Environmental Hearing Board

Adjudications and Opinions

1996

Volume I

COMMONWEALTH OF PENNSYLVANIA
George J. Miller, Chairman

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

1996

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1996.

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

ADJUDICATIONS

OPINIONS

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ENVIRONMENTAL HEARING BOARD
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M. DIANE SMITH
SECRETARY TO THE BO

LLOYD WILSON CHAPTER OF TROUT UNLIMITED, SUSQUEHANNA CHAPTER OF TROUT UNLIMITED, AND DAVID L. WILLIAMS	:	
v.	:	**EHB Docket No. 95-245-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, LAMAR TOWNSHIP BOARD OF SUPERVISORS, WALKER TOWNSHIP BOARD OF SUPERVISORS, PORTER TOWNSHIP BOARD OF SUPERVISORS, PORTER TOWNSHIP MUNICIPAL AUTHORITY, AND EAST NITTANY VALLEY JOINT MUNICIPAL AUTHORITY	:	**Issued: January 5, 1996**

OPINION AND ORDER SUR JOINT PROPOSED CASE MANAGEMENT ORDER

By Michelle A. Coleman, Member

Synopsis:

When submitting a Joint Proposed Case Management Order to the Board, the joint proposed order must be a submission by all of the parties to the appeal.

DISCUSSION

On December 26, 1995, the Department of Environmental Protection (Department) filed a document titled "Joint Proposed Case Management Order" which in the opening paragraph states that the document is a joint submission of the Appellants and the Department. In paragraph 1, the Department and Appellants request an extension of discovery "in order to provide the townships in this appeal the opportunity to conduct discovery." The two parties also state that no appearance has been entered on behalf of any of the five townships which are named as

appellees in this action.[1]

A joint proposed case management order as described in 25 Pa. Code §1021.81(a)(3) and §1021.81(b) is a joint submission of all parties to the action. In this case, five of the appellees have not joined in the submission and, therefore, this cannot be a joint proposed case management order.

However, recognizing that the two parties who are active in this matter can proceed no further without an extension of time, the Board would like to treat this submission as a motion for an extension of time. Since the submission is not currently a motion it does not meet the requirement of notice to all parties. Therefore, the Department should resubmit this document as a request for an extension of time following the rules found at 25 Pa. Code §1021.71.

ORDER

AND NOW, this 5th day of January, 1996, upon consideration of the Joint Proposed Case Management Order submitted by the Department, it is hereby ordered that the Joint Proposed Case Management Order be set aside until all parties have participated in the proposed order, and an extension of time of 15 days from the date of this order, January 22, 1996, be granted to allow

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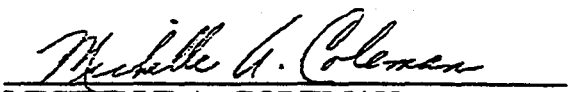
[1] The Townships and Municipal Authority should note that failure to obtain counsel and failure to actively participate in this appeal places you at a much greater risk that your official plans could be voided. The Department has no obligation to represent you and should the Board render a decision in this matter reversing the Department's action, your official plans might be in jeopardy.

the Department and the Appellants time to submit a request for a longer extension of time if they believe one is needed.

ENVIRONMENTAL HEARING BOARD



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: January 5, 1996

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NOTTINGHAM NETWORK OF NEIGHBORS	:	
	:	
v.	:	EHB Docket No. 94-181-E
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES and	:	
MAPLE CREEK MINING, INC., Permittee	:	Issued January 9, 1996

OPINION AND ORDER SUR MOTION FOR DIRECTED ADJUDICATION AND MOTION FOR NON-SUIT

By: Richard S. Ehmann

Synopsis:

Motions for Non-Suit/Directed Adjudication are granted where Appellants, who have the burden of proof, fail to establish a *prima facie* case on any of their objections based on the evidence admitted through their case-in-chief.

Appellants may not raise new objections to DER's permit issuance decision in their response to motions for non-suit/directed adjudication.

OPINION

On July 7, 1994, the Notttingham Network of Neighbors ("NNN") filed a *pro se* appeal with this Board from the Department of Environmental Resources' ("DER")[1] issuance to U.S. Steel Mining Co., Inc. ("USSM") of the June 8, 1994 amendment of Mining Activities Permit No. 63841302. This permit amendment purports to add an additional 1,681 acres of underground coal in the Pittsburgh

[1]Since this hearing DER has been split in two and is now the Department of Environmental Protection and the Department of Conservation and Natural Resources. For consistency's sake, however, in this opinion we continue to refer to it as DER.

Coal Seam to that previously permitted to USSM in 1992 as part of its underground Maple Creek Mine. This added acreage is located beneath the surface in Nottingham, North Strabane and Somerset Townships in Washington County. The Maple Creek Mine is not currently producing coal, but USSM is complying with all environmental requirements in the existing permits for this mine.

NNN is a non-profit organization formed in June of 1993, which is comprised of persons who reside in Nottingham Township and the general vicinity of the Maple Creek Mine. NNN was formed one month before USSM submitted both its application to amend its permit to add this acreage and its subsidence control plan for this acreage to DER for review.

After DER issued USSM this amended permit on June 8, 1994, NNN appealed. Thereafter, the parties engaged in discovery and filed their respective Pre-Hearing Memoranda.

The merits of this appeal came to be heard by this Board on December 5, 1994. After the close of NNN's case-in-chief, USSM and DER both moved orally for the Board to issue an order granting a directed adjudication in their favor and against NNN. Because the presiding Board Member believed there might be merit in this Motion, he then stayed the remainder of this merits hearing and directed the parties to brief the issues raised by this motion. DER and USSM filed their written motions and Briefs in January of this year. NNN, in turn, responded thereto on February 8, 1995. On February 15, 1995, USSM filed its Reply Brief, and on February 16, 1995, DER's counsel advised us by letter that DER joined in USSM's Reply Brief.

After these Briefs were all filed, counsel for USSM informed us that Maple Creek Mining, Inc. ("MCM") was the successor permittee for USSM. Accordingly, we substituted MCM in the caption of this appeal and hereafter refer to permittee as MCM.

Discussion

DER's motion is captioned Motion For Non-Suit, whereas MCM's motion is captioned Motion For Directed Adjudication. While there is a distinction between the two motions which we discussed in Ron's Auto Service v. DER, 1992 EHB 711 and City of Harrisburg v. DER, 1993 EHB 90, the distinction is not important here. Both movants seek the appeal's dismissal because NNN is alleged to have failed to make a *prima facie* showing that DER abused its discretion or violated the law by issuing the permit to MCM with the 1,681 acres of coal added.

In reviewing the motions, it is clear that the movants have a heavy burden. County of Schuylkill, et al. v. DER, et al., 1991 EHB 1. ("Schuylkill") Firstly, the motions must be viewed in a light most favorable to NNN. Hubert D. Taylor v. DER, 1991 EHB 1926.[2] Secondly, we can not grant these motions unless NNN's case is clearly insufficient. Moreover, this type of motion only lies where the appellant has the burden of proof (the burden to show DER abused its discretion), see Warren Sand & Gravel, Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975), and fails to meet it by a preponderance of the evidence. Schuylkill.

Since it is clear that as a third party challenging this permit issuance decision, NNN has the burden of proof under 25 Pa. Code §1021.101(c)(3)[3], we turn to the issue of whether NNN has made out a *prima facie* case as to any of its contentions. NNN raises thirty objections in its Notice Of Appeal. However, by

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[2]The impact of a party's election to proceed *pro se* as discussed in this opinion and what happened there, in part, because Mr. Taylor elected to appear *pro se*, is repeated here as to NNN.

[3]Our rules have been amended since the parties submitted their briefs and the Board's rule on burden of proof is now found at 25 Pa. Code §1021.101(c)(3).

the time of the merits hearing, it had reduced that number substantially.[4] In order to fully evaluate what NNN contends it is trying to assert on the merits and in response to these motions, the Board will not limit itself to the statements made by NNN's representatives at the merits hearing as to which of NNN's contentions its representatives felt they were offering evidence to support. Rather, we will consider both those representations and the contentions advanced in NNN's Response to these motions and its Brief in support thereof. However, to the extent there are other reasons for appeal set forth in NNN's Notice of Appeal, the failure to address them at either point will be deemed a waiver thereof by NNN. See Lucky Strike Coal Co. and Louis J. Beltrami v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

In considering these issues and whether a *prima facie* case has been demonstrated by NNN, we limit ourselves to the facts stipulated to by the parties as set forth in Board Exhibit No. 1, the testimony of the three fact witnesses found in the hearing's 239 page transcript and the ten exhibits admitted on NNN's behalf during the presentation of its case-in-chief. We emphasize that we do not consider any exhibits attached to any party's Pre-Hearing Memorandum (attached thereto as a document which that party may seek to offer into evidence at the hearing) as part of the record. We so advised NNN's citizen representatives at the merits hearing. (T-134-136)[5] Documents not offered as evidence by a party and admitted by the presiding Board Member do not become part of the evidentiary record. The same is true of factual allegations appearing in any party's Briefs,

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[4]NNN offered no evidence on its mine subsidence, township road damage, loss in property values, decline in mortgageability of properties, increased landslide potential, methane gas hazard, contamination of ground and surface waters, increased fire hazard to surface structures, mine fire and other objections.

[5]T-___, is a reference to a page in the merits hearing's transcript.

Motions, Pre-Hearing Memoranda, Notice of Appeal, or similar filings. Facts also do not include allegations as to a fact's existence by a party's lawyer (or as to *pro se* NNN, its representatives). The facts before this Board come solely from the three groups of sources listed above. To the extent any party relies upon other alleged facts to support its assertions, these "facts" do not exist within the factual record of this proceeding. As a result, where a party references documents not admitted into the record or avers a fact exists in the Response to these motions, those facts are not facts of record and we do not consider them in reaching our conclusions.

We mentioned briefly above the potential impact of a party's decision to appear *pro se*. We return to this subject here to observe that the impact of this decision on NNN's case is obvious, even at this early stage in this evaluation of these motions, because NNN failed to offer MCM's permit application or the permit as issued by DER into the record; it relies on four exhibits not admitted into evidence[6] and defends its failure to offer any testimony by expert witnesses to support its allegations of DER's errors by asserting: "The NNN did not introduce expert opinion, since the Department is the expert opinion which the NNN challenges." (NNN's Response at Paragraph 11) No matter how strongly NNN's representatives believe in their assertions on NNN's behalf, the strength of those beliefs do not change the extent of the factual record against which these Motions are weighed, and the impact of potentially crucial omissions therefrom, on NNN's appeal.

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[6]Paragraph 3 of NNN's "Response to Motion for Non-Suit, DER and MCM" asserts that MCM's permit application was not accurate and complete and cites Appellant's Exhibits Nos. 1, 2, 3, 4, 7, 15, 18, 27, 28, 30, 31, 32, 33, and 35 as proof but, for example, four of these exhibits (Nos. 2, 3, 4, and 27) were not admitted into the record.

Mining Feasibility

In its Response to the MCM and DER Motions, NNN asserts that DER failed to comply with 25 Pa. Code §86.37(a)(2) because MCM has not demonstrated it is feasible for it to deep mine this additional acreage. NNN bases this contention on the assertion that MCM has failed to make such a demonstration in the past. In its Reply to NNN's Response (at page 3), MCM points out that this issue was not raised by NNN prior to the hearing and may not be raised for the first time in its Response to the Motions, citing Sunshine Hills Water Company v. DER, 1993 EHB 73. A review of NNN's Notice of Appeal confirms that MCM is correct that this issue was not recited there. It is thus barred from consideration now, under Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986) aff'd on other grounds, 521 Pa. 121, 555 A.2d 812 (1989) ("Game Commission").

Article I Section 27

As pointed out in DER's Reply to NNN's Response, what is stated immediately above as to mining feasibility is true as to NNN's contention that "the Board has jurisdiction to interface with other laws, Article I Section 27, of the Pennsylvania Constitution." Again, our review of NNN's Notice of Appeal confirms that this issue is not raised therebut was only raised thereafter, so its consideration now is barred under Game Commission.

Fish Commission Concerns

One of NNN's challenges to issuance of this permit is based upon DER's alleged failure to address concerns of the Pennsylvania Fish Commission. It is also an argument which is quickly disposed. The Fish Commission's Fishery Biologist, Steve Kepler, testified on NNN's behalf at the merits hearing, but only as a fact witness and not as an expert witness. (T-25) A report of his

visit to the surface streams over a portion of this mine (the Mingo Creek drainage basin) is Exhibit A-1. However, it was admitted only to show the Commission commented on this permit application to DER and requested that DER conduct a complete hydrologic investigation to insure that the hydrologic balance within the basin is protected. Kepler did not personally know if this was done by DER, but on page 10 of the parties' Joint Stipulation (Board Exhibit No. 1) the parties stipulated that as part of DER's review and as required by 25 Pa. Code §86.37(a)(4), DER "assessed the probable cumulative impacts the proposed mining activity on the hydrologic balance ("CHIA"), within the permit area." Thus, NNN stipulated DER did perform as the Fish Commission requested and, in light of that factual stipulation, we cannot find a *prima facie* contrary NNN showing has been made.

Adherence to CHIA Action Plan

NNN also asserts that "the CHIA Action Plan; a revised PGM, implemented January 19, 1994, was not adhered to." After making this statement in its Response to the Motions, NNN adds a footnote which says: "Office of Surface Mining, U.S. Department of the Interior, 1994 Annual Report, Harrisburg Field Office, November 1994." No reference to this allegation appears in the NNN filings before us and, assuming this annual report is a written document, it was not offered into evidence let alone identified in any testimony or the factual stipulation. The total absence of any evidence on the record on this NNN contention compels the Board to find merit in the MCM/DER Motions in regard to this contention.

Inadequate Data For CHIA

Finally, with regard to the CHIA, NNN asserts there was insufficient data available for DER to properly conduct a CHIA and then conclude that the permit

should be issued. In support of this assertion, NNN asserts that Exhibit A-7 (containing flow data for surface streams) is incomplete because the average annual flow data for all surface streams listed on this form is not shown there. Additionally, NNN contends that all ponds and reservoirs within the area to be mined are not identified and discussed within the narrative portion of the application. Further, NNN contends, through the testimony of Anna Filippelli and Exhibit A-18, that only 41% of these ponds and dams appear in that narrative. Finally, NNN also asserts that there is also inadequate data as to the groundwater from MCM's groundwater inventory because, as to the wells, MCM supplied complete information thereon for only 14% of the dwellings and it did not provide well data for wells at 42% dwellings located over the area to be mined.

Taking NNN's concerns as to adequate CHIA evidence on a segment by segment basis holes appear within NNN's allegations. NNN found well data (both complete and incomplete) in MCM's application for only 58% of the dwellings shown as existing on the maps submitted with MCM's application. NNN's spokesperson indicated however that the dwellings in this area are served not only by wells, but also by cisterns and springs. (T-106) NNN's witness also admitted she does not know if all of those dwellings are served by wells (T-102) and does not know if some of them use cisterns for their water supply.

Further, NNN"s witness admitted NNN did not know how many dwelling owners elected not to respond to MCM's well survey or refused MCM access to their wells for sampling purposes. (T-105)

According to the evidence, of the wells that were sampled, MCM's survey sought information on each well as to its depth, diameter, casing depth and water elevation or flow statistics. (T-108) NNN's witness on this subject admitted she

did not know whether some of this information could have been unknown to a dwelling owner so it would be unavailable to MCM for its survey. She was unaware of the reasons this information is not available. (T-108-109) Thus as to well data, NNN has established that it would like the application to have contained more well data but not that it could have contained it or was deficient as to groundwater inventory because of its absence.

Filippelli (NNN's witness on this topic) also admits that NNN raised possible discrepancies in the permit application to DER in an informal conference with DER and DER asked NNN for more information on its allegations. However, Ms. Filippelli has no knowledge of whether NNN brought to DER's attention its concerns over the groundwater survey's completeness or if DER was ever furnished the added information on alleged permit discrepancies which DER asked for from NNN. (T-117-118)

As to the omissions of some of the ponds and reservoirs over the additional acreage to be mined, the evidence shows that NNN is correct that the application's narrative does not identify every pond and reservoir. The map which NNN used to show which ponds and reservoirs were identified by MCM in the application's narrative and which were not, is Exhibit A-18. Those highlighted in green on Exhibit A-18 are in the narrative, while those in yellow are not. (T-86) However, A-18 is a map which itself was part of MCM's permit application, so all ponds and reservoirs are shown on it and, thus, were before DER even if they were not mentioned in the application's narrative. Moreover, as MCM points out, it is not required to discuss in the application's narrative every pond and reservoir over this additional acreage. Under 25 Pa. Code §89.142(a)(6)(ix) MCM's maps are required to show every impoundment with a volume of 20 acre-feet or greater and to index numerically "those perennial streams and other bodies of

water which are a significant source for a public water supply." Thus, the maps need not even show every lake, stream, dam or impoundment. Moreover, the proposed mine's operational plan is only required by 25 Pa. Code §89.34(a)(2) to address "streams, valuable impoundments and alternative water supplies." Thus, it requires the narrative not to cover all 20 acre-feet or greater ponds or impoundments but only those that are valuable impoundments. Accordingly, it appears, as MCM suggests, that an application could be complete even when the map and narrative portions do not address identical ponds and impoundments.[7] Since NNN offers no evidence to the contrary or evidence MCM did not adhere to these regulations, we cannot conclude a *prima facie* showing on this segment of NNN"s contention either.

Finally, as NNN points out, it is clear that Exhibit A-7 does not contain average annual flows data for all streams listed thereon. Again, however, this fact does not show an error on DER's part in issuing this permit. Firstly, to the extent some of these streams are not perennial but are intermittent, it follows that at times, these streams have no flow and therefore average annual flow would have no meaning as to them. Of the 52 streams shown on this Exhibit, 31 are listed as intermittent. Of the remainder, MCM had average annual flow measurements on all but nine, and eight of these nine are so small they are only identified as unnamed tributaries to other streams, and each of the nine shows the flow as not available through consultation with the United States Geological Survey's ("USGS") topographical maps of this area. The problem for NNN with its accurate observation as to omission of flow data on these streams is NNN's

[7]The regulations are silent on whether "valuable" impoundments equate with those holding 20 acre feet or more.

failure to tie this into some meaningful omission or error on DER's part in issuing the permit to MCM.

25 Pa. Code §89.34 requires MCM's submission as part of its application of its operating plan which include "premining and baseline hydrologic information representative of the proposed permit adjacent and general areas." The regulation does not require the submission of all data on all streams but rather representative information only. Under 25 Pa. Code §89.35 this operating plan is to contain a prediction of the probable hydrologic consequences and a description of the measures to be taken to protect the hydrologic balance from adverse hydrologic consequences. 25 Pa. Code §86.37(a) then provides the permit application will not be approved unless it affirmatively demonstrates and:

> "DER finds, in writing on the basis of the information in the application or from information otherwise available... that the following exists:
>
> (1) The permit application is accurate and complete and all requirements of the acts and this chapter have been complied with." (emphasis added)

These regulations, read together, compel two conclusions. The first is that, absent a showing of inadequate representative information by NNN, MCM's application is complete if it includes the representative information required by Sections 89.33 through 89.35. The regulations do not require detail on each and every body of surface and groundwater. The second conclusion is that, in deciding to issue this permit DER may consider other available information as long as it documents what that information is in its approval of the application. Thus, the omission of some surfaces or groundwater data does not mandate the application's rejection so long as the included flow data is representative or is representative when added to other data available to DER. We have no evidence before us of a factual or expert nature to suggest the data here is not

adequately representative and thus that the application was sufficiently incomplete or inaccurate to require its denial. We also have no evidence before us to show DER lacked sufficient evidence of this type, whether from the application documents or other sources from which to decide to issue this permit. If NNN had offered expert testimony on this issue to challenge DER's action, this conclusion might be different, but it elected to offer no such testimony.

Lastly, we also reject NNN's suggestion in paragraph 13 of its Response To Motion For Non-Suit, that all of this information was necessary for the CHIA. There is no evidence to support this assertion. In its "Answer to Brief", NNN asserts that DER's "review process of the probable cumulative impacts of proposed mining activity was not conducted, or assessed, a mere compiling of permit enclosures were made a part of and a cover letter signed by the hydrogeologist John Kernic." This statement's meaning is not clear. However to the extent this is an attack on the adequacy of the data supporting the CHIA or the CHIA, it is one based on allegations of facts *de hors* the record. As such, no *prima facie* evidence exists on this issue.[8]

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[8]In its Answer To Brief, NNN also asserts DER acted contrary to its Program Guidance Manual (Exhibit A-4), which became effective about five months before the permit's issuance. NNN says this Manual requires water quantity to be protected as part of the hydrologic balance and the Manual does say this, but, NNN fails to show that, either through the application's information or from other sources, DER did not have the information to make the proper decision on this issue. Showing omission of flow data only in the application does not show violation of this Manual when the regulations allow DER to consider data from sources other than the application. However, this same Manual appears to explain why USSM did not evaluate some of the unnamed tributaries as to flow volumes because it provides that certain small streams (as shown on USGS' topographical maps as having a drainage area of less than .5 square miles) need not be evaluated.

USSM's Violational History

Next, NNN attacks the issuance of this permit amendment based upon DER's handling of MCM's violational history from two standpoints (obviously MCM had no such history here). Firstly, at the hearing, evidence was offered that NNN asked DER for information as to violations by Brenkee Mining Co. and a bond forfeiture but DER never provided it. (T-125-126, 129) However, it is not clear in any of NNN's filings how NNN was injured by DER's alleged failure to provide NNN information on this company or why, if it occurred, the failure to provide NNN this information is grounds to invalidate the permit's issuance. Exhibit A-4, referenced at that point in the transcript, is a copy of a portion of the transcript of the deposition on October 5, 1994, of NNN's Nancy Close-Flaherty (who was also NNN's chief spokesperson at the merits hearing). In this deposition transcript, after reviewing a condition in the permit making the permit conditional on MCM satisfactorily complying "with the Brenkee issue in West Virginia", Ms. Close-Flaherty indicated this "Brenkee issue" was apparently no longer an issue.[9] Since that is the conclusion Ms. Close-Flaherty drew and NNN points to no violation of a regulation or statute during permit issuance occurring from the DER's failure to provide this information to NNN through issuing this permit, NNN has failed to establish a *prima facie* case based on failure to provide this Brenkee data. In so saying this Board is neither condemning nor condoning DER's provision of information to NNN. We lack

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[9]At the hearing, NNN's witness testified that NNN understood: "through the law that if a forfeiture of bonds has taken place, a permit shall not be issued. In this instance, a permit was issued upon conditions of the forfeiture of bond which Nottingham Network of Neighbors still to date, has not received and has requested it twice." (T-126) However, other than this reference to this condition and an assumption that it is somehow related to this NNN contention, the record is devoid of any evidence of any bond forfeiture as to USSM, MCM, or Brenkee.

sufficient information to do either. DER must make its files on permit applications open to the public under 25 Pa. Code §86.35. However, public access means NNN may review documents at DER's offices and may secure copies of same (paying the appropriate fee if there is one) but it does not mean unreasonable access on demand. This Board strongly believes that like all government agencies DER has a duty to reasonably facilitate public access so that citizens can continue to have confidence in the governmental decision making process even when they do not agree with a particular decision.

NNN also challenges the accuracy of a DER response on bond forfeiture as to Brenkee given at a public conference held on January 6, 1994. The only evidence of what DER said in response to an inquiry at the conference is found in Exhibit A-33 which are DER's written Findings as a result of that conference. This DER memorandum says DER could locate no information in its computer database on Brenkee so the memo concludes that this indicates DER never issued a permit to such an entity and such an entity is not listed in the corporate structure of any permittee or licensee. Why this DER statement is in error in NNN's opinion is not of record. This statement is consistent with the idea that an entity by that name had dealings involving USSM in West Virginia rather than dealings with USSM and DER in Pennsylvania. Without a showing as to how NNN was injured as to permit issuance by this statement in this memo or an assertion as to what DER did wrong, (we again note the permit application's absence from the record), we can find no *prima facie* case on NNN's behalf as to this issue.

NNN also attacks permit issuance to MCM in light of USSM's violation history. In DER's written Findings (Exhibit A-33), DER notes one outstanding violation at the Maple Creek Mine which dealt with an erosion and sedimentation problem which DER ordered to be corrected by January 4, 1995, (a date two days

before DER prepared these Findings). DER's Findings also assert a $3,250 civil penalty assessment against USSM for the violation. No evidence exists showing that this violation remained uncorrected. Exhibit A-30 is NNN's written response to the DER Findings. NNN's Response mentions the existence of an unspecified number of other violations by MCM but does not indicate what statutes are violated, or what the violations are or whether they were abated. Rather, these NNN comments in Exhibit A-30 question whether DER's requiring of only a three-year violation history is adequate.[10] NNN's Response To Motion For Nonsuit asserts no evidence is necessary to introduce the USSM violation history because MCM's permit application was introduced. NNN is in error. This application was not introduced into the record. In the parties' Joint Stipulation it is listed as a document which any party could introduce without objection but no party offered it. NNN says it is offered by USSM and cites T-17 and 18 as the source for this conclusion. But, no such offer into the record is found at that location. At that location, MCM's counsel observes that he did not attach the application to his client's Pre-Hearing Memorandum (as one of the documents which MCM might seek to introduce at the hearing) because of its voluminous nature but he had provided a copy of it to NNN and DER's counsel on the morning of the hearing. That statement did not seek the document's admission and it is not otherwise before us. With this lack of record evidence the Board cannot conclude there are outstanding violations by USSM shown sufficiently by NNN to make a *prima facie* case that DER erred in issuing this permit.

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[10]Moreover, with NNN's concurrence, Exhibit 30 was admitted only to show that NNN responded to DER's Findings and without those responses being agreed to as "correct, accurate, or otherwise admissible". (T-218-219) So, we can not consider the document's assertions for their intended truth but only to show NNN responded to DER and additional requests for information were made.

DER's Response To Public Comments

Lastly, NNN says it made a *prima facie* case for reversal of this permit issuance decision based on how DER dealt with public comments on the inaccuracies in MCM's application. Again, we conclude no such showing has been made by NNN. We are aware from Ms. Close-Flaherty's testimony and Exhibits A-32 and A-33 that DER received comments from many people and asked MCM for more information as a result thereof. Exhibit A-32 also shows that issues raised to DER required its staff to address some ideas they had not previously considered. NNN also contends, based on Ms. Close-Flaherty's testimony (T-199-200), that DER's failure to send NNN a copy of Exhibit A-32 is evidence of another DER error. On NNN's behalf, Ms. Close-Flaherty also indicates that Exhibit A-30 shows NNN asked DER for another meeting to reemphasize NNN's concerns and to secure copies of DER's central office comments. (T-216-217) However, A-30 was only admitted to show comments were made to DER by NNN. (T-218) Other than this limited evidence, the record is barren on this issue. Did DER ask for and receive other information from MCM? Did it modify the permit as a result? Did it again meet with NNN? We do not know because the record is silent thereon just as NNN's Response is silent on any legal theory as to how DER's handling of these comments in this fashion constitutes grounds for this Board to reverse DER's permit issuance decision. In this regard, NNN's Response does assert NNN "begged for [DER] to ensure the rights of residents and members of NNN, under 86.42.." 25 Pa. Code §86.42 provides:

> Each permit issued by the Department will ensure and contain specific conditions requiring that the:
>
> > (1) Permittee shall take all possible steps to prevent an adverse impact to the environment or public health and safety resulting from noncompliance with terms or conditions of the

permit, including:

> (i) An accelerated or additional monitoring necessary to determine the nature and extent of non-compliance and the results of the noncompliance.
>
> (ii) Providing warning, as soon as possible after learning of the noncompliance, to a person whose health and safety is in imminent danger due to the noncompliance.

(2) Permittee shall conduct the activities in accordance with measures specified in the permit as necessary to prevent environmental harm or harm to the health or safety of the public.

However, there is neither evidence before us that DER failed to comply with this regulation, nor a legal theory as to how this permit's issuance violated this regulation. NNN failed to offer evidence that the permit's conditions did not comply with this regulation.[11] Thus, no *prima facie* case on this issue has been presented either.

Based on these conclusions this Board enters the following Order.

ORDER

AND NOW, this 9th day of January, 1996, it is ordered that Motions For Directed Adjudication/Non-Suit on behalf of MCM and DER are granted and NNN's appeal is dismissed.[12]

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[11]Contrary to NNN's assertion of some duty to insure protection of NNN's members, DER neither has a duty to ensure that the owner of a coal seam can mine its coal nor a duty to ensure a surface owner's undisturbed use of its property. Its duty is to use its best judgment to see that these statutes and regulations promulgated pursuant thereto, are complied with. Parties of all kinds frequently equate their position with DER's role and ignore this fact.

[12]In so ruling, this Board does not address MCM's argument that NNN lacks standing to challenge this permit's issuance. But see Lower Allen Citizens Action Group v. Commonwealth, DER, 119 Pa. Cmwlth. 236, 546 A.2d 1330. (1988)

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DATED: January 9, 1996

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COLUMBIA GAS OF PENNSYLVANIA, INC.	:	
v.	:	EHB Docket No. 95-231-R
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY, Permittee	:	
PEOPLE UNITED to SAVE HOMES	:	
v.	:	EHB Docket No. 95-232-R
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY, Permittee	:	
PENNSYLVANIA AMERICAN WATER COMPANY	:	
v.	:	EHB Docket No. 95-233-R
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY, Permittee	:	
EIGHTY-FOUR MINING COMPANY,	:	
v.	:	EHB Docket No. 95-235-R
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
SOUTH STRABANE TOWNSHIP	:	
v.	:	EHB Docket No. 95-250-R
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY, Permittee	:	

OPINION AND ORDER SUR MOTION TO CONSOLIDATE

By Thomas W. Renwand, Member

Synopsis

When five appeals involving common questions of fact or law arise from the Department of Environmental Protection's approval of a permit revision to a coal mining permit the Board may consolidate the appeals in order to promote judicial and administrative efficiency, reduce the inconvenience of numerous witnesses who would otherwise have had to undergo multiple depositions, and reduce or limit unnecessary cost and expense to the parties and the Board.

Opinion

On September 22, 1995, the Department of Environmental Protection ("Department") approved a Permit Revision to Eighty-Four Mining Company's ("Eighty-Four") Bituminous Coal Mining Permit which authorized Eighty-Four to substantially expand its underground mining operations in Washington County, Pennsylvania. The permit revision spawned five appeals, including one by Eighty-Four itself objecting to two of the permit conditions. In addition, appeals were filed by Columbia Gas of Pennsylvania, Inc. ("Columbia"), Pennsylvania American Water Company ("PAWC"), People United to Save

Homes ("PUSH"), and the Township of South Strabane ("South Strabane"). Presently before the Board is Columbia's Motion to Consolidate the Appeals.

Columbia argues that the appeals should be consolidated as they all involve common issues of fact and law. Columbia contends that consolidation would promote administrative and judicial economy and reduce the expense and cost of litigation to both the parties and the Board. PUSH, PAWC, and South Strabane support the Motion to Consolidate. Eighty-Four vigorously opposes the Motion. Eighty-Four argues that common legal and factual questions "are not generally present" and consolidation would not result in "judicial and administrative adjudicatory efficiencies." It also argues that consolidation would make resolution of the underlying appeals more difficult and its rights would be prejudiced. The Department believes that consolidation of the appeals at this time will unnecessarily complicate the settlement negotiation process. At oral argument, the Department indicated a strong desire to amicably resolve the appeals but admitted that its attempts to resolve one or more of the appeals have not been successful.[1]

Both Pennsylvania Rule of Civil Procedure 213[2] and the Board's own Rule set forth at 25 Pa. Code §1021.80 authorize the consolidation of one or more appeals.

