of the Pennsylvania Department of Environmental Protection Bureau of Mining and Reclamation. (T. 759)

181. He supervises a staff of geologists. (T. 759)

182. He has participated in dozens of informal reviews over the years. (T. 771)

183. He has worked for the Pennsylvania Department of Environmental Protection for

27½ years. (T. 771)

184. He assigned the informal review to Mr. Edwards. (T-771-772)

185. He visited the Flenniken property and accompanied Mr. Edwards on the visit. (T. 773)

186. The conclusions of Mr. Matyus and Mr. Blauvelt are entitled to more weight and credibility than the conclusions of Mr. Edwards based on the foregoing Findings of Fact. (Testimony of Mr. Matyus and Mr. Blauvelt)

187. Although the access road had numerous wet areas and/or seeps this was not the cause of the water loss to the Flenniken Spring nor is it impacting to any measurable degree the flow of groundwater to the Spring. (T. 282-285)

Discussion

The Flenniken property is served by a spring. Mr. and Mrs. Flenniken constructed a spring box in 1962. The spring box is used to capture water from the spring. The spring box is located in a depression several feet below the surface. It is constructed of standard cement foundation blocks. Beneath the blocks is gravel. There is also a collar of gravel around the spring box.

The bottom run of the cement blocks is turned sideways which allows water from the spring to enter the spring box. A one-inch plastic pipe leads from the spring box to a 500 gallon concrete reservoir. A one-inch plastic pipe, placed approximately one foot from the bottom of the reservoir, supplies water by gravity to their home which is over 300 feet from the concrete reservoir.

The overflow from the 500 gallon reservoir drains through another one-inch

plastic pipe to a 1,000 gallon concrete reservoir. This services a hunting cabin on the property.

Mr. and Mrs. Flennikens' property has not been undermined by Cumberland Coal and the underground removal of coal is not alleged to have been a potential cause of the alleged diminution of flow in this case. On January 3, 2005, pursuant to regulation, Cumberland Coal submitted a Notice of Intent to Explore/Permit Waiver Request (NOI) to the Pennsylvania Department of Environmental Protection for coal exploration "mining-activities" on the Flennikens' property. The Department acknowledged receipt of the NOI by letter dated approximately one week later.

Coal Exploration Activities

In June of 2005, Cumberland Coal constructed a temporary access road, drilling pad and sump for the drilling of an exploration core hole on the Flenniken property. The purpose of the drilling of the core hole was to identify the thickness and quality of the Pittsburgh coal seam that is mined by Cumberland Coal. Mr. Scott Peterson, Cumberland Coal's geologist, testified that there is a sandstone channel in this area and he was trying to determine if the Pittsburgh coal seam was washed out or otherwise diminished before mining in this area.

The contractor used a bulldozer to build the access road. Some trees and brush were removed but no more than 2½ feet of soil. The access road took approximately 5 hours to build. It was 8 feet wide and approximately 500 feet long. It is not paved. According to the contractor no water was encountered when constructing the road.

From June 28, 2005 to July 6, 2005 the core hole was drilled to a depth of 854

feet. It was logged on July 7, 2005. The core hole was then properly plugged with thirty sacks of cement. Although it was drilled within 1,000 feet of the Flenniken Spring it was not located within the recharge area for the spring. Cumberland Coal then reclaimed the temporary access road by placing dirt and material back on the road and planting seed. Cumberland Coal completed all of its activities on the Flenniken property by July 13, 2005.

The evidence indicated that the access road was only used ten to eleven times by various vehicles. Other than the 13 ton bulldozer, the heaviest vehicle to use the temporary access road was the 13½ ton rubber tired truck mounted drill rig. This vehicle used the road twice. A drilling supply truck also made two trips to the drilling site along with two or three pick up trucks to drive workers to the site.

Water Loss or Diminution

At no time during the relatively short period when Cumberland Coal was engaged in surface mining activities on the Flenniken property did Mr. and Mrs. Flenniken complain of a reduction of flow from their Spring. However, on August 1, 2005 they contacted Cumberland Coal and indicated that they were experiencing problems with their domestic water supply. Cumberland Coal immediately investigated and although they did not believe that their coal mining activities were the cause of the problem, they contacted Higgins Hauling Company, and a temporary water supply was established for Mr. and Mrs. Flenniken the same day.

Mr. John Higgins, of Higgins Hauling Company, installed a 1,550 gallon water tank, referred to as a "water buffalo," not far from the Flenniken Spring and connected it

to the 500 gallon reservoir. Water is added to the water buffalo by a two inch-fill line that runs over 300 feet to the road where it can be hooked up to a water delivery truck.

The Department of Environmental Protection Investigation

Following this occurrence, Mr. Joseph P. Matyus, a very experience geologist with the Pennsylvania Department of Environmental Protection, investigated the Flennikens' water loss claim. After a detailed investigation involving several trips to the Flennikens' property, Mr. Matyus concluded that Cumberland Coal's mine exploration activities did not cause the water loss in question. He mainly focused his investigation on the core hole as opposed to the temporary access road. In late January, 2006, the Department conveyed this information to Mr. and Mrs. Flenniken. The letter also advised the Flennikens that they had the right to request an informal review if they disagreed with the Department's findings.

The Flennikens by letter dated February 7, 2006 requested such an informal review. The Department shortly thereafter assigned Mr. Martin J. Edwards, a professional geologist in the Department's Bureau of Mining and Reclamation, to conduct the informal review.

The Department Takes a Second Look

Mr. Edwards, who was recognized as an expert in geology by the Board at the trial, is a licensed professional geologist in the Commonwealth of Pennsylvania. He holds both a Bachelor of Science degree and a Masters of Science degree in geology. He has been employed by the Department since 1994. Although now currently in the Department's Bureau of Abandoned Mine Reclamation in Harrisburg, he had been a

geologist in the Bureau of Mining and Reclamation. In this position, he was largely responsible for reviewing and conducting geologic and hydrologic investigations in response to water loss and mine subsidence complaints.

Mr. Edwards has conducted numerous informal reviews, most involving the Department's California District Mining Office. Mr. Edwards visited the site several times and conducted a thorough investigation. He ended up disagreeing with his colleague, Mr. Matyus, and concluded that Cumberland Coal had failed to rebut the legal presumption of liability that its coal exploration mining activities within 1,000 feet of the Flennikens' Spring were the cause of the water loss. Mr. Edwards, despite ample evidence to the contrary, concluded that the water problems of the Flennikens were caused by a dam which developed under the location of the former access road as a result of construction and use that caused groundwater to mound and express itself on the surface as wet spots. According to Mr. Edwards, this resulted in a diminution or loss of water flow to the spring.

On September 28, 2006, the Pennsylvania Department of Environmental Protection, in reliance on Mr. Edwards' opinion, issued an Order which required Cumberland Coal to immediately submit a plan to restore or replace the Flennikens' domestic water supply. Cumberland Coal filed a timely appeal of the Order.

The Rebuttable Presumption

A key statutory provision, at least initially, in this appeal is the rebuttable presumption found in the Surface Mining Conservation and Reclamation Act, 52 P.S. Section 1396.1 *et. seq.* Under this Act, a coal company conducting coal exploration

activities is presumed liable for affecting a water supply, if the water supply is within 1,000 feet of mining activities, subject to the coal company's opportunity to rebut the presumption.

> It shall be presumed, as a matter of law, that a surface mine Operator or owner is responsible without proof of fault, negligence or causation for all pollution, except bacteriological contamination, or diminution of public or private water supplies within one thousand (1,000) linear feet of the boundaries of the areas bonded and affected by coal mining operations, areas of overburden removal and storage and support areas except for haul and access roads. If surface mining activities are conducted on areas which are not permitted and bonded, this presumption applies to all water supplies within one thousand (1,000) linear feet of the land affected by such operations.
>
> There shall be only five defenses to the presumption of liability provided in this clause. A mine owner or operator *must affirmatively prove by a preponderance of evidence* that one of the following conditions exists:
>
> (i) The landowner or water supply company refused to allow the surface mining operator or owner access to conduct a survey prior to commencing mining activities.
> (ii) The water supply is not within one thousand (1,000) linear feet of the boundaries of the areas bonded and affected by coal mining operations, areas of overburden removal and storage and support areas except for haul and access roads.
> (iii) The pollution or diminution existed prior to the surface mining activities as determined by a survey conducted prior to commencing surface mining activities.
> (iv) The pollution or diminution occurred as a result of some cause other than the surface mining activities.
> (v) The landowner, water supply user or water supply company refused to allow the surface mining operator or owner access to determine the cause

of pollution or diminution or to replace or restore the water supply.

52 P.S. § 1396.4b(f)(2) (*emphasis added*).

Similarly, the regulations implementing the above section of SMCRA state:

(1) It shall be presumed, as a matter of law, that a surface mine operator or mine owner is responsible without proof of fault, negligence or causation for all pollution, except bacteriological contamination, and diminution of public or private water supplies within 1,000 linear feet (304.80 meters) of the boundaries of the areas bonded and affected by coal mining operations, areas of overburden removal and storage and support areas of overburden removal and storage and support areas except for haul and access roads.

(2) If surface mining activities are conducted on areas which are not permitted or bonded, it shall be presumed, as a matter of law, that the surface mine operator or mine owner is responsible without proof of fault, negligence or causation for all pollution, except bacteriological contamination, and diminution of public or private water supplies within 1,000 linear feet (304.80 meters) of the land affected by the surface mining activities.

(c) *Defenses to presumption of liability.* There are only five defenses to the presumption of liability provided in subsection (b). For any of the five defenses to apply, the mine operator or mine owner *shall affirmatively prove by a preponderance of evidence* that one or more of the following conditions exists:

(1) The landowner or water supply company refused to allow the surface mine operator or mine owner access to conduct a water supply survey prior to commencing surface mining activities.

(2) The water supply is not within 1,000 linear feet (304.80 meters) of:

(i) The boundaries of areas bonded and affected by coal mining operations, areas of overburden removal and storage and areas used for support but not including haul and access

roads.

(ii) The boundaries of areas affected by surface mining activities in areas which are not bonded.

(3) The pollution or diminution existed prior to the surface mining activities as evidenced by a water supply survey conducted prior to commencing surface mining activities and as documented in the approved surface mine permit application submitted to the Department prior to permit issuance.

(4) The pollution or diminution occurred as a result of some cause other than the surface mining activities.

(5) The landowner, water supply user or water supply company refused to allow the surface mine operator or mine owner access to determine the cause of pollution or diminution or to replace or restore the water supply.

25 Pa. Code § 87.119(c) (*emphasis added*).

The Pennsylvania Environmental Hearing Board's *de novo* Review

The Pennsylvania Environmental Hearing Board reviews all Pennsylvania Department of Environmental Protection final actions *de novo*. *Warren Sand & Gravel Company v. Department of Environmental Resources,* 341 A.2d 556, 565 (Pa. Cmwlth. 1978). Former Chief Judge Krancer, in the oft-cited case of *Smedley v. DEP*, 2001 EHB 131, clearly set forth our duty in every case:

> We must fully consider the case anew and we are not bound by prior determinations made by the DEP. Indeed, we are charged to "redecide" the case based on our *de novo* scope of review. The Commonwealth Court has stated that "[*d*]*e novo* review involves full consideration of the case anew. The [EHB], as a reviewing body, is substituted for the prior decision maker, [the Department], and redecides the case." *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *O'Reilly v. DEP*, Docket No.

> 99-166-L, slip op. at 14 (Adjudication issued January 3, 2001)

2001 EHB at 156.

The Board earlier determined in this case in an opinion issued in August, 2007, *Cumberland Coal Resources v. DEP*, 2007 EHB 495, that the presumption of liability set forth in the statute and regulation applies where diminution or loss of a water supply is allegedly caused by the construction and operation of an access road and/or the drilling of a core hole within 1,000 feet of a domestic water supply. We explained that the word "permitted" is used in the regulatory context "as a noun rather than as a verb and refers to an actual permit to mine coal. We believe it is a 'word of art' when used in this context and means an actual permit to mine coal." 2007 EHB at 498.

We hold that in accordance with the clear language of the statute and the regulation that there are five defenses to the presumption of liability and to prevail, "a mine owner or operator must affirmatively prove by a preponderance of evidence one of the five defenses." *See* 25 P.S. Section 1396.4b(f)(2). In this case, Cumberland Coal proved by a preponderance of evidence that the diminution or water loss "occurred as a result other than its surface mining activities." Furthermore, Cumberland Coal proved by a preponderance of evidence that the diminution or water loss was caused by very low rainfall together with the design and maintenance of the spring box.

Discussion of the Evidence

We now turn our attention to a discussion of the evidence. Both parties' experts, Mr. Blauvelt and Mr. Edwards, are very knowledgeable. However, after considering all

of the testimony and exhibits we find Mr. Blauvelt's testimony to be more credible. We agree with Cumberland Coal that they introduced more than sufficient evidence to actually establish, by a preponderance of the evidence, that neither the core hole nor the temporary access road could have caused either a temporary or permanent diminution in flow or water loss to the Flennikens' domestic water supply. Indeed, Cumberland Coal proved by a preponderance of evidence that the lack of rainfall and condition of the spring box caused the water loss or diminution. Cumberland Coal surely introduced enough credible evidence to rebut the presumption of liability.

We look first to the core hole itself which even Mr. Edward's testimony does not support as a viable cause of the water loss. After the core hole was drilled the static water level in the core hole remained well below the elevation of the Flenniken Spring and the source of flow to the spring. This is not consistent if the core hole was a cause of the water loss.

In addition and very importantly, overwhelming evidence was introduced by Cumberland Coal that the core hole was properly plugged with thirty bags of cement. Once a core hole is properly plugged it simply no longer has the potential to divert water away from the Flenniken Spring. Indeed, even Mr. Edwards, after hearing testimony from Mr. Salisbury on this issue, agreed on cross-examination that the core hole was not the cause of any diminution in flow to the spring.

Moreover, if the core hole had been the cause of the problem, both Mr. Blauvelt and Mr. Matyus testified convincingly that a problem would have been immediately observed. We also believe that the Flenniken Spring was recharged by ground water

flowing close to the surface. As such, it was extremely sensitive to drought and periods of low rain.

Mr. Edwards testified that the temporary access road caused the water problem by acting as a dam and preventing flow from the area above the Flenniken Spring from recharging the spring. Although this theory is more viable than the core hole theory, it also is not supported by the evidence. Mr. Blauvelt testified persuasively that he located all of the wet spots in the area of the temporary access road. He further introduced evidence that the soils immediately below the area of the wet spots were not saturated. Mr. Blauvelt also produced evidence that was not contradicted by the Department that groundwater was moving beneath the location of the former access road toward the Flenniken Spring, a physical finding that is completely at odds with Mr. Edward's theory of a "dam" having developed beneath the access road. Mr. Blauvelt's detailed testimony about the soils, overburden and movement of groundwater also strongly supports Cumberland Coal's position. Therefore, based on this overwhelming evidence we find Mr. Blauvelt's testimony much more convincing and credible than the testimony of Mr. Edwards.

We conclude that the evidence offered by Cumberland Coal was more than sufficient to establish by the preponderance of the evidence that its coal exploration activities did not cause any temporary or permanent reduction in flow from the Flenniken Spring. In fact, Cumberland Coal proved by a preponderance of the evidence that the water diminution or water loss was caused by very low rainfall in the months prior to August 1, 2005 combined with the design and maintenance of the spring box. Stated

another way, after Cumberland Coal rebutted the statutory presumption, the Pennsylvania Department of Environmental Protection failed to prove by a preponderance of evidence that the coal exploration activities of Cumberland Coal caused the water diminution or water loss. Therefore, we find in favor of Cumberland Coal.

Conclusions of Law

1. The Pennsylvania Environmental Hearing Board has subject matter jurisdiction over the parties and this appeal. 35 P.S. Section 7514.

2. The Pennsylvania Environmental Hearing Board conducts its hearings *de novo*. The Board must fully consider the case anew and is not bound by any prior determinations made by the Pennsylvania Department of Environmental Protection. Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, based solely on the evidence of record in the case before it. *Warren Sand & Gravel Co. v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975); *Westinghouse Electric Corporation v. DEP*, 1999 EHB 98, 120 n.19; and *Smedley v. DEP and International Paper Co.*, 2001 EHB 131, 156.

3. The presumption of liability set forth in 52 P.S. Section 1396.4b(f)(2) and 25 Pa. Code Section 87.119(b) applies where diminution of a water supply is allegedly caused by coal exploration activities within one thousand feet of the water supply.

4. Cumberland Coal proved by a preponderance of credible evidence that the diminution or water loss occurred as a result of some cause other than the surface mining activities. 52 P.S. Section 1396.4b(f)(2)(iv).

5. The Pennsylvania Department of Environmental Protection failed to prove by a

preponderance of the evidence that Cumberland Coal's exploration activities on the Flenniken property were the cause of the water diminution or water loss claim.

6. Cumberland Coal proved by a preponderance of evidence that their coal exploration activities did not cause the water diminution or water loss on the subject property.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CUMBERLAND COAL RESOURCES, L.P.	:	
	:	
v.	:	**EHB Docket No. 2006-234-R**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 10th day of November, 2008, it is ordered as follows:

1. The appeal of Cumberland Coal is **sustained** and the Department's Order of September 28, 2006 is ***revoked***.
2. Cumberland Coal rebutted the presumption of liability set forth in 52 P.S. Section 1396.4b(f)(2) and 25 Pa. Code Section 87.119(b).
3. The Pennsylvania Department of Environmental Protection failed to prove by a preponderance of evidence that the coal exploration activities of Cumberland Coal caused the water diminution or water loss on the subject property.
4. Cumberland Coal proved by a preponderance of evidence that their exploration activities did not cause the water diminution or water loss on the subject property.
5. Cumberland Coal proved by a preponderance of evidence that the water

diminution or water loss was caused by very low rainfall in the months prior to August 1, 2005 combined with the design and maintenance of the spring box.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: November 10, 2008

See following page for service listing

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

TIMBER RIVER DEVELOPMENT CORP.	:	
	:	
v.	:	**EHB Docket No. 2008-095-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PAINT TOWNSHIP, Permittee	:	**Issued: November 12, 2008**

OPINION AND ORDER
ON PETITION FOR SUPERSEDEAS

By: Michelle A. Coleman, Judge

Synopsis:

The Board denies a petition for supersedeas where petitioner fails to support its petition with adequate affidavits, and fails to explain the absence of affidavits.

Opinion

Timber River Development Corporation (Timber River or Petitioner) filed a notice of appeal on March 27, 2008 to the Department's February 27, 2008 approval of Minor Act 537 Update Revision to Paint Township for its Riverhill Sewer Extension Project. This Update Revision was pursuant to an April 16, 2007 Consent Order & Agreement between the Department and Paint Township that required the Township to provide public sewage to 62 failing systems. It appears from the Petition for Supersedeas (Petition), now before the Board, that Timber River is planning to develop property in the Township that would be affected by the

sewage line extension required by the Consent Order & Agreement.

We must deny Timber River's Petition. After review of the Petition the Board is not fully aware of what the Petitioner is asking the Board to supersede and the Petition is not properly supported in accordance with our Rules.

We do not, however, need to go into the substance of the Petition because it fails to comply with 25 Pa. Code § 1021.62. This section requires that the petition for supersedeas be supported by affidavits, setting forth the facts upon which the granting of the supersedeas may depend or an explanation of why there are no supporting affidavits with the petition. 25 Pa. Code § 1021.62(a)(1)-(2).