> (a)The Board, on its own motion or on the motion of any party, may order proceedings involving a common question of law or fact to be consolidated for hearing of any or all of the matters in issue

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[1] The Department has attempted to negotiate with the parties in accordance with paragraph eight of prehearing order number one.

[2] (a)In actions pending in a county which involve a common question of law or fact or which arise from the same transaction or occurrence, the court on its own motion or on the motion of any party may order a joint hearing or trial of any matter in issue in the actions, may order the actions consolidated, and may make orders that avoid unnecessary cost or delay.

in the proceedings.

The decision to consolidate appeals rests within the sound discretion of the Board and is not a matter of right. Pullium v. Laurel School District, 316 Pa. Super. 339, 462 A.2d 1380 (1983). So long as there is a common question of law or a common question of fact, or the appeals arise out of the same action or order, consolidation may be proper. *See* Lincoln General Ins.Co. v. Donahue, 151 Pa. Cmwlth. 297, 616 A.2d 1076 (1992). *See also* Bumberger by Hems v. Duff, 160 Pa. Cmwlth. 354, 634 A.2d 1162 (1993).

Although the Board is cognizant of the arguments ably made by counsel for both Eighty-Four and the Department, after careful reflection it believes the interests of all the parties and witneses will best be served by consolidation. For example, all of the parties wish to depose one or more employees of the Department involved in the permit revision process. If these appeals were not consolidated several of these employees would potentially be deposed five times. These witnesses would not only have to undergo the taxing process of five depositions but as the transcripts of their earlier testimony became available the later questioning attorneys would likely ask them to explain statements made at earlier depositions which would further lengthen the ensuing depositions. Moreover, since only the Department and Eighty-Four are parties in all five appeals they would have to incur the added expense and cost of multiple depositions of the same witnesses. Such multiple depositions would likely generate a flurry of motions for protective orders and motions to compel. The only entity who would truly benefit would be the court reporter. This is just one small example of how discovery costs would multiply while at the same time make the cases much more difficult to manage from the Board's perspective.

A review of the appeals filed by Columbia, PAWC, and PUSH show various common questions of both fact and law. These issues center around Eighty-Four's subsidence control plan and risks associated with longwall mining under utility lines and homes. Eighty-Four is certainly correct in arguing that the issues raised by PUSH are more detailed. However, that fact alone should not prevent the appeals from being consolidated. This is especially true considering that the parties whose appeals might be slowed down by the complexity of the PUSH appeal are in favor of consolidation. Although Eighty-Four's own appeal could arguably take more time if consolidated with the other appeals, this may not be the case. In addition, the main thrust of Eighty-Four's appeal centers on condition 18 to the permit which also is a central part, albeit for different reasons, of the other appeals. Again, as noted earlier, Eighty-Four and the Department are already parties in all the appeals so it is not a situation where if Eighty-Four would settle its appeal its litigation resolving the permit revision would be concluded.

None of the parties have raised the troublesome issues of res judicata or collateral estoppel. If these appeals are not consolidated, the Board would likely be faced with issue preclusion arguments which could greatly prolong the resolution of the issues and add greatly to the cost and expense of all involved.

Eighty-Four and the Department both argue that the PUSH appeal is the most complex and will likely take the most time. Pursuant to 25 Pa.Code §1021.81(a)(3), the parties to that appeal, PUSH, the Department, and Eighty-Four, submitted a proposed case management order to complete all discovery by April 24, 1996 and file all dispositive motions by May 24, 1996. At oral argument, all the other appellants agreed to this same schedule so it

does not seem, at least initially, that the consolidation of these appeals will result in the unnecessary prolonging of discovery for any individual party. In fact, none of the parties has taken any depositions even though most of the appeals are over three months old.

A consolidation of these appeals should greatly aid the Board in managing its case load. In these appeals, it will help insure uniformity in resolving various issues and motions. At oral argument, counsel for Eighty-Four voiced concern over the Board's standard motion practice. See 25 Pa.Code §1021.72. Eighty-Four evidently foresees discovery being hard-fought with various motions. The Board shares Eighty-Four's concerns and pursuant to §1021.72(c) will modify its usual procedures accordingly. In order to insure a prompt resolution of all discovery disputes an order will be issued indicating that discovery motions in this consolidated appeal will be handled as follows:

1) The Board will hear oral argument on any outstanding discovery motions approximately twice a month. These dates will be set forth in a separate order.

2) Pursuant to the suggestion of counsel for PUSH and not objected to by any other party, counsel for the moving party, at the time of filing the discovery motion, shall set forth a statement showing with specificity that the attorney making the motion has made a reasonable effort to reach agreement with the opposing attorney on the matters set forth in the motion.[3]

---

[3] The parties are especially encouraged to resolve their discovery disputes. As pointed out to the Board at oral argument, the attorneys involved in these appeals are experienced litigators with, in many cases, years of practice before this Board. As such, they are well aware that

3) All motions should be filed in Harrisburg with a copy sent directly to the undersigned in Pittsburgh at least ten days prior to the hearing date. The Board will not issue an order advising the parties of the hearing date. Instead, the moving party should set forth a notice of presentment advising the other party as to when the Motion will be presented. The nonmoving party shall be given at least ten days notice.

4) The nonmoving party may, but is not required to, file a written response.

5) In most instances, a decision will be made at the oral argument on the motion. A written order will be issued shortly thereafter.

The intent of this procedure is to resolve discovery disputes quickly and economically. Consolidation of these appeals will likely result in fewer motions. Efficient motion disposition may be vital to the timely progress of this litigation and play a key role in the Board's management of its docket.

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experience counsel can usually resolve any discovery dispute to their mutual satisfaction if they take the time and energy to reach common ground. More importantly, a judge is much more likely to issue a ruling on the same issue which will probably make one of the litigants more unhappy than if they would have taken the time to negotiate their discovery differences. This is because the judge is less likely to compromise the issue. It will usually be decided one way or the other. Although this judge certainly enjoys and even relishes deciding discovery disputes the above admonition is still probably applicable.

All the parties will now be proceeding on the same discovery track. Moreover, consolidation may facilitate settlement discussions which the Department admits have been mostly fruitless so far. The Board stands ready to assist the parties within the confines of its rules in attempting to resolve their disputes. Even though the appeals are consolidated, the parties, if they wish, can still negotiate separately. The Board fails to see how consolidation, in and of itself, will inhibit the settlement process if the parties are sincerely interested in settling their differences.

Consequently, the Board will issue an order consolidating these appeals to promote judicial and administrative efficiency, reduce the inconvenience of numerous witnesses who would have otherwise had to undergo multiple depositions, and act to reduce or limit unnecessary cost and delay to the parties and the Board.

ORDER OF CONSOLIDATION

AND NOW, this 12th day of January, 1996, it is hereby ordered that the Motion to Consolidate filed by Columbia is **granted** and the above-captioned matters are consolidated at **Docket No. 95-231-R.** The caption henceforth shall read as follows:

Columbia Gas of Pennsylvania, Inc.,	:	
People United to Save Homes,	:	
Pennsylvania American Water Company,	:	
and the Township of South Strabane	:	
v.	:	**EHB Docket No. 95-231-R**
	:	**(Consolidated)**
Commonwealth of Pennsylvania,	:	
Department of Environmental Protection,	:	
and Eighty-Four Mining Company	:	

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: January 12, 1996

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SKY HAVEN COAL, INC.	:	
	:	
v.	:	EHB Docket No. 95-103-E
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	Issued: January 17, 1996

OPINION AND ORDER SUR
DEPARTMENT OF ENVIRONMENTAL PROTECTION'S
MOTION FOR SUMMARY JUDGMENT

By: Richard S. Ehmann, Member

Synopsis

Where the mining company fails to timely challenge a DEP order to treat acid mine drainage discharges and subsequently applies for bond release, the doctrine of administrative finality bars the miner's challenge to DEP's denial of bond release based on liability for the discharge. No Kent Coal type exception exists under Section 4(a)(2)L(I)of SMCRA allowing a subsequent challenge to liability for three discharges in an appeal of a bond release denial.

DEP's failure to include a copy of its verification with the copy of its timely Answers to the mining company's Request For Admissions sent to the company, where it filed verified Answers with this Board and promptly remedied its omission as to the Answers sent to the miner, does not render the Request For Admissions to be deemed admitted. Moreover, under the circumstances here "deemed

admitted" facts cannot "trump" application of the doctrine of administrative finality to bar the doctrine's application.

DEP's Motion, the Board's opinion in the prior appeal of the order to treat three discharges coupled with this doctrine and DEP's affidavits, aver sufficient facts to sustain DEP's Motion For Summary Judgment and forfeiture pursuant to 25 Pa. Code §86.171(f)(1)(iii).

Opinion

On May 16, 1995, the Department of Environmental Protection's ("DEP") predecessor agency issued Sky Haven Coal, Inc. ("Sky Haven") a letter denying Sky Haven's Bond Release Application No. 495006 in connection with bonds posted in regard to Sky Haven's Surface Mining Permit No. 17880103. According to DEP's letter, the mine site is located in Bradford Township, Clearfield County.

Sky Haven appealed that denial to the Board. After Sky Haven had filed its Pre-Hearing Memorandum, DEP filed the instant Motion For Summary Judgment and a supporting Memorandum of Law. Attached to DEP's motions are affidavits by DEP's District Mining Manager and the Compliance Specialist at DEP's Hawk Run District Office. Also attached are a series of exhibits referenced in these affidavits and copies of two Board orders dealing with other appeals by Sky Haven relating to this mine site. On October 23, 1995, the Board received Sky Haven's Memorandum Of Law In Opposition To Department's Motion For Summary Judgment and its Response to the Motion. Attached to Sky Haven's Responses are its Request For Admissions and DEP's Answers thereto. On November 9, 1995, the Board

received DEP's Reply to Sky Haven's Response. Accompanying it was a supporting DEP Memorandum Of Law.

Administrative Finality

DEP's Motion is based upon the application in this appeal of the doctrine of administrative finality as discussed in Commonwealth, DER v. Wheeling-Pittsburgh Steel Corp., 22 Pa. Cmwlth. 250, 348 A.2d 765 (1975) *aff'd* 473 Pa. 432, 375 A.2d 320 (1977). ("Wheeling-Pittsburgh") DEP asserts the doctrine's application here because it denied bond release based on the contamination of three springs which it blames on Sky Haven's mining of the tract covered by this permit. DEP asserts that Sky Haven could have challenged its assertion of Sky Haven's liability for the contamination of these springs by timely appeal of DEP's 1994 administrative order to Sky Haven to treat this water. Instead, Sky Haven filed an untimely appeal of that order which was dismissed for untimeliness. See Sky Haven Coal Company, Inc v. DER, (EHB Docket No. 94-241-E, Opinion issued March 17, 1995). DEP also asserts this doctrine's application because Sky Haven could have challenged DEP's conclusions as to these three springs in its appeal from DEP's 1994 civil penalty assessment against Sky Haven for water quality violations at these three springs. As DEP points out Sky Haven appealed that assessment to this Board but later asked this Board to dismiss its appeal (Docket No. 94-335-E) as moot because it had paid that assessment to DEP. This Board's Order, attached to DEP's motion, confirms dismissal of Sky Haven's appeal at that docket number for mootness. Accordingly, under this doctrine DEP

asserts that Sky Haven may not challenge denial of bond release by challenging DEP's conclusion that Sky Haven is liable for the quality of these three springs nor can it challenge bond release denial based thereon.

In response, Sky Haven does not dispute that these two prior appeals dealt with DEP's actions against it because of the discharges through the three springs or that those two appeals were terminated. Thus, it concedes that, absent another argument, this doctrine does apply here. Of course if it applies it bars our consideration in this appeal of anything which could have or should have been raised in either of those appeals as to its liability for the mine drainage discharges at the springs. Wheeling-Pittsburgh, *supra*.

The Kent Coal Argument

This administrative finality doctrine bars Sky Haven's challenge here unless some exception to this doctrine applies. Ingram Coal Co. v. DER, 1988 EHB 800. Sky Haven, citing the Commonwealth Court's rationale in Kent Coal Mining Company v. Commonwealth, DER, 121 Pa. Cmwlth. 149, 550 A.2d 279 (1988) ("Kent Coal"), argues that it retains the right to challenge the DEP's denial of Sky Haven's bond release request because of the language in Section 4(a)(2)L(I) of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, ("SMCRA"), 52 P.S. §1396.4(I). In other words it reads an exception to application of the doctrine by virtue of this section's language in the same way that the Court in Kent Coal found an exception to the doctrine based on the language in Section 18.4 of SMCRA, 52 P.S. §1396.22.

In its Reply to Sky Haven's Response, DEP predictably argues no such exception exists.

> Section 18.4 of the statute, which applied in Kent Coal, provides in relevant part:
>
> > The person or municipality charged with the penalty shall then have thirty (30) days to pay the proposed penalty in full or, if the person or municipality wishes to contest either the amount of the civil penalty or the fact of the violation, forward the proposed amount to the secretary ... (emphasis added)
>
> On the other hand, Section 4(a)(2)L(i), which is applicable in this appeal, provides in relevant part:
>
> > "Should any operator be aggrieved by any decision or action of the secretary with respect to the amount of any bond, the terms, conditions or release thereof, or any other matter released thereto, he may proceed to lodge an appeal with the Environmental Hearing Board in the manner provided by law ..."

The language in section 18.4 "or the fact of the violation" is thus not part of Section 4(a)(2)L(I).

The lack of this quoted phrase in Section 4(a)(2)L(I) is crucial here because it was this phrase's existence in Section 18.4 which caused the Commonwealth Court to reach the result it reached in Kent Coal. In reversing this Board on the applicability of the doctrine of administrative finality there, the Court concluded that both Section 18.4 and 25 Pa. Code §86.202(a) recognized that when a penalty was asserted by DEP the miner had a right to contest the fact of the violation, even if it had not previously contested a DEP administrative order to correct the alleged violation. Thus, the Court concluded that this

doctrine did not apply because the statute explicitly modified the doctrine's application as to civil penalty assessments under this statute.

Sky Haven seeks to expand the Kent Coal exception to cover the denial of a bond release application despite the absence of this language in Section 4(a)(2)L(I). This language's absence is fatal to Sky Haven's argument. Kent Coal is specific to Section 18.4 and the doctrine of administrative finality. Indeed, the court explicitly recognizes that other preclusion doctrines would still apply, just not the doctrine of administrative finality. Although Section 4(a)(2)L(I) does contain a provision allowing the miner aggrieved by a DEP action on a bond to appeal as to "release thereof, or any other matter relating thereto", there is nothing in this subsection allowing the contest of "the fact of the violation". Accordingly, there is nothing within this statute section to suggest a statutory modification of this doctrine as to bond release denials. In Kent Coal the Court also explicitly recognized that 25 Pa. Code §86.202 recognized a right to contest the fact of the violation in civil penalty assessment appeals. Nothing in 25 Pa. Code §86.171 provides a similar exception as to a denial of a bond release. Section 86.171(g) only states that appeals may be taken from DEP decisions to this Board. Further, if Section 86.171(g) and Section 4(a)(2)L(I) are read together and consistently, just as the Court read Section 18.4 and Section 86.202 consistently (both were found to provide the right of appeal in Kent Coal), then no Kent Coal type exception exists under Section 4(a)(2)L(I). Indeed, this section can be read as stating that any final

decision of DEP as to bonds, rather than just a DEP decision on amount, terms, conditions, or release, is appealable to this Board (unless otherwise barred by a preclusion doctrine such as the doctrine of administrative finality). We believe this latter interpretation is the intended interpretation and adopt it, rejecting Sky Haven's Kent Coal argument.[1]

As a defense to DEP's Motion, Sky Haven also asserts that because DEP answered Sky Haven's Requests For Admissions improperly under Pa. R.C.P. 4006 the Requests For Admissions are deemed admitted and as a result the Board must find Sky Haven has met the criteria for bond release found at 25 Pa. Code §86.172 (which in turn requires that we deny DEP's Motion). The errors in DEP's answers are alleged by Sky Haven to be a failure by DEP to make its answers under oath or verification and their failure to identify every document "which supports the grounds" or to supply "a copy of the same with the answer as requested." Appellant thus appears to argue in part that somehow a failure to properly respond to a Request For Admissions trumps the application of the doctrine of administrative finality's application to Sky Haven's current appeal. Sky Haven's Memorandum Of Law never explains how this could be.

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[1]Having dealt with Sky Haven's argument in this fashion the Board does not address DEP's second argument on this doctrine found on pages 5 and 6 of its Reply, which deals with the issue of the adequacy of Sky Haven's Response and the allegations of facts contained, not in the Response but the Memorandum Of Law accompanying it.

As to the oath or verification issue raised by Sky Haven, DEP's Reply asserts its Answers comported with Pa. R.C.P. 4014. DEP says the Answers it timely filed with this Board were verified but through inadvertence, it initially failed to send a copy of the verification to Sky Haven. DEP then advises that 22 days later it sent the verification to Sky Haven's counsel. The Board's docket does show we received DEP's Answers on October 2, 1995, and these Answers contain two verifications signed on DEP's behalf by Scott L. Barnes a hydrogeologist at DEP's Hawk Run District Mining Office and by David E. Butler a DEP Surface Mine Conservation Inspector. The Board's docket also reflects the Board's receipt on October 25, 1995, of a copy of DEP's letter transmitting copies of these verifications to Sky Haven's counsel (and a copy of the two verifications).

It is clear DEP failed to comply with Pa. R.C.P. 4014(b) in timely fashion, contrary to its assertion. Under Pa. R.C.P. 4014(b), DEP had to serve verified answers to the Requests For Admissions on Sky Haven within 30 days, but, instead, sent unverified Answers to Sky Haven while timely filing verified answers with the Board. However, DEP promptly corrected this error on its part. On October 23, 1995, the Board received Sky Haven's Response to DEP's Motion which raised this issue and by letter dated October 24, 1995, DEP sent Sky Haven a copy of the verifications. Thus, DEP corrected its initial error within the same calendar month on which it first filed its Answers. Moreover, this DEP rectification of its omission in no way modified the substance of DEP's Answers to the Requests

For Admissions. It appears the situation before us is more akin to that discussed in C & K Coal Company v. DER, 1992 EHB 1261 at 1289. ("C&K Coal") than it is to Manor Mining and Contracting Corp. v. DER, 1992 EHB 66, and as a result we reject Sky Haven's argument based on DEP's initial omission of the verification.[2]

Sky Haven also attacks DEP's Answers to Sky Haven's Requests For Admissions because DEP fails to attach all documents which support DEP's Answer to Interrogatories. At the end of Sky Haven's Request For Admissions, the following statement exists:

> The Appellant demands, pursuant to Pa. R.C.P. 4005 and 25 Pa. Code §21.111 that you file and serve, within thirty (30) days of service, a full and complete answer, under oath to the following Interrogatory (sic), as required by Pa. R.C.P. 4006: with respect to any of the matters set forth above in the Requests for Admissions, that you do not admit unequivocally, state the full and complete grounds for your non-admission; and identify each and every document which supports those grounds and supply a copy of the same with your answer.

This is a request for documents which DEP must comply with. However, nothing in Pa. R.C.P. 4014, which governs procedure for Requests For Admissions indicates that DEP's Answers to Sky Haven's Request For Admissions is defective in any fashion if DEP fails to attach such documents. Moreover, Pa. R.C.P. 4005 and 4006 referenced in the above-quoted language dealt not with Requests For

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[2]This appears to be the type of situation which is envisioned in Pa. R.C.P. 4014 and C & K Coal as one where, if we had not reached this conclusion, DEP could move to withdraw the deemed admission and we would have to grant such a motion.

Admissions but with written Interrogatories to a party and answers to written Interrogatories by a party, not admissions under Rule 4014. Thus it appears that Sky Haven has attempted to make Requests For Admissions into Interrogatories or vice-versa.[3] Moreover, document production is governed by Pa. R.C.P. 4009 which Sky Haven fails to mention. Sky Haven's efforts as to documents are thus unclear and confused. Moreover, to the extent Sky Haven desires to compel production of documents by DEP, the proper procedure is not merely to demand them but, when the demand is not responded to by DEP, to file a Motion To Compel. New Castle Township Board of Supervisors v. DER, et al., 1994 EHB 919. No such motion has been filed by Sky Haven in this appeal. Finally, the Board is unwilling to conclude that what Sky Haven calls DEP's "deemed admissions" can "trump" the application of the doctrine of administrative finality causing the doctrine to be rendered inapplicable to this appeal. This doctrine has been applicable here since this appeal's commencement and bars the challenge to the underlying violations whether that challenge is based on facts offered at a merits hearing or facts alleged to have been deemed admitted under Pa. R.C.P. 4014. Thus the Request For Admissions argument cannot "trump" this doctrine. Rather the reverse is true. For each of these reasons, the Board must reject Sky Haven's challenge to the Motion's validity based on the Requests For Admissions, DEP's Answers thereto and the Request For Production of Documents.

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[3]The Board has not previously seen a discovery dispute where Requests For Admissions contain such a documentary demand.

Material Factuals Proven

Sky Haven's last group of arguments falls within the confines of the issue of whether DEP has established sufficient undisputed material facts to have its Motion granted. Here, one of Sky Haven's arguments is that DEP has failed to show undisputed facts proving that a discharge of acid mine drainage constitutes incomplete reclamation so as to bar bond release under 25 Pa. Code §§86.172 and 86.174.

DEP's response to this assertion is a citation to our opinion in Al Hamilton Contracting Company v. DER, EHB Docket No. 94-151-E (Adjudication issued August 16, 1995) ("Hamilton"). As DEP correctly observes, based upon the evidence before the Board, it concluded in that adjudication that where there is acid mine drainage occurring from mining operations DEP may not release bonds or a portion thereof "if the amount of the bond remaining will be less than the cost to ... abate harm to water[s]" of the Commonwealth. (Hamilton at page 15) Here, it is undisputed that we have a final DEP order to Sky Haven to abate the acid mine drainage discharges associated with this `mine' site which we have ruled cannot be challenged here. Adding these facts to the holding in Hamilton we conclude that allegations in the Carello and Smith affidavits attached to DEP's Motion, which are to the effect that the discharges on which denial of the bond release is based are the same as those on which DEP based its order, are sufficient to show incomplete reclamation by Sky Haven. As pointed out in 25 Pa. Code §86.171 (f)(1)(iii), DEP must base its decision on whether pollution of

surface and subsurface waters is occurring and the probability of future pollution or continuation of present pollution. Further, as we read DEP's letter denying bond release (attached to Sky Haven's Notice Of Appeal), DEP denied the application because of these discharges and went on to say Sky Haven had to abate the water pollution to secure bond release. Thus, DEP concluded denial was required under 25 Pa. Code §86.171(f)(1)(iii).

Because, as DEP's Memorandum Of Law supporting its Reply points out, DEP could and did deny bond release under 25 Pa. Code §86.171(f)(1)(iii), the Board need not consider whether DEP complied with 25 Pa. Code §86.172. Sky Haven asserts the two affidavits fail to contain a statement addressing Section 86.172(c). This subsection says DEP may not release a portion of a bond if the remaining bond is less than is necessary to complete the approved reclamation plan. Sky Haven asserts that absent this statement, sufficient facts are not proven, so the Motion must be denied. If DEP had denied bond release solely under Section 86.172, Sky Haven's argument would have to be considered on its merits as would DEP's counter arguments. However, Section 86.171(f)(1)(I) says that in deciding bond release questions DEP will look at the criteria in Section 86.172. But, this is only one of the three areas DEP is to review and, under 86.171(f)(1)(iii), the third of the three areas deals with water pollution occurring from mining. Since DEP could act solely under Section 86.171(f)(1)(iii) to deny this release and did deny bond release under both this section and Section 86.172, it is unnecessary to consider the Section 86.172

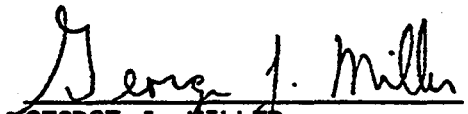
criteria in order to conclude DEP's bond release denial and the Motion have merit.

Accordingly, we enter the following order.

ORDER

AND NOW, this day 17th of January, 1996 DEP's Motion For Summary Judgment is granted and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



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Administrative Law Judge
Member

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Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: January 17, 1996

cc: DEP Bureau of Litigation:
(Library: Brenda Houck)
For the Commonwealth, DER:
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Dennis A. Whitaker, Esq.
Central Region
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M. DIANE SMITH
SECRETARY TO THE BOARD

CITY OF PHILADELPHIA	:	
	:	
v.	:	EHB Docket No. 92-034-E
	:	Consolidated with
	:	92-162; 93-129; 95-105;
COMMONWEALTH OF PENNSYLVAIA,	:	95-186; and 95-256
DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	Issued: February 13, 1996

ADJUDICATION

By: Richard S. Ehmann, Member

Synopsis

Philadelphia's appeal from DEP's limited approval of the City's application for an Act 339 subsidy of the cost of operating its three sewage treatment plants is sustained in part and denied in part. The appeal is sustained as to DEP's limitation to 1.5% on the amount of interest expense recoverable by Philadelphia because neither Act 339 nor the regulations promulgated thereunder authorize such a limitation on this admittedly subsidizable expense. The doctrine of administrative finality does not bar Philadelphia's challenge to this 1.5% limitation because while DEP applied this limitation previously, that was as to prior years' grant applications rather than to these grant applications and Philadelphia timely challenged DEP's use of these figures to these applications.

DEP properly concluded that the cost to Philadelphia for preparation by its engineers of a plan of operation and manuals for both plant operation and plant maintenance were not costs of construction or acquisition of Philadelphia sewage treatment plants (which Act 339 uses to calculate operational subsidies). The fact that their preparation was mandated under

the terms of various federal Clean Water Act grants does not change this result because grants under the Clean Water Act fund plant construction while Act 339 is intended to subsidize plant operation and maintenance rather than construction and thus the acts are not coextensive but cover different subjects. Philadelphia, which bears the burden of proof, does not meet that burden by testimony that preparation of such a plan and manuals are a standard engineering practice because under 25 Pa. Code §103.26 not all expenditures by the municipality are grant eligible. Philadelphia has not shown the federal grants were essential to fund construction of its plants' modifications so as to make all costs of compliance with federal grants' requirements an eligible cost.

Philadelphia's cost for an infiltration and inflow study mandated under federal grants is an eligible cost under Act 339 because DEP's Manual on sewage treatment plant design requires that plant permittees, like Philadelphia, consider infiltration and inflow in treatment plant design.

DEP properly concluded the cost for conversion of an administration building at one of the City's treatment plants into a spare parts and supply warehouse was a cost of plant operation and maintenance rather than plant construction and acquisition. Further, DEP correctly concluded that the cost of construction of stairs and catwalks around previously operated sludge gas storage tanks was also an ineligible cost. These facilities were built to facilitate safe operation and maintenance of the plant. Under 25 Pa. Code §103.26(d)(1) once the plants were initially constructed, only the costs of subsequent modifications to the treatment process are eligible.

DEP's decision that indirect costs incurred by Philadelphia are ineligible is reversed. According to the record, Philadelphia's indirect

DEP's decision that indirect costs incurred by Philadelphia are ineligible is reversed. According to the record, Philadelphia's indirect costs are the same as the type costs incurred by contractors who build a plant for a municipality and DEP finds such contractor incurred costs eligible when a municipality pays same and then seeks to include them in its Act 339 subsidy application.

Philadelphia's challenge to DEP's interpretation of the ratio found in 25 Pa. Code §103.26(b) and to be used to deduct federal grants prior to the subsidies' calculation is rejected. Philadelphia has shown there is more then one way to interpret this regulation but has failed to show DEP's interpretation of its regulations is clearly erroneous or inconsistent with the regulations or Act 339, so this Board will give deference to DEP's interpretation.

BACKGROUND

The City of Philadelphia (Philadelphia) owns and operates three sewage treatment facilities known as the Northeast, Southwest, and Southeast Wastewater sewage treatment plants (STPs). Pursuant to the Contribution by Commonwealth to Cost of Abating Pollution Act, the Act of August 20, 1953, P.L. 1217, as amended, 35 P.S. §§701-703, commonly referred to as "Act 339", the Commonwealth annually pays the municipal owners of sewage treatment facilities an amount equal to two percent (2%) of the costs for the acquisition and construction of the plants to help to defray the cost of operating and maintaining such plants. Before us for adjudication are a number of consolidated appeals by Philadelphia challenging DEP's federal grant deduction determination for its three STPs for the calendar years 1989, 1990, 1991, and 1992.

14, 1992, which refused to consider certain specific costs in Philadelphia's Act 339 application for all three STPs, as eligible for consideration for the calendar year 1989.

Philadelphia also commenced an appeal at Docket No. 92-162-W on April 15, 1992, requesting our reversal of DEP's decision, dated March 19, 1992, denying certain costs as eligible construction costs for Philadelphia's three STPs pursuant to Act 339 for the calendar year 1990. This appeal was consolidated with Philadelphia's appeal at Docket No. 92-034-W by an order issued May 8, 1992.

DEP filed a motion to dismiss this appeal for lack of jurisdiction on September 10, 1992. We denied DEP's motion by an order issued April 21, 1993.[1]

Philadelphia also sought our review of DEP's April 16, 1993 determination of eligible construction costs for Philadelphia's three STPs, pursuant to Act 339, for the calendar year 1991 by an appeal initiated on May 17, 1993. This appeal was initially docketed at No. 93-129-W, but has been consolidated at the instant docket number by an order dated July 27, 1993.

The parties then submitted a joint stipulation to the Board on September 27, 1994, and a revised joint stipulation on September 30, 1994, which, *inter alia*, narrowed the issues before us for adjudication. A hearing on the merits of this appeal was held before former Board Chairman Maxine Woelfling on October 3-4, 1994. The parties' proposed partial consent adjudication, which was filed with the Board on November 2, 1994, was approved by a Board order issued on November 30, 1994.

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[1] See 1993 EHB 532.

Philadelphia filed its post-hearing brief on December 5, 1994; DEP filed its post-hearing brief on January 12, 1995, and filed its corrected version of this brief on January 18, 1995. Philadelphia filed its reply post-hearing brief on January 27, 1995.

Upon the resignation of former Board Chairman Woelfling from her position with the Board, this matter was reassigned to Board Member Richard S. Ehmann on March 2, 1995, and the Docket Number was changed to 92-034-E to reflect this reassignment.

Before the Board prepared its adjudication in this matter, however, Philadelphia filed an appeal at Docket No. 95-105-E on June 16, 1995, in which the City challenges DEP's federal grants determination with regard to Philadelphia's Act 339 application for the City's southeast STP for the 1992 calendar year. This appeal was consolidated with the appeal at Docket No. 92-034-E by an order issued July 11, 1995. Further, after receiving DEP's federal grants determination for the City's southwest STP for the 1992 calendar year, the City also filed an appeal challenging that determination at Docket No. 95-186-E. This appeal was consolidated with Docket No. 92-034-E by an order of the Board issued on September 5, 1995. As a consequence of these additional appeals, the parties' revised joint stipulation was further revised to amend the exact dollar amounts involved in the identical issues raised in Docket Nos. 95-105-E and 95-186-E. This second revised joint stipulation was received by the Board on September 25, 1995.