The Petition before the Board contains seven exhibits. Exhibit F is an affidavit by Bryan W. Huwar, President of Timber River, containing three paragraphs that do not support any of the facts relied upon by the Petitioner. The Affidavit sets forth Mr. Huwar's identity and relationship to the matter; asserts that testimony by Department employees referred to in the Petition is true and correct (although the testimony has yet to be transcribed); and that he swears and affirms that the information is true and correct to the best of his recollection. Exhibit F. The Petition fails to contain any factual assertions supported by proper affidavits that would lead the Board to issue a supersedeas in this matter, and fails to explain why there are no supporting affidavits with the Petition. The Board received an additional filing from Timber River in accordance with an Order by the Board on November 3, 2008 allowing the parties to submit additional filings with respect to the Petition. Review of the supplemental filing by Timber River does not change our position. There still remains a failure by Timber River to file affidavits in support of its Petition. Based on this failure to support the Petition with adequate affidavits, and failure to explain the absence of affidavits, the Board is unable to grant a supersedeas in this matter.

Further, Timber River claims that its future plans on developing land within the Township would be affected by the sewage line extension required by the Consent Order. Timber River believes that the Department and Township are aware of its future project, however the Township contends that Timber River never submitted a sewage facilities planning module to Paint Township. The Township asserts that only after submission of such a planning module would the Township reassess the necessity of updating the Act 537 Plan with respect to Timber River's needs. Additionally, the Department asserts that the Consent Order came about because of the failing on-lot sewage systems in the Township having the potential to pollute or are already polluting the waters of the Commonwealth. Under our Rules the Board is unable to issue a supersedeas where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect. 25 Pa. Code § 1021.63(b). For all the foregoing reasons we enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TIMBER RIVER DEVELOPMENT CORP.	:	
	:	
v.	:	**EHB Docket No. 2008-095-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PAINT TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 12th day of November 2008, in consideration of the Petition for Supersedeas (Petition) and responses thereto, IT IS HEREBY ORDERED that the Petition is **DENIED**.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Judge

DATED: November 12, 2008

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

JOCK NATIELLO and JACQUELINE NATIELLO	:	
v.	:	**EHB Docket No. 2007-217-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 24, 2008**

ADJUDICATION

By George J. Miller, Judge

Synopsis

The Board dismisses an appeal from an order requiring a former gas station owner to perform a site characterization and other corrective action for a contaminated property. Although the station owner entered into an access agreement with the Department for the purpose of a limited clean-up of the site contamination, paid some response costs and sold the property, he was not relieved from his responsibility to complete the site analysis required by the Storage Tank Act. Accordingly, the Department's order was reasonable and appropriate.

BACKGROUND

Jock and Jacqueline Natiello (the Natiellos) appeal an August 1, 2007 order of the Department which required them, among other things, to perform site characterization and corrective action activities on property formerly known as Jock's Service Station. Although the Natiellos do not dispute that there is known or suspected contamination on the property, they contend that they are no longer responsible for any corrective action, in part because they have

sold the property and also because they believe that the Department relieved them of responsibility because of their repayment of response costs to the Department.

A hearing was held before the Honorable George J. Miller on July 22, 2008. Both parties have filed post-hearing memoranda which include proposed findings of fact and conclusions of law. The record consists of a transcript, 14 exhibits and a stipulation of facts. We have considered all of these materials and make the following:

FINDINGS OF FACT[1]

1. The Department is the agency with the duty and authority to administer and enforce the Storage Tank and Spill Prevention Act[2] (Tank Act), the Clean Streams Law,[3] the Land Recycling and Environmental Remediation Standards Act[4] and the regulations promulgated thereunder. (Ex. B-1 ¶ 1)

2. Jock's Service Station (the Facility) was a retail gasoline station and auto repair facility located on Route 13 and Washington Avenue, Marcus Hook Borough, Delaware County. (Ex. B-1 ¶ 2)

3. The Appellants, Jock F. and Jacqueline Natiello, owned the Facility and the real property on which the Facility was located and are "owners" as defined by Section 103 of the Tank Act.[5] (Ex. B-1 ¶ 3)

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[1] The Transcript is designated as "N.T. __." The Department's exhibits are designated as "Ex. C-_." The Natiellos did not present any of their own exhibits. The parties entered into a stipulation of fact, which is denoted as "Ex. B-1."

[2] Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101-6021.2104 (Tank Act).

[3] Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 (Clean Streams Law).

[4] Land Recycling and Environmental Remediation Standards Act, Act of May 19, 1995, P.L. 4, *as amended*, 35 P.S. §§ 6026.101-6026.908.

[5] 35 P.S. § 6021.103.

4. There were five known underground storage tanks (USTs) located at the Facility. Three tanks held 6,000 gallons of gasoline and were removed. Another tank held an unknown quantity of gasoline and was permanently closed. The last tank held 500 gallons of used motor oil and was removed. (Ex. B-1 ¶ 4)

5. Linda Wnukowski is a compliance specialist in the storage tank section of the Department's Southeast Regional Office. She holds both a bachelor's of science degree and also a master's degree. She has worked for the Department for 15 years. (N.T. 13-14)

6. On February 21, 1993, Tanknology, Inc., a consultant working for Sidhu and Gil, Inc., a lessee of the Natiellos, conducted a tightness test on three USTs at the Facility, identified suspected contamination. (Ex. B-1 ¶ 5.a.; Ex. C-2; Wnukowski, N.T. 21-23)

7. These tanks were leased to Sidhu and Gil who operated the tanks. (Wnukowski, N.T. 23)

8. Further, on February 25, 1994, the Department inspected the Facility in connection to an emergency response. (Wnukowski, N.T 28)

9. Apparently, Sidhu and Gil attempted to remove water from one of the storage tanks and dumped it in a floor drain in the bathroom. The drain was a sanitary sewer and some nearby homes were infiltrated by vapors. There was also a concern about the potential for explosions. (Wnukowski, N.T. 16, 34; Ex. B-1 ¶ 5.b)

10. The Natiellos were present at the site. (Wnukowski, N.T. 29)

11. The Department detected five inches of water in one of the tanks. This is an indication that there is a breach in the tank and gasoline may be leaking. (Wnukowski, N.T. 33; Ex. B-1 ¶ 5.b)

12. The Department's inspection also revealed the following:

a) USTs which had been out of service for over six years had been put back into service;

b) Tanknology had conducted piping tightness testing on February 23, 1994, and one piping run failed the test;

c) The date of the first product delivery to the previously out-of-service UST correlated with the hydrocarbon vapors detected in neighboring homes.

13. At that time the Department requested that the Natiellos perform a site characterization as required by the storage tank regulations when there is a suspected release. This characterization was not done. (Wnukowski, N.T. 33-34; Ex. C-3)

14. A notice of violation was issued to Sidhu and Gil as the operators of the tanks. The Department never had any response to the notice from Sidhu or Gil and eventually determined that Mr. Sidhu had fled to Canada. Mr. Gil was never located. (Wnukowski, N.T. 36)

15. Via the Department's inspection report following the February inspection, the Natiellos were again asked to perform a site assessment and remove the tanks. (Wnukowski, N.T 41, 54-55; Exs. C-4; C-6; C-7)

16. The Department was aware that the Natiellos had limited resources to address the conditions at the Facility, but he never filed for a loan from the Storage Tank Fund and did not submit financial information to the Department to support his claim. (Wnukowski, N.T. 43-45, 64; E.g. Ex. C-9)

17. Eventually, the Department was able to secure funding for some limited remediation work at the facility. Accordingly, the Department entered into a Consent Order and

Agreement with the Natiellos in order to secure access to the site in order to remove the tanks. (Cherry,[6] N.T. 82-83; Ex. C-11)

18. The agreement did not release the Natiellos from any liability. In fact, the Department explicitly reserved the right to pursue any enforcement action it deemed necessary nor did the agreement relieve the Natiellos from his obligation to comply with the Storage Tank act and regulations. (Ex. C-11)

19. The Department's response action only included the removal of certain underground storage tanks, the dispenser island and piping connected to the tanks. The pit was lined with plastic sheathing to isolate the contaminated soil on the site. The Department then returned the excavated soil to the pit and filled the empty space where the tanks had been with crushed stone. (Cherry, N.T. 76-77, 95,104)

20. The Department also performed some limited sampling of soil and groundwater in the vicinity of the pit. The Department's November 24, 1998 Closure Report for the removed USTs included groundwater sampling results with levels of contamination above the Department's clean-up standards. (Cherry, N.T. 87-90; Ex. B-1 ¶ 5.c; Ex. C-12)

21. Additionally, during the excavation Mr. Cherry observed that the water in the excavation pit had an oily sheen including petroleum product floating on top of the water. He also observed odors associated with gasoline. (N.T. 95-96)

22. Although the Department knew that there was some level of contamination at the site, it did not perform a site characterization. A site characterization was beyond the scope of the response action. (Cherry, N.T. 103-104)

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[6] Timothy Cherry was the Department's project officer for the response action at the Facility. He currently serves as a solid waste supervisor in the Department's Hazardous Sites Clean-Up Program. (N.T. 71-73).

23. The cost to the Department for the response action was $56,000. The Department contacted the Natiellos to seek reimbursement. (Cherry, N.T. 96)

24. On June 10, 1999, the Natiellos submitted documentation to the Department which indicated their financial inability to reimburse the Department the total amount of its response costs for the response action conducted at the Facility. (Ex. B-1 ¶ 6)

25. On July 10, 2003, the Natiellos granted the Department a mortgage on the Facility to secure their obligation to reimburse the Department for a portion of the Department's response costs. The amount of the mortgage was $28,000, which the Natiellos paid to the Department when the Facility was sold. (Ex. B-1 ¶ 7; Ex. C-14)

26. The mortgage document did not contain a release from liability, but required the Natiellos to maintain the property in good repair and "comply with all laws, ordinances and regulations affecting the property or use thereof." (Cherry, N.T. 99; Ex. C-14)

27. To date, the Natiellos have not applied for a release of liability from the Department. To acquire a release, among other things, an applicant would have to complete a site characterization. (Cherry, N.T. 100-101; Natiello, N.T. 139)

28. Before the August 2007 Order, the Natiellos were never directly ordered to complete a site characterization, although they were informally told of their obligation to do so, and were provided with a copy of the regulations which required a site characterization because of the suspected release at the facility. (*e.g.*, Wnukowski, N.T. 41, 33-34, 54-55)

29. Nor did the Natiellos make any inquiries of the Department concerning what further work, if any, might be necessary at the site. (Natiello, N.T. 145-46)

30. The Natiellos sold the Facility to Marcus Hook Borough in the late spring or early summer of 2007. (Ex. B-1 ¶ 8)

31. Bruce Dorbian is the municipal manager for the Borough of Marcus Hook. One of his responsibilities includes negotiating real estate transactions on behalf of the Borough. He negotiated the purchase of the Natiellos' service station property, which is adjacent to the Marcus Hook Municipal Building. (N.T. 110-111)

32. Although the Borough was aware that there was a response action by the Department at the Facility, Mr. Dorbian never reviewed any reports relative to the environmental conditions on the property. The Borough assumed that some level of contamination remained on the site. (Dorbian, N.T. 111; N.T. 117, 120)

33. Yet, the agreement of sale included a provision that was essentially a warranty that the premises had not been contaminated in any manner which required remediation. The agreement was a form agreement which was used by the Borough so that it could receive federal funding to purchase the property. (Dorbian, N.T. 117-19; Ex. C-16)

34. The Borough refused to take responsibility for any remediation costs for contamination on the property. (Dorbian, N.T. 114)

35. The Natiellos nevertheless agreed to the sale of the property. (Dorbian, N.T. 115-16; Ex. C-16)

36. The sale of the property was settled on July 23, 2007. The property was sold for $163,000. (Natiello, N.T. 139; Ex. C-16)

37. The mortgage to the Department was paid in full. (Natiello, N.T. 139)

38. On August 1, 2007, the Department issued the order to the Natiellos which required them to perform a site characterization and other remediation on the property.

DISCUSSION

The Board's review is *de novo*.[7] Accordingly, our decision is based upon the evidence which is presented to the Board during the hearing, and is not limited to the facts that were available to the Department at the time that it issued its order.[8] In an appeal of an enforcement order, the burden of proof is upon the Department to demonstrate that its order is supported by the evidence, is authorized by statute and is a proper exercise of the Department's authority.[9]

The Department's August 1, 2007 order directs the Natiellos to take corrective action at the site related to the 1993 and 1994 incidents and further based upon the contamination documented in the closure report after the removal of the storage tanks in 1998. The Natiellos have not disputed the existence of the contamination on the site. They presented no evidence of any other source for the contamination other than the leaking underground tanks that were on the property, as alleged by the Department.

Since there was at least one suspected release at the facility, the Natiellos had a responsibility under the regulations to perform site characterization and corrective action, regardless of whether they were ordered to do so directly by the Department.[10] There is also no dispute that the Natiellos neither performed a site characterization nor any interim response actions as required by the statute regulations. Therefore, Department had the authority under the Tank Act to order him to do so pursuant to Sections 6021.1302, 6021.1304 and 6021.1309.[11]

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[7] *Pequea Township v. Herr,* 716 A.2d 678 (Pa. Cmwlth.1998).

[8] *Pequea Township v. Herr,* 716 A.2d 678 (Pa. Cmwlth.1998); *Environmental & Recycling Services, Inc. v. DEP,* 2002 EHB 461

[9] 25 Pa. Code § 1021.122(b)(4).

[10] *E.g.*, 25 Pa. Code §§ 245.306 (interim remedial measures); 25 Pa. Code § 245.309-245.310 (requirements for site characterization).

[11] 35 P.S. §§ 6021.1302, 6021.1304 and 6021.1309.

The Natiellos do not dispute any of the facts proven by the Department in regards to the release requiring the site characterization and remedial action activities. Nor do they dispute the Department's basic authority to require such actions under the Tank Act. Instead, they defend their failure to comply with the Tank Act and regulations by taking the position that they are not the proper party to whom the Department's order should be directed. The basis for this argument is either because the Department became responsible when it took action to remove the tanks and contain some of the contamination or because they have no further obligation because they no longer own the property. The Natiellos further contend that they should be excused from compliance because they paid the Department for the tank removal from the proceeds of the sale of the property, therefore equitable principles of estoppel, laches or accord and satisfaction apply. Each of these equitable theories has been rejected either by the Board and the courts, as defenses to actions by the Department and the Natiellos offer no legal argument distinguishing those holdings from the facts before us now. As we explain in more detail below, we find the defenses raised by the Natiellos unavailing, and will dismiss the appeal.

First, underpinning many of the Natiellos' defenses is their view that the Department had an obligation to explicitly inform them of their legal obligations as the owner of underground storage tanks when there is a release from those tanks, and to make sure that they understood these requirements. They further suggest that the Department concealed these obligations from the Natiellos and caused them harm. Of course, the Department has no such obligation. Rather, it is the Natiellos' obligation, as owners of regulated tanks to take responsibility for informing themselves of the obligations of that ownership.[12] Although it is desirable for the Department to

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[12] *See e.g., MOST Health Services, Inc. v DEP,* EHB Docket No. 2007-069-MG (Adjudication issued May 6, 2008).

educate permit holders of their legal obligations, it has no duty to do so. Indeed, the Department presented evidence that after the 1994 emergency response, the Department did give the Natiellos a copy of the regulations. Additionally, several inspection reports which were given to the Natiellos noted their obligation to perform a site characterization. The Natiellos did not deny at the hearing that they had, in fact, received these things. It may be that the Natiellos were so overwhelmed by the situation that they chose not to educate themselves, but that certainly does not acquit them of the responsibility.[13]

Similarly, there is no evidence that the Natiellos were deceived or misled concerning the terms of the 1998 consent agreement which provided the Department with access to the property in order to remove the underground storage tanks and contain at least some of the spill. It is very clear that while the Department intended to perform some limited site remediation, it had no intention of relieving the Natiellos of their responsibility to characterize the site. Paragraph E of the order provides that the Department "will need to have access and entry to the Property in order to remove wastes from the tanks and to seal and/or remove the tanks."[14] This is the sole purpose of the order. There is nothing in the document which discusses the Natiellos' obligation to perform other remedial measures and site analyses to determine the extent of the contamination on the site. More importantly, nothing in the document releases the Natiellos from any obligations. The agreement does the opposite. Paragraph 3 of the Order section explicitly states that the agreement is not intended, "nor shall it be construed to relieve Mr. Natiello's obligation to comply with any existing or subsequent statute, regulation, permit or order." Further, the following paragraph explicitly preserves the Department's right to "institute

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[13] Id.
[14] Ex. C-11.

any action for any past, present or future violation of any statute, regulation, order or permit."[15] Therefore, the agreement does not relieve the Natiellos of their duty to perform the site assessment and preserves the Department's right to take enforcement action should they fail to do so.

Next the Natiellos take the position that they should not be responsible for the required actions at the site because they no longer own the property. They contend that either the Borough should be responsible as the current owner, or that the Department should be responsible because it became an "occupier" by operation of the access agreement. As we explain below, we find that the Natiellos remain responsible parties as defined by the Tank Act even though they sold the property to the Borough. We further find that the access agreement did not create any Department liability for the characterization.

The Tank Act and regulations provide that a person who is responsible for corrective action includes the owner or operator of a storage tank and the landowner or occupier of the land.[16] The definition of an "owner" is not limited to a current owner, but it includes:

> "the owner of an underground storage tank holding regulated substances on or after November 8, 1984, and the owner of an underground storage tank at the time

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[15] Ex. C-11, ¶ 4.

[16] 25 Pa. Code § 245.1:

> *Responsible party*—A person who is responsible or liable for corrective action under the act. The term includes: the owner or operator of a storage tank; the landowner or occupier; a person who on or after August 5, 1990, knowingly sold, distributed, deposited or filled an underground storage tank regulated by the act which never held a valid registration, with a regulated substance; and a person who on or after August 5, 1990, knowingly sold, distributed, deposited or filled an unregistered aboveground storage tank regulated by the act, with a regulated substance, prior to the discovery of the release.

all regulated substances were removed when removal occurred prior to November 8, 1984."[17]

The Superior Court has held that this definition includes both past and present owners and that a past owner may be found liable for corrective action on a property after its sale to another.[18] Therefore, although the Natiellos sold their property to the Borough, the agreement of sale does not release the Natiellos of liability for the site characterization or for any subsequent remedial action that may become necessary. In fact, the Borough rejected the Natiellos attempts to insert language into the agreement of sale which might have released them from their responsibilities, and yet the Natiellos signed the contract anyway.[19]

As for the contention that the Department is an "occupier" of the property because it performed some limited remediation activities with the Natiello's permission, this argument is specious. First, even if another party might also be a "responsible party" that does not relieve other responsible parties from liability for corrective action. Second, although the consent agreement gave the Department a right of access, it did not convey any sort of property or leasehold interest such that the Department became an occupier within the meaning of that term in the definition of "responsible party."

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[17] 35 P.S. § 6021.103. The regulations contain the identical definition. 25 Pa. Code § 245.1.

[18] *The Juniata Valley Bank v. Martin Oil Co.*, 736 A.2d 650, 659 (Pa. Super. 1999). The Natiellos attempt to distinguish this case by quoting a section of the opinion which discusses the presumption of liability under the Tank Act, and holds that a narrower class of defendants may be subject to the presumption. We are at a loss to understand the point of this discussion. Mr. Natiello has not disputed the facts relating to the 1994 release incident nor is there any dispute that he was the owner of the property at the time of the release. Therefore the presumption of liability does not appear to be at issue at this time.

[19] Exs. C-15, C-16. It appears from these exhibits that the Natiellos were represented by counsel for this transaction. They have made no argument that they didn't understand what they were signing.

The Natiellos argue that promissory estoppel should apply to relieve them from their obligations to perform a site characterization because the Department represented that "it would handle the remediation."[20] Further, the Natiellos argue that, given the Department's "silence" concerning further remediation action, it would be "unjust" to hold the Natiellos responsible.

The Board has held that, in theory, promissory estoppel can be applied against a government agency[21] if certain factors are met:

> To invoke the doctrine it must be shown that DEP
> (1) made a promise which DEP could reasonably expect to induce action or forbearance on the part of the promise; and
> (2) which does induce action or forbearance on the part of the promise.
> If these two elements are present, the promise is enforced only if necessary to avoid injustice.
> [The] Appellant has the burden of establishing [promissory estoppel] by clear, precise and unequivocal evidence.[22]

The Natiellos have offered no evidence that any "promise" was made to them by the Department. There is no evidence in the consent agreement itself that the Department had any intention of "handling the remediation." By the plain terms of the agreement it is clear that the Department only promised to empty and remove the tanks. The agreement is silent as to any other obligations the Natiellos had relative to the necessity of characterization on the site or as to other remediation that may be necessary. Nor is there any evidence that the Department in any way induced the Natiellos to refrain from meeting these other regulatory obligations. To the extent that the Natiellos may have been unclear about what they were signing when they signed

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[20] Appellant's brief at 9.

[21] *Reinhert v. DEP*, 1997 EHB 401, 415 (citing *Department of Public Welfare v. School District of Philadelphia*, 410 A.2d 1311 (Pa. Cmwlth. 1980).

[22] *Id.*

the consent agreement, it was not the Department's responsibility to guess what the source of their confusion may have been or what assumptions they were making.[23]

Similarly the mortgage does not create any promise by the Department which would relieve the Natiellos of their regulatory duties. The mortgage states that its purpose is to reimburse the Department for the removal of the underground storage tanks.[24] It does not mention anything about other site remediation or site characterization that might be necessary. Further, there is nothing in the document which releases the Natiellos from any future liability or requires the Department to take that liability upon itself. Rather, the mortgage, like the consent agreement, requires the Natiellos to comply with the laws and regulations which affect the property.[25]

In short, the Natiellos have failed to prove any promise by the Department to perform any site characterization or remediation activities beyond the removal of the tanks. Accordingly, promissory estoppel cannot apply as a defense to the Department's August order.

Similarly, the Natiellos' argument that their payment of the mortgage constitutes an "accord and satisfaction" is also without merit. As the Natiellos point out, an accord and satisfaction requires a disputed debt, a clear an unequivocal offer of payment in full satisfaction, and acceptance and retention of the payment.[26] It is true that the Natiellos disputed the amount that was expended by the Department for the remediation work that was done on the property, that the Department and the Natiellos agreed to settle on a lesser amount and that the Natiellos paid that lesser amount to the Department which accepted this payment. Thus, it might be

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[23] *Cf. LCA Leasing, Inc. v. DEP*, 1997 EHB 546 (the Department has no obligation to guess what an applicant "meant" if the permit application was unclear.)

[24] Ex. C-14.

[25] Id.

[26] *King v. Boettcher*, 616 A.2d 57 (Pa. Cmwlth. 1992).

argued, that accord and satisfaction applies to the reimbursement to the Department for the remediation. But there is nothing on the record which suggests that the Department agreed that the amount in settlement of the cost recovery claim had anything to do with the Natiellos' obligation to complete additional corrective action at the site. Therefore we reject this claim as well.

Finally, the Natiellos argue that the doctrine of laches should apply to the Department because the Department knew of the contamination at the site since 1994, but failed to communicate to the Natiellos that further remediation was necessary at the site. This argument fails as well. It is well-settled that the doctrine of laches can not be applied to the Department as it relates to the enforcement of regulations.[27] Yet Department witnesses testified that they did not aggressively pursue the Natiellos in enforcement actions, because they were aware that before the sale of the property the Natiellos had "resource issues," therefore civil penalties or other enforcement actions were considered potentially counterproductive. We cannot find that the Department's approach was unreasonable.

Accordingly, we find that the Department has adequately demonstrated that its August 1, 2007 Order requiring the Natiellos to comply with the storage tank regulations by performing site characterization and other corrective action activities was legal and appropriate. We make the following:

CONCLUSIONS OF LAW

1. The Board's scope of review is *de novo.*

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[27] *E.g. Lackawanna Refuse Removal, Inc. v. Commonwealth*, 442 A.2d 423 (Pa. Cmwlth. 1982).

2. The Department bears the burden of proving that the administrative order was reasonable and appropriate and in accordance with the law.

3. The Natiellos are "responsible parties" within the meaning of the Tank Act regulations.

4. The Department's August 1, 2007 Order directed to the Natiellos was authorized by the Tank Act and otherwise reasonable and appropriate.

5. The Natiellos failed to prove the elements necessary to support a defense of promissory estoppel or accord and satisfaction.

6. The doctrine of laches can not be applied to the Department as it relates to the enforcement of regulations, nor was the Department's delay in seeking enforcement of the Natiellos regulatory duties unreasonable.

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOCK NATIELLO and JACQUELINE NATIELLO	:	
v.	:	**EHB Docket No. 2007-217-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 24th of November, 2008, the appeal of Jock and Jacqueline Natiello is hereby **DISMISSED.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SOLEBURY TOWNSHIP & BUCKINGHAM TOWNSHIP	:	
v.	:	**EHB Docket No. 2002-323-L (Consolidated with 2002-320-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA DEPRTMENT OF TRANSPORTATION, Permittee	:	**Issued: December 1, 2008**

OPINION AND ORDER ON REMAND

By Bernard A. Labuskes, Jr., Judge

Synopsis:

On remand from the Supreme Court, the Board awards Appellants a portion of the attorneys' fees and costs that they incurred in challenging DEP's issuance of a 401 Certification that was subsequently rescinded at PennDOT's request.

OPINION

Background

This case returns to us on remand from the Pennsylvania Supreme Court. The Supreme Court's opinion sets the scene for our work on remand:

> [T]he Pennsylvania Department of Transportation ("PennDOT") applied to the Pennsylvania Department of Environmental Protection ("DEP") (collectively, "Appellants") for a water quality certification, required by Section 401 of the Federal Water Pollution Control Act, *see* 33 U.S.C. § 1341 (the "Clean Water

Act"), in connection with its proposed U.S. Route 202, Section 700 Bypass Project, which would connect Upper Gwynedd Township in Montgomery County to the existing State Route 611 Bypass in Doylestown Township, Bucks County. In 1989, due to the pronounced traffic congestion and growth estimates for the region, preliminary engineering studies commenced to determine the feasibility of the project. The Federal Highway Administration produced a draft environmental impact statement, noting that the bypass project was directed toward improving traffic congestion and driver safety on Route 202, and that agency's formal approval of the project was granted on August 27, 1998. In order to obtain the necessary federal permits for the bypass project, PennDOT applied to DEP for the requisite Section 401 Certification. On January 20, 1999, DEP issued the Section 401 Certification, approving the bypass project with certain reservations that are not presently the subject of the Townships' appeal.

Solebury Township and Buckingham Township (collectively, the "Townships"), as well as the Delaware Riverkeeper, the Delaware Riverkeeper Network, and the American Littoral Society (collectively, "Delaware Riverkeeper"), challenged the issuance of the Section 401 Certification before the Environmental Hearing Board (EHB).[2]

> [2] The Townships opposed the bypass project because they believed that it would spoil the scenic nature of the area and significantly increase the traffic into the Townships. In this regard, they have litigated numerous aspects of the bypass project in both state and federal courts. *See, e.g., Buckingham Twp. v. Wykle*, 157 F.Supp.2d 457 (E.D.Pa.2001), (resolving claims related to, inter alia, alleged violations of the Clean Air Act, 42 U.S.C. § 7506, *affirmed*, 27 Fed. App'x 87 (3d Cir.), *cert. denied*, 537 U.S. 826, 123 S.Ct. 120, 154 L.Ed.2d 38 (2002).

Appellants filed a motion for summary judgment, arguing, inter alia, that the Townships and Delaware Riverkeeper lacked standing. The Townships and Delaware Riverkeeper filed a cross-motion for summary judgment, asserting that the issuance of the Section 401 Certification was the product of an illegally truncated review process, in contravention of certain DEP regulations. These motions were scheduled for an en banc oral argument, but, seven days prior to argument, PennDOT requested that the Section 401 Certification be rescinded, and, on November 10, 2003, DEP

complied with the request. Two days later, PennDOT filed a motion to dismiss the challenge as moot, as the rescission of the Section 401 Certification rendered the requested relief unavailable.

* * *

[B]ecause the Section 401 Certification had been rescinded, the EHB refused to rule on the merits of the Townships' and Delaware Riverkeeper's challenges and dismissed the appeals as moot.

Subsequently, Buckingham and Delaware Riverkeeper sought to recover attorneys' fees pursuant to the Costs Act, *see* Act of Dec. 13, 1983, P.L. 1127 (as amended, 71 P.S. §§ 2031-35), and Solebury requested counsel fees under Section 307(b) of the Clean Streams Law, *see* 35 P.S. § 691.307(b). The Costs Act petitions were amended to include requests for attorneys' fees and costs under Section 307. No evidentiary record was created with regard to the applications for attorneys' fees, as the EHB did not hold a hearing to elicit testimony or legal argument.

* * *

With regard to the petitions under Section 307(b), the EHB observed that previous adjudications involving attorneys' fees under Section 307 have also concerned counsel fees under Section 4(b) of the Surface Mining Conservation and Reclamation Act, *see* 52 P.S. § 1396.4(b), *superseded*, 27 Pa.C.S. § 7708, and utilized the same analysis for both provisions. *See, e.g.*, *Lucchino* [*v. DER*], 570 Pa. [277] at 280, 809 A.2d [264] at 266; *Medusa Aggregates Co. v. Department of Environmental Resources*, 1995 EHB 414, 428 n. 7, 1995 WL 227814, at *8 n. 7 (Pa. Envt'l.Hrg.Bd. Apr. 6, 1995). The EHB determined, however, that the present matter does not implicate the latter statute, as the bypass project did not involve mining. In cases involving both Section 307 and Section 4(b), the EHB explained that, to determine whether an award of attorneys' fees is appropriate, courts have applied an analysis what has become known as the *Kwalwasser* test, according to which "(1) a final order must have been issued; (2) the applicant for the fees and expenses must be the prevailing party; (3) the applicant must have achieved some degree of success on the merits; and (4) the applicant must have made a substantial contribution to a full and final determination of the issues." *Big B. Mining Co. v. Department of Environmental Resources*, 155 Pa. Cmwlth. 16, 19, 624 A.2d 713, 715 (1993) (citing *Kwalwasser v. Department of Environmental Resources*, 131 Pa. Cmwlth. 77, 82, 569 A.2d 422, 424 (1990). The EHB determined that it was

appropriate to apply this test to the present matter, as, in its view, there was no reason to apply different criteria for petitions solely under Section 307.

On the merits, the EHB determined that, although a final order had been issued, namely, the dismissal of the case as moot, none of the remaining criteria had been fulfilled. Specifically, the EHB reasoned that the Townships and Delaware Riverkeeper were not prevailing parties because no ruling on the merits had been made, notwithstanding the parties' argument that they had obtained precisely the relief sought, *i.e.*, removal of the Section 401 Certification. Similarly, the EHB determined that the Townships and Delaware Riverkeeper had not achieved any degree of success on the merits, as, again, no ruling on the merits had been issued. In addition, because there had been no full and final determination of any underlying issues, the EHB held that no substantial contribution to the resolution of those issues could have been made. Thus, the EHB denied the motions for counsel fees under Section 307(b) of the Clean Streams Law.

The Townships appealed to the Commonwealth Court, arguing that they had achieved success on the merits sufficient to sustain an award of attorneys' fees. *See Solebury Twp. v. Department of Environmental Protection*, 863 A.2d 607 (Pa. Cmwlth. 2004).

* * *

On the merits of the Townships' applications for attorneys' fees, the Commonwealth Court applied the *Kwalwasser* test, but disagreed with the EHB's conclusions, and found that all four prongs of the test had been satisfied. The court noted that no party disputed that a final order had been issued in this matter, as the Townships' appeals had been dismissed as moot. Concerning the second part of the test, the Commonwealth Court applied the definition of "prevailing party" contained within the Costs Act, pursuant to which a party may be deemed to have prevailed when an agency withdraws from or otherwise terminates the matter. *See* 71 P.S. § 2032 (defining "prevailing party" as "[a] party in whose favor an adjudication is rendered on the merits of the case or who prevails due to withdrawal or termination of charges by the Commonwealth Agency or who obtains a favorable settlement approved by the Commonwealth Agency initiating the case."). Since the Townships achieved the goal they sought, namely, revocation of the Section 401 Certification, the court found that the voluntary rescission of the Certification did not affect the

Townships' status as prevailing parties.

> Further, the Commonwealth Court determined that the Townships had achieved some success on the merits. Because neither DEP nor PennDOT proffered a reason for revocation of the Section 401 Certification, the court concluded that the litigation instituted by the Townships was the cause of PennDOT's request for rescission. *See Solebury Twp.*, 863 A.2d at 611 ("This Court cannot close its eyes to the inevitable conclusion that DEP and [Penn]DOT sought to suddenly avoid a full argument on the merits for either no reason at all or because their legal position was untenable."). The Commonwealth Court emphasized that the Section 401 Certification was rescinded shortly before argument and did not accept PennDOT's suggestion that a change in governmental administration affected its decision not to proceed with the bypass project. Similarly, the Commonwealth Court held that the Townships had made substantial contributions to a full and final determination on the merits because the only contributions to the final determination were the challenges raised by the Townships. Observing that there was no evidence to show that the Section 401 Certification would have been rescinded absent the present litigation, the court held that the *Kwalwasser* test had been met and remanded the case for imposition of fees and costs. Additionally, the Commonwealth Court viewed the conduct of DEP and PennDOT in "suddenly and inexplicably" rescinding the Section 401 Certification as vexatious, especially in light of Appellants' claim that an award of fees and costs would be inappropriate as no merits determination had occurred. *See id.* at 611.

Solebury Township v. DEP, 928 A.2d 990, 993-97 (Pa. 2007).

The Supreme Court held that the Commonwealth Court erred by making factual findings without the benefit of a record. It also held that this Board's application of the *Kwalwasser* test was too narrow in light of the Board's broad discretion to award attorneys' fees. *Id.* at 1003. "[I]t is within the scope of the EHB's prerogative to channel its discretion in awarding attorneys' fees based upon considerations such as the *Kwalwasser* criteria when there has been no finding of bad faith or vexatious conduct." *Id.*

The Court continued:

> Although the discretion to award attorneys' fees granted to the EHB by Section 307 encompasses its ability to adopt standards by which applications for counsel fees may be decided, such standards cannot be interpreted to eliminate the availability of attorneys' fees to parties that may have incurred legitimate expenses solely on the basis of a restrictive interpretation of a federal statute.
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> * * *
>
> Thus, given Pennsylvania's strong policy to justly compensate parties who challenge agency actions by liberally interpreting fee-shifting provisions, see *Lucchino*, 570 Pa. at 285, 809 A.2d at 269, we agree with the Townships that the EHB's narrow application of the *Kwalwasser* criteria in the present matter was erroneous.
>
> More specifically, the broad grant of discretion to the EHB in awarding attorneys' fees under Section 307 renders Appellants' argument that a formal judgment is necessary to a finding that a party has prevailed with some degree of success on the merits untenable. Instead, we agree with the Commonwealth Court that the practical relief sought by the Townships should be considered when characterizing them as prevailing parties for purposes of the *Kwalwasser* test.

Id. at 1004. Following remand, we held a hearing on July 9, 2008, and the matter is now ripe for decision.

Additional Findings of Fact on Remand

1. The Townships filed their EHB appeals on December 18, 2002. Vigorous discovery and motions practice ensued.

2. On July 28, 2003, the Board scheduled several important, potentially dispositive motions for *en banc* argument to be held in Harrisburg on November 13, 2003.

3. Meanwhile, starting in January 2003, under the direction of its new Secretary, Allen D. Biehler, P.E., PennDOT was engaged in a long-term evaluation of transportation needs in the state. (Notes of Transcript page ("T.") 63, 69; PennDOT Ex. 25.)

4. On October 14, 2003, Secretary Biehler and other Commonwealth officials met

with Governor Edward G. Rendell to discuss the bypass project. (T. 81-82.) Governor Rendell expressed a strong negative reaction to the project's cost. (T. 84.)

5. The meeting with Governor Rendell confirmed the direction in which PennDOT had already been taking the project; namely, a need to consider alternatives to an expressway estimated to cost $486 million. (T. 81-84.)

6. PennDOT decided to put the expressway project on hold primarily but not exclusively because the new Administration was concerned that the project was too expensive given the Commonwealth's multiple needs and the limited resources available to meet those needs. (T. 84-91.)

7. PennDOT decided to put the project on hold to give it an opportunity to determine whether less expensive alternatives were available that would serve local mobility needs while addressing ongoing concerns about the project's impact on the landscape, thereby reaching an accommodation with local groups and municipalities opposed to the project. (T. 84-91, 114; Solebury Ex. 8, ("effects on outlying areas") 21 (at 3-5), 24 (at 4), 26, 55 (evaluate options that "would preserve and enhance the surrounding communities") (desire to "balance concerns of proponents and opponents"); PennDOT Ex. 8, 11.)

8. Local opposition to the project had been expressed in multiple ways, such as commissioning alternate designs, lobbying, and prosecuting litigation in multiple fora, including, of course, the appeals filed by the Townships with this Board. (*Solebury Township*, 928 A.2d at 993 n.2; *Buckingham Twp. v. Wykle*, 157 F. Supp. 2d 457, 473 (E.D.Pa. 2001), *aff'd*, 27 Fed. App'x 87 (3rd Cir. 2001), *cert. denied*, 537 U.S. 826 (2002); T. 79, 80, 217-20; Solebury Ex. 8, 19, 20.)

9. PennDOT after years of study now intends to move forward with a "parkway"

concept, which is roughly in line with one of the transportation choices that had been advocated by the Townships from the beginning. (*Buckingham Twp. v. Wykle*, 157 F.Supp. 2d at 473 n.16; T. 79-80, 87-88, 236-37; Solebury Ex. 55 p. 6; PennDOT Ex. 29.)

10. The parkway will be a new roadway located on the same alignment as the expressway project, but at a significantly reduced scale. (T. 87-88, 334-35.) The parkway will provide fewer travel lanes than the expressway, and it is budgeted to cost $200 million (which is $285 million less than what the expressway would have cost). (PennDOT Ex. 9.)

11. The EHB appeals in and of themselves were not a substantial cause of the highway project moratorium or its ultimate redesign. (Findings of Fact ("FOF") 1-10.)

12. Meanwhile, as the date for oral argument before the EHB loomed and it appeared that the expressway project might be put on hold, PennDOT's attorneys in late October and early November 2003 began to look into ways to terminate the Townships' EHB appeals with extreme prejudice. (T. 262-73, 277-78; Solebury Ex. 31.)

13. PennDOT devised a strategy to render the appeals moot. On November 6 (five days before oral argument), PennDOT sent a letter to DEP requesting that DEP rescind the 401 Certification for the project. No reason was given. (T. 264; Solebury Ex. 9.)

14. Although DEP's permitting staff may have been aware of PennDOT's reason for seeking a rescission, the Regional Director claims that he approved the rescission without really knowing why PennDOT wanted it. (T. 327-28.)

15. DEP swiftly rescinded the Certification on November 10. (T. 327; DEP Ex. 2.)

16. On November 10, due to the rescission, PennDOT moved this Board to postpone oral argument. We granted that request on November 12.

17. PennDOT that same day moved to dismiss the appeals as moot. After briefing,

we eventually dismissed the appeals as moot by opinion and order dated January 16, 2004. The fee litigation followed.

18. PennDOT had **not** as of October 14, 2003 or November 6, 2003 definitively decided to scrap the expressway design and/or select any particular alternative to the expressway. Although a realization of the expressway concept was very much in doubt, the project had **not** been finally rejected. PennDOT merely decided as of those dates that it needed to take a fresh look at possible alternatives. (T. 84-91, 114, 268; Solebury Ex. 31.)

19. It was not known in October-November 2003 whether the existing or a new 401 Certification would be needed. (Solebury Ex. 31.)