On November 13, 1995, DEP partially rejected Philadelphia's calendar 1992 Act 339 application as to its Northwest Wastewater Treatment Plant; Philadelphia's appeal thereof was assigned Docket No. 95-256-E. By Order dated December 14, 1995, the Board granted the parties' request to consolidate

it with the appeals already consolidated at Docket No. 92-034-E based on the issues raised there. That Board Order also accepted for filing a Supplement To The Second Revised Joint Stipulation Of Counsel Pursuant To Pre-Hearing Order No. 2 (dated December 12, 1995) from the parties which brought disposition of the issues from the appeal at Docket No. 95-256-E into parallel focus with those already before the Board.

We may adjudicate this matter from a cold record. See Lucky Strike Coal Co. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988). ("Lucky Strike") Any arguments not raised by the parties' post-hearing briefs are deemed waived. *Id.* Based on the record before us, which consists of two volumes of transcript from the merits hearing, the parties' partial consent adjudication, and the parties' second revised joint stipulation, as amended, we make the following findings of fact.

FINDINGS OF FACT

1. The appellant is Philadelphia or "the City", which is a city of the first class in the Commonwealth. (Partial Consent Adjudication (PCA))

2. The appellee is DEP, which is the agency of the Commonwealth with the duty and authority to administer Act 339, and the rules and regulations promulgated thereunder. (PCA)

3. The Commonwealth, pursuant to Act 339, provides an annual operating subsidy to publicly-owned STPs in an amount equal to two percent (2%) of the costs incurred for the acquisition and construction of the STPs. (PCA)

4. Philadelphia applied for its Act 339 subsidy payment for calendar years 1989, 1990, 1991, and 1992. (Board Exhibit (B Ex.) 1)[2]

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[2] B Ex. 1, as admitted at the merits hearing, was the parties' revised joint stipulation filed on September 30, 1994, but, by agreement of the parties, has been amended as their Second Revised Joint Stipulation, filed with the Board

5. In reviewing an application submitted under Act 339, DEP looks at the eligibility in conformance with Act 339 and DEP's regulations, referring to DEP's program guidance materials. (N.T. 134)

6. DEP made subsidy awards for Philadelphia's 1989, 1990, and 1991 applications, but certain categories of costs were deemed by DEP as ineligible for Act 339 subsidy, including costs related to:

> a. Modifications to the Northeast Water Pollution Control Plant Sludge Gas Storage Tanks and to the conversion of the Northeast Administration Building into a material supply warehouse.
>
> b. Supplemental engineering costs related to inflow and infiltration studies, plans of operation, and operation and maintenance manuals.
>
> c. Interest during construction.
>
> d. Federal funds deductions.
>
> e. Indirect costs.

(B Ex. 1)

Eligible Facilities

7. Philadelphia applied for Act 339 subsidy in 1991 for costs related to conversion of the northeast administration building to a supply warehouse and for costs related to the construction of catwalks at the northeast STP's sludge gas storage tanks. (N.T. 190-192; B Ex. 1)

8. Rosemary Gary is Chief of the State Program Administration Unit of DEP's Bureau of Water Quality Management, Division of Municipal Planning and Finance, Administrative Services Section. (N.T. 133) Gary reviewed Philadelphia's applications for eligibility of these facilities. (N.T. 153) Philadelphia takes the position that these projects were an ordinary and

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on September 25, 1995. Thus, all references to B Ex. 1 are to the parties' Second Revised Joint Stipulation as amended.

necessary part of STP construction, while DEP maintains that these costs were not related to eligible Act 339 construction. (B Ex. 1)

9. DEP's administrative review of Philadelphia's applications for the calendar years 1989 and 1990 was performed by an administrative assistant, but Gary performed the complete review for the northeast STP and the grant deduction calculations for all three STPs. Gary reviewed in their entirety the applications for each of the three STPs for the calendar year 1991. (N.T. 133-134)

10. In determining whether the facilities were eligible, Gary looked at Act 339, the regulations, and DEP's program guidance documents. She also referred to Philadelphia's previous applications for what had been considered eligible and ineligible in order to determine what remained in the contract to be reviewed. After Gary made this determination, she made notations on the contract detail sheets and passed them on to Parimal Parikh in DEP's Engineering and Construction Section for review and final decision. (N.T. 153)

11. Parimal Parikh is a civil engineer who has been employed by DEP's Bureau of Water Quality Management, Division of Municipal Planning and Finance as a sanitary engineer for the past 15 years. He has held his current position for 13 years. (N.T. 182-183)

12. Parikh reviewed Philadelphia's request for the subsidy for costs related to conversion of the northeast administration building to a supply warehouse. (N.T. 190)

13. Philadelphia, in 1991, made construction modifications to the old administration building at the northeast plant to convert it into a small parts warehouse for the facilities. (N.T. 32)

14. Jerry Bish has been a licensed professional engineer (P.E.) for 18 years, and is a partner with Greely & Hansen Engineers. Bish is a P.E. with 22 years experience in the area of wastewater engineering, studies, and designs. (N.T. 5; B Ex. 1)

15. Bish testified as a stipulated expert in the area of design and construction of sewage treatment plants. (B Ex. 1)

16. It is Bish's expert opinion that a small parts warehouse is a necessary component of the construction of a wastewater treatment plant. (N.T. 32-34) Small parts warehouses are common at wastewater treatment plants. (N.T. 33) These small parts warehouses are used to secure the parts, materials, and supplies against loss or theft, and to store them so as to prevent damage to sensitive components in order to maintain and operate the facilities. (N.T. 32-33)

17. On behalf of DEP, Parikh found the costs of the modification to the old administration building in Philadelphia's 1990/1991 application to be specifically ineligible for Act 339 subsidy. (N.T. 190) Philadelphia, as part of the expansion project, constructed a new administration and maintenance building and received subsidy for this new administration building, which was put into use as an administration building before 1991. DEP deducted the cost of the old administration building. (N.T. 190-191) Since the new administration building was already in use, Parikh did not see any need for the old administration building. (N.T. 191, 214) Parikh determined that for Act 339 purposes, the old administration building was not being used and that during 1991, the modifications to the old administration building, to convert it from an administration building to a small parts warehouse building, were not even completed. (N.T. 191-192) He treated the

changes to the old administration building as being changes to a facility not in service. (N.T. 191) He concluded that the modifications to the old administration building were not specifically related to plant construction under the 1990/1991 application. (N.T. 191)

18. Parikh also reviewed Philadelphia's application with respect to costs claimed to be related to modifications to the existing sludge gas storage tanks at the northeast STP. These costs included the construction of catwalks for the purpose of better access to these tanks for maintenance. (N.T. 192)

19. The sludge gas storage tanks at the northeast water pollution control plant are vessels used to store the sludge gas, principally methane, which is a by-product of the anaerobic digestion of sludge and sludge gases. (N.T. 29)

20. The modifications made in 1991 to the sludge gas storage tanks were to provide platforms and stairs so maintenance crews could have safer access to the tanks' operating components. (N.T. 30) These modifications were made to facilitate operation, maintenance, and inspection of the tanks. (N.T. 30-31)

21. The modifications to the sludge gas storage tanks were not unusual. (N.T. 31) Had the modifications not been made to the sludge gas storage tanks, the maintenance employees would have had less safe access to the tanks, which could endanger the facility due to the explosiveness of methane. (N.T. 31) In Bish's expert opinion, the modifications to the sludge gas storage tanks was an ordinary and necessary part of the construction of the sludge gas storage tanks. (N.T. 30-32)

22. Parikh determined that the modifications were related to existing structure and not a modification of the sewage treatment process. (N.T. 193) Parikh concluded that these costs were related to the operation and maintenance of the facility. DEP does not consider operation and maintenance costs to be part of the construction of the facility, so Parikh determined these costs were not related to the construction costs under review in the application. (N.T. 192)

23. Parikh decided that the sludge tanks' stairs and catwalks did not meet the eligibility requirements under 25 Pa. Code §103.26(d)(1). (N.T. 193)

24. Parikh admits that in constructing a sludge gas storage tank, it must be constructed in such a manner that allows for its safe operation and maintenance. (N.T. 213) He also agrees that the modifications to Philadelphia's sludge gas storage tanks allowed for safe operation and maintenance. (N.T. 214)

25. Parikh made the final determination regarding eligible facilities. (N.T. 166) The documents were returned from Parikh to Gary with Parikh's determination so that Gary could "put the numbers to the eligibility". (N.T. 154)

Supplemental Engineering

26. The parties dispute whether certain costs, i.e., inflow and infiltration studies (I&I studies), and the creation of plans of operation, and operation and maintenance manuals, are related to the acquisition and construction or operation and maintenance of Philadelphia's STPs. (B Ex. 1)

27. Gary conducted DEP's review of Philadelphia's applications as to Supplemental Engineering. (N.T. 154) Parikh made the final determination on Act 339 subsidy eligibility regarding supplemental engineering. (N.T. 165)

Philadelphia provided computer reports on the City's costs (backup documentation). (N.T. 155) Gary was responsible for making all of the calculations before the applications went to Parikh for review. (N.T. 155)

28. Parikh was DEP's reviewing engineer for all of the nine applications for 1989, 1990, and 1991 for Philadelphia's STPs. (N.T. 183) In conducting her review, Gary looked at the backup documentation to see if the amounts in the application comported with the amounts in the backup documentation, and then made a notation for Parikh's review. (N.T. 155)

Inflow and Infiltration Study Costs

29. Philadelphia began major modifications to its three STPs in the early 1970s for the purpose of upgrading them to meet the secondary treatment standards required by the Federal Water Pollution Prevention and Control Act, 33 U.S.C. §1251 (federal Clean Water Act). (N.T. 6, 9) Title II of this act provides a program for grant funding for construction of sewage treatment plants. (N.T. 16-17) Pursuant to the requirements for grants under Title II, the municipality must prepare a facilities plan as part of the design process; this facilities plan mandates that an I&I study be performed by the municipality. (N.T. 17-18) Without the facilities' plan and the I&I study, the municipality cannot receive any grant funds under Title II. (N.T. 17-18)

30. An I&I study relates to infiltration and inflow, which is extraneous flow entering the sewer system. (N.T. 184). In any sewer system, there is infiltration, normally related to the groundwater which seeps in through the cracked pipes, joints, and laterals in the system. (N.T. 184) Infiltration also results from loose joints or degraded pipes or manholes which allow the water to flow into the collector system. (N.T. 11-12) Inflow occurs because of precipitation from storm events and from cross connections

with non-sanitary sewers and sump pump discharges from households. (N.T. 12. 184)

31. The purpose of the I&I study is to determine the amount and location of the extraneous flow that is entering the sewer system. (N.T. 12. 186)

32. An I&I study is a normal engineering part of the design process. (N.T. 15) This I&I study enabled Philadelphia to determine whether it was cheaper to address any extraneous flow by its removal from the sewers forming its sewer collection system or whether it was economically sounder to accept and treat this extraneous flow at the wastewater treatment facility. (N.T. 15-16) Bish's expert opinion is that the I&I studies were necessary before Philadelphia began its major construction modification in connection with upgrading and expanding Philadelphia's existing facilities, in order to determine the volume of flow that would enter its wastewater treatment facilities. (N.T. 14) Bish would not design a facility without examining the I&I from a collection system. (N.T. 14-15)

33. It is DEP's position that an I&I study is not always necessary for every change, modification, or construction of a sewage treatment plant, and that Philadelphia performed this I&I study as part of the process for application for a federal Title II grant. (N.T. 184-185, 202)

34. According to Parikh, not all extraneous flow necessarily reaches the STP. (N.T. 186)

35. On DEP's behalf, Parikh reviewed Philadelphia's claims for costs of the I&I study. (N.T. 183) It is Parikh's interpretation of DEP's regulations that sewage treatment works are facilities, structures, or units located inside the treatment plant's boundaries, meaning the treatment units and

supporting structures that may be needed to operate the treatment plant at the treatment plant site and not the sewers tributary thereto. (N.T. 185)

36. Parikh takes the position that an I&I study deals with the sewer system which is outside of the STP's boundaries. (N.T. 185) Since flow volumes reaching the plant could be obtained by looking at the flow data available at the plant, an I&I study is unnecessary in this regard. An I&I study is performed to identify the sources of I&I problems that might exist with the interceptor and collector systems, which are outside the STP. (N.T. 186-194-195)

37. DEP's Sewerage Manual, which is a guide for preparing plant specification and designing the wastewater treatment system, at section 43.4, Design Loads, states that I&I shall be considered in determining design flow. (N.T. 19, 195-197) Parikh acknowledges that it is sensible to conduct an I&I study prior to major modification of an STP for economic reasons. (N.T. 197)

38. Philadelphia received approximately $600,000,000 in Title II federal grant money for the upgrade of its three STPs; without this funding, Philadelphia contends that its upgrades to meet the requirements of the federal Clean Water Act and the Clean Streams Law would not have been possible with only rate-payer money. (N.T. 55-56)

39. On behalf of DEP, Parikh decided that the I&I study costs were not eligible under DEP's regulations at 25 Pa. Code §103.26(d); he determined that these costs were not related to the acquisition and construction of the sewage treatment works as defined in DEP's regulations. (N.T. 185)

Plan of Operation

40. As a condition of receiving its federal grant monies, Philadelphia was required to prepare a plan of operation. (N.T. 29, 187) A plan of

operation is required under the grants program to be prepared and approved before the 50% federal construction grant payment is made. (N.T. 188) This is done to assure the federal government, as the giver of the grant, that the City is prepared to operate the plant properly. (N.T. 187)

41. Preparation of a plan of operation is standard practice in the wastewater engineering field. (N.T. 28) A plan of operation is normally prepared by the design engineer, in conjunction with the owner of the STP. Regarding start-up and operation of the plant, the plan of operation instructs the owner as to its obligations and the requirements necessary for continued operation of the facility, including proper financing, staffing levels, job functions, and training schedules and other needs that the owner will have once the plant is put in operation. (N.T. 26-28, 187, 208)

42. It is Bish's opinion that a plan of operation is a necessary component in Philadelphia's construction of major modifications to its STPs. (N.T. 28)

43. Parikh reviewed the same Philadelphia applications with respect to the plan of operation and the costs associated therewith. (N.T. 186)

44. It is Parikh's position on DEP's behalf that a plan of operation is not a necessary component of the construction of an STP when compared with the definition of construction in the Act 339 regulations at 25 Pa. Code §103.21. (N.T. 212-213)

45. If an STP's construction were already completed and a modification to the plant were involved (as here), at least a *de facto* plan of operation would already be in use. (N.T. 189)

46. Parikh opines that the plan of operation would not be prepared if the City were making the modifications or expansions without federal grant

monies, but was probably done to satisfy the federal grant condition. (N.T. 188)

47. Parikh concluded on DEP's behalf that the costs associated with the preparation of the plan of operation were ineligible for Act 339 subsidy pursuant to DEP's regulations at Chapter 103 of 25 Pa. Code, because the plan of operation was not part of the acquisition and construction costs. (N.T. 187-188, 213)

Operation and Maintenance Manuals

48. Philadelphia was required to prepare Operation and Maintenance (O&M) manuals as a condition for receipt of a federal grant. (N.T. 25-26, 190, 203) Parikh believes EPA requires this manual to help the operator effectively operate the plant once it is placed in operation. (N.T. 203-204).

49. O&M manuals are documents related to the plan, operation, and maintenance of the STPs, similar to an owner's manual for an automobile. (N.T. 22-23, 189-190) These O&M manuals transfer information from the design and construction personnel to the operation and maintenance staff for purposes of operating and maintaining the facilities. (N.T. 23) O&M manuals are not standard operating procedures providing day-to-day, hour-to-hour operational guidance. (N.T. 44-45) These documents are usually drafted by the design engineer. (N.T. 23) According to Bish, it is standard practice in the field of wastewater engineering to draft O&M manuals. (N.T. 24)

50. It is Bish's expert opinion that O&M manuals were a necessary part of the construction of Philadelphia's STPs and the modification Philadelphia made to its STPs in the 1970s and 1980s. (N.T. 25)

51. On behalf of DEP Parikh reviewed Philadelphia's applications with respect to the costs associated with these O&M manuals. (N.T. 189) As a

sanitary engineer he does not understand the need for the practice of the submission by design engineer of O&M manuals to the owner or operator of the STP, but acknowledges that the federal grants are conditioned to require production of O&M manuals. (N.T. 203)

52. It is DEP's position, as verbalized by Parikh, that O&M manuals are not related to acquisition and construction of sewage treatment works under 25 Pa. Code §103.26(d) of DEP's regulations, but are simply documents necessary for the planned operation and maintenance of the STP. (N.T. 189-190, 207, 213)

53. Parikh makes the final determination for DEP as to whether these costs are necessary and are related to construction. (N.T. 212) Parikh decided the costs for Philadelphia's O&M manuals were ineligible for Act 339 subsidy because these costs were not related to acquisition and construction of the STPs. (N.T. 189)

54. The parties agree that if Philadelphia's position that its costs for the I&I study are eligible Act 339 cost is correct, then its Act 339 eligible costs should be increased as follows:

	Amount of Increase to Total Act 339 Eligible Costs Starting in 1991	Amount of Increase to Total Act 339 Eligible Costs in 1992
Inflow and infiltration	$3,081,290	$ 2,850,000

(B Ex. 1)

Interest During Construction

55. The City floated bonds in order to construct modifications to its three sewage treatment plants to comply with the Clean Water Act. (B Ex. 1)

56. Interest during construction is an allowance for the financing of the facilities during the construction term of the facilities. (N.T. 239) In

their second revised joint stipulation, the parties agree to the following explanation of the concept of interest during construction:

> The City, like most other municipalities spending hundreds of millions of dollars to build sewage treatment plants, floats bonds in order to pay for the construction of its sewage facilities. Under the bond indenture, interest is due from the date of issuance of the bonds. Therefore, interest expense is incurred immediately. However, completing the construction of the facilities so they are ultimately available for service can take years. Hence, the City incurred costs before the capital project, in this case the sewage treatment plant, was available for service and therefore generating revenue. Therefore, interest during construction is the amount of bond interest paid which is attributable to a capital project before that capital project has been completed and put in service.

(B Ex. 1)

57. Interest expenses during construction are an eligible Act 339 cost. (N.T. 256-257; B Ex. 1) Under Act 339 DEP allows for interest during construction only for applicants who actually borrow funds. (N.T. 261) DEP takes the actual amount of interest Philadelphia earns on funds generated from the bonds issued to pay for the construction of the plants, which it invests, and deducts this amount of interest from Philadelphia's Act 339 subsidy eligible costs, prorated based on the eligibility of Philadelphia's application. (N.T. 164)

58. DEP limits the interest rate eligible during construction financing to 1.5% per year for the term of construction of the facilities placed in operation. (N.T. 159; B Ex. 1)

59. Gary is responsible for calculating the interest on the applications at the end of the review process on DEP's behalf. (N.T. 156) Parikh determines whether the length of the construction period, in terms of months, which the municipality took to construct a particular component is unusual. (N.T. 157)

60. Gary takes the eligibility determination by Parikh on the construction and the engineering, and puts numbers to it, taking into account the deleted facilities and any changes that might have occurred to the facilities. (N.T. 157) These directions are in the materials Gary receives when Parikh returns the documents to her. (N.T. 157) The usual claim for interest by an applicant like Philadelphia is 1.5% for the term of construction. (N.T. 156)

61. On DEP's behalf Gary then comes up with the interest for the grant deduction calculation part of the final eligibility. (N.T. 158) DEP does not limit the amount of interest that Philadelphia makes to 1.5%, as it does with Philadelphia's costs, in determining this figure. (N.T. 165)

62. Anthony Maisano has been employed by DEP's Bureau of Water Quality as an accountant for 20 years. (N.T. 216) Maisano testified as a stipulated expert on behalf of DEP. (N.T. 216)

63. Maisano is Chief of the Administrative Services Section and does not personally review applications. (N.T. 216) Maisano is Rosemary Gary's supervisor. (N.T. 217) Gary comes to Maisano with questions regarding applications she is reviewing. (N.T. 217)

64. For the past 20 years, Maisano has been responsible for all of the administrative and financial work related to several billion dollars in grant funds that EPA has allocated to the Commonwealth for the construction of publicly owned sewage treatment facilities. (N.T. 282)

65. Gary's direct responsibility as to the decisions made on these applications is to come up with the numbers and have them approved by Maisano. (N.T. 158) She reviews what is in the application and discusses any unusual claims with Maisano. (N.T. 156)

66. Maisano reviewed the interest during construction portion of Philadelphia's application after Gary brought it to his attention. (N.T. 239)

67. Maisano has conducted a review of applications submitted from the first year of Act 339, i.e., 1953. (N.T. 240) The 1.5% allowance for the period of construction of the eligible facilities has been used since the first year of the Act 339 program, and every Act 339 application has contained a statement that the interest percent allowed by DEP is 1.5%. (N.T. 240-246)

68. Maisano researched the issue back to the early 1950s, and discovered that the Department of Health included this interest rate in the first set of regulations promulgated for the program on December 7, 1953, for "interest during construction". Act 339 is silent on the percentage rate, and all subsequent regulations that have been promulgated in the program are silent on a percentage interest rate. Maisano concluded that 1.5% is an interest rate which has been carried out over the years of the program which has gone unchallenged. (N.T. 249-250)

69. Gary and Maisano do not know how the 1.5% figure was initially arrived at. (N.T. 164, 248-249)

70. DEP's current regulations do not contain the 1.5% interest allowance on this costs figure; rather, it is the historical figure which was used for an interest allowance based on a program decision made at the beginning of the Act 339 program in the 1950s. (N.T. 162-164)

71. The phrase "interest during construction" appears two times in DEP's regulations at 25 Pa. Code: at §§103.32 and 103.36. (N.T. 255) None of DEP's regulations indicates what the percentage should be. (N.T. 251) Maisano was unable to find out who made the decision that the percentage interest rate should be 1.5% or what was intended by 1.5%. (N.T. 251)

72. The 1.5% annual interest rate used by DEP in calculating interest during construction is in no way related to an Act 339 applicant's actual financing rate. (N.T. 159) Under the way DEP administers this Act, no matter how long construction takes to be completed, the Act 339 applicant will only receive as an annual interest rate 1.5% times the period of construction, regardless of its actual cost of funds. (N.T. 159)

73. Using this 1.5% rate, DEP allowed $15,064,671.31 as eligible Act 339 interest during construction costs for facilities placed in operation from 1981 to 1991. (B Ex. 1)

74. The City's actual weighted average interest during construction financing rate was 8.6722%. (Simply put, this was the real interest rate that the City had to pay to its bondholders in order to sell the bonds and get the necessary capital to build its sewage treatment plants.) (B Ex. 1)

75. Gary considers a claim for an amount greater than 1.5% interest unusual. (N.T. 156) Philadelphia claimed 8.6722% as its weighted average interest rate during construction. (N.T. 160)

76. Philadelphia claimed interest costs far beyond what is allowed in Act 339 as interpreted by DEP and what has historically been allowed in the Act 339 program. (N.T. 239-240)

77. Philadelphia seeks interest during construction based on what it determined was its actual interest incurred during the construction of the facilities. This is not how DEP or the Department of Health[3] interpreted the interest allowance under Act 339. (N.T. 240)

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[3] The Department of Health, which was a predecessor to DER (in turn succeeded by DEP), was responsible for administering Act 339 when it was promulgated. (N.T. 250)

78. If a cost is deemed eligible under Act 339, then the Act 339 applicant receives a 2% reimbursement of his actual Act 339 eligible cost. Interest during construction is an eligible cost. (N.T. 161) In general, if DEP deems the costs eligible under Act 339, the municipality will receive a 2% subsidy based on its total cost for that particular item. (N.T. 253) Philadelphia does not receive a 2% reimbursement on its actual interest during construction costs. (N.T. 161)

79. It is part of Maisano's responsibility to assure that the Act 339 program is administered according to Act 339 and the regulations. (N.T. 253) After considering Philadelphia's requested interest rate, DEP decided that the 1.5% interest rate would still be used in the Act 339 program. (N.T. 248)

80. If DEP had applied Philadelphia's actual cost of capital, the weighted average of 8.6722%, DEP would have arrived at a greater total interest during construction cost upon which to base the subsidy, and thus, the subsidy would have been greater. (N.T. 254, 258)

81. Use of Philadelphia's weighted average as opposed to the 1.5% figure would result in a substantial increase to the Commonwealth's outlay of funds to support the Act 339 program because allowing a change of the interest rate for Philadelphia would also mean this new concept would have to be applied to each applicant. (N.T. 252)

82. DEP made a program decision to carry over the 1.5% rate for interest during construction which has been applied in prior years. (N.T. 255-257)

83. The total allowance by DEP for Philadelphia's interest during construction was not based on Philadelphia's total interest expense during construction. (N.T. 255)

84. Before DEP could decide to change the interest rate to allow a greater interest rate under the Act 339 program, the issue would first have to be discussed with DEP, then DEP would have to discuss the issue with the Office of Budget, with whom the final decision would rest. Additional funding would be necessary to support an increase in the rate of interest to be reimbursed under the Act 339 program. There are no initiatives to increase the outlay of Commonwealth funds under the Act 339 program. (N.T. 252-253)

85. The parties have stipulated that DEP uses a 1.5% financing rate and acknowledge that Philadelphia's actual weighted financing rate was 8.6722% through 1991. (For 1992, construction was financed with Philadelphia's 16th Series bonds, which had an actual financing rate of 7.6%. Therefore, Philadelphia's calculations of the 1992 interest during construction costs were based on this 7.6% rate.)
(B Ex. 1)

86. If DEP is correct in using its 1.5% interest during construction rate, then no adjustment to Act 339 interest during construction costs is warranted. (B Ex. 1)

87. The City believes that Act 339 and the regulations require DEP to use the City's interest during construction financing rate of 8.6722%. If the City is correct, then eligible Act 339 costs shall be incrementally increased as follows:

Year		Amount of Incremental Increase to Total Act 339 Eligible Costs
1989		$70,052,197.08
1990		$ 280,591.05
1991		$ 1,698,435.58
1992	Southeast Plant	$ 500,366.97
	Southwest Plant	$ 4,433,639.90

(B Ex. 1)

Indirect Costs

88. Philadelphia claimed "indirect costs" as eligible Act 339 costs for the years 1989, 1990, 1991, and 1992. (B Ex. 1)

89. Indirect costs claimed by Philadelphia are the City's and its Water Department's centralized service costs which are accounted for through an indirect cost methodology. (N.T. 90, 95-96; 98; B Ex. 1) A centralized service cost is a cost in a large organization for a service provided by another unit, e.g., the personnel unit in the Water Department's costs for hiring all of the employees for all of the other units in the Water Department. (N.T. 90) Philadelphia's centralized support service centers are located both within the Water Department and within the City of Philadelphia's general government operations. (N.T. 90-92)

90. Gary reviewed the indirect costs in Philadelphia's applications, referring to Act 339, DEP's regulations, and DEP's program guidance documents to determine whether these costs should be eligible. She then conferred with her supervisor, Maisano. (N.T. 152, 217)

91. Maisano reviewed the indirect cost Philadelphia had included in its application, which consisted of a line item on the bottom of a computer print out sheet. Under the left hand column were the words "indirect costs", and under the right hand column was a dollar figure. (N.T. 218) This was all that was included relative to indirect costs in Philadelphia's 1989 applications for the three STPs. (N.T. 218)

92. Maisano discussed Philadelphia's indirect costs with Stuart Gansell, who was Chief of the Division at the time, and also had DEP's Chief

Counsel's office look at the indirect costs, since this was something that had not been included in Act 339 applications in the past. (N.T. 218)

93. In reviewing these indirect costs, Maisano spoke directly with representatives of Philadelphia and Gary, Gansell, Parikh, and Charlie Kuder, who was DEP's Chief of the Engineering and Construction Section at the time, regarding Philadelphia's indirect costs. (N.T. 235-236)

94. During the course of these discussions with Philadelphia, Maisano discussed with Philadelphia's representatives the specific cost centers for which they were applying for subsidy. (N.T. 236)

95. Maisano decided that the indirect cost items in Philadelphia's Act 339 application were not related to the acquisition or construction of sewage treatment facilities. (N.T. 221) Both Maisano and Gansell concluded that these indirect costs were not eligible under Act 339. (N.T. 218) DEP's Deputy Secretary for Water Management concurred with this decision. (N.T. 219)

96. After DEP's discussions with Philadelphia, DEP's initial conclusion was set forth in a letter sent to Philadelphia indicating that the indirect costs were not eligible under Act 339. (N.T. 237)

97. Philadelphia asked DEP to reconsider the matter, and, following additional discussions and meetings, DEP prepared a second letter, directed to John Pulonski, Philadelphia's Water Commissioner, which again concluded that the indirect costs were not costs related to the acquisition or construction of sewage treatment facilities. (N.T. 237) This letter also stated that the costs appeared to DEP to be costs related to the normal operations of the City and Water Department and/or were charges from City Central Services agencies for support services that benefit overall City operations. (N.T. 237, 286)

DEP based this conclusion on the indirect cost proposals that the City had prepared and submitted to the federal government, which were the identical costs sought from the Commonwealth under Act 339. (N.T. 287)

98. Philadelphia included indirect costs in its applications for years after 1989. (N.T. 238) In letters to Philadelphia, DEP reiterated its decision that the indirect costs were not eligible under Act 339. (N.T. 238)

99. Exhibit L is a list of the cost centers for which Philadelphia sought Act 339 participation and which it discussed with DEP; this list was prepared after DEP's initial decision. (N.T. 236-237) The indirect costs sought by Philadelphia relating to centralized service costs for services rendered not only for the Philadelphia Water Department but also for all of Philadelphia's other service departments, such as the finance department, the managing director's office, and the Civil Service Commission. (N.T. 91-92; Exhibit L to B Ex. 1)

100. Act 339 is a subsidy program to assist in the operation and maintenance of sewage treatment plants based on the construction costs. (N.T. 171) Its purpose is to help the publicly operated treatment works (POTW) by defraying some of its operating costs. (N.T. 171)

101. Philadelphia is reimbursed for indirect costs under Federal Title II grants. (N.T. 285-286) In order for EPA to regard a cost as eligible under Title II of the federal Clean Water Act, EPA does not need to find that the cost is necessary for construction of an STP. Instead, an eligible cost may be one which EPA deems necessary is to protect the federal interest in the money that is being provided to the municipality for construction. (N.T. 283-284) However, the federal government will not give a federal grant for a cost that is, in its opinion, not necessary to a project. (N.T. 284)

102. With regard to Act 339, some municipalities routinely submit engineering consultant costs to DEP which include overhead and profit. (N.T. 273) A consultant's bills submitted to a municipality, and in turn, submitted to DEP for reimbursement under Act 339 include, in some cases, a line item for the direct labor and a factor applying an overhead rate. (N.T. 34, 275) DEP is able to relate those costs directly to the eligible facilities under Act 339. (N.T. 281) Where DEP can relate engineering costs directly eligible under the Act 339 program, DEP allows those engineering costs. (N.T. 105-106, 281) DEP routinely deems these consultant overhead and profit costs as eligible Act 339 costs as part of the costs incurred for the acquisition and construction of the eligible facilities. (N.T. 273)

103. Maisano made the final decision as to indirect costs eligibility. (N.T. 166) DEP denied all these costs based on its position that these costs represent the general operating costs of a municipality which would continue even in the absence of Act 339 subsidies and therefore are not eligible for subsidy under Act 339. (B Ex. 1) While DEP acknowledges that overhead costs had to be incurred in constructing Philadelphia's STPs, DEP's position is that Philadelphia's indirect costs cannot be directly related to the construction of eligible sewage treatment facilities. (N.T. 281, 289) It is DEP's position that the indirect costs are not related to acquisition or construction of eligible sewage treatment works. (N.T. 289)

104. Joseph Clare has been employed as the Utility Accounting Manager for Special Accounting at the Philadelphia Water Department, where he has worked since 1987. (N.T. 52) Clare is responsible for preparation and submission of Philadelphia's Act 339 forms, and is the contact person for Philadelphia with regard to follow-up on these applications. (N.T. 52)

105. Clare has been a certified public accountant (CPA) since 1983. (N.T. 54) Clare testified as a stipulated expert in the area of cost accounting. (N.T. 54; B Ex. 1)

106. It is Philadelphia's position that the centralized support centers are not general operating costs of government as defined by all applicable grant accounting guidelines. (N.T. 103-104)

107. It is Philadelphia's position that some of the work the Water Department Centralized Service Support Centers performed was necessary to the acquisition and construction of sewage treatment facilities, i.e., without Philadelphia's personnel department and accounting staff, people could not have been hired or fired, and the contractors could not have been paid. (N.T. 91-94, 98, 266) Examples cited by Clare of centralized support services provided were: the procurement department's procurement of construction-related items for the Water Department's STPs; and the Water Department's materials testing laboratory testing materials used in the construction of the STPs. (N.T. 91-94) Almost all of Philadelphia's support services have incurred some additional or incremental cost as a result of taking on this construction activity. (N.T. 105)

108. Without the construction work on Philadelphia's STPs, Philadelphia's centralized service support centers would have a decreased level of expenses, and some of the support centers would not be needed. (N.T. 116-119) Philadelphia is unusual in that it undertakes construction activity with its own personnel. (N.T. 105-106)

109. Maisano does not agree that some of the work the Water Department Centralized Service Support Centers performed was necessary to the acquisition and construction of sewage treatment facilities. (N.T. 266)

110. The indirect costs that Philadelphia is asking DEP to approve as eligible for Act 339 subsidy are the same costs which were submitted to and approved by the federal Environmental Protection Agency (EPA) as eligible construction costs. (N.T. 120, 287) DEP acknowledges that the EPA will not deem a cost eligible for a federal grant unless the EPA deems it necessary to construction of the STP. (N.T. 284)

111. DEP's opinion of what is necessary to construction of the project is different from EPA's opinion of what is necessary to protect the federal government's interests in money it is providing to the municipality. (N.T. 284)

112. Maisano's division was familiar with the indirect cost proposals Philadelphia had submitted to the federal government under the Federal Construction Grant Program. Philadelphia had to document its indirect costs on a fiscal year basis. (N.T. 219) Those indirect costs were broken down into specific line items in the indirect cost proposals. (N.T. 220) The original application which Maisano reviewed did not include these specific line items in indirect costs. (N.T. 220)

113. If the City's position is correct, then eligible Act 339 costs should be incrementally increased each year by the following amounts:

Year	
1989	$28,385,990.16
1990	$ 862,459.52
1991	$ 966,953.85
1992	$ 473,727.74
1992	$ 1,624,250.54

(B Ex. 1)

Federal Funds Deduction

114. The parties agree that DEP's regulations, at 25 Pa. Code §103.26(b), require DEP to deduct federal grants that Philadelphia receives for the construction of its sewage treatment plants from eligible Act 339 costs. (B Ex. 1) Further, the parties have stipulated that 25 Pa. Code §103.26(b) requires that the calculation of these federal deductions be done as follows:

> "Calculation of these deductions shall be based on the ratio of eligible construction costs under the act to the construction costs paid for with State or Federal grant funds or PENNVEST loan funds."

(B Ex. 1) This provision is commonly known as the ratio. (B Ex. 1)

115. The parties disagree as to the methodology used in calculating and applying the federal funds deduction. (N.T. 60-62; B Ex. 1)

116. Philadelphia has received 34 federal grants for the upgrade of its STPs, under Title II of the Clean Water Act. (N.T. 54-55)

117. Each grant has a scope in it which defines what work is to be undertaken which will be paid for by that particular grant. (N.T. 57) Federal grants are not allocated on a line item format but internally they are broken down into four cost categories: construction costs; engineering costs; indirect costs; and other direct costs. (N.T. 57, 112-113) Construction costs are the costs involved in building the STP and installing its major systems. (N.T. 58-59) Engineering costs represent all engineering services including an I&I, development of a plan of operations, O&M manuals, and inspection services. (N.T. 59-60) As to federal grants, indirect costs are Philadelphia's costs of the centralized support services and fringe benefits, paid leave, the personnel department, i.e., it is Philadelphia's overhead. (N.T. 59) Direct costs are a miscellaneous category which includes direct

activities which do not fit into another category, such as printing of manuals, utility relocation, administration, or legal costs. (N.T. 58, 60)

118. Prior to 1990, DEP had an agreement with Philadelphia under which DEP deducted 75% of the eligible federal facilities grant monies received by Philadelphia. (N.T. 135)

119. As part of an agreement between DEP and Philadelphia, since Philadelphia was not satisfied with the cumulative method, Gary used the construction ratio method now in dispute for the Southeast Plant applications beginning with the 1989 application because that was when Philadelphia first asked for the method's use with regard to that one plant. (N.T. 142)

120. Beginning with Philadelphia's 1990 application, DEP used the "grants funds received method" for federal grant monies received by Philadelphia for all three plants, in accordance with Philadelphia's request. (N.T. 135) This method was the means DEP used to reach the calculations in dispute in this appeal. (N.T. 142) Under this method, Gary looked at the construction cost under each separate grant on a contract by contract basis. Gary went back through the applications and pulled out the approved Act 339 eligible construction from each of those applications. (N.T. 138)

121. Under the grants funds received method used by DEP to calculate the deduction for federal grant monies received, DEP takes into account actual funds received on the project paid by the federal government pursuant to each separate grant. DEP had to consider all of the payments to the end of the year of the application DEP was reviewing in arriving at these figures. (N.T. 136)

122. Under the grant funds received method, DEP prorates federal grant payments received by Philadelphia based on the construction ratio. (N.T. 140)

123. The construction ratio DEP used is the ratio of eligible Act 339 construction costs to the eligible federal construction costs. (N.T. 138-140) Both the eligible Act 339 construction costs and the eligible federal construction costs components of the construction ratio represent the cumulative totals of eligible federal or Act 339 construction costs from the date of the initiation of construction until the date of the application. (N.T. 138-140)

124. DEP's methodology in arriving at the Construction Ratio is to take the ratio of the Federal eligible construction amount (just the construction part of the federal funds) to the Act 339 eligible construction amount. DEP then multiplies the construction ratio by the total federal grant money received to date. (N.T. 140-141, 149-151)

125. For the contract for Philadelphia's Southwest Plant designated Southwest-01, Gary determined that the cumulative total of all of the contract eligible Act 339 costs was $131,033,362.77. This figure represents the Act 339 approved construction through 1990 on all of the contracts under that segment. (N.T. 139) This $131,033,362.77 is the amount DEP deemed eligible for the construction component of costs in the grant. (N.T. 166) Dividing the $131,033,362.77 figure by the federal eligible construction figure,[4] Gary arrived at a Construction Ratio of 99.21% for the 1990 application for the Southwest-01 Plant. (N.T. 139-141, 167) This construction ratio was applied to the amount of grants that Philadelphia has received for the Southwest-01,

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[4] The federal eligible construction figure represents the amount of money that the federal government has deemed eligible solely for the construction costs of the grant. (N.T. 167) The federal eligible construction figure came from the payment file for the Southwest-01 grant; it was the most recent eligible construction as of December 31, 1990. This information was found on the Form 271. (N.T. 139)

that is, $111,612,200. (N.T. 167) That includes all four of the cost categories of the grant that Philadelphia received. (N.T. 167)

126. The DEP Construction Ratio method makes a ratio solely of these construction costs in the federal grant and under Act 339 to determine the ratio, instead of using everything that happened and putting all of the costs eligible for federal funding into the ratio. This is the method normally used by DEP in response to an Act 339 application to decide the amount eligible for Act 339 funding. (N.T. 147)

127. Gary used DEP's interpretation of 25 Pa. Code §103.26(b) to determine the Construction Ratio method. The ratio DEP applies varies from year-to-year because construction costs vary from year-to-year, contrary to the hypothetical offered by Philadelphia in Exhibit H. (N.T. 177)

128. Exhibits G, H, and I to B Ex. 1 are hypotheticals which Philadelphia asserts illustrate the dispute between DEP and Philadelphia as to applying and/or calculating the ratio. (B Ex. 1)

129. According to Gary, who was a fact witness only, Exhibit H depicts unusual circumstances in which there are no Act 339 eligible costs. (N.T. 179)

DISCUSSION

In this appeal Philadelphia is challenging DEP's refusal to agree to increase the amount of the subsidy given to the City. There are five distinct and separate areas where Philadelphia claims DEP erred in approving too small a subsidy amount. They include eligible facilities, supplemental engineering, interest during construction, indirect costs and the federal funds deduction.

Philadelphia, pursuant to 25 Pa. Code §1021.101(a),[5] bears the burden of proving that DEP's determination is contrary to law or an abuse of DEP's discretion. Warren Sand & Gravel Co., Inc. v. Commonwealth, DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975).

Philadelphia's burden here is not insignificant. While DEP is required to comply with its own regulations when it acts pursuant thereto according to Mil-Toon Development Group v. DER, 1991 EHB 207 we are required to give great weight to DEP's interpretation of the regulations promulgated under Act 339 because DEP administers them (where DEP's interpretation is not clearly erroneous or inconsistent with the interpreted regulation and where it is consistent with the statute's policy and objectives). See Twining Village v. Commonwealth, Department of Public Welfare 105 Pa. Cmwlth. 227, 523 A.2d 1199 (1987), T.R.A.S.H. Ltd. v. DER, 132 Pa. Cmwlth. 654, 574 A.2d 721 (1990) appeal denied, 527 Pa. 659, 593 A.2d 429 (1990), Cambria Co-Gen Company v. DER, EHB Docket No. 92-308-MJ (Opinion issued February 10, 1995).[6] Thus, where Philadelphia challenges DEP's interpretation of Act 339 regulations and actions pursuant thereto, it has a significantly difficult burden in trying to prove DEP's interpretation of the regulations in regard to the DEP decisions challenged in this appeal is clearly erroneous or inconsistent therewith, not merely that there are other possible interpretations.

Section 701 of Act 339 provides:

> Commencing on the first day of July, 1954, and annually thereafter, until the end of the fiscal year ending the 30th day of June, [1965], the Commonwealth

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[5] The Board's rules were amended effective on September 9, 1995. See 25 Pa. Bull. 3823.

[6] The same difference exists in interpretation of Act 339. See 1 Pa.C.S. §1921(c)(8) and Max L. Starr v. DER, 147 Pa. Cmwlth. 196, 607 A.2d 321 (1992).

> shall pay toward the cost of operating, maintaining, repairing, replacing and other expenses related to sewage treatment plants, an amount not to exceed two per centum (2%) and commencing on the first day of July, 1965 and annually thereafter, the Commonwealth shall pay an amount equal to two (2) per centum (2%) of the costs for the acquisition and construction of such sewage treatment plants by municipalities, municipal authorities and school districts to control stream pollution....

Pursuant to section 703 of Act 339, DEP is authorized to promulgate rules and regulations governing the amounts to be expended for the purposes set forth in section 701. Section 103.24(a) of DEP's regulations under Act 339, as found in Title 25 of the Pennsylvania Code, provides:

> Although the act provides that payments made to applicant municipalities shall be toward the cost of operating, maintaining, repairing, replacing and other expenses related to sewage treatment works, the basis for calculation of those payments is 2% of the cost of acquisition and construction of the eligible sewage treatment works.

Before addressing the five disputed areas individually, it is important to note that as to each, the disagreement is over how DEP interprets Act 339 and the regulations. There are no challenges to the facial validity of the sections of the statute or regulations nor suggestions of conflict between the statute and the regulations.

I Interest During Construction

In awarding Philadelphia a subsidy under Act 339, the parties agree that a portion of Philadelphia's interest expense is includable within the total figure on which DEP bases its calculation of the subsidy amount. As is common to construction of a municipal sewage system, to the extent construction of a municipal sewage system is not financed exclusively with federal grants or similar funding sources, Philadelphia floated municipal bonds to generate the funds necessary to construct and modify its sewage treatment works to comply

with requirements of the Clean Water Act and, coincidentally, Pennsylvania's requirements. Such bonds pay interest to their purchasers from the date of issuance, so Philadelphia begins to incur interest expenses immediately upon sale of the bonds even while construction of its plants' modifications are underway, and, the modified plants are neither on-line nor generating revenue. The parties agree that interest expenses incurred after the bonds are sold and during construction, are a type of cost eligible for inclusion in the subsidy calculation under Act 339. In making its calculation of the amount of interest includable in the subsidy calculation DEP first subtracts the amount of the interest Philadelphia earns from the interim investment of the funds realized from the sale of the bonds, from the total interest expense on these bonds incurred by Philadelphia. Such an approach prevents DEP from paying a subsidy based on an artificially high amount or subsidizing Philadelphia in the event investment conditions allowed its investment of these funds to earn more than Philadelphia's interest expense.

After this calculation is complete, in determining the Act 339 subsidy amount DEP limits the rate of interest it will pay a subsidy to 1.5% per year. The dispute between the parties arises because DEP and Philadelphia also agree that Philadelphia's actual weighted average interest during construction financing was $8.6722% through 1991 and 7.6% for 1992. Importantly, neither Act 339 nor the regulations currently promulgated thereunder contain DEP's 1.5% ceiling figure. However, this 1.5% limitation has been used since it was first set forth in the first set of Act 339 regulations promulgated by the Department of Health in 1953 as the rate for interest during construction. How this 1.5% figure was arrived at back in 1953 is unknown to the DEP staff

now administering this program despite their research attempting to discover its basis.

Apparently, the usual claim for interest from an Act 339 applicant is 1.5% and it is not disputed that every DEP Act 339 application form contains a statement that the interest percent allowed by DEP is 1.5% (even though DEP does not limit the amount of interest Philadelphia can make by investing the proceeds from the bond sales to 1.5%.)

Philadelphia's claim for its actual interest expense during construction is uncommon and far beyond that allowed under DEP's interpretation of Act 339. If DEP used actual interest costs for Philadelphia it would have to use it as to all other applicants and DEP contends that it would have to secure additional funding to support universal use of actual interest costs. Had DEP used Philadelphia's actual interest expense instead of the 1.5% figure, Philadelphia's subsidy would have been larger because where a cost is deemed eligible under Act 339 the applicant receives a 2% reimbursement of its actual eligible costs. On other eligible costs Philadelphia receives the 2% reimbursement based on the actual eligible costs. However, because of this 1.5% figure's use Philadelphia does not receive 2% of its overall actual eligible costs. DEP says it considered Philadelphia's request for use of an interest rate in excess of 1.5% before making the decision now under appeal but rejected it, and decided to use 1.5% interest again on all Act 339 applications submitted to it.

In defense of this decision DEP's Brief (page 18) notes Act 339 and the regulations are silent on the rate to be allowed. It asserts application of this 1.5% rate since 1953 makes this rate's application a DEP policy justified because it stabilizes the DEP expenditures and is a reasonable expenditure of

the public funds. It also asserts the doctrine of administrative finality should be applied to preclude Philadelphia's challenge to this rate since it did not challenge this rate in prior years.

In reply the City disputes each position adopted on DEP's behalf.

The doctrine of administrative finality has no application in the instant appeal contrary to DEP's assertion.[7] DEP cites "Commonwealth, DER v. Wheeling-Pittsburgh Steel Corporation, 348 A.2d 765"[8] in this regard arguing this doctrine bars Philadelphia's appeal because Philadelphia only recently discovered it was aggrieved by the amount of the subsidy. DEP asserts that the City does not claim that [DEP] has changed anything in its determination of the subsidy, solely that the subsidy is insufficient. DEP then attempts to distinguish Allegheny County Sanitary Authority v. DER, 1982 EHB 29 arguing that DEP's 1.5% rate has been consistently applied since 1953.

DEP is correct that Allegheny County Sanitary Authority v. DER, 1982 EHB 29 does not apply here, but neither it nor Commonwealth, DER v. Wheeling-Pittsburgh Steel Corporation, 22 Pa. Cmwlth. 280, 348 A.2d 765 (1975) apply because of the facts surrounding the appeal before us. In Commonwealth, DER v. Wheeling-Pittsburgh Steel Corporation, 22 Pa. Cmwlth. 280, 348 A.2d 765 (1975) that company sought and received a specific variance from DEP which

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[7]Curiously DEP does not raise 25 Pa. Code 103.28 as part of its defense to this aspect of this appeal. Because it was not raised by DEP in its Post-Hearing Brief it is deemed waived. See Lucky Strike Coal Co. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988). Had waiver not occurred the Board would not have hesitated to reject such a defense because neither DEP nor the Environmental Quality Board may adopt regulations limiting this Board's ability in timely appeals to review decisions reached by DEP. The right to appeal to this Board from DEP's actions is controlled not by this regulation but by Section 4(c) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530 No. 94, 35 P.S. §7514(c).

[8]The proper citation for this decision is 22 Pa. Cmwlth. 280, 348 A.2d 765 (1975) rather than that in DEP's brief.

variance was in an order deferring application of certain regulations as to certain pollution emitting facilities until a specific future date. After that date's passage DEP sought the order's enforcement, i.e., compliance with the regulation at that facility, and the company's challenge thereto was barred because the court said it had to challenge the administrative order when it was issued not when it was enforced. Unlike the scenario therein, in the instant appeal DEP makes a new decision, albeit here reaching the same conclusion as to use of the 1.5% rate to each year's crop of applications. Its predecessor first made such a decision in 1953 when the decision was authorized in regulations but DEP has made an identical decision afresh each year thereafter. As to the applications preceding those of Philadelphia now before us in this consolidated appeal, DEP's decision to reimburse at the 1.5% rate became final when Philadelphia took no timely appeals therefrom. DEP is correct insofar as it suggests that Philadelphia can no longer challenge those DEP decisions. Commonwealth, DER v. Wheeling-Pittsburgh Steel Corporation, 22 Pa. Cmwlth. 280 348 A.2d 765 (1975), so states. DEP might also be correct if, in this appeal's situation, DEP had made a decision in 1953 to pay 1.5% interest in all applications ever submitted in any year in the future. However, as to the DEP 1.5% decisions as to these current applications, the evidence shows DEP made a new decision to use 1.5% again and the instant appeals are indisputedly timely in regard thereto. Since there are no prior DEP decisions to apply this rate to these applications which could have been appealed and thus created the cornerstone necessary to give rise to application of this doctrine, it cannot apply here. Thus, as to the 1.5% interest rate issue now before us, Philadelphia has not failed to exhaust its statutory remedies the way Wheeling-Pittsburgh did.

Allegheny County Sanitary Authority v. DER, 1982 EHB 29 is also inapplicable here because in it the doctrine of *res judicata* was the basis for the Board's conclusion as set forth in the language quoted in DEP's Brief. Specifically, at 1982 EHB pages 38 and 39 the Board concluded one of the four elements of *res judicata* (identity of the thing sued for) had not been shown by DEP. No mention of the doctrine of administrative finality is contained therein and no mention of the doctrine or *res judicata* is contained in DEP's argument herein.[9]

Having rejected a bar to this appeal based on administrative finality we turn to the merits of DEP's use of this 1.5% interest rate and conclude there is no valid basis on which to sustain DEP's use thereof. DEP agrees Philadelphia's interest expenses are to be reimbursable under Act 339 and that the Act and regulations do not authorize it to limit reimbursement to this 1.5% amount. DEP's Brief asserts this 1.5% rate is a DEP policy but we do not find that it is a DEP policy. Maisano testified: "It is just a program decision that was made that has been carried over the years." (N.T.-257) He did not say this was a DEP policy contrary to that suggestion in DEP's proposed finding of fact No. 11. Maisano testified this rate was adopted in 1953 and has been used ever since. He also indicated he was aware that Philadelphia sought a higher rate and he decided, on DEP's behalf, to reject Philadelphia's application for use of a higher rate and remain at the 1.5% rate. (N.T.-254-255). Where DEP can decide to subsidize based in part on the actual interest rate but elects not to solely because it would mean a

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[9]To the extent DEP might read Allegheny County Sanitary Authority v. DER, 1982 EHB 29 as saying *res judicata* while actually meaning administrative finality, that opinion would not apply for the reasons set forth above as to why Commonwealth, DER v. Wheeling-Pittsburgh Steel Corporation, 22 Pa. Cmwlth. 280, 348 A.2d 765 (1975), does not apply.

"substantial increase" in the outlay of Act 339 funds (N.T.-252) and thus decides to continue at the rate allowed earlier despite DEP's admission that interest expense is not limited in Act 339 or regulations (N.T.-225 and 256), we cannot conclude there is a DEP policy.

Finally, as to interest rates, we conclude that DEP's choice of this 1.5% rate for interest expense must be rejected. As DEP's choice of the 1.5% interest rate was not mandated by Act 339 or the regulations, the decision to use it was of a discretionary nature. As this is true we may substitute our discretion for that of DEP where the evidence fails to support DEP's choice, i.e., where the choice was arbitrary. Warren Sand and Gravel Co., Inc. v. Commonwealth, DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). Because both parties agree interest expense is a subsidy eligible item under the Act and there is no evidence to support the idea that the General Assembly empowered DEP to limit interest expense eligibility to only a portion of the interest expense incurred by Philadelphia. Philadelphia has made a sufficient showing to have all of this expense considered for subsidy unless DEP comes forward with some superior justification for its action. DEP has not done so.

That this must be our conclusion is reinforced by the applicable regulations. They are not only silent and thus lacking in support for DEP's 1.5% rate but 25 Pa. Code §103.25(b) states that the General Assembly's intent in Act 339 is clear and it intends the Commonwealth to share operating costs via a subsidy based on eligible sewage treatment plant construction costs. Because DEP must comply with these regulations according to Mil-Toon Development Group v. DER, 1991 EHB 207 and they do not allow DEP to calculate the Commonwealth's 2% payment on only a portion of the eligible costs, DEP's use of the 1.5% interest expense limitation is a violation of this regulation.

Under the current version of Act 339 and these regulations, DEP may no more limit eligible interest expense to 1.5% than it may conclude only 50% of the eligible cost of construction of a municipal treatment plant's aeration equipment or effluent disinfection facilities will be included as a cost for purposes of calculating the actual subsidy payment.

In drawing this conclusion the Board expressly rejects DEP's assertion that this is a permissible stabilization of DEP's expenditures and is a reasonable expenditure of the public funds. Act 339 is the General Assembly's determination of what is a reasonable expenditure of public funds. In enacting this statute it did not expressly vest DEP with the power to decide what percentage of interest expense is not a reasonable expenditure and neither do the regulations promulgated thereunder. Under the Act and regulation, as long as a construction cost fits within the act as eligible, it must be included. Had the General Assembly intended a different conclusion it would have said so. The same response applies to DEP's "permissible stabilization" argument. If use of actual versus artificial interest rates did not suit the General Assembly, it could have so indicated (or will in the future). It is not the job of members of DEP's bureaucracy to conclude that their desire to stabilize expenditures controls over a clear legislative enactment which charts a different course.[10] We hasten to add the Act 339 funds are not DEP's money as its brief asserts. This is money of the

[10]The only evidence on DEP's knowledge of legislative intent as to interest expense came from Maisano, who testified that he had no idea of what the intent of the act and regulations is. (N.T.-259) If this is true, it is sufficient in and of itself to show a DEP imposed limit of 1.5% is at least arbitrary since such an imposition contains within it the implicit assertion that this is what the Legislature desired by passing this law.

Commonwealth as opposed to money allocated to DEP by statute for a specific use.

II Supplemental Engineering

During the time period in which Philadelphia made the modifications to its three sewage treatment plants, it incurred costs for completion of an I&I study and the preparation of an O&M Manual, a Plan of Operation and Maintenance Manual. Philadelphia alleges the costs of all of the engineering work should be included within the formula for its subsidy because their cost was a cost of construction or acquisition of the plant modifications. In turn, DEP has rejected Act 339 funding for all three.

Plan of Operation

As a condition for receiving its federal grant Philadelphia was required to prepare a plan of operation of its modified plants. Such plans are required to assure the federal government, as the grant-in-aid provider, that Philadelphia is prepared to operate the plant properly. The plan covers issues such as staff levels, training schedules, job functions and other needs once the plant is in operation.

On Philadelphia's behalf Bish says preparation of such plans are standard practice in the wastewater industry. He also testified that preparation of this plan is a requirement for grantees receiving funds through EPA under the Clean Water Act. Philadelphia also put in conclusory testimony that it could not fund these modifications solely with rate-payer monies and thus these grants were a financial necessity.[11]

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[11]The basis for Philadelphia's various arguments is much less than clear in its Post-Hearing Brief in part because of the Brief's format. The Brief consists of proposed findings of fact and proposed conclusions of law but it contains no argument or discussion of how the application of the statute, regulations and case law to these proposed findings of fact produced the suggested conclusions

DEP's position on the I&I study, the plan, and the manuals is identical. DEP contends that while costs of this engineering work is a cost to Philadelphia, it is not a cost directly related to construction and acquisition of Philadelphia's treatment facilities within the scope of this statute and the regulations. DEP thus contends some expenditures are within the Act's coverage and some are not. In support of its position it cites Northampton, Bucks County Municipal Authority v. Commonwealth, DER, 521 Pa. 253, 555 A.2d 878 (1989) in which this concept was recognized (although as to interceptor sewers rather than studies) by the Supreme Court.

To the extent that Philadelphia is contending preparation of this plan is a standard practice for engineers in this field there appears no dispute between the parties. However DEP argues, and we believe correctly, that even if a plan's preparation is assumed to be a standard practice, that does not by itself mean that it is a cost which must be included within the total amount on which the Act 339 subsidy is calculated. As DEP points out in Northampton, Bucks County Municipal Authority v. Commonwealth, DER, 521 Pa. 253, 555 A.2d 878 (1989), when it was before this Board, the Board affirmed DEP's denial of eligibility for all interceptors and included only those essential to the treatment plant system. On appeal through the Commonwealth Court to the Supreme Court, that court explicitly held that not all construction costs are to be subsidized but rather that the coverage was restricted. Using this rationale, merely because Philadelphia's engineer undertook this work does not make it eligible to be included within that which forms the basis for calculation of the subsidy. Philadelphia must show more than that it incurred

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of law. As the Board has repeatedly stated in the past, we advise parties that this type of Brief is not the kind which should be filed here.

this cost. As the party with the burden of proof here, it must show it is a cost eligible for inclusion within the eligible cost concepts of the Act and regulations. An allegation that this plan's preparation is standard practice does not do this.

Apparently to get around the omission of such evidence Philadelphia asserts that this plan's preparation is required by EPA of any party receiving federal grants under the Clean Water Act. DEP does not dispute that this is so. In fact, its evidence asserts that this is the only reason Philadelphia had its engineers undertake this work. However, merely because EPA mandates such a plan's preparation by those receiving grants from it under the Clean Water Act, does not make this an Act 339 eligible cost. As to any grant-in-aid contract with EPA a grantee can accept the obligations of the contract in recognition that it is getting the grants' monies, reject the contract because of the obligations, or not even apply for a grant and finance its facilities in other fashions. But what is required of grantees either by EPA or directly within the terms of the Clean Water Act has no impact by itself on whether the cost of meeting the Federal requirements is eligible under Act 339 for inclusion in the amount on which a subsidy is based. We draw this conclusion because while both statutes are concerned with the total cost of municipal waste treatment to the municipality they address different aspects of this total cost. The Clean Water Act federal grants program appears from the evidence before us and the DEP regulations thereon found at 25 Pa. Code §103.1 to §103.14, to deal with funding construction of sewage systems which includes everything from collector sewers through interceptor sewers to the plant itself and even on to acquisition of land for disposal of treatment plant residues. On its face Act 339 is a subsidy of a portion of the annual costs

to the municipality of operating its treatment plant. Act 339 does not fund plant construction costs. After those costs are incurred however it uses construction costs to arrive at the gross dollar figure on which the 2% operating cost subsidy is calculated and then only subsidizes costs of operations at the treatment plant itself, rather than all municipal sewerage system operation and maintenance costs. In concluding the Acts are neither coextensive nor aimed at funding the same aspects of the total costs picture we do not restrict what EPA may require of grantees. Rather, we only conclude that a showing by Philadelphia that this plan is a Clean Water Act grant requirement, is not sufficient, standing alone, to show that DEP erred in concluding that the plan's preparation cost is eligible under Act 339. However, so that there is no question as to what we have concluded here, this holding is limited in application to grants from EPA under Title II. When and if DEP determines other such "costs" to be ineligible using a similar theory that subsidy applicant retains the right to appeal such a decision to this Board.

Philadelphia has offered a further theory for inclusion of this cost within those eligible for use in calculating this Act 339 subsidy. Philadelphia's accountant Joseph Clare testified that the federal grants were essential to finance the various modifications of these three plants and that absent the grants, the modifications could not be completed using rate-payer dollars. (N.T.-56) Absent replacement of rate-payer dollars Clare opined that the modifications would not have been completed. (N.T.-56) From this testimony Philadelphia asserts the grants were necessary to finance construction so any requirements to secure the grants is a cost of construction.

Section 1 of Act 339 provides in relevant part:

> "... the Commonwealth shall pay toward the cost of operating, maintaining, repairing, replacing, and other expenses relating to sewage treatment plants ... an amount equal to two per centum (2%) of the costs for the acquisition and construction of sewage treatment plants by municipalities ... ."
>
> 35 P.S. §701.

As spelled out in 25 Pa. Code §103.24(a) this 2% is of the cost of acquisition and construction of the eligible sewage treatment works (which is in turn defined as the treatment plants, treatment devices, and structures for treatment and disposal of sewage, plant outfalls and "liquid waste disposal equipment and facilities.") As asserted by DEP, ineligible costs are defined in 25 Pa. Code §103.26(d) and include costs not related to construction and acquisition and costs of engineering expenses incurred in the operation of the sewage facilities. DEP asserts eligibility is based on whether the costs are directly associated with plant construction and this plan's cost is not so associated. Philadelphia takes the broader view saying in essence a cost associated with construction is any cost associated with construction regardless of directness and, if it is associated at all, it is eligible. Neither party really addresses why it believes the countervailing assertions of its opponent are in error. The impact of this omission does not fall on DEP but on Philadelphia. As we set forth above at this opinion's beginning we are required to give controlling weight to DEP's opinion because it administers this Act and these regulations. We can see no reason, in light of the Supreme Court's recognition in Northampton, Bucks County Municipal Authority v. Commonwealth, DER, 521 Pa. 253, 555 A.2d 878 (1989) that not all costs are eligible, to reject DEP's opinion as to what is covered by this Act and what is not. The Board's decision in Allegheny County Sanitary Authority

v. DER, 1982 EHB 29 as cited by Philadelphia does not change this conclusion. Not only does it predate Northampton, Bucks County Municipal Authority v. Commonwealth, DER, 521 Pa. 253, 555 A.2d 878 (1989) but to the extent it is offered by Philadelphia to support the theory that all costs associated with construction are intended to be eligible, it is inconsistent therewith.