20. PennDOT did not publicly announce that it had decided to rethink the project. It instead decided to evaluate alternatives in secret. (T. 50-51, 89-91, 169-70.)

21. It was not until March 25, 2004 (4 months after the rescission) that PennDOT publicly announced that it was reevaluating or deferring 26 major projects, including the expressway. (T. 68, 74, 84-91, 262; Solebury Ex. 50.)

22. Even as of March 24, 2004, there was still no final decision on what to do with the project. (Solebury Ex. 50.)

23. PennDOT's right-of-way purchases and some engineering work continued even after the rescission. (T. 90-91, 131-32.)

24. A 401 Certification is not like a permit. It does not create any obligations or impose any liability. (T. 331.) It does not expire. (T. 331.) No purpose whatsoever vis-à-vis the underlying project is served by rescinding it.

25. The only reason that a DEP witness could imagine why a certification holder would ask for a rescission was if the underlying project was cancelled and the certification was

not, therefore, "needed." (T. 331.)

26. A 401 Certification *will* be needed for the future project. There has never been a time that it has been known that a 401 Certification would not be needed in this case. (T. 334-335; Solebury Ex. 13, RR at 1178a, 1211a.)

27. Retaining a 401 Certification is essential to assuring federal funding. (T. 111.)

28. Neither PennDOT nor DEP were able to cite another example of a party asking to rescind or withdraw a 401 Certification. (T. 121, 324, 329-30.)

29. The Townships' appeals were the catalyst for the rescission of the 401 Certification. (FOF 12-26.)

30. The primary basis for the Townships' EHB appeals was that the 401 Certification "was the product of an illegally truncated review process." *Solebury Township*, 928 A.2d at 993. Specifically, the Townships charged that DEP allowed PennDOT to skip the permitting requirements set forth in 25 Pa. Code Chapter 105 as a prerequisite to obtaining the 401 Certification. (Solebury Exhibit 10, Reproduced Record ("RR") Vol. I 26a-32a, Solebury Ex. 11, RR Vol. II, 328a-764a, Solebury Ex. 12, RR Vol. III, 764a-937a.) The Board, of course, never ruled on the merits of this argument.

31. DEP states that it intends to continue to use the process, but there is no evidence that it has in fact done so since 2004, before the Commonwealth Court's ruling in this case. (T. 328; 34 Pa. Bull. 4074.)

32. PennDOT in October 2003 suggested to DEP that the Townships' argument against DEP's review procedures could be avoided if DEP caused the Environmental Quality Board to add language to the Chapter 105 regulations. DEP rejected the suggestion. (T. 305-10; Solebury Ex. 27.) There have been no regulatory changes as a result of the Townships' EHB

appeals.

33. Although PennDOT has not made any binding commitment to limit its options when applying for a future certification for a redesigned highway project, PennDOT intends to request a certification on the entire project at the same time it submits an application for a Chapter 105 permit for the first of the three design sections of the project. (Solebury Ex. 13, RR, 1178a and 1211a.) (*See also* Buckingham's Proposed Conclusions 34-37, not denied or otherwise addressed in PennDOT's or DEP's briefs.) This approach would be more in keeping with the procedure advocated by the Townships. There is no evidence, however, that DEP will revise its procedures when reviewing these materials.

34. Between preparation of its appeal in December 2002 and the Board's January 16, 2004 Opinion dismissing the appeals as moot, Solebury Township reasonably incurred a total of $189,989.06 in legal fees and $10,641.50 in costs, for a subtotal of $200,630.66. (Solebury Ex. 1.) Twenty-five percent of this amount is $50,157.67.

35. In pursuing its petition for costs and fees, which was filed after the Board's January 16, 2004 Opinion, Solebury Township reasonably incurred a total of $116,018.50 in legal fees and $8,504.86 in costs, for a subtotal of $124,523.36. (Solebury Ex. 1; Solebury Post-Hearing Brief, Ex. A; Solebury Motion to Amend Fees Petition, Ex. A.)

36. Adding the amounts of costs and fees Solebury Township reasonably incurred in the underlying litigation together with the amount reasonably incurred in pursuit of its petition for costs and fees, Solebury Township incurred a grand total of $325,154.02. (FOF 34-35.)

37. Between preparation of its appeal in December 2002 and the Board's January 16, 2004 Opinion, Buckingham Township reasonably incurred a total of $83,385.16 in legal costs and fees. (T. 197-98; Buckingham Ex. 1, 1-A.) Twenty-five percent of this amount is

$20,846.29.

38. In pursuing its petition for costs and fees, which was filed after the Board's January 16, 2004 Opinion, Buckingham Township reasonably incurred a total of $55,397.24 in legal costs and fees. (T. 197-98; Buckingham Ex. 1, 1-A; Buckingham's Requests to Amend Petition (September 24, 2008 and November 18, 2008).)

39. Adding the amounts of costs and fees Buckingham Township reasonably incurred in the underlying litigation together with the amount reasonably incurred in pursuit of its petition for costs and fees, Buckingham incurred a grand total of $138,782.40. (FOF 37-38.)

DISCUSSION

The Supreme Court in its opinion and order remanding this matter to us for further consideration confirmed that the Board may, in its discretion, award attorneys' fees under Section 307 of the Clean Streams Law solely on the basis of a finding of bad faith or vexatious conduct, which is supported by the record, without reference to the *Kwalwasser* criteria. *Solebury Township*, 928 A.2d at 1005. Although the bad-faith criterion was originally applied where a permittee sought to recover fees from a third-party appellant, *Lucchino v. DEP*, 1998 EHB 556; *Alice Water Protection Ass'n v. DEP*, 1997 EHB 840, it now appears clear that bad faith or vexatious conduct on the part of the Commonwealth can support an award of fees. *Solebury*, 928 A.2d at 1005 (citing *Lucchino*, 809 A.2d 264, 269-70 (Pa. 2002)). The Supreme Court emphasized, however, that such a finding must be based on a factual record. *Id.*

Although the Commonwealth Court perceived vexatious conduct on the part of the agencies, the Supreme Court chastened it for making what amounted to factual findings from an appellate perspective based upon an undeveloped record. *Id.* The Court remanded the case to this Board to make factual findings on the issue. On remand, however, the Townships have not

alleged, let alone proven, that the agencies acted in bad faith or vexatiously. We certainly do not independently discern any evidence of such conduct. Accordingly, we do not award fees on that basis.

Moving past bad faith, the Supreme Court has given us conflicting signals on what we are to do with the *Kwalwasser* test. Although the Court has never endorsed the test, *see Lucchino*, 809 A.2d at 270 n.1, it also has never expressly disavowed the test, and at several points in its opinion the Court seems to refer to the test as if it remains viable. *See, e.g.*, 928 A.2d at 1003 (EHB may award fees based upon considerations "such as" the *Kwalwasser* criteria), 928 A.2d at 1004 (EHB should consider practical relief sought when determining whether a party prevailed "for purposes of the *Kwalwasser* test"), 928 A.2d at 1005 (EHB's holding that there was no degree of success on the merits, a *Kwalwasser* criterion, was not supported by a factual record) and 928 A.2d at 1005 (fees may be awarded based upon bad faith, "without reference to the *Kwalwasser* criteria"). Similarly, the Court did not criticize us for applying the *Kwalwasser* criteria, it criticized us for our "narrow application" of the test. 928 A.2d at 1003, 1005.

On the other hand, the Court was also critical of the application of the *Kwalwasser* test to Section 307 of the Clean Streams Law because the *Kwalwasser* test was derived from federal regulations promulgated under a federal mining statute. The Court noted that many federal statutes and cases interpreting those statutes are distinguishable because the federal laws use the term "prevailing party" but Section 307 does not. The Court seemed to say that the federal standard--which *Kwalwasser* happens to parrot--is not entirely in synch with Pennsylvania's "strong policy to justly compensate parties who challenge agency actions by liberally interpreting fee-shifting provisions ...." *Id.* at 1004. Furthermore, it is very difficult to reconcile the Court's holding that we must consider the practical relief sought by the fee

applicant with the *Kwalwasser* requirement that there must be some degree of success "on the merits" and a substantial contribution "to a full and final determination of the issues." As we held in our original Opinion in this case and continue to believe, a dismissal based upon mootness is anything but a decision on the merits or a full and final determination of the issues. And yet, the Court has clearly signaled that fee awards should be an option in such situations. Finally, the Court, without expressly adopting the catalyst theory for awarding fees, repeatedly cited with approval that approach and quoted from other opinions that specifically advocated its use. *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health & Human Services*, 532 U.S. 598, 622 (Ginsburg, J., dissenting); *Graham v. Daimler–Chrysler Corp.*, 101 P.3d 140 (Cal. 2004). The catalyst theory and the *Kwalwasser* test are similar in some ways, but they are hardly consistent. Under the catalyst theory, still widely used throughout the United States despite the U.S. Supreme Court's 5-4 rejection of the test in *Buckhannon*, attorneys' fees are available in the absence of a formal judgment or Board-approved settlement agreement under certain circumstances if a lawsuit brings about a voluntary change in the defendant's conduct consistent with the relief sought by the fee applicant in the litigation. This standard appears to mirror quite closely the Pennsylvania Supreme Court's vision in this case of how Section 307 should be applied.

We will take the Supreme Court's opinion as an invitation to take a fresh look at the standards that the Board will apply in awarding fees pursuant to Section 307 of the Clean Streams Law. The Supreme Court's basic point is that this Board has "broad discretion" to award fees under Section 307 where we believe that it is appropriate to do so. To paraphrase the dissenting opinion in *Buckhannon*, our Legislature in promulgating Section 307 of the Clean Streams Law assigned responsibility for awarding fees not to automatons unable to recognize

extortionists, but to judges expected and instructed to exercise "discretion." 532 U.S. at 639-40.

When adopting standards and otherwise exercising our discretion, the Court reminds us that Pennsylvania has a strong policy in favor of justly compensating parties who challenge agency actions, and that fee-shifting provisions should be liberally interpreted. 928 A.2d at 1004-05. While the Board may "channel its discretion" by adopting standards and criteria by which applications for counsel fees will be decided, 928 A.2d at 1003-04, our standards should not be based upon a restrictive interpretation of federal statutes. 928 A.2d at 1004.[1] Our criteria may include the *Kwalwasser* criteria, but we should not apply those criteria narrowly or exclusive of other pertinent considerations. 928 A.2d at 1003-05; *see also* 928 A.2d at 1006 (Eaken, J., dissenting in part) (the majority opinion appears to authorize *Kwalwasser* and other unspecified criteria). In other words, failure to meet one or more of the *Kwalwasser* criteria should no longer be considered fatal to a claim for attorneys' fees (with the exception of the procedural requirement that there must be a final order before we will accept a fee application).

A formal judgment or Board-approved settlement agreement is not a prerequisite to an award of fees, 928 A.2d at 1004, and we must consider the extent to which the fee applicant attained the practical relief it sought. 928 A.2d at 1004. This Board may award some or all of the costs and attorneys' fees reasonably incurred in proceedings pursuant to the Clean Streams Law to a party who participates in those proceedings if the proceedings caused the Department to alter its behavior, even in the absence of a Board order on the merits or a Board-approved

[1] It would seem that we have now been cautioned against relying on federal fee-shifting standards on multiple occasions. *See Lucchino v. DEP*, 809 A.2d 264, 269 (Pa. 2002) (reliance on federal law in interpreting state fee statute "was unnecessary and rendered more complicated a decision that could have been based on the language of the statute"); *Big B Mining Co. v. DER*, 597 A.2d 202 (Pa. Cmwlth. 1991), *app. denied*, 602 A.2d 862 (Pa. 1992) ("*Big B I*") (error to interpret state mining statute based upon congressional intent regarding parallel federal mining statute); *Big B Mining Co. v. DER*, 624 A.2d 713, 714-15 (Pa. Cmwlth. 1993) ("*Big B II*") (error to adopt standard for awarding fees based upon federal standard).

settlement. The fee applicant must be said to have prevailed in the sense that it achieved a favorable result and its success to some extent can be tied to its appeal. We will bring our reasoned discretion to bear by applying these criteria flexibly and fairly, always keeping in mind the purposes underlying the fee-shifting provision in particular and the Clean Streams Law in general. Finally, to the extent an award of fees rests upon factual findings, it must be supported by a record. 928 A.2d at 1005.

Of course, discretion entails the freedom to make choices and the Supreme Court repeatedly emphasized that the Board has "broad discretion" in awarding fees. 928 A.2d at 1003-05. *See also Lucchino*, 809 A.2d at 307. The fact that the Board *may* award fees does not mean that the Board *must* award fees simply because a party satisfies the threshold requirement of having pursued litigation that brought about a favorable change in circumstances. *Hoy v. Angelone*, 720 A.2d 745, 751 (Pa. 1998) (statutory provision stating that fees "may" be awarded does not mean that a court must award fees); *Krebbs v. United Refining Co.*, 893 A.2d 776, 786 (Pa. Super. 2006) (same).

It would also be a mistake to view fee awards as an all-or-nothing affair. Whether we will award fees in a particular case and the amount of the fees that we will award will depend upon several considerations, no one of which will be dispositive. We may need to consider exactly what the party accomplished, the extent to which the litigation brought about the accomplishment, the particular party's role in the process, and the extent to which the accomplishment matches the relief sought by the fee applicant. In other words, a party's degree of success can vary widely, and we will take that into consideration in awarding fees. *See In re LaRocca*, 246 A.2d 337, 340 (Pa. 1968) (fee award depends in part on the result obtained). *See also Krebbs,* 893 A.2d at 789*; Signora v. Liberty Travel, Inc.*, 886 A.2d 284, 293 (Pa. Super.

2005) ("The prevailing party's degree of success is the critical consideration in determining an appropriate fee award."); *Borough of Bradford Woods v. Platt*, 799 A.2d 984, 991-92 (Pa. Cmwlth. 2002).[2] We will consider whether an appeal involved multiple statutes, and whether litigation fees overlap fees unrelated to the litigation itself. *Harborcreek Twp. v. Ring*, 570 A.2d 1367, 1372-73 (Pa. Cmwlth. 1990) (fees recoverable only for efforts within the case). *See generally Hensley v. Eckerhart*, 461 U.S. 424, 429-30 (1983). We will also consider how the parties conducted themselves in the litigation, the size, complexity, importance, and profile of the case, the degree of responsibility incurred and risk undertaken, and the reasonableness of the hours billed and the rates charged. *See In re LaRocca Estate*, 246 A.2d at 339; *Holz v. Holz*, 850 A.2d 751, 760-61 (Pa. Super. 2004), *app. denied*, 871 A.2d 192 (Pa. 2005); *South Whitehall Twp. v. Karoly*, 891 A.2d 780, 784-85 (Pa. Cmwlth. 2006); *DER v. PBS Coals, Inc.*, 677 A.2d 868, 875 (Pa. Cmwlth. 1996).

The Clean Streams Law authorizes this Board to award fees in recognition of the fact that appeals are often essential to the effectuation of fundamental public policies embodied in the Clean Streams Law, and that without some mechanism authorizing the award of attorneys' fees, appeals to effectuate such policies will as a practical matter frequently be infeasible. *See Solebury*, 928 A.2d at 1002 (*citing Graham*, 101 P.3d at 149). If the purpose of fee shifting in EHB appeals is to see that public policies are effectuated through the correction of Departmental errors, it is only appropriate that we consider the extent to which an appeal effectuated such policies when we consider whether to award fees. *See Krebbs v. United Refining Co.*, 893 A.2d 776, 788 (Pa. Super. 2006) (award of fees should be made in a manner consistent with the aims and purposes of the statute), and *id.* at 791 (court should assess whether award will promote the

[2] These same authorities emphasize that degree of success should not be measured strictly in monetary terms.

purposes of the Act); *Krassnoski v. Rosey*, 684 A.2d 635, 639 (Pa. Super. 1996) (court should consider whether an award of fees would promote the purposes of the specific statute involved).

We reject the agencies' contention that fee applicants must prove that it was the strength of the applicants' arguments that brought about the favorable outcome. Of course, if a party wins on the merits, that will bode well for an award of fees. On the other hand, in a case such as this where we did not reach the merits, we simply do not know whether the claims were meritorious. We are reluctant to hazard what would be little more than a guess in this context, and fee applications should not turn into mini-trials on the merits. Furthermore, there is no apparent reason why we would want to delve into the Department's subjective motivations underlying its tactical decisions. *Mea culpas* are neither common nor traditionally required. History teaches that nearly every change in agency conduct, whether memorialized in a settlement agreement or otherwise, comes with a reservation that there is no admission of wrongdoing or liability. There is rarely if ever one factor that animates a decision to concede. Trying to measure an agency's fear of an adverse result is a distraction and an exercise in futility. Still further, requiring proof of the Department's fear of losing where the Department has not acknowledged the weakness of its position sets up a nearly insurmountable practical burden that cannot be reconciled with Pennsylvania's strong policy in favor of justly compensating parties who challenge agency actions. It is nearly impossible for a private party to prove why a governmental agency changed its institutional mind. Finally, the dissent in *Buckhannon*, cited repeatedly and favorably by our Supreme Court, noted that fees in many jurisdictions have long been available in cases where there is no resolution on the merits or a judicially approved settlement agreement. *Buckhannon*, 532 U.S. at 625-26 (Ginsburg, J., dissenting). *See also id.* at 617-18 (Scalia, J., concurring). The important point is that the agency changed its conduct at

least in part as a result of the appeal. The appeal caused the change, not necessarily the "merits" of the appeal. Causation is the key; motive is not.

This Case

We start with the threshold questions of (1) whether the Townships prevailed and (2) whether they prevailed because of their appeals. We recognize that the Supreme Court did not appear to question that there was a favorable outcome and remanded primarily for a determination of causation. We nevertheless believe it is appropriate to take a careful look at both questions. Determining whether a fee applicant prevailed requires us to consider both the relief sought and the result obtained. This might very well evolve into a multitiered inquiry depending upon how we define the two sides of the equation. For example, in this appeal, it might be said that the Townships sought (1) a rescission of the 401 Certification, (2) a change in the procedures DEP uses to review highway project Certifications, and/or (3) termination (or at least a dramatic alteration) of the highway project. Solebury Township in its brief focuses exclusively on the causative relationship between its appeal and the eventual rescission of the 401 Certification. Buckingham Township takes the analysis further and argues that its appeal also caused the highway redesign and a change in DEP's review procedure. We prefer Buckingham's approach (if not all of its conclusions) and agree that the analysis should consider all of the objectives.

Turning first to the expressway project, the Townships could not have asked for more. In fact, the outcome was more favorable than anything that the Townships could have achieved in the appeals themselves. This Board would not have been in a position to do anything with respect to the highway project or its design. However, a causative relationship between the appeals and the change in the project is lacking. We do not believe that the Townships' litigation

substantially contributed to PennDOT's decision to put the highway project on hold and eventually redesign it. Although local opposition in its many forms was certainly a factor in propelling the expressway project to the top of the list of dozens of projects that could have been put on hold, what primarily drove the reconsideration was the fact that PennDOT realized that it had far more projects in the works than money to pay for them. Further, the EHB appeals were only one small part of the opponents' broad strategy for bringing about a change. If we imagine that PennDOT had the necessary funds, it is our sense that the project would have gone forward notwithstanding the EHB appeals. Indeed, even if the Townships had obtained a favorable ruling in the appeals, relief for their attack on DEP's review procedures would likely have taken the form of a remand with instructions to DEP to follow proper procedures. We cannot agree with Buckingham that the limited exposure and expense presented by the EHB appeals resulted in the massive redesign of a $486 million project.

Turning secondly to DEP's review procedures, we do not reach causation questions with respect to those procedures because the Townships did not achieve a favorable outcome with respect to those procedures. Although it would be naïve to think that the Townships cared more about DEP's procedures than stopping the bypass, *see Solebury*, 863 A.2d 607, 610 (Pa. Cmwlth. 2004) (the Townships' strategy of attacking the process was "but a means to an end"), it nevertheless was an outcome that they sought, but did not achieve. Although PennDOT has suggested it *might* in a *limited way* proceed more in line with the Townships' vision of proper procedures in the future *on this project*, (FOF 33), DEP has steadfastly insisted that it will not change it ways. This case is rather different, then, from cases such as *Buckhannon* where the West Virginia legislature repealed the law that was the subject of the court challenge.

Turning finally to the 401 Certification, as with the underlying project, there obviously

was a favorable outcome. The Certification was rescinded, which was exactly the practical relief that the Townships sought in their appeals. (Solebury Ex. 11, 372a, 13.1281a.) The more challenging question regarding the Certification is whether the Townships' appeals *caused* the rescission. We conclude that they did.

The agencies posit that fiscal constraints leading to the highway redesign caused the rescission. We do not believe that to be the case. The first problem with the Commonwealth's argument is that DEP rescinded the 401 Certification at a time when it was not known whether it would be needed or not. In the momentous fall of 2003, when the Certification was rescinded, PennDOT had not decided much of anything regarding the project. At most, PennDOT had decided that it might be worthwhile to explore less expensive alternatives. PennDOT actually continued land acquisitions and permitting work after the rescission. Its counsel opined that rescission would not prevent the project from continuing to move forward. (Solebury Ex. 31.)

More importantly, if we imagine that the highway project was put on hold for possible revamping due to fiscal concerns but there was no litigation underway regarding the Certification, there would have been no reason whatsoever for PennDOT to request a rescission and for DEP to grant that request. The Certification could have remained in place notwithstanding a decision to redesign the project. There was no downside to allowing the Certification to remain in place. It carried with it no liability or responsibility. It had no expiration date. It was the product of considerable work, and it was obviously a valuable thing to have. The *only* conceivable reason for PennDOT to get rid of it and for DEP to rescind it was to set up a motion to dismiss the Townships' appeals as moot. But for the appeals, we are convinced that the Certification would not have been rescinded. At a minimum, the appeals were a substantial contributing factor in the nullification of the Certification.

The timing of events confirms our conclusion. At the time PennDOT requested the rescission, it had already litigated against the Townships for years. The high cost of the project was also known for years, and finding funds for projects is a never-ending problem. (T. 65-66.) As early as the summer of 2003, if not earlier, PennDOT says that it began to rethink this project. In fact, it has yet to decide on a final course of action. Yet, in the midst of all this ongoing uncertainty, in a process that has dragged on for a decade, PennDOT in an incredible rush of activity in a few short weeks in late October and early November 2003 managed to not only decide upon a course of action but implement that course of action with respect to the 401 Certification. What propelled this burst of activity? The *only* event that was happening was the imminent EHB oral argument. Nothing else can explain why PennDOT and DEP did what they did *when* they did it.

PennDOT argues that it would have been a senseless waste of resources to continue to litigate the appeals once the decision was made to potentially revamp the project. We do not necessarily agree that the litigation was "senseless." It is difficult to ignore the irony that PennDOT's desire to avoid litigation has resulted instead in years of litigation. And despite the years of litigation, important issues remain completely unresolved. Even if the litigation was senseless, however, the fact remains that it was that senseless litigation, and specifically the desire to terminate that litigation, that was the direct and proximate cause of the rescission.

It is interesting, if not more, that PennDOT never offered its fiscal-constraint explanation at the time that these events were taking place. It would have been easy enough to do. PennDOT spins this mysterious silence as a need to protect its secret decision to revisit the project. The Townships spin it as *post hoc* rationalization. Regardless of who is right, PennDOT might have saved everybody a lot of trouble had it revealed that the project was under review,

that the Townships had a chance of prevailing after all, and that the litigation could be put on hold pending the completion of that process. Instead, by its own admission, its strategy remained a secret until it appeared that it was potentially liable for rather substantial attorneys' fees. It was only then that its secret strategy was revealed.

Withdrawal of a 401 Certification is a highly unusual event. There is no record evidence that it has *ever* occurred before or since PennDOT requested it in this case. At the time PennDOT decided to reevaluate the project, there were at least 26 other PennDOT projects that were being deferred or reevaluated, yet the 401 Certifications, if issued, were not withdrawn or rescinded on any of those projects. (T. 73-74, 121, 329-30; Solebury Ex. 50.)

DEP, an agency not ordinarily given to extraordinary alacrity, granted PennDOT's request for a rescission in four days. DEP's Regional Director somewhat incredibly did so claiming to not really know why PennDOT wanted it. DEP granted the rescission request despite the fact that there is no record of a 401 Certification before or since having been surrendered. It did so even though surrendering a certification is an essentially irrational act unless there is an ulterior objective. It did so even though obtaining a certification is not only no easy task for the applicant, it presumably entailed a considerable amount of work on the part of DEP's staff. From these and other circumstances we draw the inescapable conclusion that DEP was a willing participant in the plan to defeat the Township's litigation.

DEP was, of course, not required to grant PennDOT's request for a rescission. We will never know whether it would have been so quick to grant the request from an entity other than a sister agency, but it is clear that the only reason that DEP granted the rescission was because PennDOT asked for it, and the only reason that PennDOT asked for it was to terminate the Townships' appeals. Therefore, the Townships prevailed against both agencies and their appeals

caused both agencies to change course with respect to the certification itself.[3]

Although the Townships may be said to have prevailed, theirs is a rather limited victory. The Townships cannot take credit by virtue of their appeals for changing the expressway project, and they cannot claim any victory regarding DEP's review procedures. Although the Townships achieved some immediate success with respect to the 401 Certification, the proposed parkway project will presumably require a new 401 Certification despite the fact that the proposal shares the same alignment as the bypassed bypass, and the same streams and waterways will be affected. *See Kwalwasser v. DER*, 569 A.2d 422, 425 (Pa. Cmwlth. 1990) (EHB did not abuse its discretion in denying award of fees where ostensibly favorable relief proved to be limited and temporary).

Furthermore, it is difficult to see how the Townships have advanced the purposes, objectives, interpretation, or implementation of the Clean Streams Law in any way. The appeals have not served to protect or enhance the quality of the Commonwealth's waters. The appeals have not resulted in any actual improvements to or protection of waterways. The appeals have not resulted in improved standards, regulations, permits, or procedures. Even if we assume (inaccurately) that the Townships' appeals caused the highway redesign, whether that redesign is in the public interest is in the eye of the beholder. The project presumably had as many proponents as opponents. For all we know, the death of the expressway is unfortunate. The public policy that the Townships sought to effectuate here by virtue of their EHB appeals was correction of DEP's allegedly illegal procedure for reviewing PennDOT's projects. Not only has there been no finding of an error on DEP's part, there has been no equivalent practical success

[3] No party has raised any issue regarding DEP's and PennDOT's respective liability for fees. The parties have assumed that PennDOT and DEP as sister agencies of the Commonwealth are jointly and severally liable and we will do the same.

because DEP has not changed its procedure.

Of course, the fundamental purpose of fee-shifting is to encourage *bona fide* challenges to DEP actions, and that is exactly what the Townships brought here. We have no interest in stifling such challenges. An award of fees here will encourage such *bona fide* challenges. If DEP is employing improper procedures, its error needs to be corrected. On the other hand, parties are not awarded fees for filing appeals. They are awarded fees for achieving results. The Supreme Court's decision did not change that. The Townships achieved limited and temporary success with respect to the 401 Certification itself and no success in any other respects. Given the rather limited victory occasioned by their appeals, we do not believe that it would be appropriate to award them all of their fees. On the other hand, we do not feel comfortable denying the Townships any fees given that they, at least for now, accomplished exactly what they sought out to do by filing their appeals. On balance, and in light of all of the above, we will award the Townships 25 percent of their fees incurred in the underlying litigation. We see no reason why we should discount their collection costs and we award them 100 percent of the fees incurred in the fee litigation.

It remains for us to determine whether the Townships' fees were "reasonably incurred," as required by Section 307. We are cognizant of the large amount of fees that were incurred in this case. Once the Townships quantified with credible evidence the fees that they incurred using the lodestar method (the number of hours expended on the litigation multiplied by a reasonable hourly rate), however, it was incumbent upon the agencies to show us why the fees were unreasonable. The agencies put virtually no effort into making such a showing, instead placing all of their eggs in the basket of no fees at all. At the parties' joint request, the Board reluctantly allowed for an extended period of discovery in this case following remand. The

parties did little to take advantage of that opportunity. DEP did not challenge the calculation of the fees in any way. PennDOT has raised a few short criticisms in its post-hearing brief, but it does not point to any specific amounts by which the fees should be adjusted. It is not sufficient for a party to raise generic complaints and then expect the Board to do its accounting.

For example, PennDOT argues, correctly, that only the hours that Buckingham's attorney spent on the EHB appeal may be awarded. PennDOT goes on, correctly, to argue that Buckingham's attorney was involved in nonlitigation activities. PennDOT fails, however, to pinpoint any specific entries that are on their face inconsistent with the Township's credible testimony supported by adequate documentation that only litigation fees are included in the claim. PennDOT did nothing to overcome that credible evidence. PennDOT goes on to claim that "many" billing entries are rather generic, but that is no excuse for failing to nail down allegedly unrecoverable fees.

PennDOT also challenges the hourly rates of Solebury's first law firm, which were in the $480 range for the partner in charge. The Township eventually changed to its current firm, whose partner has billed this matter at $200 an hour. PennDOT characterizes the first firm's rate as excessive, but the only evidence that it cites is the fact that competent firms with lower rates were obviously available because the Township switched to one. We need more than that, however, to conclude that the rates were unreasonable. There will always be a lower-priced attorney available for hire. Parties are not required to shop for price alone. For all we know based on the record before us, the second firm's rates were unreasonably low. PennDOT has failed to rebut the Township's case by sufficient proof that either rate was within or outside of customary rates for a complex, high-profile case of this nature in this location.

With all of this in mind, we award the following attorneys' fees:

Solebury Township

Underlying Litigation $200,630.66

Percent Awarded (25%) **$50,157.67**

Fee Litigation $124,523.36

Percent Awarded (100%) **$124,523.36**

Total Amount Awarded: **$174,681.03**

Buckingham Township

Underlying Litigation $83,385.16

Percent Awarded (25%) **$20,846.29**

Fee Litigation ..... $55,397.24[4]

Percent Awarded (100%) **$55,397.24**

Total Amount Awarded: **$76,243.53**

Standing

At this late date, PennDOT rather remarkably challenges Solebury Township's standing to appeal the 401 Certification. This argument very nearly qualifies for the sort of vexatious conduct that the courts speak about when approving a fee award as a consequence of bad faith. The Supreme Court remanded this matter to us for the very limited purpose of making findings and conclusions regarding the fee award. Whether the EHB appeals were timely, whether the parties had standing, whether the DEP's review processes are valid, and any other issues presented in the original appeals are long past consideration. For PennDOT to now suggest that

[4] In its November 18, 2008 request to Amend its Petition for Attorneys' Fees, Buckingham includes a request for an additional $647.00. The request is supported by an affidavit from Buckingham's attorney. Neither DEP nor PennDOT have opposed the Township's calculations in the past. However, we note that the $647.00 addition includes a request in the amount of $100.00 for an expense Buckingham expects to incur. We have included everything in the Township's latest amendment in the award except for that $100.

this Board should go back and, for example, assess what streams would have been affected by the project to evaluate standing is not well taken.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this appeal. 35 P.S. § 7514; *Solebury Township v. DEP*, 928 A.2d 990, 1005 (Pa. 2007).

2. The Board has broad discretion to award attorneys' fees under Section 307 of the Clean Streams Law, 35 P.S. § 691.307.

3. The Board may, in its discretion, and when supported by the record, award attorneys' fees under Section 307 of the Clean Streams Law solely on the basis of a finding of bad faith or vexatious conduct. *Solebury Township*, 928 A.2d at 1005.

4. A formal judgment on the merits or a Board-approved settlement agreement is not a prerequisite to an award of fees. The Board may also consider the extent to which the applicant attained the practical relief it sought. *Solebury Township*, 928 A.2d at 1004.

5. When no judgment on the merits is reached or a Board-approved settlement is entered, the Board may award some or all of the costs and attorneys' fees reasonably incurred in proceedings pursuant to the Clean Streams Law to a prevailing party who participates in those proceedings if the proceedings caused the DEP to alter its behavior. The fee applicant must be said to have prevailed in the sense that it achieved a favorable result and its success to some extent can be tied to its appeal. The Board will bring its reasoned discretion to bear by applying these criteria flexibly and fairly, keeping in mind the purposes underlying the fee-shifting provision in particular and the Clean Streams Law in general.

6. An award of attorneys' fees will depend upon several considerations, no one of which will be dispositive, including what the party accomplished, the extent to which the

litigation brought about the accomplishment, the particular party's role in the process, and the extent to which the accomplishment matches the relief sought by the fee applicant.

7. The Board will consider whether an appeal involved multiple statutes, and whether litigation fees overlap fees unrelated to the litigation itself. We will also consider how the parties conducted themselves in the litigation, the size, complexity, importance, and profile of the case, the degree of responsibility incurred and risk undertaken, and the reasonableness of the hours billed and the rates charged.

8. The Clean Streams Law authorizes this Board to award fees in recognition of the fact that appeals are often essential to the effectuation of fundamental public policies embodied in the Clean Streams Law, and that without some mechanism authorizing the award of attorneys' fees, appeals to effectuate such policies will as a practical matter frequently be infeasible. *See Solebury*, 928 A.2d at 1002 (*citing Graham*, 101 P.3d at 149). If the purpose of fee shifting in EHB appeals is to see that public policies are effectuated through the correction of Departmental errors, it is only appropriate that we consider the extent to which an appeal effectuated such policies when we consider whether to award fees.

9. Fee applicants must not prove that it was the strength of the applicants' arguments that brought about the favorable outcome.

10. The Townships' appeals caused PennDOT to request rescission of the 401 Certification, and caused the DEP to rescind the Certification.

11. The Townships quantified with credible evidence the fees that they incurred by calculating the number of hours they expended on litigation multiplied by a reasonable hourly rate. The Commonwealth failed to rebut the Townships' presentation and calculation of their incurred expenses.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SOLEBURY TOWNSHIP & BUCKINGHAM TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2002-323-L**
	:	**(Consolidated with 2002-320-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA DEPRTMENT OF TRANSPORTATION, Permittee	:	

ORDER

AND NOW, this 1st day of December, 2008, it is hereby ordered that the Commonwealth of Pennsylvania, Departments of Environmental Protection and Transportation, are jointly and severally responsible to within 60 days pay Solebury Township $174,681.03 and Buckingham Township $76,243.53.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

Judge George J. Miller recused himself and did not participate in this matter.

DATED: December 1, 2008

c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library

For the Commonwealth of PA, DEP:
Anderson Lee Hartzell, Esquire
Southeast Regional Counsel
Office of Chief Counsel

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For Permittee, PennDOT:
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PennDOT Office of Chief Counsel
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Harrisburg, PA 17105-8212

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SOLEBURY TOWNSHIP & BUCKINGHAM TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2002-323-L**
	:	**(Consolidated with 2002-320-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA DEPRTMENT OF TRANSPORTATION, Permittee	:	

DISSENTING OPINION

By Thomas W. Renwand, Acting Chairman and Chief Judge

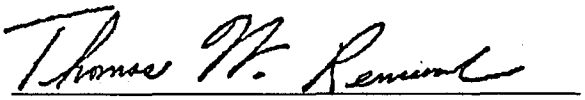
I respectfully dissent from the well written majority opinion. There is much about this opinion to admire. Nevertheless, the townships have the burden of proof to show they are entitled under the law to the hundreds of thousands of dollars in attorney fees they seek from the public coffers. I find the record is utterly devoid of any factual evidence that they have carried their burden. Indeed, I find especially compelling and creditable the testimony of Pennsylvania Secretary of Transportation Allen D. Biehler.

Secretary Biehler testified convincingly, and without contradiction, that the Pennsylvania Department of Transportation faced a very significant backlog of projects and that there were simply insufficient funds to complete all of the projects that it had started. (N.T. at 70) By April 2003, the estimated cost of this project had soared to $486,000,000. (Exhibit PennDot-9, Transportation Briefing Paper dated April 18, 2003 at 1) On October 14, 2003, Secretary Biehler and other Commonwealth officials met with Governor Edward G. Rendell to discuss the project. (N.T. at 81-82) Following this meeting, it was decided that the Pennsylvania Department of

Transportation would not be able to conclude the project because it was simply too expensive. (N.T. at 85) Shortly thereafter, the Pennsylvania Department of Transportation logically concluded that in light of the above decision it was senseless to continue in the above litigation.

I find the withdrawal of the 401 Certification to have been the simplest and (before today's decision) most logical way to quickly end the litigation. I find that this withdrawal had nothing to do with the merits of the litigation filed by the townships. Therefore, I find no legal basis for awarding attorney fees.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Acting Chairman and Chief Judge

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JEFF LIPTON, LOUISE E. MOYER, BRIAN K. MOYER and JACQUELINE D. MOYER	:	
v.	:	**EHB Docket No. 2007-026-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, DISTRICT TOWNSHIP, And PINE CREEK VALLEY WATERSHED ASSOCIATION, INC.	:	**Issued: December 8, 2008**

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

By George J. Miller, Judge

Synopsis

The Board awards attorney fees and costs in this appeal under the Clean Streams Law to Pine Creek Valley Watershed Association, Inc. in the total amount of $34,833.89 representing an award of counsel fees of $22,530 and $12,303.89 in necessary costs. The petitioner is the prevailing party in this appeal relating to the Department's approval of a sewage planning module for a residential subdivision, where the Department failed to determine whether the method of sewage disposal would adversely impact exceptional value waters as required by the antidegradation regulations promulgated pursuant to the Clean Streams Law.

BACKGROUND

Appellant Pine Creek Valley Watershed Association, Inc. (Pine Creek) seeks an award of attorney's fees and costs following our opinion and order in an earlier appeal relating to the Mulberry Hill II Subdivision.[1] In that opinion we held that the Board could exercise its discretion to award costs and fees because the Board concluded that Pine Creek had prevailed on the issue of the Department's failure to consider the impact of its approval of a sewage planning module on exceptional value waters as required by the Department's anti-degradation regulations promulgated under the Clean Streams Law. [2,3] We rejected the Department's position that no award could be made because the approval of the module was made under the Sewage Facilities Act[4] which has no provision for attorney fees. We concluded under the facts of that appeal that Pine Creek's appeal was a proceeding under the Clean Streams Law that provides for the recovery of attorney fees and costs in Section 307(b) in proceedings under that Law.[5] We have made an award of attorney fees and costs to Pine Creek in that appeal by separate order issued today.[6]

This appeal is also from the Department's approval of a sewage planning module (module) as an official plan revision for the Fredricksville Farms Subdivision in District and

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[1] *Pine Creek Valley Watershed Association v. DEP*, EHB Docket No. 2005-249-MG (Opinion issued May 20, 2008).

[2] Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 (Clean Streams Law).

[3] Our opinion mistakenly stated that these regulations were also issued under the Sewage Facilities Act. See 29 Pa. Bull. 3720, C. Statutory Authority.

[4] Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20a (Sewage Facilities Act).

[5] 35 P.S. § 691.307(b).

[6] *Pine Creek Valley Watershed Association v. DEP*, EHB Docket No. 2005-249-MG (Opinion issued December 8, 2008).

Longswamp Townships, Berks County. The module was approved by the Department pursuant to the Sewage Facilities Act. The notice of appeal in this Fredricksville appeal objected to the Department's approval on the ground that the Department failed to consider the impact of the method of sewage disposal for the subdivision on exceptional value waters of the Commonwealth. A number of other objections were included in the notice of appeal. Pine Creek complained that the proposed buildings and on-lot disposal systems would be in a buffer zone adjacent to exceptional value wetlands connected to the Exceptional Value Pine Creek watershed. According to the notice of appeal, the District Township Official Sewage Facilities Plan prohibits sewage facilities that would result in damage to this buffer zone. In addition, Pine Creek said that the project would damage exceptional value wetlands connected to the Pine Creek Watershed, the delineation of the wetlands was inadequate, the erosion and sedimentation plan was not complete, the Department's criteria for nitrates was not reasonable, the approval violated nutrient loading requirements, the project might result in destruction of bog turtle habitat and the plan failed to adhere to best management practices.