In addition, we find serious problems within the argument advanced by Philadelphia. Philadelphia's argument is virtually the financial impossibility defense which is normally not raisable before this Board. Ramey Borough v. Commonwealth, DER, 15 Pa. Cmwlth. 601, 327 A.2d 647 (1974) *aff'd* 466 Pa. 45, 351 A.2d 613 (1976). In its Brief Philadelphia asserts that absent the grants the City could not afford to construct the modifications so it could not comply with either the Clean Water Act or the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1, *et seq*. The first problem with this argument is that the evidence does not show this. The most the evidence shows is that the grants were needed because rate-payer monies would be inadequate to fund this work. Whether rate-payer monies plus general tax revenues, funds from the sale of bonds, third party grants or other sources of funds (including state grants) would be adequate is never addressed. Since a financial impossibility defense requires proof of exhaustion of all possible efforts to find a financing alternative according to Comm., ex rel. Alessandroni v. Borough of Confluence, 427 Pa. 540, 234 A.2d 852 (1967), we conclude the evidence necessary to support Philadelphia's argument is not of record before us. Absent evidence to support it we must reject it.

Moreover, we are mindful that preparation of a plan of operation is not commonly considered as construction. One may be given an owner's manual when

one buys a car but it is not related to the actual physical construction of the car. Finally, on this point we observe that Philadelphia already owned and operated these three treatment plants. It thus had some plan for operation thereof before it made the modification/improvements thereto for which it received these grants from EPA. This suggests to the Board that a plan of operation, while required by EPA under its grants' requirements, was less construction related than it was grants related and there is no evidence which rebuts this suggestion. Accordingly, we sustain DEP's denial of Philadelphia's application in this regard.

Operation and Maintenance Manuals

Manuals of both types were prepared by Philadelphia's engineer. According to Philadelphia's Brief they show the treatment plant staff how the plant is designed and how it can be properly operated. Mr. Bish also testified that preparation of these manuals is standard practice, that in his opinion they are necessary components in plant construction and that they are a requirement imposed on EPA grantees as a condition of the grant. As to these manuals Philadelphia and DEP raise the same arguments for their inclusion and exclusion under Act 339 as were raised above with regard to the Plan of Operation. (It is less than clear on this record why an Operations Manual, separate from a Plan of Operation, is needed). As our conclusions on the cost of these manuals is the same as we have set forth above as to the Plan of Operation, we also sustain DEP's decision as to this aspect of Philadelphia's application.

I&I Study

An I&I study is not a study conducted at Philadelphia's plant. Rather it is a study conducted upstream in the collector and interceptor sewers which

has as its task the identification of the sources of extraneous water entering the sewer lines' tributary to this plant and mixing with the sewage flows therein. Such a study helps pinpoint where such water flows can be removed so that it is not a volume of water in need of treatment at the plant.

As to Philadelphia's I&I study the parties advance all of the arguments covered above as to the plan of operation and one more which causes us to view its costs differently.

Philadelphia argues that an I&I study is a necessary component of design of modifications of a plant. While DEP disputes the eligibility of the study's costs, on cross examination of DEP's Parimal Parikh (its civil engineer witness) the following exchange occurred:

> Q Are you familiar with the Department of Environmental Resources' Sewerage Manual?
>
> A Yes, I am.
>
> Q What is this manual?
>
> A This manual is a guide for preparing plant specification and designing the wastewater treatment system.
>
> Q Would you agree that this is the manual that POTWs must follow when they are designing a sewage treatment plant?
>
> A This is a guide, yes.
>
> Q Do you agree that POTWs routinely rely upon this guide?
>
> A Yes.
>
> ...
>
> Q Mr. Parikh, let me show you that DEP Sewerage Manual, page 44, Section 43.4 entitled "Design Loads." Could you read the sentence beginning with "The following considerations," and then move on to item C?
>
> ...

A "The following considerations shall be included in determining design flow: (a) Peak rates of flow over a sufficient length of time to adversely affect the detention time of treatment units or the flow characteristics of conduits: (b) Data from similar municipalities, in the case of new systems; (c) Wet weather flows including infiltration/inflow in separate and combined sewerage systems."

...

Q Doesn't this manual in effect say that you should understand what your I&I is when you are calculating the design loads of your treatment plant?

A Yes.

Q Would you agree that this statement in this DER Sewerage Manual is correct?

A Yes.

(N.T.-195-199)

DER's manual (DER is now DEP), while not a regulation, is the DEP approved and sponsored guide for municipal sewerage system design. It says I&I shall be studied in the process of plant design. Moreover, DEP's witness agrees this is correct. Thus DEP endorses and supports the idea that an I&I study is to occur during plant design (a part of construction). If DEP wants municipalities to study I&I before design of their plants' modifications then an I&I study is not engineering to insure plant operation which is an ineligible cost under 25 Pa. Code §103.26(d)(3) but is an integral part of proper construction. Accordingly, as to the I&I study component of Philadelphia's engineering costs we sustain Philadelphia's appeal.

III Eligible Facilities

Supply Storage Building

At Philadelphia's northeast treatment plant, it built a new administration building. Philadelphia then converted its older existing administration building into a small parts warehouse for the facilities. In its application to DEP for an Act 339 subsidy it sought to include the cost of converting this building into a warehouse as a cost of construction. DEP rejected this cost's inclusion.

In its Post-Hearing Brief Philadelphia contends a warehouse is necessary to operate and maintain a treatment plant because parts, materials, and supplies must be available 24 hours per day 365 days per year of operation and a warehouse protects against loss or theft while preventing environmental damage to any sensitive components during storage. Bish, who testified to the above, also states such a warehouse is a necessary component of construction of a treatment plant because one must maintain and operate a plant. Philadelphia asserts this testimony is unchallenged and Act 339 should be read to permit payments for construction furthering the purposes of the Clean Streams Law *supra*.

In response DEP asserts the stronger position. It again contends not all municipal costs are covered by the Act and this is one that is not.

Unaddressed by Philadelphia on the record or in either of its Briefs is how a warehouse to store these spare parts can be an eligible cost when the cost to buy spare parts and supplies is not eligible according to 25 Pa. Code §103.26(d)(2). Philadelphia does not assert the parts and supplies are eligible despite Section 103.26(d)(2) or challenge the validity of this

regulation. Thus it argues to us that the container's contents may not be eligible but the container is.

Equally difficult for this Board to grasp is how Philadelphia can assert the building's conversion cost is eligible at all when it bases this contention on Bish's testimony and Bish says:

> Q Is a small parts warehouse a necessary part of the construction of a sewage treatment plant?
>
> A They are a necessary component of the wastewater treatment facilities, yes.
>
> Q Why is that?
>
> A To maintain and operate the facilities, you need to have parts and materials and supplies available at all times to ensure that these facilities are operating 24 hours a day, 365 days a year.
>
> Small parts in a facility the size of Philadelphia have to be controlled. They have to be put in a place so that they are, one, kept so that they are in a secure area so they don't tend to walk or be taken offsite.
>
> And two, that they are stored properly. Generally some of these components are sensitive to the environment so they have to be provided in the necessary and appropriate spaces for their storage.

(N.T.-32-33)

Thus Bish's testimony is not that the facility is a necessary component of treatment plant construction but is a necessary component of a treatment plant's operation and maintenance. As pointed out above, operation and maintenance is subsidized under Act 339 but not based on O&M costs. It is subsidized based on the cost of construction and acquisition. Moreover, and of critical import here, under 25 Pa. Code §103.26(d)(1), a modification's costs are also an eligible construction cost only when the modification is to the treatment process. This building's conversion cost is not a modification

to the treatment process but is an unreimbursable O&M cost. Importantly, Philadelphia never addresses this regulation's impact on its appeal of this aspect of DEP's decision. As a result, the Board concludes it is not eligible for inclusion in the amount upon which the subsidy is based.

Sludge Storage Tank Modifications

What we have just concluded above as to Philadelphia's warehouse, we now conclude is also applicable to the modification to the sludge gas storage tanks at Philadelphia's northeast plant. Sludge gas storage tanks are just that. They are tanks used to store the gas produced in the treatment of sewage, when sewage sludge is anaerobically digested.[12]

The initial construction of these tanks predates their modification in 1991. In 1991 Philadelphia constructed platforms and stairs at these tanks to provide access to the counterweights, gauging station, lighting and the stops in this storage facility. These platforms and stairs are to provide the operation and maintenance personnel better access to the tanks "to keep this facility in operation." As Bish testified for Philadelphia:

> Q What would happen if these modifications were not made?
>
> A If these modifications were not made, one of two things would occur.
>
> One, you would not have the proper maintenance

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[12]C.C. Lee's Environmental Engineering Dictionary defines anaerobic digestion on page 27 as:

> Anaerobic digestion (anaerobic contact) process: An EPA listed treatment technology, list code, T70. It is a sequential, biological treatment process in which hydrocarbons are converted, in the absence of free oxygen, from complex to simple molecules and ultimately to carbon dioxide and methane. The primary digester serves mainly to reduce volatile suspended solids (VSS), while the secondary digester is mainly for solids-liquid separation, sludge thickening, and storage (EPA, 10/87a).

> that is required to maintain the facilities which means that you could perhaps have a safety issue because of this methane gas which could be explosive if you don't properly maintain the facilities. You may have leaks that would cause an unsafe condition.
>
> Or two, you would have to maintain it using equipment such as cherry pickers and ladders and what-not, which again would put the operations people in an unsafe condition as they maintain these facilities.

(N.T.-31)

Philadelphia's Brief contends this is a common modification which was made for employee safety and proper operation and maintenance. As to these costs DEP advances its strict interpretation argument.

The problem for Philadelphia in regard to its assertions regarding these costs is that prior to the modification's completion this plant operated without the stairs and catwalks and Philadelphia offered no evidence that these facilities accomplished anything that was not already accomplishable and, in fact, accomplished as to treatment. We commend Philadelphia for its desire to produce safe working conditions for its employees and have no reason to doubt that stairs and catwalks should be safer than ladders or cherry pickers (although we lack evidence other than Bish's conclusions on this point and under the parties' Stipulation he is not offered as a safety expert but as an expert in sewage treatment plant design and construction.) There is no evidence from Philadelphia that proper maintenance was not performable and performed prior to this equipment's installation which might support Philadelphia's need to install this equipment. Thus, this appears to be a discretionary decision by Philadelphia to install this equipment to facilitate maintenance, i.e., to replace one method of maintenance with another. There is no suggestion by Philadelphia that this is a modification of the treatment

process. As a result, we do not find Philadelphia's argument sufficiently persuasive to conclude that DEP's narrower view is in error. DEP's view appears to be that the amount on which the subsidy is based does not include O&M costs nor costs of modifications to the plant which are based on O&M concepts versus modifications dealing with sewage treatment equipment or capacity, i.e., the treatment process. As DEP points out, once a plant is in operation under 25 Pa. Code §103.26(d)(1) only modifications to the treatment process are subsidy eligible. Philadelphia fails to challenge this regulation. It also does not show how DEP erred in its interpretation thereof as to this modification or how this regulation misconstrues Act 339. Absent some attempt at such a showing the Board will not overturn DEP's interpretation of its own regulation.

IV Indirect Costs

In this appeal "indirect costs" is a term referring to central support services provided by the City in regard to its sewage treatment plants. As part of its governmental situation Philadelphia has a central support service center which provides certain services to other city governmental units. Philadelphia's central services centers are located at its Water Department and at its general government operations unit. For example, the central services unit procures goods and services for all functional units of the city including construction-related items for the treatment plants. Another central services unit is the Water Department's Materials Testing Laboratory which tests construction-related items for the treatment plants. Other central services include the City's Personnel Department and Water Department accounting staff. Philadelphia contends that each of the central service units incur additional costs in order to perform that aspect of their work

necessary for construction and acquisition of the three treatment plants. Note that according to the testimony, Philadelphia is somewhat unique, in that it undertakes construction at its plants itself rather than hiring contractors to construct the plant modifications.

Within the wastewater industry it is standard practice that contractors building sewage treatment plants bill municipalities for their labor and for their indirect costs and profits. Such costs and profits are then paid by the municipality. When a municipality submits such a contractor's bills covering labor, indirect costs, and profits, which it has paid, DEP routinely deems them eligible for inclusion in the subsidy amount.

When Philadelphia submitted its indirect costs to DEP under Act 339 for inclusion in the subsidy amount, DEP rejected inclusion of these costs because it believes they are general operating costs of the municipality and thus are ineligible.

While we have no evidence before us on exactly how each of the central service support center costs on Exhibit L were incurred or the dollar amounts arrived at, the parties do not contest whether they are costs incurred as to the sewage treatment plant construction efforts. They also do not have on dispute whether these are O&M costs versus construction and acquisition costs. Rather, they limit their dispute to the issue of whether these costs are ineligible general city operating costs. During the course of the merits hearing presided over by former Board Chairman Woelfling, she simplified the statement of dispute based on the record as follows:

> The whole issue here, I think, is rather simple. If DEP is going to reimburse the City for whatever the consultants charge them in overhead and not do it for the City's overhead costs, where is the justice here.

(N.T.-279) The parties did not dispute her simplification.

The sole argument as to these indirect costs set forth in DEP's Brief is found in Section B. In that location it makes the single argument for Indirect Costs that it advanced as to all of the portions of Supplemental Engineering and two segments of Eligible Facilities, i.e., Act 339 and the regulations do not provide for use of these costs to calculate the subsidy. As DEP states there is: "... no testimony which demonstrates that the ... indirect costs were essential or integral to construction or acquisition of the plants."

The parties stipulated in the Joint Stipulations Of Counsel Pursuant To Pre-Hearing Order No. 2 at page 15:

> This dispute now turns on essentially a legal issue: Although these costs are directly related to the acquisition and construction of the City's three sewage treatment plants are they ineligible under Act 339 because these costs represent the general operating costs of the City?

This Stipulation contains within it an agreement that these costs were directly related to construction and acquisition. Because the parties so stipulated there was no obligation on Philadelphia to offer additional testimony that these costs were essential and integral to construction. To the extent "direct" equates with integral and essential the Stipulation covers this point. To the extent DEP argues integral and essential means something else this represents a departure from DEP's position on this dispute as set forth by its counsel at the merits hearing. (N.T.-222-223, 226-227, 230-231) We reject this argument at this time to the extent it is a departure from its arguments at the hearing because it is such a last second departure.

At the merits hearing DEP repeatedly insisted these Philadelphia costs are merely general overhead/operating costs of the City and thus are ineligible. In response Philadelphia's counsel asserted that these are costs

incurred uniquely because of plant construction. The evidence supports the latter conclusion. Not only did the parties stipulate these costs are directly tied to construction and acquisition of these treatment plants but also some of these central service centers would have decreased work while others might cease to exist but for this treatment plant work. As Philadelphia points out, for example, contractors and suppliers as to treatment plant modifications are paid through efforts of its accounting department and similar overhead costs included in bills other municipalities pay their contractors are submitted to DEP by Act 339 subsidy applicants and form a portion of the amount routinely approved by DEP as eligible for inclusion in the amount on which the subsidy is based. Thus DEP has not articulated a rational basis on which to treat Philadelphia's overhead costs relating to these modifications in the fashion it does. Because that is true we can give no deference to DEP's position and sustain Philadelphia's challenge thereto.

V Federal Funds Deduction

The final area of dispute as to Philadelphia's Act 339 applications concerns the deduction of federal funds. The parties agree that under Act 339 before DEP can calculate the dollar figure on which the 2% subsidy is based, it must subtract from the total cost of plant acquisition and construction that portion thereof which is paid for with federal and state grants, (grants of the type which need not be repaid to the grantor) and the portion covered by PENNVEST loans. This is required by 25 Pa. Code §103.26(b), which provides in relevant part:

> "Calculation of these deductions shall be based on the ratio of eligible construction costs under the act to the construction costs paid for with state and and federal grant funds or PENNVEST loan funds."

The parties' dispute centers on this ratio, and what goes into it and how DEP applies it.

The use of this ratio concept was first incorporated into the regulations effective on September 28, 1991. DEP first used it as to Philadelphia's 1989 Act 339 application and began using what is called this "grants funds received" methodology at Philadelphia's request. (N.T.-144)

According to the testimony of Rosemary Gary on behalf of DEP, DEP switched to this methodology after Philadelphia complained about the prior methodology. After the complaint DEP studied its regulations and came up with this current methodology which it believes still conforms to its view of the regulation. (N.T.-141) In this regard we observe that DEP is bound by and must act in accordance with its own regulations. Mil-Toon Development Group v. DER, 1991 EHB 207.

Turning to the actual dispute, DEP reads its regulations as authorizing it to make a ratio using the actual amount Philadelphia has received from the Federal Government for construction eligible costs on each grant at each plant and then add these up to secure a cumulative eligible construction amount. According to DEP's Brief (Page 16), this is the denominator of the ratio. The numerator is the total of all eligible Act 339 construction costs for each plant which are also added together to produce a cumulative total of all construction eligible Act 339 costs. This construction ratio is then applied to the grants' payments received to date to produce the amount of the deduction as required under 25 Pa. Code Section 103.26(b).

Philadelphia has no disagreement with use of this ratio by DEP to the extent that DEP applies it to that portion or component of the federal grants monies covering construction costs. (N.T.-78) Philadelphia contends, however,

that its federal grants are broken down into four components of which construction is one. The other three are engineering costs, indirect costs, and other direct costs. DEP applies this ratio to all four components but Philadelphia believes such an application is improper as to the other three. Philadelphia contends that DEP should not use this ratio on costs components as to which DEP does not participate. Philadelphia does not challenge this regulation's facial validity; rather, it says where DEP applies the construction costs ratio to costs it does not participate in, that is unfair and DEP "should only deduct federal grants in relation to [DEP's] participation in the related costs..." (N.T.-78) Thus, under Philadelphia's approach, where DEP participates in more total costs than does the federal grant, it should deduct the entire amount of its participation whereas when it participates to a lesser degree than EPA, DEP should only deduct up to the amount of its participation in, that cost category rather than using the construction costs ratio which is greater. According to accountant Clare's testimony for Philadelphia, using Philadelphia's ratio methodology produces greater deductions (a lesser subsidy) in some categories and a smaller deduction (thus a greater subsidy) in others. (N.T.-79-81) On cross examination, moreover, Clare admitted that where DEP deems construction costs are eligible for inclusion in the subsidy calculation basis, associated engineering costs are deemed eligible too. Engineering costs and indirect costs, that DEP has previously deemed ineligible, like those litigated in this appeal, are those which DEP does not participate in. Thus, as Clare testified on direct examination for Philadelphia, using Philadelphia's ratio methodology as to some cost components DEP should deduct more money than it does (N.T.-79-

80) and under DEP's ratio methodology at other times too much money is deducted. (N.T.-82-83)

It cannot be disputed that if Philadelphia's "spin" on how this ratio concept is to be implemented, overall it will produce a greater dollar amount in subsidies for Philadelphia under Act 339 than if DEP's methodology is used. Philadelphia asserts DEP's methodology penalizes Philadelphia. It claims Act 339's purpose is to encourage building of municipal treatment plants through the Act's subsidy so the Act must be interpreted to permit such payments. Philadelphia's brief states that DEP's narrow interpretation of "construction" is contrary to the purpose and intent of the Act. Philadelphia says that one of the principles of statutory interpretation requires words be given their ordinary and common sense meaning, and when the regulation and statute are read together they require DEP to interpret the regulation as Philadelphia does.

In response, DEP argues its method is consistent with Act 339 and Section 103.26(b) and that it is neither arbitrary nor an abuse of discretion. Philadelphia fails to meet its burden of proof and to convince the Board of the error of DEP's approach. On this specific issue, Philadelphia says that DEP's definition of "construction" is too narrow. However, Philadelphia never points to a definition of "construction" used by DEP other than that found in Section 2 of Act 339 (35 P.S. §702) and in 25 Pa. Code §103.21. Moreover, DEP is required to comply with and use these definitions according to Mil-Toon Development Group v. DER, 1991 EHB 207. Further, Philadelphia never points to a definition of its own which is both found in this statute or the regulations and is broader than that used by DEP. Finally, where a statute and regulation promulgated under it, explicitly defines a word, that is the definition of the

word for purposes of that statute's administration. This Board cannot ignore the statutory and regulatory definition of construction to follow Philadelphia's suggestion that this word be given what Philadelphia suggests is its ordinary and common sense meaning. As pointed out at 1 Pa. C.S. 1921(a) and (b):

> (a) The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to all its provisions.
>
> (b) 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.

Clearly, by defining construction within Act 339 the Legislature has prevented this Board from pursuit of some alternative definition for this word in this appeal using the excuse that we do so to pursue Act 339's spirit.

Philadelphia's assertion that DEP's position thwarts the purpose of Act 339 is of course flawed by Philadelphia's failure to point out any error in DEP's definition of construction. Though we held above that Allegheny County Sanitary Authority v. DER, 1982 EHB 29 did not apply on one issue before us here, we agree with Philadelphia that Allegheny County Sanitary Authority v. DER, 1982 EHB 29 is correct in stating that the purpose of this statute is to permit payments to municipalities which construct municipal sewage treatment plants. However, this Act does not mandate payments from DEP based upon demand by an applicant. The statute and regulations limit what is eligible for subsidy,[13] how a subsidy is determined, and how an applicant makes

---

[13]A strong argument could be made that, were Allegheny County Sanitary Authority v. DER, 1982 EHB 29 to come before this Board today, a different result as to eligibility of costs of interceptor sewers might be reached under the current regulations which differ significantly from those in effect when the Allegheny County Sanitary Authority v. DER, 1982 EHB 29 appeal began.

application therefor. Philadelphia has clearly shown us that the regulations may be read two ways (as it does and as DEP does) but it has failed to show us DEP's interpretation is in error. It is not enough to state the Act's purpose to the Board and to say if Philadelphia's interpretation of statute and regulations is used, it provides the city with a greater subsidy. Philadelphia must show us DEP's interpretation of Section 103.26(b) is clearly erroneous or we will defer to it. See Twining Village v. Commonwealth, Department of Public Welfare, 105 Pa. Cmwlth. 227, 523 A.2d 1199 (1987). Philadelphia fails to make such a showing based on this evidence and these arguments.

Accordingly, the Board makes the following Conclusions of Law and enters the appropriate Order.

CONCLUSIONS OF LAW

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

2. Philadelphia bears the burden of proof as to its entitlement to a greater subsidy under Act 339 for the years 1989, 1990, 1991, and 1992.

3. DEP is required to comply with its own regulations.

4. Absent a showing that DEP's interpretation of its regulations is clearly erroneous or inconsistent with the regulation or Act 339, the DEP interpretation of the regulation must be given deference by this Board.

5. The interest paid by Philadelphia on bonds floated to construct treatment plant modifications in the period from the bond issuance date until completion of construction of the modification, (minus the interest earned by Philadelphia from investing the proceeds of the bond sales pending their expenditure), is a subsidizable expense. Since the parties agree that Act 339

and the regulations promulgated under it do not limit the rate of interest on which DEP is to pay a subsidy, DEP cannot artificially reduce the amount of interest during construction which is subsidizable but must subsidize based on the actual interest expense rate incurred.

6. Just because DEP has used a 1.5% interest expense rate on past Act 339 applications does not make use of this rate a DEP policy where the evidence establishes a DEP elected choice to apply this 1.5% cap to these applications and to, again, subscribe to the practice first used in the 1950's.

7. The doctrine of administrative finality does not bar Philadelphia's challenge to DEP's 1.5% cap on interest expense because here, DEP made a fresh decision to apply this cap to these applications albeit DEP's decision reached a conclusion identical to that reached in prior years as to the crop of applications then under consideration. Where DEP is arbitrary in selecting the percentage of Philadelphia's interest expense which it will subsidize, this Board may substitute its discretion for that of DEP.

8. A study of infiltration and inflow by Philadelphia is eligible for a subsidy under Act 339 because DEP's own manual for preparing municipal treatment plant specifications and designing such plants mandates consideration of infiltration and inflow rates in designing treatment plants and design is part of construction.

9. The cost to Philadelphia of preparation of a Plan of Operation of its treatment plants and of preparation of Manuals for both operation and maintenance were properly concluded to be ineligible for subsidy under Act 339 since they are not necessary to acquire or construct the treatment plants.

10. The fact that preparation of a Plan of Operation and O&M Manuals are requirements imposed on Philadelphia as grantee of federal funds administered by EPA under the Clean Water Act does not make the portion of the cost to prepare these documents not funded by the federal grant eligible for reimbursement under Act 339. The federal Clean Water Act grants help fund construction of municipal treatment plants but Act 339 does not fund such construction; rather it creates a subsidy to offset the cost of plant operation and maintenance with the subsidy amount being based on construction costs. Thus, the two statutes address different aspects of the total costs to build and operate a municipal STP.

11. Not all municipal expenditures on its treatment plant are included within Act 339 according to "Northampton Bucks County Municipal Authority v. Commonwealth, DER", 521 Pa. 253, 555 A.2d 878 (1989); it is Philadelphia's burden to prove that a DEP ineligibility determination as to a cost incurred by Philadelphia was in error. The fact that Philadelphia's engineer believes that preparation of a plan or these manuals is a standard practice in municipal treatment plant design fails to demonstrate that these expenditures are of the type included as eligible under Act 339.

12. The evidence that Philadelphia offered to show that it would not have been able to pay for these modifications to its treatment plants and thus that the grants were essential to finance the construction thereof, so that the cost of securing the grants (incurring the cost of the preparation of the plan and these manuals) is an Act 339 eligible item, did not rise to that level or show the financial impossibility of construction absent these grants under Comm., ex rel. Alessandroni v. Borough of Confluence, 427 Pa. 546, 234 A.2d 852 (1967).

13. Philadelphia's cost to create a spare parts storage warehouse was not an eligible cost under Act 339. Such a facility may be essential to operate and maintain the plant once it is in operation but the Act's subsidy is not based on operation and maintenance costs but on the costs to acquire and construct the treatment plant. Where a plant is modified, to be eligible under Act 339 the modification must be to the treatment process according to 25 Pa. Code §103.26(d)(1).

14. Based on the record DEP also properly concluded that modifications to the sludge gas storage tanks in the form of stairs and catwalks were not shown to be an Act 339 subsidy eligible cost but were costs to facilitate safe operation and maintenance of the treatment plant by Philadelphia's employees. Under 25 Pa. Code 103.26(d)(1), once Philadelphia's plant was in operation, only modifications to the treatment process are eligible to be includable within the subsidy.

15. The indirect costs incurred by Philadelphia are identical to the same types of costs incurred by a contractor building a treatment works for a municipality. Since DEP routinely allows a municipality, which pays such indirect costs by paying its contractor's bill, to include them as a construction cost in seeking an Act 339 subsidy, they are properly includable within the figure on which Philadelphia's Act 339 subsidy is calculated.

16. Philadelphia has failed to show that DEP's interpretation of 25 Pa. Code §103.26(b), as it applies to the ratio used by DEP to calculate the deduction of federal funds before determining the Act 339 subsidy, is clearly erroneous. A showing that there is another interpretation of this Act and these regulations which produces a greater subsidy for Philadelphia does not show an erroneous interpretation by DEP.

ORDER

AND NOW, this 13th day of February, 1996, it is ordered that Philadelphia's appeal is sustained as to the issues dealing with: (1) Interest Expense; (2) Indirect Costs incurred by Philadelphia; and (3) the eligibility of the costs to Philadelphia of the I&I study, but is denied as to the remainder of the issues raised by Philadelphia. Because we have sustained Philadelphia's appeal in part, it is ordered that this consolidated appeal is remanded to DEP to recalculate the subsidy for each plant in each year for which Philadelphia has appealed, in accordance herewith.

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Member

* Board Member Michelle A. Coleman did not participate in this decision.

DATED: February 13, 1996

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HARBISON-WALKER REFRACTORIES	:	
v.	:	EHB Docket No. 91-268-MJ
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	Issued: February 23, 1996

ADJUDICATION

By the Board

Synopsis:

DER has met its burden of proving that acid mine drainage from Harbison-Walker's mine site has degraded two nearby streams, and, therefore, we affirm that portion of DER's order requiring Harbison-Walker to submit a plan for the abatement of acid mine drainage flowing to the streams. We further uphold that portion of DER's order requiring Harbison-Walker to construct erosion and sedimentation controls and to conduct further reclamation at its site.

However, we find that DER failed to meet its burden of proving that a hydrogeologic connection exists between Harbison-Walker's mine site and two off-site acid mine discharges. Neither the expert testimony nor the circumstantial evidence presented by DER was sufficient to carry its burden of proof.

BACKGROUND

Harbison-Walker Refractories ("Harbison-Walker") filed this appeal on July 5, 1991, challenging an administrative order issued by the Department of

Environmental Resources ("DER")[1] on June 5, 1991. The order concerns a surface mine located in Stewart Township, Fayette County, known as the "Smith Mine," at which Harbison-Walker conducted surface clay mining operations.

The order alleged that Harbison-Walker caused and allowed unauthorized discharges of acid mine drainage from the Smith Mine to surface and subsurface waters; failed to reclaim, backfill, and revegetate certain areas of the site which it had mined and affected; and failed to construct and maintain adequate erosion and sedimentation controls, in violation of the Clean Streams Law; Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.*; the Non-Coal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §3301, *et seq.* ("Non-Coal Act"); the regulations promulgated thereunder; and the terms and conditions of Harbison-Walker's permits.

The order requires Harbison-Walker to collect and treat acid mine water flowing from certain discharges designated as the "A," "B," and "C" seeps, submit and implement a plan to improve the water quality of a nearby stream designated as Laurel Run and an unnamed tributary thereto, and complete reclamation of the mine site. In its Notice of Appeal, Harbison-Walker asserts, *inter alia*, that it has not caused or allowed any unauthorized discharges of industrial waste from the Smith Mine site, that it has not caused pollution to any surface waters, that it cannot be held liable for the B and C seeps since they are not located within Harbison-Walker's permitted area, that the Commonwealth of Pennsylvania, as current owner of the land on which the B and C seeps are located, is responsible for treating them, and, finally, that Harbison-

[1] Effective July 1, 1995, DER was reorganized and divided into two separate agencies: Department of Environmental Protection and Department of Conservation and Natural Resources.

Walker fully reclaimed all areas affected by it in accordance with its reclamation plan.

On June 24, 1992, Harbison-Walker entered into a Stipulation and Agreement ("the Agreement") which resolved certain issues related to the appeal of DER's order.[2] The Agreement set forth the manner and extent of reclamation and water treatment to be conducted by Harbison-Walker at the site in the event the Board determined Harbison-Walker to be liable for further reclamation at the site and treatment of the A, B, and C seeps. Pursuant to paragraph H(1) of the Agreement, the sole issue to be decided with respect to reclamation and treatment of the seeps is DER's authority to order Harbison-Walker to conduct further reclamation of the site and to treat the acid-mine seeps. Should the Board determine that DER did not abuse its discretion in ordering Harbison-Walker to treat the seeps and conduct further reclamation at the site, the parties agree that the manner and extent of reclamation and treatment set forth in the Agreement shall fulfill the requirements of DER's order.