Shortly after the Department rescinded its approval of the module for Mulberry Hill II, in January, 2008, the Department withdrew its approval of the Fredericksville module for failure to consider the effect of the approval on Exceptional Value waters and moved to dismiss the appeal as moot. The Intervener-developers opposed this motion and filed an appeal from the Department's action, but the Board held that the withdrawal of the approval was reasonable.[7] Pine Creek's petition for an award of counsel fees and costs under Section 307(b) of the Clean Streams Law followed.

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[7] See *Lipton v. DEP*, EHB Docket No. 2007-026-MG (cons.)(Opinion issued May 20, 2008).

OPINION

Our decision to grant fees is governed by the fee-shifting provision found in Section 307(b) of the Clean Streams Law. That sections provides that the Board:

> upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to this act.[8]

The Pennsylvania Supreme Court has instructed the Board to liberally construe the interpretation of this section in order to effectuate Pennsylvania's strong policy to "justly compensate parties who challenge agency actions."[9] With this in mind, we turn to the arguments of the parties.

Pine Creek seeks an award of attorney's fees at the minimum of $22,080, or $39, 360 if the award is based on a claimed market rate of $300 per hour, and costs of $12,303.89.[10] Pine Creek's Supplemental Petition also seeks an additional award for fees and costs incurred in pursuit of the fee petition.

The Department claims that no award is appropriate because this appeal is a proceeding under the Sewage Facilities Act, which does not contain a provision for an award of attorney's fees, and because Pine Creek has not made a reasonable effort to apportion time and costs related to the pursuit of objections set forth in the notice of appeal that are not related to the claim that the Department improperly failed to consider the effect of the project on Exceptional Value waters.

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[8] 35 P.S. § 691.307(b).

[9] *Solebury Township v. Department of Environmental Protection*, 928 A.2d 990, 1004 (Pa. 2007).

[10] Pine Creek Memorandum of Law, filed on September 29, 2008, p.1. Pine Creek says that this represents a reduction of about 14% from the amounts requested in the original petition for an award as result of discussions held with the Department.

We again reject the Department's contention that no attorney's fees can be awarded because this proceeding arose under the Sewage Facilities Act rather that under the Clean Streams Law for the reasons set forth in our previous opinion dated May 20, 2008.[11] Nevertheless, we believe the Department's contention that any award of fees has to be limited to counsel's efforts in prevailing on a claim under the provisions of the Clean Streams Law has some merit. In *McDonald Land & Mining Co. v Department of Environmental Resources,*[12] the Commonwealth Court rejected a claim for fees under Pennsylvania's surface mining law because the applicant had failed to make a reasonable effort to apportion between its fees from its appeal from a bond release order, for which fees would be recoverable, from those fees incurred in defense of a related enforcement action, for which fees would not be recoverable.

However, we think that principle has limited application where the claims made by the petitioner contain a common core of facts or are based on inter-related legal theories. In those situations it is difficult to divide the hours expended on a claim-by-claim basis. For this reason Pine Creek contends that it is entitled to recover the full fees claimed in its petition because it prevailed on all issues. The permit was rescinded. In the alternative, Pine Creek argues it is not required to prevail on every issue because nearly all of Pine Creek's claims contain a common core of facts or are based on related legal theories. In *Township of Harmar* v. *Department of Environmental Resources*[13] the Board rejected the Department's contention that an award should be made of only a fraction of the petitioner's claims because it had failed to prove that all hours and costs were necessary to prevail on the claim for which attorney fees were recoverable. In that

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[11] *Pine Creek Valley Watershed Association v. DEP*, EHB Docket No. 2005-249-MG (Opinion issued May 20, 2008).

[12] 664 A.2d 194 (Pa. Cmwlth. 1995).

[13] 1994 EHB 1107, 1136-1138.

case the Board relied on the United States Supreme Court decision in *Hensley v. Eckerhart,*[14] where the U.S. Supreme Court said that "[w]here the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee."[15]

We believe that it is appropriate in this case to make an award of attorney fees and costs to Pine Creek. Pine Creek has clearly prevailed in having the approval of the module set aside with the Department acknowledging that it had failed to consider the effect of the module on exceptional value waters as required by the Department's anti-degradation regulations.[16] These regulations were promulgated under the Clean Streams Law as a necessary part of the Department's authority from EPA to administer the Department's wastewater program. Accordingly, we believe this appeal must be considered to be a proceeding under the Clean Streams Law within the meaning of Section 307(b) of that Law. We therefore conclude that the fact that the module was approved by the Department under the Sewage Facilities Act to be irrelevant to the issue of whether Pine Creek is entitled to an award of fees.

Our examination of Pine Creek's exhibit to its fee application indicates that Pine Creek has made a reasonable effort to apportion its claim for fees between issues recoverable under the Clean Streams Law and those which are not, by negotiating a reduction of the fees with the Department. It is most difficult for counsel and the Board to delineate just what time and costs were incurred on a particular issue. We acknowledge that some of the objections raised by Pine Creek are unrelated to its successful claim that the Department failed to consider the effect of the

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[14] 461 U.S. 424 (1983).

[15] 461 U.S. at 439. See also, *Cerva v. E.B.R. Enterprises, Inc.*, 740 F. Supp. 1099, 1104 (E.D. Pa. 1990).

[16] See *Lipton v. DEP*, EHB Docket No. 2007-026-MG (cons.)(Opinion issued May 20, 2008).

development on exceptional value waters. These include the failure to complete an erosion and sedimentation control plan, the plan failed to adhere to best management practices for pre and post construction activities, the possible threat to bog turtles and the failure to the site to comply with general site suitability requirements.[17]

While these claims are wholly unrelated to Pine Creek's proceeding under the Clean Streams Law, many others are based on a common core of facts or related legal theories to the objections on which Pine Creek prevailed. These include, for example, the following:

1. Because of soil limitations, the proposed on-lot system posed a threat to wetlands and groundwater;

2. Marginal soils existed on which the proposed on-lot system would be constructed;

3. Impacts from the proposed construction and development activities would impact exceptional value waters.[18]

However, Pine Creek and the Department worked together to negotiate stipulated reductions in the hours charged in an attempt to apportion the fees and costs between the antidegradation related claims and those that were more closely related to the Sewage Facilities Act. While this appears to be a reasonable effort at apportionment, the Department would not agree that the result of the negotiation is enough to enable Pine Creek to prevail on its claim for fees. We believe that given the interrelationships among many of the claims made by Pine Creek, that these deductions are a reasonable effort to exclude fees and costs which are not properly recoverable under Section 307(b) of the Clean Streams Law.

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[17] Department Brief in Opposition filed on September 29, 2008, p. 2.
[18] See Department's Brief in Opposition filed on September 29, 2008, p. 2.

Allowable Earning Hours.

Considering all of this, we find that the claim by Eugene E. Dice, Esquire, of 57.3 hours for pursuit of the proceedings under the Clean Streams Law is supported and reasonable as being related to the successful claim under the Clean Streams Law. Mr. Dice commenced these proceedings and pursued the appeal from January 5, 2007 to April 2, 2007. He attributes 15.7 hours for the preparation and filing of the notice of appeal and its amendment. We do not think it appropriate to reduce his hours in this effort simply because the notice of appeal includes some issues that appear to be unrelated to the successful claim under the Department's anti-degradation regulations. Under the Board's rules counsel for appellants are under extreme pressure to be sure that all possible objections are raised in the notice of appeal within 30 days of the Department's action and that any amendment to the notice of appeal be made as soon as possible. Under the agreement with the Department his hours have been reduced by 10% to account for stormwater work.[19] Other hours for client communications, review of expert reports, settlement issues, discovery and legal research appear reasonable and are supported by his billings to Pine Creek.[20]

We also find that the hours spent by John Wilmer, Esquire, as adjusted by agreement with the Department are reasonable as being necessary to the pursuit of Pine Creek's claim under the Clean Streams Law. Mr. Wilmer entered his appearance for the appellant in April, 2007 and represented Pine Creek thereafter including legal research, legal analysis, meetings with client, discovery, and work on the expert's report. Pine Creek claims a total of 60.6 hours for his time of spent on the merits of the appeal and 13.3 hours were spent in pursuing the petition for an

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[19] Pine Creek Exhibit 4.
[20] Pine Creek Exhibit 4.

award of attorney's fees. By a supplemental application for fees and costs, Pine Creek seeks an additional award based on 3 hours of Mr. Wilmer's time responding to the Department's motion for summary judgment on Pine Creek's entitlement to an award of fees and costs.

As we explained in the companion opinion issued today, we believe that these items are recoverable, including the costs and fees incurred in pursuit of the petition for attorneys fees. In its recent *Solebury Township* decision our Supreme Court said that a purpose of the award of fees is "to diminish the deterrent effect of litigation costs on parties seeking to challenge agency actions."[21] The Court also referred to Pennsylvania's strong policy to justly compensate parties who challenge agency actions by liberally interpreting fee-shifting provisions.[22] Similarly, the United States Court of Appeals for the Third Circuit has found these items recoverable in furtherance of the policies of the Civil Rights Act to encourage "attorneys to represent indigent clients and to act as private attorneys general in vindicating congressional policies."[23]

Applicable Earning Rate.

Pine Creek argues that our award of fees should be based upon an hourly rate of $300/hour, which, it contends is the market rate for attorneys with the experience and expertise of Mr. Wilmer and Mr. Dice. This claim is supported Mr. Dice's verified statement that the market rate for attorneys of his experience during this time frame was equal to at least $300/hour.[24] The Department offers no challenge to this claim.

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[21] *Solebury Township v. Department of Environmental Protection*, 928 A.2d 990, 1004 (Pa. 2007).

[22] *Id.* See also *Lucchino v. Department of Environmental Protection*, 809 A.2d 264, 269 (Pa. 2002).

[23] *Parandini v. National Tea Co.*, 585 F.2d 47, 53 (3d Cir. 1978). See also *Solebury Township v. DEP,* EHB Docket No. 2002-323-L (cons.)(Opinion issued December 1, 2008).

[24] Pine Creek Exhibit 3.

Typically, fee shifting statutes authorize courts to award "reasonable attorneys fees." The calculation of an appropriate fee to be awarded to the prevailing party, or "lodestar" is common to both state and federal courts.[25] Using this formulation a fee is awarded based on the reasonable number of hours reasonably worked multiplied by a reasonable hourly rate.[26] However, the Clean Streams Law provides that we are to award only "attorneys fees [which are] reasonably incurred."[27] Accordingly, we must reject Pine Creek's claim that it may recover fees at a rate which would result in an award of fees higher than the fees actually incurred.

Both Mr. Dice and Mr. Wilmer are known to the Board to be able and experienced environmental lawyers. Mr. Dice has practiced environmental law in the Harrisburg area for 35 years. He currently is Counsel to the highly regarded firm of Buchanan Ingersoll & Rooney, PC in Harrisburg, Pennsylvania. His standard billing rate as set by his firm during the time the work was performed was $240/hour. His actual billing rate was $210/hour. His verified statement states that the market rate for attorneys of his experience during this time frame was equal to at least $300/hour.[28]

John Wilmer has practiced exclusively in the area of environmental law and litigation since June, 1980. He began this career as Assistant Counsel for the Department from June, 1981 to September, 1987. He was employed by the Philadelphia law firm of Stradley, Ronan, Stevens and Young as an environmental attorney where his billing rate was $185-200/hour. His billing

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[25] *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 478 U.S. 546, 564 (1986); *Public Interest Group of New Jersey v. Windall*, 51 F.3d 1179, 1190 (3d Cir. 1995); *Medusa Aggregates Company, Inc. v. DER*, 1995 EHB 414.

[26] *E.g. Perry v. Fleet Boston Financial Corp.*, 229 F.R.D. 105 (E.D. Pa. 2005).

[27] 35 P.S. § 691.307(b).

[28] Pine Creek Exhibit 3.

rates for Pine Creek and others at the time of this litigation was his normal billing rate of $150/hour, although he did some of the work for $120/hour.

Final Fee Calculation.

We find that Pine Creek's claim for fees and costs are all reasonably incurred.[29] Having concluded that 134.2 hours of counsel time are recoverable as "reasonably incurred," we must calculate the fee award based upon the hourly rates actually charged by Mr. Dice and Mr. Wilmer. We have found 57.3 hours allowable for Mr. Dice. At the rate of $210/hour, the total fee for Mr. Dice is $12,033. Mr. Wilmer charged 34.6 hours at a rate of $120/hour and the remaining hours at $150/hour for a total allowable fee of $10,497. Accordingly, Pine Creek is entitled to an award of $22,530.

Allowable Costs.

Pine Creek claims allowable costs of $12,303.89. Mr. Dice claims costs of $582 largely for photocopying large documents. Our examination of his bills to his clients indicates that he billed a slightly higher amount for costs to his client. We will accept his claim of $582 as being related to the successful claim under the Clean Streams Law. Mr. Wilmer's claim for costs is $295 and additional costs in the amount of $44.89 related to the fee petition filings. Finally, the billings of Pine Creek's expert were reduced from $17,618 for consulting work to an amount of $11,382 by reducing amounts due to unrelated storm water, Act 537 and other unrelated work as well as the elimination of double billing in a related case. We will accept Mr. Wilmer's cost claim as well as the reduced claim for Pine Creek expert's work.

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[29] *Solebury Township v. DEP*, EHB Docket No. 2002-323-L(cons.)(Opinion issued December 1, 2008).

Final Calculation.

In sum, we find that $22,530 is an appropriate measure of the value of Pine Creek's attorneys in this case. In addition, we find as reasonable the costs of the attorneys and their expert in the total amount of $12,303.89 to be reasonably expended in pursuit of the successful claim under the Clean Streams Law.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JEFF LIPTON, LOUISE E. MOYER, BRIAN K. MOYER and JACQUELINE D. MOYER	:	
v.	:	**EHB Docket No. 2007-026-MG (consolidated with EHB Docket No. 2008-038-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, DISTRICT TOWNSHIP, And PINE CREEK VALLEY WATERSHED ASSOCIATION, INC.	:	

ORDER

AND NOW, this 8th day of December, 2008, it is hereby ORDERED as follows:

1. The Board awards counsel fees and costs in this case to Pine Creek Valley Watershed Association, Inc. in the total amount of **$34,833.89**, representing an award of counsel fees of **$22,530** and, in costs **$12,303.89**.

2. The Department shall pay this total amount of **$34,833.89**, to Pine Creek Valley Watershed Association, Inc., within 60 days of this order.

ENVIRONMENTAL HEARING BOARD

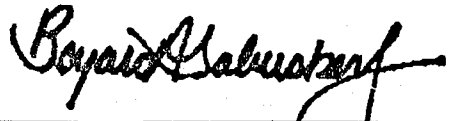
Thomas W. Renwand

THOMAS W. RENWAND
Acting Chairman and Chief Judge

George J. Miller

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

DATED: December 8, 2008

C: **DEP Bureau of Litigation:**
Attn: Brenda K. Morris, Library

For the Commonwealth, DEP:
Martin Siegel, Esquire
Southcentral Region

For Petitioner:
John Wilmer, Esquire
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PINE CREEK VALLEY WATERSHED ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2005-249-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, ROCKLAND TOWNSHIP, Permittee and LEON E. SNYDER, Intervenor	:	**Issued: December 8, 2008**

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

By George J. Miller, Judge

Synopsis

The Board awards reasonable attorney fees and costs in this appeal under the Clean Streams Law to the Pine Creek Valley Watershed Association, Inc. in the total amount of $67,864.55, representing an award of counsel fees of $56,094 and $11,770.55 in necessary costs as the prevailing party in this appeal relating to the Department's approval of a sewage planning module for a residential subdivision, where the Department failed to determine whether the method of sewage disposal would adversely impact exceptional value waters as required by the antidegradation regulations promulgated pursuant to the Clean Streams Law.

BACKGROUND

Appellant Pine Creek Valley Watershed Association, Inc. (Pine Creek) seeks an award of counsel fees and costs following our opinion and order in this appeal deciding that the Board

may exercise its discretion to award costs and fees to Pine Creek.[1] In that opinion, the Board concluded that Pine Creek had prevailed on the issue of the Department's duty to consider the impact of its approval of a sewage planning module (module), on exceptional value waters as required by the Department's antidegradation regulations promulgated under the Clean Streams Law.[2,3] The module for the Mulberry Hill II real estate development was submitted to and approved by the Department under the Sewage Facilities Act.[4] However, the Department conceded the antidegradation issue in December 2007, by withdrawing its approval of the module for the reasons advanced by Pine Creek after the hearing on the merits and after Pine Creek had filed its post hearing memoranda and requests for findings of fact.

Pine Creek claims that it is entitled to an award of fees and costs as stated because it has prevailed in the litigation and has achieved much for the present and future protection of the Commonwealth's special protection watersheds because these watersheds will now receive the heightened scrutiny by the Department in the future that they deserve.[5] Pine Creek's fee requests as set forth in its petition are for actual counsel fees of $55,224. The petition states that if fees were calculated at market rate of $300 per hour, the claim would be $88,920. The Petition claims costs of $13,062. This represents a claimed deduction of about 14% from the original request to eliminate hours that may have been spent on items other than Clean Streams Law

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[1] *Pine Creek Valley Watershed Association v. DEP*, EHB Docket No. 2005-249-MG (Opinion issued May 20, 2008).

[2] Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001 (Clean Streams Law)

[3] Our opinion mistakenly stated that these regulations were also issued under the Sewage Facilities Act. See 29 Pa. Bull. 3720, C. Statutory Authority.

[4] Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20a (Sewage Facilities Act).

[5] Pine Creek Memorandum of Law, p. 2, filed on September 29, 2008.

issues.[6] Pine Creek's response to the Department's Brief in opposition also claims additional fees for work recently performed in pursuing the recovery of counsel fees.

The parties have stipulated that no further discovery is necessary for the Board's decision as to the amount of fees and costs to be awarded and that the billing records for hours and costs represent those hours and costs billed to Pine Creek by counsel for the items described. The Department's sole claims are (1) that Pine Creek is not entitled to be reimbursed for these fees and costs because the appeal is a proceeding is under the Sewage Facilities Act rather than the Clean Streams Law; and (2) that Pine Creek is unable to prove that the claimed fees and costs are related only to its antidegradation claim under the Clean Streams Law. The Department says that as a matter of law the Board's discretion to award attorney fees is limited to those fees directly associated with claims that arise under the Clean Streams Law and regarding claims upon which it prevailed.[7] However, the Department makes no other attack on Pine Creek's claims for attorney hours spent on the case, on the amount of recoverable costs, or on Pine Creek's claim that the allowable earning rate should be calculated at $300 per hour.

OPINION

Our decision to grant fees is governed by the fee-shifting provision found in Section 307(b) of the Clean Streams Law. That section provides that the Board:

> Upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to this act.[8]

The Pennsylvania Supreme Court has instructed the Board to liberally construe the interpretation of this section in order to effectuate Pennsylvania's strong policy to "justly compensate parties

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[6] Pine Creek Memorandum of Law, p. 1, filed on September 29, 2008.
[7] Department Brief filed on September 28, 2008, p. 18-20.
[8] 35 P.S. § 691.307(b).

who challenge agency actions."[9] With this in mind, we turn to the arguments of the parties.

We again reject the Department's contention that no attorney's fees can be awarded because this proceeding arose under the Sewage Facilities Act rather that under the Clean Streams Law for the reasons set forth in our previous opinion dated May 20, 2008.[10] Nevertheless, we believe the Department's contention that any award of fees has to be limited to counsel's efforts in prevailing on a claim under the provisions of the Clean Streams Law has some merit. In *McDonald Land & Mining Co. v Department of Environmental Resources,*[11] the Commonwealth Court rejected a claim for fees under Pennsylvania's surface mining law because the applicant had failed to make a reasonable effort to apportion between its fees from its appeal from a bond release order, for which fees would be recoverable, from those fees incurred in defense of a related enforcement action, for which fees would not be recoverable.

However, we think that principle has limited application where the claims made by the petitioner contain a common core of facts or are based on inter-related legal theories. In those situations it is difficult to divide the hours expended on a claim-by-claim basis. For this reason Pine Creek contends that it is entitled to recover the full fees claimed in its petition because it prevailed on all issues. The permit was rescinded. In the alternative, Pine Creek argues it is not required to prevail on every issue because nearly all of Pine Creek's claims contain a common core of facts or are based on related legal theories. In *Township of Harmar* v. *Department of Environmental Resources*[12] the Board rejected the Department's contention that an award should be made of only a fraction of the petitioner's claims because it had failed to prove that all hours and costs were necessary to prevail on the claim for which attorney fees were recoverable. In

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[9] *Solebury Township v. Department of Environmental Protection*, 928 A.2d 990, 1004 (Pa. 2007).

[10] *Pine Creek Valley Watershed Association v. DEP*, EHB Docket No. 2005-249-MG (Opinion issued May 20, 2008).

[11] 664 A.2d 194 (Pa. Cmwlth. 1995).

[12] 1994 EHB 1107, 1136-1138.

that case the Board relied on the United States Supreme Court decision in *Hensley v. Eckerhart,*[13] where the U.S. Supreme Court said that "[w]here the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee."[14]

After examining Pine Creek's Exhibit 7[15] to its fee application, we believe that Pine Creek made a reasonable effort to apportion the fees and costs expended in pursuit of the appeal between the claims related to Clean Streams Law regulations from those which fall more clearly within the purview of the Sewage Facilities Act and its regulations. It is most difficult for counsel and the Board to delineate just what time and costs were incurred on a particular issue. As the Department points out, the notice of appeal as amended contained 28 separate objections to the Department's approval of the module. These included the claims that the approval of the module violated antidegradation requirements that there was no evaluation of the potential impact to exceptional value streams, and that erosion and sedimentation from the subdivisions will adversely impact wetlands and streams.

Other objections are wholly unrelated to Pine Creek's claim under the Clean Streams Law. These include the objection that Rockland Township did not have an approved base Act 537 Plan and the relevant municipalities had not adopted the sewage planning module. Objections relating to storm water management are also unrelated to Pine Creek's successful claim under the Clean Streams Law.

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[13] 461 U.S. 424 (1983).

[14] 461 U.S. at 439. See also, *Cerva v. E.B.R. Enterprises, Inc.*, 740 F. Supp. 1099, 1104 (E.D. Pa. 1990).

[15] Exhibit 7 contains affidavits of counsel concerning their hours, bills, billing rates and descriptions of the work done for those billing hours. The Department does not challenge the substance of these exhibits.

In short, while these claims are wholly unrelated to Pine Creek's proceeding under the Clean Streams Law, many others are based on a common core of facts or related legal theories to the objections on which Pine Creek prevailed. These include, for example, the following:

1. The Sewage Planning Module did not include adequate information regarding the quality of the groundwater and the potential impact that the on-lot systems will have on groundwater.

2. Soils were unsuitable for on-lot sewage disposal.

3. No nitrogen-nitrate assessment was completed for the site and the lots were too small to comply with requirements for nitrate-nitrogen contamination.

4. The sewage planning module did not include any stream flow impact calculations.

5. Erosion and sedimentation from the subdivision will adversely impact wetlands and streams.

6. The module did not include an adequate analysis of alternatives.

In the case of some objections, it is difficult to tell whether or not the claims are related to the proceeding under the Clean Streams Law or are solely related to a claim under the Sewage Facilities Act. These include, for example:

1. The module did not include an adequate operation and maintenance program.

2. The module did not include adherence to best management practices for pre and post construction activities.

3. Results of testing for replacement areas for the on-lot system systems were not included with the module.

However, Pine Creek and the Department worked together to negotiate stipulated reductions in the hours charged in an attempt to apportion the fees and costs between the antidegradation related claims and those that were more closely related to the Sewage Facilities Act. While this appears to be a reasonable effort at apportionment, the Department would not agree that the result of the negotiation is enough to enable Pine Creek to prevail on its claim for

fees. As we explain below, we believe that given the interrelationships among many of the claims made by Pine Creek, that these deductions are a reasonable effort to exclude fees and costs which are not properly recoverable under Section 307(b) of the Clean Streams Law.

Allowable Earning Hours.

We find that the claim by Eugene E. Dice, Esquire, of 180.8 hours for pursuit of the proceedings under the Clean Streams Law is reasonable as being related to the successful claim under the Clean Streams Law. Mr. Dice commenced these proceedings and pursued the appeal from September, 2005 to December, 2006. He attributes 12.6 hours for the preparation and filing of the notice of appeal and the amendment to the notice of appeal. We do not think it appropriate to reduce his hours in this effort simply because the notice of appeal includes some issues that appear to be unrelated to the successful claim under the Department's antidegradation regulations. Under the Board's rules counsel for appellants are under extreme pressure to be sure that all possible objections are raised in the notice of appeal within 30 days of the Department's action and that any amendment to the notice of appeal be made as soon as possible.

Pine Creek has properly reduced the amount of its fee application for Mr. Dice's time by eliminating hours spent on some issues that are clearly unrelated to its claim under the Clean Streams Law. This reduction amounts to about 10% of Mr. Dice's time for storm water work, activities on a related case and municipal plan issues so that his total time was reduced to 180.8 hours.[16] His billing records substantiate the claim that this is a reasonable reduction that excludes work not related to the successful claim under the Clean Streams Law.[17]

We also find that the hours spent by John Wilmer, Esquire are reasonable as being necessary to the pursuit of Pine Creek's claim under the Clean Streams Law. Mr. Wilmer

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[16] Verified Statement of Eugene E. Dice, Pine Creek Exhibit 3.

[17] Pine Creek Exhibit 4. Our review of Mr. Dice's billing records indicates that this is a reasonable reduction for items not connected with Pine Creek's claim under the Clean Streams Law.

entered his appearance for Pine Creek in April, 2007 and represented Pine Creek thereafter including the preparation of pre-hearing memoranda, the hearing on the merits and the preparation and filing of Pine Creek's post hearing brief and requests for findings of fact and conclusions of law. Pine Creek claims a total of 115.6 hours for his time of which 82.9 hours were spent on the merits of the appeal and 32.7 hours were spent in pursuing the petition for an award of counsel fees and costs. We see no unreasonable duplication of effort in his participation in the case. Most importantly, his participation in this appeal was fully concentrated on the Department's failure to consider the Department's antidegradation regulations. That was the issue that was considered at the hearing on the merits, advanced in his requests for findings and conclusions and was the reason expressed by the Department for withdrawing its approval of the module.

Fees for Pursuing an Award of Counsel Fees.

Pine Creek also seeks recovery of fees connected with its efforts to recover counsel fees and costs. The claim for work in connection with preparing the petition for fees and costs is based on Mr. Wilmer's 32.7 hours.[18] In Pine Creek's Response to the Department's brief Pine Creek also requests additional fees based on Mr. Wilmer's 5.8 hours as well as for additional costs of $44.89.[19] This work was necessary to counter the Department's claim in its brief that Pine Creek is not entitled to an award of fees because it cannot show that any of the claimed time and costs were related only to the issue on which it prevailed. The addition of these items would make the claim for hours in pursuing fees to 38.5 hours of Mr. Wilmer's time.

We believe that these items are recoverable, even though neither Pine Creek nor the Department provides any legal authority for or against the recovery of fees and costs incurred in

[18] Pine Creek Memorandum of Law filed on September 29, 2008, p. 16.
[19] Pine Creek Memorandum of Law filed on October 10, 2008, Exhibit 9.

pursuing an award of counsel fees. In its recent *Solebury Township* decision our Supreme Court said that a purpose of the award of fees is "to diminish the deterrent effect of litigation costs on parties seeking to challenge agency actions."[20] The Court also referred to Pennsylvania's strong policy to justly compensate parties who challenge agency actions by liberally interpreting fee-shifting provisions.[21] Similarly, the United States Court of Appeals for the Third Circuit has found these items recoverable in furtherance of the policies of the Civil Rights Act to encourage "attorneys to represent indigent clients and to act as private attorneys general in vindicating congressional policies."[22]

Applicable Earning Rate.

Pine Creek argues that our award of fees should be based upon an hourly rate of $300/hour, which, it contends is the market rate for attorneys with the experience and expertise of Mr. Wilmer and Mr. Dice. This claim is supported Mr. Dice's verified statement that the market rate for attorneys of his experience during this time frame was equal to at least $300/hour.[23] The Department offers no challenge to this claim.

Typically, fee shifting statutes authorize courts to award "reasonable attorneys fees." The calculation of an appropriate fee to be awarded to the prevailing party, or "lodestar" is common to both state and federal courts.[24] Using this formulation a fee is awarded based on the reasonable number of hours worked multiplied by a reasonable hourly rate.[25] However, the Clean Streams Law provides that we are to award only "attorneys fees [which are] reasonably

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[20] 928 A.2d at 1004.

[21] *Id.* See also *Lucchino v. Department of Environmental Protection*, 809 A.2d 264, 269 (Pa. 2002).

[22] *Parandini v. National Tea Co.*, 585 F.2d 47, 53 (3d Cir. 1978). *See also Solebury Township v. DEP*, EHB Docket No. 2002-323-L(cons.)(Opinion issued December 1, 2008).

[23] Pine Creek Exhibit 3.

[24] *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 478 U.S. 546, 564 (1986); *Public Interest Group of New Jersey v. Windall*, 51 F.3d 1179, 1190 (3d Cir. 1995); *Medusa Aggregates Company, Inc. v. DER*, 1995 EHB 414.

[25] *E.g. Perry v. Fleet Boston Financial Corp.*, 229 F.R.D. 105 (E.D. Pa. 2005).

incurred."[26] Accordingly, we must reject Pine Creek's claim that it may recover fees at a rate which would result in an award of fees higher than the fees actually incurred.

Both Mr. Dice and Mr. Wilmer are known to the Board to be able and experienced environmental lawyers. Mr. Dice has practiced environmental law in the Harrisburg area for 35 years. He currently is Counsel to the highly regarded firm of Buchanan Ingersoll & Rooney, PC in Harrisburg, Pennsylvania. His standard billing rate as set by his firm during the time the work was performed was $240/hour. His actual billing rate was $210/hour. His verified statement states that the market rate for attorneys of his experience during this time frame was equal to at least $300/hour.[27]

John Wilmer has practiced exclusively in the area of environmental law and litigation since June, 1980. He began this career as Assistant Counsel for the Department from June, 1981 to September, 1987. He was employed by the Philadelphia law firm of Stradley, Ronan, Stevens and Young as an environmental attorney where his billing rate was $185-200/hour. His billing rates for Pine Creek and others at the time of this litigation was his normal billing rate of $150/hour, although he did some of the work for $120/hour.

Final Fee Calculation.

We find that Pine Creek's claim for fees and costs are all reasonably incurred.[28] Having concluded that 302.2 hours of counsel time are recoverable as "reasonably incurred," we must calculate the fee award based upon the hourly rates actually charged by Mr. Dice and Mr. Wilmer. We have found 180.8 allowable hours for Mr. Dice and 121.4 hours for Mr. Wilmer. The petition supports an hourly rate for Mr. Dice of $210/hour, which results in an attorney fee of $37,968. Mr. Wilmer charged $120/hour for 2.8 hours of work and $150/hour for the

[26] 35 P.S. § 691.307(b).

[27] Pine Creek Exhibit 3.

[28] *Solebury Township v. DEP*, EHB Docket No. 2002-323-L (cons.)(Opinion issued December 1, 2008).

remaining hours, resulting in a total fee of $18,126. Accordingly, the total award to Pine Creek for attorneys fees is $56,094. This is a reasonable fee for the important result achieved by Pine Creek which will ensure the protection of exceptional value waters of the Commonwealth from potential pollution by proposed sewage facilities. Thus, Pine Creek's success in this appeal clearly forwards the purposes of the Clean Streams Law.

Allowable Costs.

The costs contained in Pine Creek's exhibit appear to be reasonable. Mr. Dice claims costs of $599 for the costs of deposition transcripts and photocopying.[29] Mr. Wilmer claims costs of $553.29, for the litigation of the main case and for pursuing the award of counsel fees and costs. In addition, Pine Creek incurred $10,617.36 in fees and costs of Pine Creek's expert, Alternate Environmental Solutions. This amount properly represents a reduction for this firm's total bill for the time on storm water issues. We find these costs reasonable and conclude that allowable costs amount to $11,770.55.[30]

In sum, we find that it is appropriate to award Pine Creek reasonable attorneys fees in the amount of $56,094 and costs in the amount of $11,770.55, for a total award of $67,864.55. Accordingly, we enter the following:

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[29] Exhibit 4. This claim properly excludes the time spent on the deposition of the Township Secretary in pursuit of the claim relating to the absence of a Township Sewage Facilities Plan.

[30] Although the petition states that the costs incurred were $13,062, there does not appear to be any support or explanation for the additional $11,891.45 difference.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PINE CREEK VALLEY WATERSHED ASSOCIATION, INC.	:	
	:	
v.	:	**EHB Docket No. 2005-249-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, ROCKLAND TOWNSHIP, Permittee and LEON E. SNYDER, Intervenor	:	

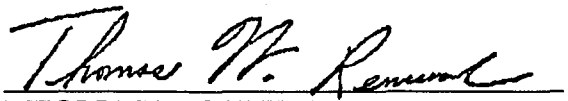
ORDER

AND NOW, this 8th day of December, 2008, it is hereby ORDERED as follows:

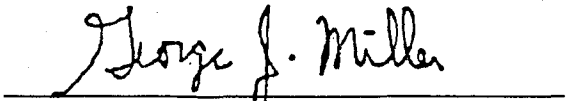
1. The Board awards counsel fees and costs in this case to Pine Creek Valley Watershed Association, Inc. in the total amount of **$67,864.55**, representing an award of counsel fees of **$56,094** and **$11,770.55**, in costs.

2. The Department shall pay this total amount of **$67,864.55**, to Pine Creek Valley Watershed Association, Inc., within 60 days of this order.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Acting Chairman and Chief Judge



GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: December 8, 2008

c: **DEP Bureau of Litigation:**
Attn: Brenda K. Morris, Library

For the Commonwealth of PA, DEP:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SOLEBURY TOWNSHIP & BUCKINGHAM TOWNSHIP	:	
v.	:	**EHB Docket No. 2002-323-L (Consolidated with 2002-320-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Permittee	:	**Issued: December 23, 2008**

OPINION AND ORDER ON PETITIONS FOR RECONSIDERATION

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board denies petitions for reconsideration of its Opinion and Order awarding Appellants a portion of their attorneys' fees and costs. Among other things, the Board emphasizes that fees are not awarded in frivolous or nuisance appeals. There was no allegation that the Appellants' appeals were frivolous or groundless.

OPINION

The Department of Environmental Protection ("DEP") and Department of Transportation ("PennDOT") have filed separate petitions for reconsideration of our Opinion and Order awarding Solebury and Buckingham Townships (the "Townships") 25 percent of the attorneys' fees and costs that they incurred in appeals challenging DEP's issuance of a 401 certification to

PennDOT for a highway project, and 100 percent of the fees that they incurred in their efforts to obtain an award of fees. The Board only grants reconsideration for compelling and persuasive reasons. Under our rules, the reasons may include the following:

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

25 Pa. Code § 1021.152. We will deny the agencies' petitions because neither DEP nor PennDOT has presented compelling or persuasive reasons for reconsidering our decision. *Mountain Watershed Association v. DEP*, 2005 EHB 592, 593-94.

DEP's Petition

DEP's first reason for requesting reconsideration is that this Board "ignored" what DEP characterizes as a principal element of the case law regarding fee awards. The Department agrees with the Board's adoption of the catalyst test, but complains that we "rejected or completely ignored" a fundamental part of that test; namely, a requirement that a fee applicant demonstrate that "the suit's *merits* caused the Department to change its behavior." DEP states that we rejected or ignored that aspect of the test "without any explanation whatsoever," and that our "failure to follow the law" is "even more striking" when we consider that "public policy purposes ... were not even present in the Townships' claims."

Initially, it is worth noting that DEP did not raise this argument in its post-hearing brief. PennDOT did, which induced us to consider the issue, but DEP has raised it for the first time in

its petition for reconsideration. This is ordinarily an inappropriate practice.

In any event, it is not surprising that DEP has so strenuously, albeit belatedly, raised the argument. DEP's interpretation would likely make it very difficult for any fee applicant to prevail in a catalyst-theory setting. Under DEP's proposed interpretation, which concededly was never followed in all federal circuits,[1] a fee applicant must prove that the "merits" of the appeal caused the DEP action. As we discussed in the Opinion, this sets up a nearly impossible task. How is an applicant to show that the government acted in response to the "merits" of an appeal? By definition, if we are operating in the catalyst-theory world, the Board did not decide the merits. DEP will rarely, if ever, concede that it acted in response to a meritorious claim in a catalyst-theory case. DEP also will inevitably, as it did in this case, claim attorney-client and deliberative-process privileges, which will hinder an applicant's realistic ability to discover the government's true motivations. As we said in our Opinion, setting up such high road blocks is hardly consistent with the Supreme Court's instruction that the fee-shifting provision is to be liberally construed.

Petitions for reconsideration are appropriate when we simply miss a key legal or factual point, not as a vehicle for arguing issues that should have been raised at the hearing or rearguing issues based upon nothing more than disagreement. *Mountain Watershed Association*, 2005 EHB at 594. Here, it is difficult to reconcile DEP's statements that we "completely ignored" the role that the merits of the underlying litigation should play with a careful reading of our Opinion.

---

[1] DEP says that Justice Ginsberg in her dissent in *Buckhannon* "approvingly" referenced a merit requirement. That characterization is debatable at best. *See Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health & Human Services*, 532 U.S. 598, 642, 642 n.14. In fact, Justice Scalia at great length takes the dissenters to task for *not* insisting upon a connection to the merits. 532 U.S. at 610-22. Although DEP purports to agree with the Ginsberg analysis, its position on reconsideration is actually on all fours with Justice Scalia's position.

We discussed this very issue in detail first on pages 13-14, where we described the inherent tension (albeit less than outright contradiction) between the *Kwalwasser* test, which turns dispositively on the merits of the underlying appeal, and a catalyst test, which focuses on the practical results achieved. We then discussed on pages 18-19 the precise issue that DEP accuses us of completely ignoring. Indeed, Acting Chairman Renwand in his dissent states that "the withdrawal [of the 401 certification] had nothing to do with the merits of the litigation," which confirms that this question was the subject of careful deliberation. It is simply inaccurate to accuse the Board of completely ignoring the issue.

It is also not entirely accurate to say that we "rejected" the relevance of the merits of the underlying appeal. It is true that we held that a causative relationship between the merits of an underlying appeal and the change in the agency's behavior is not an absolute prerequisite to an award of fees. Again, however, a careful reading of the Opinion reveals that the merits of the underlying appeal retain relevance. As we said on page 18, "if a party wins on the merits, that will bode well for an award of fees." And as we discuss more fully below, merits are relevant to the extent that fee awards are never available in frivolous or nuisance appeals.

DEP's statement that our "ignorance of the law" is "all the more striking" because of public policy considerations is also difficult to understand. We reduced the Townships' awards by 75 percent in part based upon those very considerations. More to the point, we specifically recognized on page 25 of our Opinion that, "the fundamental purpose of fee-shifting is to encourage *bona fide* challenges to DEP actions, and that is exactly what the Townships brought here." That is why we concluded that an award of less than 25 percent would have been inappropriate notwithstanding the Townships' limited success.