The parties entered into a second stipulation entitled "Joint Stipulation" on March 31, 1993, which set forth facts, exhibits, and witnesses to which the parties stipulated. This document was filed with the Board on April 2, 1993.

A hearing was held before former Board Member Joseph N. Mack on April 19-23, May 3-7, July 26-28, and August 17, 1993. At the close of DER's case-in-chief, Harbison-Walker moved for a non-suit. Because a final order may not be entered by a single Board Member, but requires a majority of the Board, 25 Pa. Code §21.86, Harbison-Walker elected to proceed with its case-in-chief. Post-

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[2] Dresser Industries, Inc. ("Dresser") also was a party to the Agreement. Harbison-Walker was a division of Dresser at the time the Agreement was signed.

hearing briefs were filed by DER and Harbison-Walker on November 1, 1993, and December 27, 1993, respectively. DER submitted a reply brief on January 31, 1994, to which Harbison-Walker responded with a sur-reply brief, filed on February 10, 1994. Any arguments not raised by the parties in their post-hearing briefs are deemed to be waived. Lucky Strike Coal Co. v. DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).[3]

The record in this matter consists of the 14-volume transcript of the merits hearing, Board exhibits ("BE-___") to which both parties stipulated prior to the hearing, and numerous exhibits introduced by DER ("DER Ex.___"), and Harbison-Walker ("HW Ex.___"). The record also includes facts to which the parties stipulated as set forth in paragraph E of the Joint Stipulation ("J.S.___") and portions of the deposition of James A. King taken by Harbison-Walker on February 11, 1993. Former Board Member Mack having left the Board prior to the issuance of an adjudication in this matter, this adjudication has been prepared from a cold record. Lucky Strike, *supra*.

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[3] On June 7, 1994, Harbison-Walker filed a letter with the Board, enclosing copies of the following two decisions issued subsequent to the close of the briefing schedule: Benco, Inc. of Pennsylvania v. DER, 1994 EHB 168, and Kerrigan v. DER, ___ Pa. Cmwlth. ___, 641 A.2d 1265 (1994). Harbison-Walker contends that these decisions are relevant to issues involved in this appeal. Benco dealt with the issue of equitable estoppel, while Kerrigan addressed the issue of what constitutes "substantial evidence." In examining each of these decisions, we find that they do not represent a change in the law. In Benco, the Board relied on the Commonwealth Court's decision in Foster v. Westmoreland Casualty Co., 145 Pa. Cmwlth. 638, 604 A.2d 1131 at 1134 (1992) and the Board's earlier decision in Willowbrook Mining Co. v. DER, 1992 EHB 303, both of which were issued more than one year prior to the filing of Harbison-Walker's post-hearing brief in the present appeal. Likewise, in Kerrigan, the Commonwealth Court cited its earlier decisions in Newlin Corp. v. DER, 134 Pa. Cmwlth. 396, 579 A.2d 996 (1990), *appeal denied*, 527 Pa. 595, 588 A.2d 915 (1991), issued well before the filing of Harbison-Walker's post-hearing brief, and A. H. Grove & Sons, Inc. v. DER, 70 Pa. Cmwlth. 34, 452 A.2d 586 (1982), issued more than ten years earlier. Therefore, we do not read Benco and Kerrigan as representing changes in the law.

PROCEDURAL MATTERS

Before making our findings of fact in this appeal, we must first address Harbison-Walker's request for reconsideration by the Board of certain evidentiary rulings made at the hearing. Harbison-Walker argues that the Board Member who presided at the hearing erred in admitting two DER exhibits (DER Ex.JJJ and V), in failing to admit certain Harbison-Walker exhibits (HW Ex.92, 93, 101, and 118 through 123), and in precluding Harbison-Walker's expert in environmental science from testifying as to the magnitude of the reclamation required by DER's order. We shall examine each of these rulings below.

DER Ex.JJJ

DER Ex.JJJ is a map prepared by Neilan Engineers in January, 1952 which purports to show the extent of mining done by Harbison-Walker's predecessor, Union Firebrick. (T. 58-59, 64-65) The map is subject to the following stipulation by the parties set forth in section D of the Joint Stipulation:

> c. It shall be a rebuttable presumption that any document prepared before 1980 was prepared and maintained in the normal course of business and was not prepared in anticipation of litigation or in the course of litigation.

At the hearing, DER called Harbison-Walker's former mining supervisor, Charles Krey, to testify concerning the identity of DER Ex.JJJ and what it purported to represent. Mr. Krey testified that the map showed the contours of Union Firebrick's clay mining and the location of drill holes, but did not show all of the area disturbed by Union Firebrick by the removal of top strata. (T. 61) Mr. Krey stated that the map contained errors in elevation levels, which were off by 23 feet (T. 63, 65, 1164), but gave no indication that it did not accurately depict the extent of clay removal.

DER moved for the admission of DER Ex.JJJ based on the parties' Joint Stipulation. Harbison-Walker objected to the map's admission on the basis that Mr. Krey was unable to authenticate it and testify as to the accuracy of its data. The presiding Board Member admitted the map pursuant to the parties' Joint Stipulation, but subject to a rebuttable presumption "that some of it [is] inaccurate." (T. 149)

In its post-hearing brief, Harbison-Walker renews its objection to the admission of DER Ex.JJJ, on the basis that it constitutes hearsay. DER counters that the map is admissible under the business records exception to the hearsay rule.

Hearsay is a statement made by an out-of-court declarant offered for the truth of the matter asserted. C & K Coal Co. v. DER, 1992 EHB 1261, 1297 (citing Semievaro v. Com. Utility Equipment Corp., 578 Pa. 454, 544 A.2d 46 (1988). There is no question that the map constitutes hearsay, as it is a statement made by an out-of-court declarant, namely Neilan Engineers, offered by DER to show the extent of mining by Union Firebrick, as depicted on the map.

An exception to the rule against hearsay is set forth at 42 Pa. C.S.A. Section 6108, known as the Uniform Business Records as Evidence Act. This section states in relevant part as follows:

> **(b) General Rule.** A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information, method and time of preparation were such as to justify its admission.
>
> 42 Pa.C.S.A. Section 6108(b)

This rule was developed on the premise that a high degree of accuracy may be imputed to business records because of the regularity with which they are kept and the degree of accuracy placed on them by the entities keeping such records. L. Packel and A. Poulin, Pennsylvania Evidence 582 (1987).

Thus, according to the language of 42 Pa.C.S.A. Section 6108(b), in order for a document to qualify for the business records exception, three criteria must be met: 1) The custodian of the record or other qualified witness must testify to its identity and the mode of its preparation; 2) The record must have been made in the regular course of business at or near the time of the act, condition, or event in question; and 3) In the opinion of the tribunal, the sources of information, method, and time of preparation are such as to justify the document's admission.

Harbison-Walker argues that DER Ex.JJJ fails to qualify for the business records exception of 42 Pa.C.S.A. Section 6108(b) because DER offered no testimony as to the map's method of preparation or its source of data. DER counters that the parties' Joint Stipulation satisfies the requirements of the business records exception.

Unfortunately, it is not clear from the language of the Joint Stipulation whether the parties intended that all documents prepared prior to 1980, including DER Ex.JJJ, qualify as business records under 42 Pa.C.S.A. Section 6108(b). The Joint Stipulation states only that such documents were prepared in the normal course of business. Preparation in the normal course of business is only one of the criteria which must be met in order for a document to qualify under the business records exception to the hearsay rule, as noted above. In addition, there must be authenticating testimony by the custodian of the document or other qualified witness as to the document's preparation so as

to justify a presumption of trustworthiness. Gulf Oil Corp. v. Delaware County Board of Assessment Appeals, 88 Pa. Cmwlth. 341, 489 A.2d 323-324 (1985); D. Binder, Hearsay Handbook 233 (3d ed.).

At the hearing, in response to questioning by the presiding Board Member as to what was intended by the parties' Joint Stipulation, counsel for Harbison-Walker stated as follows:

> Our stipulation, Your Honor, is that with respect to any document that was generated prior to 1980, we have a rebuttable presumption that it was generated as a business record. But as I said the business record doctrine does not extend to the truth of the statements. There are a lot of documents that I think will stand for the proposition that something was said or stated.
>
> (T.145-146) (emphasis added)

He then explained that Harbison-Walker's objection was not that the document was not a business record but that it contained inaccuracies. Based on this exchange, the presiding Board Member admitted the map as a business record exception to the hearsay rule, subject to a rebuttable presumption that the map contained inaccuracies. (T.149)

We affirm the ruling of the presiding Board Member in admitting DER Ex.JJJ, subject to a rebuttable presumption that the map contained errors. Pursuant to the parties' Joint Stipulation, as articulated by counsel at the hearing, the map was admissible as a business record exception to the hearsay rule. Therefore, Harbison-Walker may not now assert that the map fails to qualify as a business record. As for the contention that the map contains inaccuracies, these inaccuracies involved elevation levels at the site, and not the dimensions of Union Firebrick's clay removal. There is nothing in the record which indicates that the map does not accurately depict the extent of Union

Firebrick's clay extraction. Therefore, we accept DER Ex.JJJ as evidence of the extent of Union Firebrick's clay extraction.

DER Ex.V

DER Ex.V is a composite map prepared from several sources, including DER Ex.JJJ. Harbison-Walker's sole objection to the admission of DER Ex.V is its contention that DER Ex.JJJ is inadmissible and, therefore, any map generated from it is similarly inadmissible. Because we find DER Ex.JJJ to be admissible, Harbison-Walker's objection to DER Ex.V is without merit. As Harbison-Walker has aised no other objection to DER Ex.V in its post-hearing brief, any other objections to this exhibit are deemed waived. Lucky Strike Coal Co. v. DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

HW Ex.92, HW Ex.93, HW Ex.101

HW Ex.92, HW Ex.93, and HW Ex.101 are internal DER memoranda which Harbison-Walker asserts demonstrate that DER unconstitutionally commingled investigatory, prosecutorial, and adjudicatory functions.

HW Ex.92 is a memorandum dated June 27, 1988 from C. R. Greene, Inspector Supervisor with DER's Bureau of Mining and Reclamation, to James Brahosky, Acting District Mining Manager. The memorandum summarizes events which had taken place and which were yet to occur with respect to the Smith Mine. The memorandum discusses the drilling of test holes to be done by Harbison-Walker in the vicinity of the Group B and C discharges and states in relevant part as follows:

> We believe that after the drilling is conducted, we will be able to hold Harbison-Walker at least responsible for the Group B discharges. Group C discharges may not be the responsibility of the company.

Harbison-Walker sought the admission of HW Ex.92 at the hearing on the grounds that it expressed prejudice on the part of Mr. Greene as to Harbison-

Walker's liability for the discharges. The presiding Board Member ruled the document inadmissible on the basis of relevancy, holding that the document did not show bias, but was simply an internal memorandum exploring possible outcomes with respect to the Smith Mine site and containing temporary opinions. (T. 1342)

We find that HW Ex.92 was properly excluded on the basis of relevancy. The memorandum does not, as Harbison-Walker asserts, show prejudice on the part of DER with regard to the question of Harbison-Walker's liability for the discharges at the Smith Mine site. Rather, the memorandum merely sets forth DER's plan to conduct additional drilling at the site and expresses DER's belief that the testing would show Harbison-Walker to be liable for the seeps. This language cannot be construed as indicating that DER intended to hold Harbison-Walker liable for the seeps regardless of the results of additional testing. This is evident in the last line of the memorandum, which acknowledges that the "Group C discharges may not be the responsibility of the company." (Emphasis added) Therefore, we conclude that HW Ex.92 was properly excluded on the basis of relevancy, and we affirm the ruling of the presiding Board Member.

Harbison-Walker next contends that the sitting Board Member erred in excluding HW Ex.93 from evidence. HW Ex.93 is an internal DER memorandum dated August 4, 1988 from Monitoring and Compliance Manager, John Matviya, to James Brahosky, summarizing a July 27, 1988 meeting held between representatives of DER and Harbison-Walker, including counsel for both sides. Among the topics discussed at the July, 1988 meeting was an abatement order which had been issued by DER, requiring treatment and/or abatement of the seeps and reclamation of the site. At the meeting, Harbison-Walker presented a proposal to resolve the issue of abatement of the seeps. HW Ex.93 discusses the terms of Harbison-Walker's

proposal, as well as Mr. Matviya's opinion as to why the proposal should be rejected.

DER objected to admission of the memorandum into evidence on the grounds of relevancy and on the grounds that it contained settlement discussions. The presiding Board Member sustained DER's objection on the basis that the document contained settlement discussions which were inadmissible.

We affirm the ruling of the presiding Board Member. Harbison-Walker's proposal for abatement of the seeps at the site and Mr. Matviya's rejection thereof falls into the category of settlement negotiations, which are inadmissible in Pennsylvania. George W. Yeagle v. DER, 1990 EHB 469, 470-71 (citing Rochester Machine Corp. v. Mulach Steel Corp., 498 Pa. 545, 449 A.2d 1366, 1369-70 (1982)).

Finally, Harbison-Walker argues that the sitting Board Member erred in excluding HW Ex.101 from evidence. HW Ex.101 is an internal DER memorandum dated June 12, 1989 from Inspector Supervisor C. R. Greene to District Mining Manager, James Brahosky, documenting a meeting between Harbison-Walker and DER held on June 6, 1989 at the office of Harbison-Walker's counsel. The memorandum discusses the Board's denial of supersedeas with respect to an order issued by DER for Harbison-Walker to conduct a study of the seeps.[4] The memorandum further discusses the action which DER intended to take should Harbison-Walker fail to comply with the order.

At the hearing, Harbison-Walker sought to introduce the memorandum on the grounds that it allegedly demonstrated that DER already believed, prior to the study, that Harbison-Walker was liable for the seeps and, thus, went to the issue of abuse of discretion. DER objected to the document's admission on

[4]The date of the study order is not referenced in the memorandum.

the basis that it concerned an order not at issue in this appeal, that the study referenced in the memorandum was completed, and, finally, that the memorandum contained settlement discussions. The presiding Board Member ruled the memorandum to be inadmissible on the basis of relevancy.

We agree that HW Ex.101 is not relevant and was properly excluded from evidence. The memorandum does not demonstrate bias or unfairness on DER's part, as Harbison-Walker asserts. Rather, the memorandum simply states what actions DER intended to take in the event Harbison-Walker did not comply with the study order. Since Harbison-Walker's request for supersedeas had been denied, it was under a legal obligation to comply with the order. Thus, it was not unfair or prejudicial for DER to consider what courses of action it would take should Harbison-Walker fail to comply.

Because we find nothing in HW Ex.101 which would tend to show an abuse of discretion by DER, we find this document to be properly excluded from evidence, and we affirm the ruling of the presiding Board Member.

HW Ex.118-123

HW Ex.118 through 123 are a series of structure contour and potentiometric surface maps which were offered by Harbison-Walker in connection with the testimony of its expert witness, geologist Robert Bellamy. DER objected to the maps' admission on the grounds that they were based on a limited amount of data and were unreliable. The presiding Board Member sustained DER's objection (T. 1834, 1837-38), noting that there was no drill information or surveyed information for portions of several of the maps and they were based on pure "guesstimate." (T. 1778-79)

Harbison-Walker further asserts that any question DER has raised regarding the maps' creation should go to the weight to be afforded Mr. Bellamy's

testimony and not to exclude the maps as evidence. In support of its argument, Harbison-Walker relies on the Board's decision in Al Hamilton Contracting Co. v. DER, 1993 EHB 1651 ("Al Hamilton I"). In that appeal, the appellant argued that hydrologic gradients produced by DER's expert were invalid because there were not enough data points in the area of the discharges. The Board overruled the appellant's objection, stating, "While there are few data points in that area, we accept [DER's expert's] ability, based on his education and experience, to extrapolate these hydrologic gradients from the information he had." *Id.* at 1710. Harbison-Walker contends that we are faced with a similar situation here, where it was necessary for Mr. Bellamy to use his expertise to extrapolate certain data based on the information available.

However, as DER points out in its reply brief, the Board allowed the expert in Al Hamilton I, 1993 EHB 1651, to extrapolate in only one small area of the map. Further, the Board was satisfied that the expert had sufficient data upon which to base his extrapolations. In the present case, the presiding Board Member determined that there was insufficient data from which to extrapolate.

In reviewing the transcript and the exhibits in question, we agree with the ruling of the presiding Board Member. DER's voir dire with respect to HW Ex.118 through 123 established that the maps, in fact, were based more on estimations than on actual data. Based on this, we cannot say that Harbison-Walker satisfied its burden of establishing that the maps accurately represent what they purport to represent. Al Hamilton Contracting Co. v. DER, ___ Pa. Cmwlth. ___, 665 A.2d 849, 855 (1995) ("Al Hamilton II").

Harbison-Walker claims in its post-hearing brief that the maps were offered, not as demonstrative evidence, but merely to assist in illustrating Mr. Bellamy's testimony. However, this assertion is not supported by the record.

For instance, Mr. Bellamy identified HW Ex.118 as depicting the structural top of the Homewood sandstone and the approximate outcrop of its top. (T. 1496) He identified HW Ex.119 as a potentiometric map of the Homewood Sandstone aquifer which was prepared for his report and which was used to produce an overlay of the same. (T. 1526) He identified the remaining maps in similar fashion, not merely as an aid in illustrating his testimony but as depicting certain information. Based on this, we cannot agree with Harbison-Walker's claim that the exhibits were not offered as demonstrative evidence since they were, in fact, used for that purpose. Moreover, even if the maps were introduced merely to depict Mr. Bellamy's testimony, where the maps are based on inadequate data, they are of questionable assistance to the Board.

Therefore, we conclude that the presiding Board Member did not err in excluding HW Ex.118 through 123 from evidence, and we affirm his ruling.

Testimony of Dr. Gonsoulin

Finally, Harbison-Walker asserts that the sitting Board Member erred in excluding Dr. Gonsoulin's testimony as to reclamation work performed at the Smith Mine site by Harbison-Walker pursuant to the parties' Agreement. At the hearing, DER objected to this testimony on the basis that it was not germane to any of the issues of the case since the parties had stipulated to what reclamation work was to be done at the site. Harbison-Walker asserts that Dr. Gonsoulin's testimony was offered, not to challenge the appropriateness or technical propriety of the reclamation work to which the parties stipulated under their Agreement, but, rather, as evidence that DER exceeded its authority in requiring any further reclamation at the site.[5]

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[5] As noted earlier herein, Harbison-Walker retained its right to challenge whether DER had exceeded its authority in requiring <u>any</u> reclamation at the site, but agreed not to challenge the specific work required by DER if it was

Again, however, there is a contradiction between Harbison-Walker's stated purpose and apparent purpose in introducing Dr. Gonsoulin's testimony. Although Harbison-Walker states that it did not intend to challenge the technical propriety of the reclamation work through Dr. Gonsoulin's testimony, that, in fact, appears to be its purpose. In discussing the extent of Dr. Gonsoulin's proposed testimony in its post-hearing brief, Harbison-Walker states as follows:

> ...Dr. Gonsoulin's testimony would have shown that DER abused its discretion with regard to the ordered reclamation because the reclamation required Harbison-Walker to destroy established vegetation. The destruction of established vegetation resulted in more serious erosion at the site and caused unnecessary environmental harm....

It is apparent that Harbison-Walker is not simply seeking to challenge whether DER had the authority to require reclamation of the site, but also the exact nature and effect of the specific reclamation work required by DER.

Moreover, the specific testimony to which DER objected at the hearing concerned reclamation work which had occurred at the site pursuant to the Agreement.[6] Because the specific reclamation work to be performed at the site is covered by the parties' Agreement, this is not relevant to the issues raised in this appeal. Thus, Dr. Gonsoulin's testimony as to the reclamation work which had been performed at the site as of the date of the hearing would have served no purpose in helping to resolve the issues involved in this appeal. Therefore, we affirm the ruling of the presiding Board Member in excluding any testimony by

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subsequently determined that DER had not exceeded its authority.

[6] The question posed to Dr. Gonsoulin at the time counsel for DER voiced his objection was as follows: "Dr. Gonsoulin, I would like...to ask you to describe what has occurred at the site under the Stipulation?" (T. 2077)

Dr. Gonsoulin as to the actual reclamation work performed or to be performed at the site.

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

FINDINGS OF FACT

1. The Appellant is Harbison-Walker Refractories, a division of INDRESCO, Inc., a corporation organized and existing under the laws of the State of Delaware, with its principal offices in Dallas, Texas. Harbison-Walker was previously a division of Dresser Industries, Inc., a corporation organized and existing under the laws of Delaware, with its principal offices in Dallas, Texas. Harbison-Walker has a mailing address of One Gateway Center, Pittsburgh, Pennsylvania 15222. (J.S. 2)

2. The Appellee is DER (now the Department of Environmental Protection), the agency of the Commonwealth with the authority to administer and enforce the Clean Streams Law, *supra*; the Non-Coal Act, *supra*; the Surface Mining Conservation and Reclamation Act ("Surface Mining Act"), Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §1396.1 *et seq.*; and the regulations promulgated thereunder. (J.S. 1)

3. Harbison-Walker is licensed to conduct surface mining operations in Pennsylvania pursuant to License No. 100266. (J.S. 3) Harbison-Walker previously conducted surface mining operations pursuant to License No. 266-69. (J.S. 3)

Geography of Area

4. The Smith Mine sits in the Allegheny Mountain section of the Appalachian Plateau. (T. 189)

5. The Smith Mine is bounded on the north by an unnamed tributary to Meadow Run, referred to as the "Backside Tributary," on the west by Laurel Run, on the south by an unnamed tributary to Laurel Run designated Unnamed Tributary C ("Tributary C"), and on the east by a topographic divide.[7] (T. 186, 269)

6. Laurel Run is a tributary to Meadow Run. (T. 370)

7. Meadow Run is classified as a cold water fishery. (J.S. 20) Laurel Run is classified as a high quality cold water fishery. (J.S. 19)

Geology of the Smith Mine Site

8. The lowest geologic horizon underlying the Smith Mine site is the Homewood sandstone. (T. 1533)

9. Immediately above the Homewood sandstone lies carbonaceous shale, approximately one and one-half to two feet in thickness. (T. 1534)

10. Directly above the shale lies the Brookville coal seam, one-half foot in thickness. (T. 1534)

11. Above the Brookville seam are the following layers: approximately five feet of clay and silty shale; one-half foot of coal "stringer," *i.e.*, coal which is not part of a main seam; and one and one-half to two feet of black shale. (T. 1534)

12. Directly above the black shale lies the Clarion coal seam. (T. 1534-1535)

13. Three to four feet of sandy silt and clay lie above the Clarion coal, followed by residual soil. (T. 1551)

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[7] The transcript states that the site is bounded on the "north" by a topographic divide. We believe this to be a transcription error.

14. Strike and dip are measures of the inclination of a plane space. "Strike" is where a geologic unit would intersect with a horizontal plane if a plane were present. "Dip" is the direction that the plane or strata is inclined. (T. 195)

15. The strike of the Smith Mine is approximately 15 degrees east with a dip of approximately 6% to the northwest. (T. 196)

History of Smith Mine Site

16. Prior to Harbison-Walker's mining operations, Union Firebrick Company ("Union Firebrick") mined clay at the Smith Mine by the surface mining method. (J.S. 5)[8]

17. Union Firebrick conducted surface mining at the Smith Mine pursuant to a lease with the owners of the property, the Brackett A. Smith family. (J.S. 7)

18. DER Exhibit JJJ is a map prepared by Neilan Engineers in 1952 ("the Neilan map"). (T. 142)[9]

19. The Neilan map shows the extent of Union Firebrick's strip mining, with the exception of the outslope of the spoil left by Union Firebrick's mining. (T. 1177)

20. There are inaccuracies in the elevations shown on the Neilan map. The elevations shown on the Neilan map are 23 feet higher than the actual elevation. (T. 1165, 1176) The record does not indicate that the Neilan map contains any errors in its depiction of the contour of Union Firebrick's clay extraction.

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[8] The record does not show the exact time period during which Union Firebrick mined the site, except to indicate that it was prior to the commencement of Harbison-Walker's mining in 1954.

[9] "T.___" refers to a page from the transcript of the merits hearing.

21. In 1954, Union Firebrick was liquidated, and the Smith Mine lease was assigned to R. Green Annan. (J.S. 8)

22. In May 1954, Mr. Annan assigned the Smith Mine lease to Harbison-Walker. (J.S. 9)

23. On May 1, 1962, Harbison-Walker released, surrendered, quitclaimed, and discharged all of its right, title, interest and estate in and to the Smith Mine site, except for an area containing 576 acres, more or less. (BE-15)

24. On May 2, 1963, the Commonwealth of Pennsylvania acquired the deed to certain tracts of land located in Stewart Township, Fayette County, which included the land subject to the Smith Mine lease. (BE-16)

25. On June 11, 1992, Harbison-Walker released, surrendered, quitclaimed, and discharged unto the Commonwealth of Pennsylvania all of its remaining right, title, interest and estate in the Smith Mine site. (BE-17)

26. The Smith Mine is located within the current boundaries of Ohiopyle State Park. (J.S. 17)

Harbison-Walker's Mining Operation

27. Between 1954 and 1972, Harbison-Walker extracted clay at the Smith Mine site by the surface mining method. (T. 51, 72, 78)

28. Harbison-Walker was issued Industrial Waste Permit No. 2037 in 1960. (T. 864)

29. On September 12, 1969, Harbison-Walker applied for a mining permit covering two non-contiguous parcels of land at the Smith Mine site. Mining Permit ("MP") No. 266-3 was issued on December 15, 1969 covering 22.1 acres. (J.S. 28)

30. A "mining permit" outlines the area where an operator is permitted to conduct mining activities. (T. 870)

31. On November 23. 1969. Harbison-Walker was issued an amendment to its mining permit. designated MP No. 266-3A. adding 5.8 acres to the area it was permitted to mine. (J.S. 29)

32. Harbison-Walker was issued another amendment to its mining permit. designated MP No. 266-3A2. which authorized it to conduct mining in the area behind Hill No. 2 at the Smith Mine site. (T. 871) However. no mining was ever conducted in this area. (T. 871)

33. On September 15. 1969. Harbison-Walker applied for a mine drainage permit to cover 200 acres at the Smith Mine site. (BE-6)

34. On November 26. 1969. Mine Drainage Permit ("MDP") No. 2969BSM24 was issued to Harbison-Walker. (BE-6)

35. The MDP covered only 45 acres but did not specify the portion of the site covered by it. (BE-6)

36. In 1971. an amendment to the MDP was issued to Harbison-Walker to add 231 acres to the original area covered by the MDP. (T. 865)

37. A "mine drainage permit" is issued in connection with the drainage of water discharging from a mine site and may cover an area made up of several mining permits. (T. 870)

38. Harbison-Walker disturbed the Lower Kittanning unit for clay. (J.S. 12; T. 200) The Lower Kittanning clay unit is located below the Lower Kittanning coal seam and above the Clarion coal seam. (J.S. 12)

39. Harbison-Walker encountered coal during its clay removal. (T. 95)

40. Harbison-Walker did not preserve or store topsoil which it encountered during clay extraction. (T. 95)

41. Areas affected by Union Firebrick's mining were reaffected by Harbison-Walker. (T. 689)

42. Harbison-Walker ceased active clay extraction in 1972. (J.S. 17)

43. Since 1972, Harbison-Walker has removed and sold clay from stockpiles remaining at the site. (T. 1435-1436)

44. Harbison-Walker personnel or contractors have operated water treatment facilities at the Smith Mine site on a continuous basis since 1960. This has included water treatment, sludge handling, and sludge disposal. (J.S. 31)

Other Mining in the Area

45. Kaiser Minerals and Chemicals, Inc. ("Kaiser") mined coal and clay at a surface mine, known as the Potato Ridge Mine or Kaiser Mine, located to the south-southeast of Harbison-Walker's mine. (J.S. 14; T. 194)[10]

46. There is no evidence that any deep mining took place in the vicinity of the Smith Mine. (T. 75, 201)

DER's Administrative Order

47. On June 5, 1991, DER issued to Harbison-Walker an administrative order ("order") which is the subject of this appeal. (J.S. 34)

48. DER's order requires Harbison-Walker to collect and treat acid mine drainage from certain seeps, designated as the "A seeps," "B seeps," and "C seeps"; to submit a plan for the abatement of acid mine drainage flowing from the

[10] The record does not clearly indicate when mining took place.

Smith Mine to Laurel Run and Tributary C. and to reclaim certain areas of the Smith Mine site. (BE-4)

Conditions at the Site

49. Acid mine drainage is characterized by high acidity, a depressed pH level, elevated sulfates, and elevated metal concentrations (typically iron, manganese, and aluminum). (T. 327)

50. Factors which determine whether a surface mine has the potential for the production of acid mine drainage include the presence or absence of pyrite,[11] the presence or absence of calcareous materials,[12] and the operational characteristics of the mine. (T. 327)

51. The following factors affect the magnitude of acid mine drainage production at a surface mine: the amount of pyrite or calcareous material which is present, the amount of water moving through the mine site, and the length of time spoil is allowed to sit and oxidize.

52. The following factors at the Smith Mine site are conducive to the formation of acid mine drainage: the widespread presence of secondary compounds which form after the oxidation of pyrite; the presence of pieces of coal and black shale in the spoil material; and the absence of limestone or other calcareous materials. (T. 329, 330-331, 334)

53. Harbison-Walker's mining at the Smith Mine had the potential for the formation of acid mine drainage: Mining took place in overburden that had the potential to produce acid mine drainage, as evidenced by sulfur analyses in the coal, and the spoil sat for long periods of time and was allowed to

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[11] Pyrite is a naturally-occurring mineral in iron disulfide. (T. 327)

[12] A calcareous material is one which contains calcium or calcium carbonate. Webster's Ninth New Collegiate Dictionary, 196 (1989).

oxidize, causing its potential to produce acid mine drainage to be realized. (T. 432-433)

54. Groundwater at the Smith Mine site exhibits the effects of acid mine drainage, based on groundwater samples taken from monitoring wells at the site. (T. 418, 434; BE-3, Tab. F)

55. Groundwater samples taken from the area known as Hill No. 2 are representative of background water quality for the Smith Mine site since no mining took place at this location. (T. 335)

56. Groundwater in the area of Hill No. 2 does not exhibit the effects of acid mine drainage, based on water samples taken in this area. (T. 787)

57. Acid mine drainage is present at the Smith Mine site both on and off the bonded area and near the toe of spoil. (T. 763)

Degradation to Laurel Run and Tributary C

58. Stephen Kepler is a fisheries biologist with the Pennsylvania Fish and Boat Commission ("Fish Commission"). (T. 806)

59. In this capacity, he reviews, *inter alia*, non-coal surface mining permits through field review and sampling. (T. 808) His reviews have included determining the pollutional effects of acid mine drainage on aquatic communities. (T. 809)

60. The parties stipulated to Mr. Kepler's qualifications as an expert in fisheries biology. (T. 806-808; J.S., p.2)

61. Acid mine drainage affects benthic macroinvertebrate life in a stream either by acute toxicity from the depositing of metal precipitates or by depressing the pH level of the stream. (T. 809)

62. Acid mine drainage affects fish life in a stream in the following ways: It may result in acute toxicity from the elevated metal concentrations; it may depress the pH level of the stream; it may cause the loss of other interdependent organisms within the stream system. (T. 809)

63. Based on research and testing, the Fish Commission has set the following standards for aluminum levels in a stream for the protection of fish life: 0.6 milligrams per liter ("mg/l") for pH levels below 6.0, and 0.7 mg/l for pH levels greater than 6.0. (T. 810)

64. When pH levels fall below neutral levels, this may result in toxicity to fish. (T. 810)

65. In 1982, Mr. Kepler performed a watershed study in the vicinity of the Smith Mine. The purpose of the study was to evaluate the sensitivity of the watershed in connection with a proposed permit application for a coal mining operation to be conducted upstream of the Smith Mine along Laurel Run. (T. 812, 816)

66. As part of the 1982 study, Mr. Kepler sampled at various locations on Laurel Run. (T. 816)

67. Sampling along Laurel Run at points upstream of the Smith Mine showed a healthy aquatic community with numerous benthic macroinvertebrates and a healthy population of brook trout and brown trout. (T. 819)

68. The sampling station on Laurel Run immediately downstream of the Smith Mine showed a depressed aquatic community and a degraded stream system. (T. 819-820)

69. Based on the degradation occurring in the lower watershed, the Fish Commission recommended that no mining be approved in the upper watershed. (T. 820)

70. In 1991, at the request of DER, Mr. Kepler performed an aquatic study of the Laurel Run watershed. (T. 811, 820)

71. As part of the 1991 study, Mr. Kepler performed qualitative sampling of benthic macroinvertebrates at various locations along Laurel Run, Tributary C, and the Backside Tributary. (T. 821-824)

72. Sampling Station LR-01 was located on Laurel Run, upstream of its confluence with Tributary C. (T. 821-822) This location is upstream of the Smith Mine. (T. 821)

73. Sampling Station LR-02 is located on Laurel Run, upstream of its confluence with Meadow Run and downstream of the seep area. (T. 822)

74. Sampling Station UNT-01 is located on Tributary C near the location of Harbison-Walker's upper haul road. (T. 821; DER Ex. V) This location was chosen by Mr. Kepler as an area which had not been impacted by mining. (T. 822)[13]

75. Sampling Station UNT-02 is located on Tributary C directly below the point at which discharges from the Smith Mine site would enter the stream. (T. 821-822; DER Ex. V)

76. Sampling Station UNT-03 is a sampling point on the Backside Tributary. This station was chosen as being representative of the water quality prior to any effects of mining and as having a watershed comparable in size to that of Tributary C. (T. 822-823)

77. Stations UNT-01 and UNT-03 exhibited the highest numbers of benthic macroinvertebrates. (T. 827)

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[13] On page 822 of the transcript, this sampling point is incorrectly referred to as "LR-01."

78. Station LR-01 also had a relatively high number of benthic macroinvertebrates (T. 827). but not as high as Mr. Kepler would expect to find upstream of the mine site. (T. 847)

79. Stations UNT-02 and LR-02 had depressed benthic macroinvertebrate communities. (T. 827)

80. During his sampling, Mr. Kepler observed the lower portion of Tributary C at Station UNT-02 coated with iron precipitate. (T. 828)

81. Based on his 1991 investigation, Mr. Kepler concluded to a reasonable degree of scientific certainty that discharges from the Smith Mine site have degraded aquatic communities in Laurel Run and Tributary C. (T 835)

82. Mr. Kepler bases his conclusion on the strong population of benthic macroinvertebrates in the portions of Laurel Run and Tributary C located upstream of the Smith Mine and the depressed aquatic communities found downstream of the site. (T. 836)

83. DER hydrogeologist Scott Roberts has observed drainage from the toe of spoil on the Harbison-Walker site entering Tributary C. (T. 406)

84. Mr. Roberts has observed white staining, representative of aluminum precipate. just below Laurel Run's confluence with Tributary C. (T. 407-408)

85. The Backside Tributary exhibits no effects of acid mine drainage. Its water quality is characterized by low sulfates, low metal concentrations, and some alkalinity. (T. 410-411)

Groundwater Flow

86. Groundwater flows from areas of high fluid potential to areas of low fluid potential. "Fluid potential" is the amount of potential energy developed by the mass itself. (T. 375)

87. The rate and direction of groundwater flow is dependent on the porosity, permeability, and conductivity of the material through which the groundwater is flowing.[14] (T. 375-376)

88. "Primary porosity" occurs through actual pores or voids in the material. (T. 376)

89. "Secondary porosity" occurs through fractures, large voids, or cavities in the material. (T. 376)

90. Surface mining can affect groundwater flow in the following ways: It can change the porosity and permeability by replacing rock with spoil. t can remove hydrologic barriers. It can change the chemistry of groundwater and cause shifts in recharge divides. (T. 379)

91. "Hydraulic conductivity" is the property of a porous media to transmit water. (T. 1509)

92. An "aquifer" is a subsurface confining unit which has sufficient permeability to allow water to flow through it. Lee, *supra* at 32.

93. At the Smith Mine site, there is an aquifer associated with the Clarion coal seam and the Homewood sandstone. (T. 380)

94. The aquifer associated with the Lower Kittanning coal seam no longer exists at the Smith Mine since the mining of the Lower Kittanning clay seam. To reach the Lower Kittanning clay, Harbison-Walker had to disturb the Lower Kittanning coal seam, and, thus, any aquifer associated with it would have been removed. (T. 381-383)

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[14] "Porosity" defines the amount of water a saturated material can contain. "Permeability" reflects the qualitative rate at which liquids pass through soil or other material in a specified direction. "Hydraulic conductivity" is similar to permeability, except that it reflects the rate of flow in a quantitative sense. C.C. Lee, Environmental Engineering Directory 385, 405.

95. There is a man-made aquifer associated with the mine spoil at the Smith Mine site. (T. 384-385)

Seeps

96. A "seep" is a surface manifestation of groundwater. (T. 336)

97. Some or all of the seeps designated as the "A seeps" are located within the area disturbed by Harbison-Walker's mining activity on the western portion of the site near the area where a dam and surge pond originally existed. (BE-4; T. 337)

98. The A seeps developed after the site was graded, in or about 1972. (T. 340)

99. Water flowing from the A seeps exhibits characteristics of acid mine drainage: depressed alkalinity and pH level, elevated acidity, and elevated metals, and sulfates. (J.S. 22)

100. Water from the A seeps is treated by Harbison-Walker (T. 360) and has been since 1960. (T. 1189)

101. The seeps designated as the "B seeps" are located to the west of the main area of the site (T. 340), off the permit area. (DER Ex. V)

102. The B seeps appear on a map included with Harbison-Walker's permit application in 1969. (T. 345)

103. There is no indication of the B seeps in an aerial photograph of the site taken in 1959. (T. 345)

104. During a visit to the site in April 1965, Terry Livingston, then a water pollution control specialist with the Department of Health, observed no seeps in the area where the B seeps are now located. (T. 149-150, 159-160)

105. Water flowing from the B seeps exhibits characteristics of acid mine drainage: depressed alkalinity and pH level, elevated acidity, and elevated metals and sulfates. (J.S. 23)

106. Water from the B seeps flows untreated into Laurel Run. (J.S. 26; T. 361)

107. The C seeps are located in clusters along the southern edge of the mine site. (T. 346; DER Ex. V) The C seeps are located off the permit area. (DER Ex. V)

108. One cluster of the C seeps appears in a 1991 photograph taken by DER. (T. 346)

109. Water flowing from the C seeps exhibits characteristics of acid mine drainage: depressed alkalinity and pH level, elevated acidity, and elevated metals and sulfates. (J.S. 25)

110. Prior to DER's order, water from the C seeps flowed into Tributary C. Following the order, Harbison-Walker now treats the water from the C seeps, and it follows the same path as the A seeps. (T. 361)

DER's Hydrogeologic Study

111. J. Scott Roberts is a hydrogeologist with DER's Bureau of District Mining Operations, Greensburg District. (T. 174)

112. Mr. Roberts holds a Bachelor of Science degree in geology from the University of Pittsburgh. (T. 178)

113. He has participated in in-house training courses provided by DER, including hydrogeologist training, principles of hydrogeology and mining, and mining-related courses presented by the U.S. Department of the Interior's Office of Surface Mining ("OSM"), as well as a continuing education course in

fundamentals of mining presented by the Pennsylvania State University. (T. 179-180)

114. In addition, Mr. Roberts teaches two workshops for OSM which deal with acid-forming materials. (T. 181-182)

115. Mr. Roberts was permitted to testify as an expert in hydrogeology. (T. 185)

116. Mr. Roberts conducted a study of the Smith Mine site for DER from January to April 1991. (T. 187)

117. The purpose of DER's study was to examine the A, B, and C seeps and assess their connection, if any, to the mining activities at the Smith Mine site. (T. 187)

118. As part of the study, Mr. Roberts reviewed the following materials: DER files, report prepared by Environmental Management and Engineering in August 1990, results of water samples taken at the site, standard texts on hydrogeology and geology, and standard geologic references for Fayette County. (T. 187) He also reviewed aerial photographs from the Pennsylvania Geologic Survey Library and information from Neilan Engineers regarding the Union Firebrick operation. (T. 188)

119. Mr. Roberts also conducted visits to the site as part of his study. During the site visits, he took measurements of fractures and joints and measured water levels in piezometers and monitoring wells. (T. 188)

120. Mr. Roberts observed fractures on the Smith Mine site; one set roughly parallel to the strike, one set roughly parallel to the dip, and a third set at an angle bisecting the strike and dip. (T. 197)

121. Mining generally results in an expansion of fractures caused by the unloading of material from the pit floor and the removal of overburden from the highwall. (T. 197)

122. The existence of fractures affects both the rate and direction of groundwater flow. (T. 199)

123. Approximately 20 to 30 feet of shale exists between the Clarion aquifer and mine spoil aquifer. (T. 2211)

124. It is Mr. Roberts' opinion that secondary porosity, *i.e.*, fractures in the shale, has allowed the two aquifers to come together. (T. 2212)

125. Because the shale is not visible, DER could provide no physical evidence of fracturing in the shale. (T. 2212)

126. Piezometers were set up at the site in the mine spoil aquifer. (T. 735)

127. Monitoring wells were set up at three levels at the site: the Homewood aquifer, the Clarion aquifer, and the mine spoil aquifer. (T. 735)

128. Monitoring wells ("MW") 1, 2A, and 4A through 8A monitor the Homewood aquifer. (T. 474, 531, 569-570, 573-574, 1438-1439; DER Ex. V)

130. Monitoring well ("MW")-1 is located upgradient of the area of mining (T. 335, 474, 531)

129. The pH readings at MW-1 during DER's three-month study were 5.8 on December 7, 1989; 3.8 on January 11, 1990; and 4.5 on February 27, 1990. (BE-3, Attachment ("Att.") 5) The reading of 3.8 on January 11, 1990 is acidic. (T. 532)

130. MW-2A is a second upgradient well for the Homewood aquifer. (T. 1438-1439) MW-2A is located to the west of MW-1 in the direction of the bonded area of the mine site. (DER Ex.V) The pH readings at MW-2A were 5.9 on

December 7, 1989, and 3.9 on January 11, 1990 and February 27, 1990. (BE-3, Att. 5)

131. Overall, the readings at MW-2A showed a slightly higher level of acidity, sulfates, manganese, dissolved iron, and dissolved ferric iron than those at MW-1. (T. 535-536; BE-3, Att. 5)

132. MW-4A is located to the northwest of MW-2A, within Harbison-Walker's bonded area. (T. 537; DER Ex. V)

133. The pH readings for MW-4A were 3.4 on December 7, 1989; 5.6 on January 11, 1990; and 6.2 on February 27, 1990. (BE-3, Att. 5) A reading of 6.2 is within the acceptable pH range for water quality. (T. 538) Sulfates were 880, 340, and 98 parts per million ("ppm"), respectively. Dissolved iron readings were 110, 61.3, and 34.6 ppm, respectively. Manganese readings were 29.38, 7.51, and 2.64 ppm, respectively. (BE-3, Att. 5)

134. Overall, the readings at MW-4A showed substantially higher levels of acidity, sulfates, manganese, dissolved iron, and dissolved ferric iron than those at MW-2A. (BE-3, Att. 5) MW-4A also showed a slight increase in alkalinity. (BE-3, Att. 5; T. 540)

135. Sulfates are a product of the oxidation of pyrites and are an indicator of acid formation. (T. 540-541)

136. To the west of MW-4A in the direction of the B seeps is MW-5A. (DER Ex.V; T. 569-570)

137. Acidity and sulfate levels at MW-5A were elevated on each of the sampling dates. However, on December 7, 1989, MW-4A's acidity and sulfate levels were higher than those at MW-5A. (T. 570; BE-3, Att. 5)

138. Overall, the pH readings at MW-5A were lower than those at MW-4A. (T. 570; BE-3, Att. 5)

139. Northwest of MW-5A is MW-7A. (DER Ex.V: T. 573)

140. The pH readings at MW-7A were lower than those at MW-5A. (BE-3. Att. 5) Acidity was higher at MW-5A than at MW-7A. (BE-3. Att. 5) Sulfate levels at the two wells were similar. (BE-3. Att. 5)

141. MW-8A is located to the southwest of MW-7A in the direction of the B seeps. (T. 574; DER Ex. V)

142. Acidity, sulfates, manganese, and dissolved iron were higher at MW-8A than at MW-7A. However, the pH readings at MW-8A were less acidic than at MW-7A. (BE-3, Att. 5)

143. MW-4B through MW-8B are monitoring wells for the Clarion aquifer. (T. 542; DER Ex. V)

144. MW-4B in the Clarion aquifer is located approximately 30 feet above MW-4A in the Homewood aquifer. (T. 542, 544-545)

145. The readings at MW-4B were as follows: The pH level was 2.8 on all three sampling dates; sulfates were 1300 to 1500 ppm; dissolved iron readings were 178, 170, and 209 ppm; and manganese readings were 29.55, 29.90, and 32.0 ppm. (BE-3, Att. 5)

146. The water at MW-4B exhibits more characteristics of acid mine drainage than the water at MW-4A. (T. 545) The pH readings were significantly more acidic at MW-4B than at MW-4A. Acidity, sulfates, manganese, and dissolved iron readings were higher at MW-4B. (BE-3, Att. 5)

147. To the west of MW-4B in the direction of the B seeps is MW-5B. (DER Ex.V)

148. MW-5B in the Clarion was dry on all three sampling dates. (T. 571; BE-3, Att. 5)

149. MW-7B is located to the northwest of MW-5B in the Clarion aquifer. (DER Ex.V)

150. Readings at MW-7B in the Clarion showed some signs of acid mine drainage: acidic pH readings of 3.9 and 3.5 on two sampling dates, as well as elevated levels of acidity, sulfates, manganese, and dissolved iron. (BE-3, Att. 5; T. 573-574)

151. MW-8B is located to the southwest of MW-7B in the direction of the B seeps. The B seeps are located directly to the west of MW-8B. (DER Ex.V)

152. At MW-8B, pH readings were less acidic than readings at MW-7B on January 11, 1990 and February 27, 1990. However, acidity, sulfates, manganese, and iron levels were significantly higher at MW-8B than at MW-7B. (BE-3, Att. 5)

153. Acidity, sulfates, manganese, and iron levels were higher at MW-8B in the Clarion aquifer than at MW-8A in the Homewood aquifer. (BE-3, Att. 5; T. 575)

154. MW-5C is positioned in the mine spoil aquifer at the base of the mine spoil and fire clay. (T. 571-572)

155. Water sampled at MW-5C exhibits signs of acid mine drainage: low pH readings and elevated acidity, sulfates, manganese, and dissolved iron. (BE-3, Att. 5; T. 572)

156. Groundwater in all three aquifers located below the surface of the bonded area of the Smith Mine site exhibits signs of acid mine drainage.

157. Mr. Roberts did no testing to trace the flow of groundwater from Harbison-Walker's bonded area to the seeps. (T. 717)

158. Mr. Roberts failed to explain how the piezometer and monitoring well readings supported his theory that groundwater from the Smith Mine site moves in the direction of the B and C seeps.

EME Hydrogeologic Study

159. Robert Bellamy is a former senior hydrogeologist at Environmental Management Engineering ("EME"), an engineering consulting firm which specializes in addressing environmental problems. (T. 1467, 2029) In this capacity, he was project manager for hydrogeologic investigations conducted by EME, including those involving mining projects. (T. 1467)

160. Mr. Bellamy holds a Bachelor of Science degree in geology and geography and is a registered professional geologist. (T. 1461-1462)

161. Mr. Bellamy was accepted by the Board to testify as an expert in geology and hydrogeology. (T. 1473-1474)

162. Mr. Bellamy conducted a hydrogeologic investigation of the Smith Mine site from the Fall of 1989 through the Spring of 1990. He completed a report of his investigation in the Summer of 1990. (T. 1477)

163. The report of the hydrogeologic study performed by EME, labeled Ex.HW-6, was not admitted into evidence.

164. MW-5B, located in the Clarion coal horizon, remained dry throughout the EME study. (T. 1557; BE-3, Tab 6)

165. MW-5B is located between the disturbed area of the permit site and the B seeps. (T. 1908, 1910)

166. MW-5A, in the Homewood aquifer, produced water only after screening.[15] (T. 1868)

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[15] Although not defined in the record, "screening" is the process of separating out material by passage through or retention on a screen. Webster's Ninth New Collegiate Dictionary 1055 (1989).

167. MW-5C, in the mine spoil aquifer, produced flowing water and had an artesian effect. (T. 1869)

168. Piezometer well("PW")-8 is located at the base of the mine spoil. (T. 1886)

169. PW-8 remained dry during the entire study. (T. 1886-1887)

170. The B seeps are at a lower elevation than PW-8. (T. 1886)

171. Based on the study, Mr. Bellamy concluded that the direction of groundwater flow in the Clarion coal horizon is west/northwest, toward the A seeps. (T. 1882-1884)

172. Mr. Bellamy performed a water budget analysis at the site. (T. 1589) The purpose of a water budget analysis is to understand the movement of water in a watershed and to determine the recharge area. (T. 1589, 1903)

173. There is an increase in the water table of the mine spoil aquifer in the immediate area around the A seeps. (T. 1562-1563)

174. There is a mound of water above the base of the fire clay in the region of the A seeps. (T. 1584)

175. Daily flow measurements made at the A weir do not correspond to the recharge area available to it. This indicates there is another source of recharge to the A seeps. (T. 1587)

176. In Mr. Bellamy's opinion, water passing through Harbison-Walker's permit area discharges solely at the A seeps. (T. 1912-1913)

177. The basis for Mr. Bellamy's opinion is his determination of the direction of groundwater flow in the Clarion horizon, the dry area at MW-5B located between the disturbed portion of the permit site and the B seeps, and the amount of water discharging at the A seeps. (T. 1913)

178. Much of Mr. Bellamy's testimony regarding groundwater flow was based on information which was inferred or implied and was not based on actual data. (T. 1720-1725, 1731-1735)

Reclamation of the Site

179. Clay stockpiles from Harbison-Walker's mining still existed at the Smith Mine site at the time of the hearing in May 1993. (T. 879)

180. A "stockpile" is an area where clay is stored for later shipment. (T. 879)

181. Clay has been stockpiled at the site since 1972. (T. 885)

182. The stockpile areas have not been reclaimed. (T. 885)

183. Robert Musser is a compliance specialist with DER's Bureau of Waste Management. (T. 859) Prior to that, he was a mine inspector for DER's Bureau of Mining and Reclamation. (T. 860)

184. Mr. Musser was an inspector at the Smith Mine site from 1988 to 1992. (T. 863)

185. During his inspections, Mr. Musser observed highwalls existing at the Smith Mine site. (T. 887)

186. In December 1988, Mr. Musser measured the slope of the highwalls using an Abney level, which is an instrument designed for measuring slope. (T. 893) Mr. Musser is trained in the use of this instrument. (T. 894)

187. According to Mr. Musser's measurements, the average slope of the highwall on the bonded area was 37°. (T. 898)

188. Mr. Musser observed portions of the highwall off the bonded area where the slope was greater than 45°. He did not take measurements of these slopes because he determined that it was unsafe to do so. (DER Ex.J(2); T. 900)

189. The method of backfilling which Harbison-Walker was attempting to achieve at the site was a "terrace backfill," which consists of a relatively uniform steeper slope near the final highwall with a flat table portion at the side away from the highwall. (T. 897)

190. As of June 1991, Harbison-Walker had not achieved an adequate terrace backfill. There were exposed parts of the highwall which were never backfilled. (T. 897, 901)

191. Harbison-Walker's Mining Permit requires that terracing be done in accordance with the Land Reclamation Board guidelines. (BE-8; T. 1007-1008)

192. According to the Land Reclamation Board's guidelines on terrace backfilling, the steepest slope of the highwall is to be no greater than 45°. (BE-19)

193. As of May 1992, the area to the west of the A seeps, bounded on the south by the treatment facilities, on the north by the toe of spoil, and on the west by the clay stockpile, had not been backfilled. Spoil piles remained unreclaimed, and water from the A seeps flowed along the pit floor. (DER Ex.G(1); T. 934-935)

194. Erosion was occurring on the site in 1991, as evidenced by an aerial photograph taken in 1991. (DER Ex.F(3); T. 914-915)

195. Prior to DER's order, Harbison-Walker had not implemented or maintained adequate erosion and sedimentation control. (T. 932-933)

196. Harbison-Walker did not save topsoil or top strata during mining. (T. 942)

197. Harbison-Walker's Mine Drainage Permit application stated that there was little or no topsoil available for later placement over the backfilled area. (BE-6)

198. Mr. Musser observed that topsoil existed at the site prior to Harbison-Walker's mining. (T. 943)

199. Special Condition 7 to Harbison-Walker's amended Mine Drainage Permit required that a minimum of twelve inches of topsoil or top strata be removed and stored in a readily accessible location for replacing after completion of backfilling. (BE-7)

200. Top strata is available even in locations where there is no topsoil. (T. 1007)

201. Exhibit BE-1-34 contains DER's inspection report for the completion of mining of Harbison-Walker's Mine Drainage Permit area. The report was prepared by James King on July 31, 1973. (BE-1-34; T. 1025)

202. In response to the question, "Has reclamation been completed in conformance with approved restoration plan?", Mr. King marked "Yes." (BE-1-34; T. 1025)

203. With respect to the type of backfill done at the site, Mr. King marked "Terrace."[16] (BE-1-34; T. 1025)

204. In response to the question, "Has planting been done?", Mr. King marked "Yes." (BE-1-34; T. 1027)

205. In response to the question, "Has operator fulfilled all legal requirements except planting?", Mr. King marked "Yes." (BE-1-34; T. 1028)

206. Mr. Musser's inspection report of August 31, 1988 through September 2, 1988 states that "other environmental problems and possible mining violations, including backfilling of the site, topsoiling, and erosion and sedimentation controls, are being evaluated with DER's legal staff to determine

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[16] Mr. King also marked "Approximate contour." (BE-1-34) However, Mr. Musser testified that backfilling to approximate original contour was done only in the backside parts of the site. (T. 1026)

the operator's liability and the appropriate enforcement action to be taken." (BE-1-116)

207. No mention of reclamation or erosion and sedimentation violations was made in subsequent inspection reports prepared by Mr. Musser in 1988 through May 1990, except to say "Site conditions same as previously noted." (BE-1-117 through BE-1-140)

208. Mr. Musser's inspection report of June 28, 1990 states that Harbison-Walker had completed construction of a lateral diversion ditch where spoil had been eroding, had seeded and mulched graded areas causing new growth to develop, and had limed, seeded, and mulched the lower section of the bonded area, where grasses and legumes were beginning to become established. (BE-1-141)

209. Mr. Musser's inspection report of July 16, 1990 states that the areas which had been limed, fertilized, and seeded had generally good growth, but that maintenance was needed in erosion controls around the lower clay stockpile. (BE-1-142)

210. Mr. Musser's inspection report of December 14, 1990 states that reclamation of the site had not progressed. (BE-1-147)

211. Mr. Musser's inspection report of May 10, 1991 states that an administrative order would be issued to Harbison-Walker to collect and treat the A, B, and C seeps and that the order would also address reclamation violations. (BE-1-152)

212. C. R. Green is an Inspector Supervisor with DER's Bureau of Mining and Reclamation and Bureau of Field Operations and had held this position for approximately ten years as of the time of the hearing. (T. 1103)

213. As Inspector Supervisor, Mr. Green oversees the enforcement of safety rules and regulations at surface mines. (T. 1104)

214. Mr. Green received mine safety training in courses sponsored by DER, the Mine Safety and Health Administration, and the Pennsylvania State University. (T. 1104-1105)

215. Mr. Green has accompanied inspectors to the Smith Mine site on approximately 15 to 20 occasions. (T. 1105-1106)

216. In the course of his visits to the Smith Mine site, he observed unsafe conditions with respect to three areas: the highwall, outslopes, and sludge ponds. (T. 1106)

217. Mr. Green observed the following unsafe conditions with respect to the highwall: a steep vertical face approximately 90° from the horizontal, overhanging rocks, and loose, unconsolidated material in the wall. (T. 1106)

218. The aforesaid conditions of the highwall were eliminated as a result of efforts taken by Harbison-Walker pursuant to its Agreement with DER. (T. 1119)

219. Mr. Green observed unstable rocks on the surface of the outslopes, resulting in a safety hazard. (T. 1121)

220. As of the date of Mr. Green's testimony, Harbison-Walker had taken no steps to address the condition of the outslopes. (T. 1121)

221. Mr. Green observed that the sludge ponds had the appearance of being hard but were not solid, creating a safety hazard for anyone who might accidentally walk onto the sludge pond. (T. 1120)

222. Mr. Green did not formally put Harbison-Walker on notice of any violations by means of an inspection report; however, he verbally communicated to company representatives conditions which he determined to be violations. (T. 1124-1126)

223. Charles Krey became Harbison-Walker's District Mining Superintendent in 1969. Prior to that, he was Assistant to the District Mining Superintendent. (T. 1154, 1157)

224. As Superintendent and Assistant, he was responsible for overseeing the Smith Mine site. (T. 1156-1157)

225. He last visited the site in 1989. (T. 1160)

226. At that time, the only area of major erosion he observed was at the toe of the highwall. (T. 1162) However, he did not visit the eastern or western portions of the site. (T. 1162)

227. At a meeting between representatives of DER and Harbison-Walker in August 1989, DER informed Harbison-Walker of the following alleged violations on the permit and bonded areas: failure to provide adequate erosion and sedimentation control for the entire site, failure to complete reclamation of the clay stockpiles and remaining highwall, failure to complete revegetation of areas where erosion had occurred, and failure to conserve and replace topsoil or top strata. (T. 1399-1400)

228. At a meeting between representatives of DER and Harbison-Walker in January 1991, DER advised Harbison-Walker it had determined that Harbison-Walker was liable for the aforesaid conditions at the site. (T. 1409-1410)

229. Jeffrey P. Jahn was Manager of Mining at Harbison-Walker from May 1982 to January 1993. (T. 1292)

230. Mr. Jahn admitted that, prior to Harbison-Walker's entering into the June 1992 Agreement with DER for reclamation of the mine site, the clay stockpiles had not been totally reclaimed and vegetated. (T. 1435)

231. Photographs of the site, taken by DER Inspector Robert Musser prior to the issuance of DER's order, depict the following conditions: erosion

gullies; areas of heavy sedimentation; steep highwall slopes, some with sheer rock faces or loose rocks; areas devoid of vegetation. (DER Ex. G-1, I-2, I-3, J-2, J-3, J-4, J-6, J-7, K-1, K-2, M-1, M-2, M-4, M-5, N-3)

232. Certain photographs of the site, taken in October 1991 and June and October 1992, and introduced into evidence by Harbison-Walker, depict areas of erosion, sedimentation, and inadequate vegetation. (HW Ex. 124 AD, AE, AF, AG, AH, AI, AK, AL, AM, AN, AO, AP, B, K, W, Y, Z)

233. Gene Gonsoulin is owner and president of EME. (T. 2029) He holds a Bachelor of Science degree in wildlife biology, a Master of Science degree in aquatic biology, and a Ph.D in science, with a specialization in environmental science. (T. 2030)

234. Dr. Gonsoulin was accepted by the Board as an expert in environmental science to testify on the reclamation of the Smith Mine site. (T. 2043)

235. Dr. Gonsoulin first visited the Smith Mine site in September 1988. (T. 2049) Thereafter, he visited the site on five occasions between June 1991 and October 1992, and at least three times subsequent to October 1992. (T. 2050)

236. Dr. Gonsoulin admitted that the photograph labeled DER Ex.K-1, taken from the Kaiser side of the Smith Mine site, shows erosion on the outslopes. (T. 2066)

237. DER Ex.F-1 and DER Ex.F-3 are aerial photographs of the Smith Mine site taken in 1981 and in Winter 1991, respectively. (T. 2074) Although Dr. Gonsoulin testified that the photographs demonstrate that vegetative growth, in the form of conifers, has progressed at the site from 1981 to 1991, this is not apparent from the photographs. (DER Ex.F-1 and F-3)

238. HW Ex. 124 contains photographs of the bonded area and the highwall, showing extensive growth of trees and other vegetation. These were taken in October 1991 and from June 1992 to December 1992, after issuance of DER's order. (HW Ex.124; T. 2080-2101)

DISCUSSION

Burden of Proof and Standard of Review

In an appeal of a compliance order, the burden lies with DER to prove that its order was lawful and an appropriate exercise of its discretion. 25 Pa. Code Section 21.101(b)(3); Paul E. and Madeline R. Kerrigan v. DER, 1993 EHB 453, 470.

In its post-hearing brief, Harbison-Walker asserts that the Board's "abuse of discretion" standard is an inadequate standard of review where there has been an improper commingling of prosecutorial and adjudicative functions, which Harbison-Walker asserts has occurred in this case. In support of its argument, Harbison-Walker points to the case of Lyness v. Commonwealth, State Board of Medicine, 529 Pa. 535, 605 A.2d 1204 (1992), wherein the Pennsylvania Supreme Court held that an appellant's due process rights had been violated by the commingling of prosecutorial and adjudicative functions within a single administrative board. The Court noted, "[I]f more than one function is reposed in a single administrative entity, walls of division [must] be constructed which eliminate the threat or appearance of bias." *Id.* at ___, 605 A.2d at 1209.

In the present case, not only is there a clear division between prosecutorial and adjudicative functions, but these functions are handled by two separate, independent agencies. The roles of prosecutor and adjudicator are clearly divided between DER and the Environmental Hearing Board. While DER is

empowered to initiate enforcement actions pursuant to the various environmental statutes and regulations, the Board is responsible for adjudicating any appeals from those actions.