DEP is gravely concerned that it will be forced to pay fees because it changed its

behavior to avoid frivolous or nuisance litigation. Pointedly, there has never been any allegation in this case that the Townships' appeals were frivolous or nuisance appeals. Indeed, it should be remembered that the Townships' concerns with DEP's permitting procedures were serious enough to attract the Board's *en banc* consideration. Furthermore, as we said on page 25 of our Opinion, only *bona fide* challenges can result in fee awards. Still further, we wonder whether DEP will ever change its behavior in response to or because of a frivolous appeal. We expect not. Finally, let us take this opportunity to be clear: fee awards are not available in frivolous, groundless, or nuisance appeals. But to repeat, there was no allegation here that the Townships' appeals were frivolous, groundless, or nuisance appeals.

DEP's second reason for seeking reconsideration is that our decision "is based upon a fundamental misapprehension of Pennsylvania environmental law." Our "basic misunderstanding" of this "basic tenet of environmental law," according to DEP, arises from what it appears to think was our finding that the 401 certification for the old highway project would have had value for the new highway project.

Initially, we need to point out that there was no factual or legal record produced on the issue. This is emblematic of DEP's case in chief, which consisted of about six pages of transcribed testimony (T. 322-28) and a few isolated questions posed to other parties' witnesses. Indeed, even as late as DEP's petition for reconsideration, DEP cites no record support for the proposition, other than the generic regulatory provision relating to environmental assessments, 25 Pa. Code § 105.15(b). DEP cannot be heard to now complain based upon a failure to produce an adequate record. Absent a record, it is certainly not self-evident that the 401 certification would have been "absolutely valueless" for the revised highway project, particularly given the fact that the new project will implicate the exact same streams as the old project. (FOF 10.)

But this is really beside the point of our primary answer to DEP's accusation, which is that we actually did not make the finding DEP appears to believe that we made. We never held that the 401 certification for the old project would cover the new project. The key fact that drove our finding that the highway redesign did not cause the certification rescission was that the certification was rescinded *before* a decision was reached on the project. (FOF 18.) We specifically held: "It was not known in October–November 2003 whether the existing or a new 401 certification would be needed." (FOF 19.) Thus, the Commonwealth rescinded the certification at a time when it was not known whether it would be needed *for the old project*. So, if there was still a possibility that the original design would go forward, the only explanation for rescinding the certification when it was rescinded was the desire to avoid the EHB litigation. Therefore, the conclusion is inescapable that the litigation was a substantial factor in bringing about the rescission.

DEP does not directly challenge our finding that no final decision had been made regarding what to do with the project *at the operative time*. Indeed, to do so would essentially amount to accusing PennDOT of covering up for months the fact that a final decision had already been made at the same time it was telling myriad stakeholders and the public at large that the project was being reevaluated and no final decision had been made. (*See* FOF 20-23.) We are not willing to ascribe such furtive conduct to PennDOT. Notwithstanding PennDOT's admitted decision to reevaluate the project in secret, we continue to believe that no *final* decision was made on the project until months *after* the 401 certification was rescinded. (FOF 22.) We acknowledge and understand that the future of the project as originally designed was in doubt in the fall of 2003, but that is quite different than saying that a final decision had in fact been made. With the future of the project undecided, there was simply no project-driven reason *at the time at*

issue here to rescind the certification.

DEP states that we were critical of PennDOT's decision to request and DEP's decision to grant a rescission. That is incorrect. We actually expressed no opinion whatsoever on whether rescission was the right thing to do. We have no reason to fault the agencies' decisions. However, a fee award under the Clean Streams Law is not designed merely to punish bad behavior. In the absence of bad faith, it is also designed to encourage *bona fide* challenges, and to repeat, that is exactly what the Townships brought here.

DEP's third basis for seeking consideration is really just a restatement of its first reason that the Board should demand a showing that the merits of the appeal led to the behavior-altering event. DEP, unfortunately, complains that it will need to enforce and implement environmental laws solely based upon its exposure to fee awards. Among other things, DEP says that it will be forced to defend frivolous appeals rather than give meaningful thought to whether requests for revocation of permits and approvals should be granted.

Once again, DEP's argument does not support reconsideration. DEP's argument goes against the catalyst theory itself, not anything that we decided in our Opinion. The policy advantages and disadvantages of the catalyst theory presumably informed the Pennsylvania Supreme Court's decision. DEP's end-of-the-world arguments were persuasively rebutted by, among others, Justice Ginsberg in *Buckannon*. 532 U.S. at 638-39. We would like to believe that DEP's decisions will continue to be driven more by its sense of duty as the Commonwealth agency tasked with preserving and protecting the environment in the public interest than its fear of exposure to attorneys' fees. In any event, if our decision has the unintended consequence of compelling DEP to give requests for permit recissions more thoughtful consideration (*see* FOF 14), or to give more consideration to seeking dismissal in EHB appeals based purely on

procedural grounds or technicalities having nothing to do with the merits, that would hardly impel us to reconsider our decision. *See Buckhannon*, 532 U.S. at 639 (Ginsberg dissenting) ("The catalyst rule may lead defendants promptly to comply with the law's requirements: the longer the litigation, the larger the fees."). As we noted in our Opinion, had DEP defended the Townships' appeals and prevailed as it insists it would have, this litigation might have ended years ago with no award of fees. Instead, in what might very well be the greatest paradox of this case, fees continue to mount, seemingly without end.

PennDOT's Petition

PennDOT seeks reconsideration of our decision to award the Townships 100 percent of their fees on fees. Because we only awarded the Townships 25 percent of their fees incurred in the underlying litigation, PennDOT argues we should also reduce our award of the fees on fees by 75 percent. If we do not reduce the award, PennDOT argues that the Board will depart "from Pennsylvania and federal precedent by failing to consider the degree of the Townships' success when determining the appropriate award for fees on fees."

PennDOT acknowledges that time spent pursuing fees ("fees on fees") is generally recoverable. *In re Ciaffoni*, 584 A.2d 410 (Pa. Cmwlth. 1990), a case PennDOT relies on in its petition for reconsideration, clearly illustrates this point, indicating that "it is reasonable to compensate a party for time reasonably necessary to obtain a reasonable fee to recover the amount owed him as a result of an award of fees against his adversary ...." *Id.* at 414.

PennDOT also does not dispute that evaluating fees in the underlying litigation is a process that is separate and apart from determining whether to reduce an award for fees on fees. This is the accepted process of awarding fees, as the cases PennDOT cites to point out. *E.g.*, *Institutionalized Juveniles v. Beal*, 758 F.2d 897, 924 (3d Cir. 1985). Therefore, it would be

incorrect to automatically or blindly apply the same discounting factors to fees on fees as we applied to fees incurred during the underlying litigation.

We pointed out in our Opinion that the Departments offered no reason why we should discount the Townships' collection costs. (p. 25.) PennDOT is raising the issue for the first time in its petition for reconsideration, which is discouraged. As we stated in our Opinion, "it was incumbent upon the agencies to show us why the fees were unreasonable." (p. 25.) This obligation by its very nature applies to both the fees incurred in the underlying litigation and the fees incurred in the fee litigation. As we noted, "[t]he agencies put virtually no effort into making such a showing ...." (p. 25.) Had the Departments actually made specific and detailed challenges to the fees incurred by the Townships during the fee litigation, we may have been in a position to discount the fees on fees award. This they did not do.

Putting that problem aside, PennDOT has yet to demonstrate any basis for reducing the Townships' fee-litigation fees. It is true that an award for fees on fees does not extend to time spent attempting to be awarded fees that are ultimately found to be unreasonable. *In re Ciaffoni*, 584 A.2d at 414. (See also the other cases that PennDOT cites, *Immigration and Naturalization Service v. Jean*, 496 U.S. 154, 163 (1990); *Institutionalized Juveniles v. Beal*, 758 F.2d 897, 925 (3d Cir. 1985); *Sampaolo v. Cheltenham Township Zoning Hearing Board*, 629 A.2d 229, 231 (Pa. Cmwlth. 1993).) These holdings ensure that a party receives only the counsel fees necessary to obtain fees properly requested. To repeat, however, there is nothing to suggest that the Townships' fees were unreasonable or not properly requested.

We did not reduce fees in the underlying litigation because they were unreasonable. We exercised our discretion under Section 307 to reduce the fees primarily because of the Townships' limited success relative to the relief sought in the underlying appeals and the limited

contribution the underlying appeals made to advance the purposes of the Clean Streams Law.

The factors that induced us to award the Townships only 25 percent of their fees in the underlying litigation do not apply to the fee litigation itself. First, the Townships have achieved dramatic success in obtaining fees, notwithstanding the reduced recovery. The Townships obtained a fee award in the face of preexisting case law that was squarely against them. They obtained an award without satisfying the *Kwalwasser* criteria.

More importantly, although the Townships may not have done much to advance the purposes of the Clean Streams Law in the underlying appeals, they have actually made a tremendous contribution to the purposes of the Clean Streams Law as a result of their fee litigation. Not only have they changed or at least refined the law of fee-shifting, they have set a precedent that will encourage *bona fide* appeals of DEP actions. As the Supreme Court pointed out, and we parroted in our Opinion, that is exactly what Section 307 was intended to do. *Solebury Township v. DEP*, 928 A.2d 990, 1004-05 (Pa. 2007); *Solebury*, slip op. at 15 and 25 (Opinion, December 1, 2008). Hopefully, more DEP errors will be caught and rectified now that appellants know that they will not necessarily lose their shirts in the process of prosecuting legitimate concerns.

EHB appeals have a tendency to grind on for years. Litigation before the Board can be every bit as complicated as complex litigation in state or federal court. The odds are often stacked against appellants, given such factors as the Board's placement of burdens of proof and the requirement that we must often give deferential review to many of the Department's decisions. In the face of these daunting expenses and intimidating odds, Section 307 provides a dim light at the end of the tunnel. The light is further dimmed, however, by DEP's determined resistance to fee awards, and historical standards and caps that make such awards hardly worth

the effort required. In our view, as a result of the Townships' dogged perseverance, the Pennsylvania Supreme Court has sent out a clear signal that that is not the way it is supposed to be.

The agencies, of course, will be required to reimburse the Townships for fees incurred in responding to their petitions for reconsideration. We cannot imagine why the Townships would only be entitled to 25 percent of the fees that continue to mount as we write this Opinion. That very same conclusion applies with equal force to all of the fees on fees that were incurred to get the Townships to where they are today.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SOLEBURY TOWNSHIP & BUCKINGHAM TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2002-323-L**
	:	**(Consolidated with 2002-320-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION, Permittee	:	

ORDER

AND NOW, this 23rd day of December, 2008, DEP's and PennDOT's petitions for reconsideration are **denied**.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

Judge George Miller is recused in this matter.
As Acting Chairman and Chief Judge Thomas Renwand dissented from the majority opinion, his position continues to be that attorneys' fees should not have been awarded in this case. He continues to hold that view.

DATED: December 23, 2008

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MAX ROZUM JR. and CAROL K. ROZUM	:	
	:	
	:	
v.	:	
	:	**EHB Docket No. 2008-082-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	**Issued: December 29, 2008**
	:	

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis:

Where the Appellants' response to the Department's motion for summary judgment does not demonstrate that any material facts are in dispute and where the Department is entitled to judgment as a matter of law, the motion for summary judgment is granted. The Department properly issued an order requiring removal of waste tires from the Appellants' property.

O P I N I O N

Max Rozum, Jr. and Carol K. Rozum, (the "Rozums") own a parcel of real estate located adjacent to Eagle Rock Road in Allegheny Township, Venango County (the "Property"). The prior owner of the Property, Jerry Richards, disposed of a large number of waste tires on the Property. There is no record at this point that the Rozums themselves disposed or allowed others

to dispose of tires on the Property. Prior to purchasing the Property, the Rozums knew the waste tires were present on the Property. The waste tires have been present on the Property since at least September 15, 2000. There are at least 10,000 waste tires on the Property. Neither the Rozums nor anyone else has a permit from the Department to dispose of waste on the Property. *See* 35 P.S. §§ 6018.301, 6018.501.

The Rozums received a general inspection report dated December 15, 2006 that stated that the waste tires had been on the Property for more than a year in violation of 25 Pa. Code § 299.155(c). The Rozums received another inspection report on or about January 22, 2008 repeating that the waste tires had been on the Property for more than a year in violation of 25 Pa. Code § 299.155(c). On March 3, 2008, the Department issued the administrative order to the Rozums and Jerry Richards that is the subject of this appeal ("the Order"). The Order requires the Rozums to not allow the disposal of any additional waste tires on the Property, and required the Rozums and Richards to remove the waste tires from the Property by June 30, 2008. The Department chose a compliance date of June 30, 2008 due to the remote location of the Property and the length of time the waste tires had been on the Property.

In their notice of appeal from the Order, which they filed *pro se*, the Rozums objected that it was inappropriate to issue an order against them because, *inter alia*,

> a hearing on this matter was held in the courtroom of District Magistrate David L. Fish in Pleasantville, PA, Venango Co. The Plaintiff was the Commonwealth of Pennsylvania. The Defendant was Jerry L. Richards. The case was dismissed on September 2, 1997 by Magistrate Fish. Please see Docket Number NT-0000459-96 filed in the Venango Co. Courthouse. No Appeals were filed. With that knowledge, we went together with Jeff & Jennifer Hornichak and purchased the property in September 2000. We do not feel it is fair to punish us for someone else's actions.

The Rozums also object to the Order because some of the tires are located on neighboring

property, there is no good reason to move the tires, and they cannot afford to comply with the Order.

The Department has filed a motion for summary judgment. The Department avers that Allegheny Township, not the Commonwealth, filed the action referenced in the Rozums' notice of appeal. The Department affirms that it was not a party in that action, and argues that it is not bound in any way by anything that occurred in that action. The Department supports its assertions with a sworn affidavit. The Department argues that the Rozums are liable for removing the tires simply by virtue of their status as owners of the property. The Department clarifies that the Order does not require the Rozums to remove any tires that are not on the property. It argues that the Order is defensible even without proof that the 10,000 tires are creating a public nuisance, and that financial inability to comply is not a defense in an appeal from an order before this Board.

In their three-page response to the Department's motion, the Rozums, now represented by counsel, ask that the Department's motion be denied because the Rozums thought that the issue pertaining to the waste tires had been resolved when the aforementioned civil action was dismissed:

> Because it is the Appellant's position that the Commonwealth did not pursue to completion their filing of the 1996 violation against Richards, and the subsequent inaction against the known violator created an impression that no action would be taken against the waste tires on the property as it existed in 1996. The Appellants' raised this affirmative defense in principal, regardless not using the exact words in their responses.

The Rozums have not submitted an affidavit contradicting the Department's affidavit or cited to any other record evidence to support their "understanding" that the Commonwealth was a party to any prior court action regarding the Property. They nevertheless, citing no authority,

assert the affirmative defense of *res judicata*. They also continue to assert (without contradiction from the Department for purposes of the motion) that Richards (the prior owner) placed all of the waste tires on the Property. "It is further represented by the Appellants that the Commonwealth has led him [sic] to believe, through conversations between representatives of the Commonwealth held over a period of time and during pendency of this action, that the Commonwealth would make Richards, not the Appellants, clean up the waste tires." The Rozums do not explain the legal relevance of these "conversations." Finally, the Rozums continue to maintain that not all of the tires are on their property.

The Board may grant a motion for summary judgment "where the pleadings, depositions, answers to interrogatories and admissions, together with any supporting affidavits, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as matter of law." 25 Pa. Code § 1021.94a(i); *Angela Cres Trust of June 25, 1998 v. DEP*, 2007 EHB 111, 114; *Snyder Bros., Inc. v. DEP*, 2006 EHB 978, 980. "The record is to be viewed in the light most favorable to the nonmoving party, and all doubts as to the presence of a genuine issue of material fact must be resolved against the moving party." *Albright v. Abington Mem'l Hosp.*, 696 A.2d 1159, 1165 (Pa. 1997). "[S]ummary judgment is granted only in the clearest of cases, where the right is clear and free from doubt ...." *Lyman v. Boonin*, 635 A.2d 1029, 1032 (Pa. 1993). When a motion for summary judgment is made and properly supported, the opposing party may not rest upon the mere allegations or denials of its pleading. Rather, its response, by affidavit or as otherwise provided in Rule 1021.94a, must set forth specific facts rising from evidence in the record showing that there is a genuine issue for hearing. 25 Pa. Code § 1021.94a(h); *Matusinski v. DEP*, EHB Docket No 2007-278-MG, slip op. at 5 (Opinion, September 12, 2008); *Gera v. DEP*, 2006 EHB 635; *Jackson v. DEP*, 2005 EHB 496; *Borough*

of Roaring Spring v. DEP, 2004 EHB 889; *Drummond v. DEP*, 2002 EHB 413.

The Rozums' response to the Department's motion for summary judgment does not demonstrate that any material facts are in dispute or explain why the Department is not entitled to judgment as a matter of law. Our decision in *Bertothy v. DEP*, 2007 EHB 254, is directly on point. In that case, the owner of a site with an unpermitted waste tire pile complained that it was not appropriate to hold her responsible for cleaning up tires placed by others on her property. The Board, speaking through now Chief Judge Renwand, rejected that defense, holding that

> the Department also has the authority to order the owner of the property where waste tires have been dumped without a permit to clean up the property and properly dispose of the waste. As the Department correctly points out, Section 610 of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S §§ 6018.101 – 6018.1003, makes it unlawful for any person to "permit the dumping or depositing, of any solid waste onto the surface of the ground...unless a permit for the dumping of such solid wastes has been obtained from the [D]epartment...." Id. at § 6018.610. *See also*, Sections 301 and 501 of the Solid Waste Management Act, 35 P.S. §§ 6018.301 and 6018.501, which prohibit the storage and disposal of waste without a permit.

Berthothy, 2007 EHB at 256-57.

It is not necessary to show that the tires are creating a nuisance as a prerequisite to the Department's order. Nor is financial inability to comply a defense to the validity of a Department order in a Board proceeding. *Ramey Borough v. DEP*, 351 A.2d 614, 615 (Pa. Cmwlth. 1976); *Starr v. DEP*, 2003 EHB 365, 372. The Rozums do not cite any authority to support their innocent-landowner defense, but even if we assume that such a defense is available in this setting, it would not be available to the Rozums because they admit that they were fully aware of the unlawful tire pile before purchasing the Property. Notably, the Rozums have not argued that any of the specific terms or requirements of the Order are unreasonable in response

to the Department's motion.

With respect to the 1996 civil action, the Department's motion is properly supported by the Affidavit of Brian A. Mummert, which unequivocally states that, prior to issuing its order, the Department was not a party to any court proceeding regarding the Property. Accordingly, the Appellants were required, by affidavit or otherwise, to supply evidence disputing this fact. The Appellants did not provide any such supporting evidence. Thus, collateral estoppel, or issue preclusion, would not preclude the Department from seeking removal of the waste tires by Richards, much less the Rozums. *See Moles v. Borough of Norristown*, 780 A.2d 787, 792 (Pa. Cmwlth. 2001) (collateral estoppel applies when the party against whom the doctrine is asserted was a party to the prior action, and that party had a full and fair opportunity to litigate the issue). Therefore, the disposition of Allegheny Township's civil action against Richards, four years before the Rozums purchased of the Property, has no preclusive effect against the Department in its exercise of its statutory authority under the Solid Waste Management Act.

Accordingly, we issue the order as follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MAX ROZUM JR. and CAROL K. ROZUM	:	
	:	
	:	
v.	:	
	:	**EHB Docket No. 2008-082-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 29th day of December, 2008, it is hereby ordered that summary judgment is granted in favor of the Department. This appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: December 29, 2008

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