Nor do we find that DER has strayed beyond its prosecutorial role in this case, as Harbison-Walker asserts. The basis for Harbison-Walker's charge is its contention that DER personnel had already determined Harbison-Walker to be liable for the A, B, and C discharges prior to receiving the report of DER's hydrogeologist. Harbison-Walker bases its contention on certain internal memoranda at DER. The DER internal memoranda relied upon by Harbison-Walker were ruled to be inadmissible on the basis of relevancy and on the basis that one contained settlement discussions. Thus, those documents are not part of the record and may not be relied upon by Harbison-Walker in support of its argument. However, even considering these records as admissible, the communications relied upon by Harbison-Walker do not indicate that DER had already judged the company to be "guilty" prior to any investigation on DER's part. Rather, these communications merely indicated that it was DER's belief that further testing would show Harbison-Walker to be liable for the discharges. This does not show bias on the part of DER; on the contrary, in order for DER to conduct an investigation against an individual or company, it must have some basis for initiating and directing the course of that investigation. A proper exercise of DER's duties in pursuing an investigation may include a belief that evidence will show that the company is responsible for the condition in question. Indeed, an investigation conducted without such a belief may well be an improper investigation.

A second basis for Harbison-Walker asserting that DER has improperly stepped into the role of adjudicator is its contention that DER's

order constitutes an "adjudication" because it contains findings of fact and conclusions of law and mandates certain action by Harbison-Walker. DER does not respond to this argument in its reply brief.

We point out, first of all, that an action of DER may constitute an "adjudication" without being an improper use of authority. DER actions are appealable to the Board when they constitute "adjudications" within the meaning of the Administrative Agency Law, 2 Pa.C.S.A. Section 1091, or "actions" as defined at 25 Pa. Code Section 21.2(a)(1). Grand Central Sanitary Landfill, Inc. v. DER, 1993 EHB 20, 22. The Administrative Agency Law defines "adjudication" as

> [a]ny final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made.
>
> 2 Pa.C.S.A. Section 101

Thus, an order of DER which affects the personal or property rights of the person to whom it is directed constitutes an "adjudication" which is appealable to the Board.

DER's order does not overstep its role as prosecutor simply because it contains findings of fact and conclusions of law. While an order issued by DER need not recite the findings of fact upon which it is based, the Board certainly does not discourage DER from engaging in this practice and, in fact, commends DER for doing so. Moreover, although DER's order may contain findings of fact, the recipient of an order is not bound by those findings since the Board is the ultimate trier of factual issues in an appeal. The same is true for legal conclusions contained in DER's order. While DER's order may set forth the authority under which it is taken, ultimately it is up to the Board to

resolve all legal questions raised in an appeal. Therefore, we dismiss Harbison-Walker's argument that DER has overstepped its role as prosecutor because its order contains findings of fact and legal conclusions.

Likewise, we must dismiss Harbison-Walker's argument that DER's order is an improper exercise of power because it orders Harbison-Walker to take certain action. Pursuant to Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. Section 510-17, and Section 11 of the Non-Coal Act, 52 P.S. Section 3311, DER has the power to order "nuisances including those detrimental to the public health to be abated and removed." Furthermore, DER has the power, pursuant to Section 610 of the Clean Streams Law, to issue such orders as are necessary to prevent pollution or the danger of pollution to waters of the Commonwealth. 35 P.S. Section 691.610. Finally, Harbison-Walker makes the argument that DER's order overstepped its role as prosecutor because the findings of the order become final if not appealed or if upheld by the Board. Harbison-Walker's ability to appeal DER's findings to the Board is precisely what separates DER's role as prosecutor and the Board's role as adjudicator. If Harbison-Walker chooses not to exercise its right to appeal, DER's order becomes final. If, on the other hand, Harbison-Walker chooses to exercise its right to appeal the order, then the Board steps in as adjudicator to conduct a fair and impartial review of DER's action. Harbison-Walker's right to appeal DER's order to the Board is evidence of the separation of the prosecutorial and adjudicatory functions between the two agencies. Harbison-Walker recognizes this in its post-hearing brief when it says, "If, for example, Harbison-Walker's only hearing in this matter were held before and adjudicated by [DER's Acting District Mining Manager] Mr. Brahosky, it would be unconstitutional because Harbison-Walker would never [have] had an opportunity

for a hearing on a level playing field." Harbison-Walker's right to appeal DER's order to the Board provides it with such an opportunity and satisfies its right to due process. Commonwealth v. Derry Township, 10 Pa. Cmwlth. 619, 314 A.2d 874, 878 (1973). Thus, there is no merit to Harbison-Walker's contention that both the prosecutorial role and adjudicatory role have been performed by DER in this matter.

Next, Harbison-Walker argues that, in performing the role of adjudicator, the Board should conduct its review of DER's action *de novo*. This is, in fact, the standard of review exercised by the Board in determining whether DER has abused its discretion. As stated by the Commonwealth Court in Warren Sand & Gravel Co., Inc. v. Commonwealth, DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975):

> When an appeal is taken from DER to the Board, the Board is required to conduct a hearing *de novo* in accordance with the provisions of the Administrative Agency Law. In cases such as this, the Board is not an appellate body with a limited scope of review attempting to determine if DER's action can be supported by the evidence received at DER's factfinding hearing. The Board's duty is to determine if DER's action can be sustained or supported by the evidence taken by the Board. If DER acts pursuant to a mandatory provision of a statute or regulation, then the only question before the Board is whether to uphold or vacate DER's action. If, however, DER acts with discretionary authority, then the Board, based upon the record made before it, may substitute its discretion for that of DER.
>
> *Id.* at 203-04, 341 A.2d at 565
> (Citations omitted.)

Therefore, it is the Board's role to conduct a *de novo* review when determining whether DER has properly exercised its discretion. While we have frequently required proof that DER abused its discretion in those cases where it is apparent that DER has properly exercised its discretion, in this case we have fully reviewed the evidence presented at the hearing *de novo* to avoid any question as

to whether or not Harbison-Walker's claims have been fully and impartially considered.

In conclusion, we find that Harbison-Walker has not demonstrated an improper commingling of functions by DER. We further find that our role in this matter is to determine whether DER has properly exercised its discretion or acted contrary to law in issuing the order which is the subject of this appeal. We now turn to an examination of the merits of this appeal.

TREATMENT OF SEEPS

Sections 307(a) and 315(a) of the Clean Streams Law

DER's order states that Harbison-Walker caused or allowed the unauthorized discharge of industrial waste, in the form of mine drainage, to waters of the Commonwealth, in violation of, *inter alia*, Sections 307(a) and 315(a) of the Clean Streams Law, 35 P.S. Sections 691.307(a) and 691.315(a). Section 307(a) prohibits the unauthorized discharge of industrial waste to waters of the Commonwealth as follows:

> **Section 691.307. Industrial waste discharges**
>
> (a) No person or municipality shall discharge or permit the discharge of industrial wastes in any manner, directly or indirectly, into any of the waters of the Commonwealth unless such discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department.
>
> 35 P.S. Section 691.307(a).

Mine drainage is included within the definition of "industrial waste." *Id.*, at Section 691.1. Section 315(a) prohibits the unauthorized discharge from a mine to waters of the Commonwealth as follows:

> **Section 691.315. Operation of mines**
>
> (a) No person or municipality shall operate a mine or allow a discharge from a mine into the waters of the

> Commonwealth unless such operation or discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department.
>
> *Id.*, at Section 691.315(a)

The discharges prohibited by Section 315(a) include those which occur after the cessation of mining for mining operations conducted after January 1, 1966. *Id.*

Before examining the specific requirements of Sections 307(a) and 315(a), we first address the argument made by Harbison-Walker that Section 315 does not apply to its mining operations. Harbison-Walker points to the following language in subsection (1) of Section 315:

> (1) The requirements of this section shall not apply to lands on which mining operations are being conducted on August 3, 1977...
>
> 35 P.S. Section 691.315(1).

According to DER, Harbison-Walker was conducting mining operations on August 3, 1977. If that is so, asserts Harbison-Walker, then the language of Section 315(1) excludes it from the coverage of all of §315.

However, the Commonwealth Court has interpreted §315(1) as applying "on its face only to the matter of designating land areas as being unsuitable for mining" and not as exempting mining operations from the requirements of §315. Bloom v. Commonwealth, DER, 110 Pa. Cmwlth. 8, 515 A.2d 361, 364 (1986). Thus, Section 315(1) does not act to exempt Harbison-Walker from the requirements of Section 315(a).

We now turn to the question of whether DER has met its burden of proof under Sections 307(a) and 315(a) of the Clean Streams Law in ordering Harbison-Walker to treat certain acid mine discharges designated as the "A, B, and C seeps." To meet its burden, DER must demonstrate that the seeps are either

located on or hydrogeologically connected to Harbison-Walker's mine site and that they violate the applicable regulations or effluent limits of Harbison-Walker's permit. Al Hamilton I. 1993 EHB at 1686.

Hydrogeological Makeup of the Smith Mine Site

Three aquifers exist at the Smith Mine site. The lowest unit is the aquifer associated with the Homewood sandstone, or the "Homewood aquifer". Above that is the aquifer associated with the Clarion coal horizon, or the "Clarion aquifer". Separating the two aquifers are several layers of shale. Above the Clarion aquifer is a man-made aquifer associated with the mine spoil, which was created by the operation of the mine. This is referred to as the "mine spoil aquifer". Approximately twenty to thirty feet of shale lie between the Clarion and mine spoil aquifers.

It is DER's contention that mining has caused the Clarion and mine spoil aquifers to come together into one unit. DER bases this theory on the occurrence of two events: the removal of the clay which acted as a hydrogeological barrier between the two aquifers and the widening of the fractures on the pit floor caused by the removal of spoil. (T. 383, 656-657)

There are several gaps in this theory, however. First, it is not clear from the evidence that any hydrogeological barrier separating the mine spoil aquifer from the Clarion aquifer was, in fact, destroyed by mining since only the base of the fire clay was mined. An intermediate formation, consisting of a mixture of shale and clay, remains intact and acts to impede flow between the aquifers. (T. 1912)

Second, although there is evidence of fracturing at the site, this alone does not establish that the mine spoil aquifer and Clarion aquifer have formed into one unit. Rather, the evidence points to the contrary, i.e.,

that the two units are not combined. In particular, monitoring well 5B in the Clarion aquifer was consistently dry, while monitoring well 5C in the mine spoil aquifer had water flowing. (T. 571-572) The fact that monitoring well 5B was consistently dry indicates that water was not draining from the mine spoil aquifer to the Clarion aquifer. (T. 572) DER's hydrogeologist explained this disparity by theorizing that, while the two aquifers are commingled across the site, they simply are not combined at this location. However, he provided no basis for this theory, nor is there sufficient evidence to support his conclusion that the two aquifers have become commingled elsewhere across the mine site.

Therefore, we conclude that three distinct aquifer units exist at the Smith Mine site.

A Seeps

The acid mine discharges designated as the "A seeps" are located on the western portion of the Smith Mine site. (DER Ex.V) Although we are able to conclude from the record that at least some of the A seeps are located within Harbison-Walker's permit area, it is unclear from the record whether all of the A seeps are located within the area covered by Harbison-Walker's permits. Harbison-Walker makes the assertion in its post-hearing brief that "the majority of [the A seeps] are off the permitted acreage." (H-W Post-Hearing Brief, p.162)[17] However, in footnote 36 of its post-hearing brief, Harbison-Walker acknowledges that "there is a hydrogeologic connection to a small degree between the Group A Seeps and the permitted acreage." As noted earlier, a mining operator is liable under Section 315(a) of the Clean Streams Law for all discharges which either arise on the permit area or are hydrogeologically

[17] "H-W Post-Hearing Brief" refers to Harbison-Walker's post-hearing brief filed in this appeal.

connected to the permit area. Al Hamilton I, 1993 EHB at 1703. Because Harbison-Walker has admitted that the A seeps are either on its permit area or hydrogeologically connected to the permit site, albeit even to a small degree, Harbison-Walker is liable for treating the A seeps if they violate the effluent limits of its permit or the applicable regulations.

The parties have stipulated that the water which discharges from the A seeps "exhibits depressed alkalinity and pH, and elevated acidity, metals, sulfate and total dissolved solids concentrations and elevated specific conductivity." (J.S. 22) These conditions are characteristic of acid mine drainage. (T. 327) Moreover, sampling of the A seeps, conducted by DER from October 1970 through September 1991, revealed that the water flowing from the seeps violated the effluent limits of Harbison-Walker's Mine Drainage Permit for pH level, acidity, and iron levels.[18]

Harbison-Walker has been treating the A seeps since 1960 and was doing so as of the date of the hearing. (T. 360, 1189) In the introduction to its post-hearing brief, Harbison-Walker states that it is only challenging DER's authority to order it to collect and treat the B and C seeps. (H-W Post-Hearing Brief, p.3) In footnote 36 of its brief, Harbison-Walker further states that, because it is collecting and treating the A seeps, it "[c]onsequently...will not address any arguments made by the Department with respect to the Group A seeps as there was no necessity for them to be considered." DER makes no direct reference to this in its reply brief, but does acknowledge in its post-hearing brief that Harbison-Walker was treating the A

[18]The results of DER's sampling are contained in inspection reports admitted into the record as Exhibits BE-1 and BE-2.

seeps at least as early as the date of DER's order, June 5, 1991. (DER's Post-Hearing Brief, p.61)

Because there appears to be no dispute over Harbison-Walker's liability for treating the A seeps, we uphold that portion of DER's order directing Harbison-Walker to collect and treat the A seeps.

B and C Seeps

The B seeps are located to the west of the site, off the permit area. (T. 340; DER Ex.V) The B seeps existed in 1969 and were included on the map submitted with Harbison-Walker's Mine Drainage Permit application. (T. 345) The seeps do not appear on an aerial photograph of the site taken in 1959, nor did a water pollution control specialist with the Department of Health observe the seeps during a visit to the site in April 1965. (T. 149-150, 159-160, 345) Thus, the evidence indicates that the seeps developed sometime between 1965 and 1969 during the time in which Harbison-Walker was conducting clay extraction at the site. Water emanating from the B seeps flows into Laurel Run. (J.S. 26; T. 361)

The C seeps are located to the south of the mine site, off the permit area. (T. 346; DER Ex.V) The record does not indicate when the C seeps first appeared. Prior to DER's order, water from the C seeps flowed untreated into an unnamed tributary to Laurel Run designated "Tributary C". After DER's order Harbison-Walker began treating the C seeps along with the A seeps. (T. 361)

To establish liability for off-permit discharges under §315(a) of the Clean Streams Law, DER must first establish that the discharges are hydrogeologically connected to the mine site. Al Hamilton I, 1993 EHB at 1705. This connection may be established by either direct factual and expert testimony

or circumstantial evidence. C&K Coal Co. v. DER, 1992 EHB 1261, 1288. DER must also demonstrate that the discharges violate the effluent limits of Harbison-Walker's mining permit. Al Hamilton I, 1993 at 1705.

To support its claim that a hydrogeologic connection exists between the mine site and the B and C seeps, DER relies heavily on the expert testimony of its hydrogeologist, Scott Roberts,[19] and on circumstantial evidence.

Harbison-Walker makes several arguments as to why DER failed to meet its burden of proving liability for the B and C seeps under §315(a). First, Harbison-Walker asserts that DER failed to establish that the B and C seeps constitute acid mine drainage. Although Harbison-Walker stipulated to the characterization of the B and C seeps as exhibiting "depressed alkalinity and pH, and elevated acidity, metals, sulfate and total dissolved solids concentrations and elevated specific conductivity" (J.S. 23, 25), it does not concede that the seeps are acid mine drainage. (H-W Post-Hearing Brief, p.163) The basis for Harbison-Walker's objection is that DER has failed to establish the background water quality of the Smith Mine site, and without this information, DER cannot prove that the water quality of the B and C seeps is degraded.

We disagree with Harbison-Walker's contention that the record contains no evidence of background water quality for the Smith Mine site. Evidence of background water quality is provided by the sampling of springs in the area designated as Hill No. 2, an area which is included within Harbison-

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[19]Unfortunately, much of Mr. Roberts' testimony was unclear and contained conclusions which were not tied to the evidence. While we recognize that some of the confusion surrounding Mr. Roberts' and others' testimony is partly the result of a transcript which contains numerous typographical and transcription errors, most of the confusion surrounds the substance of his testimony which consisted of inadequately explained theories and conclusions.

Walker's permit but which was not affected by mining. Background data is also provided by monitoring well 1, an upgradient well which provides background monitoring for the Homewood aquifer. (T. 335, 531, 871)[20]

Springs at Hill No. 2 were sampled by DER on April 23, 1992. The laboratory analysis of the samples revealed water that is slightly acidic, with low concentrations of metals and sulfates. (BE-2, Tab 12) Of the nine samples taken, the pH levels were as follows: 4.9, 5.4, 6.1, 5.6, 4.9, 5.9, 5.5, 5.5, and 4.5. In six of the samples, acidity exceeded alkalinity, but only to a small degree. In all of the samples, sulfate levels were below the laboratory's reporting level of 20 mg/l. Although the level of iron exceeded 7 mg/l in one sample, Number 803, it was below or only slightly above the laboratory's reporting level of .3 mg/l for all of the remaining samples.

Monitoring well 1 is an upgradient well which monitors background water quality for the Homewood aquifer at the Smith Mine site. (T. 335, 531) The results of monitoring at this well are contained in attachment 5 of the hydrogeological investigation report prepared by EME for Harbison-Walker. (BE-3) Sampling was conducted at monitoring well 1 on three occasions: December 7, 1989; January 11, 1990; and February 27, 1990. The pH readings on these dates were 5.8, 3.8, and 4.5, respectively. On each of the sampling dates, acidity exceeded alkalinity. Sulfate levels were 16 mg/l, 12 mg/l, and 12 mg/l, respectively. Metal levels were low; in particular, iron was below .3 mg/l and

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[20]At the hearing, DER also introduced into evidence summaries of water quality analyses purported to represent background water quality for the area. Cross-examination of DER's hydrogeologist revealed that the summaries contained a number of inaccuracies. DER proposed to submit revised summaries which it "believes are accurate." (DER Reply Brief, p. 61) However, although these revised summaries were mailed to the Board, they were never introduced into evidence at the hearing. Therefore, we may not rely on them as evidence of the background water quality of the area of the Smith Mine site.

aluminum was below .5 mg/l on each of the sampling dates. (BE-3, Tab 5) Like the water at Hill No. 2, the water at monitoring well 1 tends to be somewhat acidic, with low metal and sulfate levels.

This is in sharp contrast to the water quality of the B and C seeps, which exhibit very low pH levels, acidity far exceeding alkalinity, and very high levels of sulfates and metal concentrations. DER inspection reports, covering the timespan of April 16, 1985 through February 4, 1993 (BE-1, BE-2) contain the results of sampling of the B and C seeps. The pH readings for the B seeps during this time period range from a low of 2.6 on August 7, 1986; July 21, 1987; and August 12, 1991 (BE-1, Tabs 87 and 98; BE-2, Tabs 3 and 4); to a high of 3.8 on December 31, 1991 (BE-2, Tab 9), with most of the samples showing a pH level slightly above or below 3.0. In all samples, acidity exceeds alkalinity. Iron exceeded 7 mg/l in 31 of the 42 samples taken of the B seeps from April 1985 through November 1992. On at least 16 sampling dates, iron levels were at or above 100 mg/l. (BE-1, Tabs 72, 75, 81, 98, 103, 109, 122, 138, and 146; BE-2, Tabs 3, 4, 5, 8, 9, and 19)

Similarly, the pH readings for the C seeps during approximately the same timespan hover slightly above 3.0, with the lowest reading being 2.7 on May 15, 1986 (BE-1, Tab 85) and the highest being 3.9 on March 2, 1988 (BE-1, Tab 109). Acidity exceeds alkalinity on all sampling dates. Iron levels vary considerably. Of the 21 samples, at least nine had an iron level above 7 mg/l. (BE-1, Tabs 75, 81, 85, 87, 93, 98, 103, and 149)[21] Of these nine, the iron level was near or above 100 mg/l for three samples: January 10, 1986; May 15, 1986; and February 13, 1987. (BE-1, Tabs 81, 85, and 93)

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[21] In two of the sample results, April 16, 1985 and April 8, 1987, the iron level cannot be discerned due to the poor quality of the photocopy.

Compared to the background water quality of the area, as evidenced by the water at Hill No. 2 and monitoring well 1, the water at the B and C seeps is highly acidic and contains high levels of sulfates and metal concentrations. Thus, we find that the water at the B and C seeps is degraded from background water quality levels for the area and is in violation of the effluent limits set forth in Harbison-Walker's permit for pH, acidity, and iron. We must now examine whether the evidence establishes a hydrogeological connection between the seeps and the mine site.

Harbison-Walker argues that DER has not made a *prima facie* showing that a hydrogeological connection exists between the seeps and the site because it has failed to define the boundaries of Harbison-Walker's permit area.

We agree with Harbison-Walker that the record does not contain an exact depiction of the boundaries of Harbison-Walker's permit area. At the hearing, DER introduced into evidence a map from its permit file, labeled DER Ex. AAAA, purporting to show the area covered by Harbison-Walker's Mine Drainage Permit. The map was submitted to DER by Harbison-Walker in 1971 with its application for an amended Mine Drainage Permit and carries the engineering seal of Harbison-Walker's former District Mining Superintendent, Charles Krey. (T. 1210-1212) The map depicts the area to be covered by the amended Mine Drainage Permit. The boundary of this area was drawn by Mr. Krey. (T. 1216-1217; DER Ex.AAAA) Adjacent to this area on the map is another area which appears to have been drawn free-hand. This area is labeled "Original Mine Drainage Permit ... 45 Acres." Although Mr. Krey acknowledged that the words "Original Mine Drainage Permit" were in his handwriting (T. 1264), he had no recollection of having drawn this area on the map. (T. 1217) The boundary of both areas is traced with an orange highlighter. In the map's legend, the orange highlighted area is

identified as "Original and Amended Drainage Area." (DER Ex.AAAA) Mr. Krey testified that the reference to "Original and Amended Drainage Area" was not his handwriting. (T. 1215) Nor could he recall whether he had placed the orange highlighting on the map. (T. 1217)

Harbison-Walker objected to the admission of DER Ex.AAAA on the basis that it was not accurate. Because this was a map submitted by Harbison-Walker to DER and carries the seal of its engineer, Harbison-Walker may not ordinarily assert that the map is inaccurate, but must be bound by what it represents. However, it is clear that the map was submitted to DER for the purpose of showing the area to be affected by an amendment to Harbison-Walker's Mine Drainage Permit. There is no indication that the area depicted as the "Original Mine Drainage Permit" area was on the map when it was submitted to DER, nor is there any evidence in the record to substantiate that the free-hand drawing is accurate. Therefore, while we can accept DER Ex.AAAA as representing the area of the Smith Mine site for which Harbison-Walker sought an amendment to its Mine Drainage Permit. Mr. Krey's testimony does not establish that it is an accurate representation of the boundaries of Harbison-Walker's original Mine Drainage Permit.

DER contends that there is other evidence in the record supporting the validity of the original Mine Drainage Permit boundary depicted on DER Ex.AAAA. DER points to the testimony of Robert Musser regarding an internal DER memorandum written at the time Harbison-Walker applied for the Mine Drainage Permit which allegedly documented the boundaries of the Mine Drainage Permit. (T. 981) The memorandum refers to the Mine Drainage Permit area as extending "from the cross-hatched area to the yellow clay outcrop" (T. 982) depicted on BE-9, the map accompanying Harbison-Walker's amended Mining Permit.

(T. 984) According to Mr. Musser, this area corresponds very closely with the orange highlighted area identified on DER Ex.AAAA as the original Mine Drainage Permit. (T. 984) Mr. Musser's observation notwithstanding, a comparison of the two maps, BE-9 and DER Ex.AAAA, does not provide strong support for this conclusion. First, it is not clear to which section of BE-9 the DER internal memorandum is referring when it states "cross-hatched area." There is a section on BE-9 which is marked with vertical lines and one which is marked with diagonal lines, neither one of which appears to be "cross-hatched." In either case, neither the area extending from the vertical lines to the yellow clay outcrop nor the area extending from the diagonal lines to the yellow clay outcrop corresponds "very closely" with the orange highlighted area marked "Original Mine Drainage Permit" on DER Ex.AAAA. Therefore, we do not find that Mr. Musser's testimony provides a reliable basis for accepting the highlighted area on DER Ex.AAAA as being an accurate portrayal of the Mine Drainage Permit area.

Moreover, further testimony by Mr. Musser supports the conclusion that the record contains no map depicting the exact boundaries of the Mine Drainage Permit. While Harbison-Walker's Mine Drainage Permit application contains a map of the area to be affected, it is not an accurate portrayal of the permit area since Harbison-Walker applied for a permit to cover 200 acres and DER issued a permit for only 45 acres. Mr. Musser admitted that DER never sent Harbison-Walker a map, a metes and bounds description, or even a general description of the exact 45 acres covered by its original Mine Drainage Permit. (T. 997) Finally, although Mr. Musser testified that a topographic map which is part of BE-6 contains a circled, cross-hatched area corresponding to the 45 acres of the Mine Drainage Permit (T. 992), the evidence indicates that the map

is in error. (T. 992) Thus, the record appears to contain no reliable map or description of the area covered by Harbison-Walker's Mine Drainage Permit.

However, while the record contains no exact depiction or description of the entire area covered by Harbison-Walker's Mine Drainage Permit, the record does clearly show the area of the site disturbed by Harbison-Walker's mining. Therefore, in order to prove its case under Section 315(a) of the Clean Streams Law, DER must demonstrate that a hydrogeologic connection exists between the seeps and the areas affected by Harbison-Walker's mining operation. Al Hamilton I, 1993 EHB 1651; Thompson & Phillips Clay Co. v. DER, 136 Pa. Cmwlth. 300, 582 A.2d 1162 (1990), alloc. denied, ___ Pa. ___, 598 A.2d 996 (1991).

Testimony of DER's Expert

To establish a hydrogeologic connection between the mine site and the seeps, DER relied on the testimony of its expert hydrogeologist, Scott Roberts, and on circumstantial evidence. Mr. Roberts was accepted by the Board to testify as an expert in hydrogeology. He holds a Bachelor of Science degree in geology from the University of Pittsburgh and completed a continuing education course in fundamentals of mining at the Pennsylvania State University in February of 1986. In addition, he has attended several in-house training courses and OSM-sponsored courses in hydrogeology. Mr. Roberts also periodically acts as an instructor at OSM-sponsored workshops on acid-forming materials.

In his position as a hydrogeologist with DER, Mr. Roberts acts as lead reviewer on surface coal mining applications and conducts investigations of post-mining discharges. At the time of the hearing, he had conducted approximately 15 hydrogeologic investigations of post-mining discharges at mine sites. (T. 176)

Mr. Roberts conducted a study of the Smith Mine from January through April 1991. The purpose of the study was to examine seeps and discharges and to assess the connection between the seeps and discharges and the mining which took place at the Smith Mine. (T. 187) The study involved an examination of DER files and records of the site, a report which was prepared by Environmental Management Engineering ("EME") in August 1990, and water samples taken from the site. He also reviewed standard geologic references for Fayette County and standard textbooks on the subject of hydrogeology and geology. In addition, Mr. Roberts visited the Smith Mine site three or four times during his investigation to orient himself with locations and features under investigation at the site, to take measurements of fractures and joints, and to measure water levels. Following his investigation, he visited the site approximately six additional times. During his investigation, Mr. Roberts also reviewed Harbison-Walker's files, aerial photography in the possession of the EADS Group and at the Pennsylvania Geologic Survey Library, and information on Union Firebrick's operation. Mr. Roberts concluded his investigation on April 25, 1991. Based on his investigation, Mr. Roberts concluded that there is a hydrogeologic connection between the B and C seeps and Harbison-Walker's mine site.

Mr. Roberts relied on the following factors in concluding that a hydrogeologic connection exists between the B and C seeps and the area affected by Harbison-Walker's mining: general principles of hydrogeology, including the principle of hydraulic potential; and artifacts of Harbison-Walker's mining operation, which DER asserts were conducive to acid formation.

Hydraulic potential refers to the amount of energy in water. (T. 375)[22] Groundwater will flow from an area of high hydraulic potential to one of low potential. (T. 375) Monitoring wells and piezometers are used to measure the hydraulic potential of a given aquifer unit. (T. 385) In conducting his study, Mr. Roberts reviewed the measurements taken by EME at monitoring wells and piezometers set up across the Smith Mine site. Static water levels were measured at each of the wells and piezometers on December 7, 1989; January 11, 1990; and February 27, 1990. The water level measurements are contained in the hydrogeologic report prepared by EME. (BE-3, Tab 6) From his review, Mr. Roberts concluded that the measurements of hydraulic potential taken in EME's monitoring wells show a potential for groundwater to move across the mine site in the direction of the B and C seeps. (T. 440, 710-711)

In its post-hearing brief, Harbison-Walker disputes that DER has adequately explained this theory. (T. 440, 710-711) We must agree. Although we find that Mr. Roberts provided an adequate explanation of the principle of hydraulic potential and how it influences the direction of groundwater flow, his testimony falls short of applying this principle to the evidence in this case. Mr. Roberts' sole testimony with regard to hydraulic potential as it relates to groundwater flow in the direction of the B seeps was as follows: "Groundwater again moving from high potential to low potential examining -- potential measurements taken in EME's monitoring wells shows a potential for the groundwater to move this direction." (T. 440) Although Mr. Roberts mentions the EME measurements in his testimony, he does not refer to

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[22] The terms "fluid potential" and "head" were also used interchangeably with "hydraulic potential" in Mr. Roberts' testimony and DEP's brief.

specific numbers or explain how or why the measurements show a potential for groundwater to move across the site in the direction of the B seeps.

A review of the static water level measurements in the EME report reveals that the water levels appear to decrease across the site in the direction of the B seeps, with a few exceptions. (BE-6, Tab 6; DER Ex.V) However, without any expert testimony to correlate these measurements to DER's findings, we can assign them little weight.

Mr. Roberts' testimony with regard to hydraulic potential as it relates to groundwater flow in the direction of the C seeps is even more tenuous. Mr. Roberts did not even mention hydraulic potential as a factor influencing the direction of groundwater flow toward the C seeps in his direct testimony. (T. 444)[23] It was only during cross-examination that he mentioned "water levels in the piezometers and monitoring wells" as being one factor on which he based his opinion that the C seeps were hydrogeologically connected to Harbison-Walker's mine site. Again, Mr. Roberts provided no further explanation as to how he arrived at this conclusion.

Without any explanation as to how he arrived at these conclusions, we cannot rely on Mr. Roberts' expert opinion that hydraulic potential causes groundwater to flow across the mine site in the direction of the seeps.

A second factor on which Mr. Roberts bases his theory of hydrogeologic connection between the seeps and the site concerns the artifacts of Harbison-Walker's mining operation. Mr. Roberts testified that gravity drains

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[23] Although Mr. Roberts referred to water levels in the monitoring wells and piezometers and testified that "a component of the flow head[s] toward the C seeps," he saw this as being a "direct result of an operational artifact left by [the] mine site," and did not refer to hydraulic potential.

which were installed at the site in the 1950s, prior to the present-day treatment system, caused groundwater to flow through the mine spoil in the direction of the B seeps as it exited the site. In addition to the gravity drains, Mr. Roberts credits the orientation of mining cuts as causing groundwater to flow in the direction of the B seeps. According to Mr. Roberts, the mine cuts "point ... like an arrow to the B seeps." (T. 723)

There are two problems with Mr. Roberts' theory. First, Mr. Roberts admitted that the gravity drains were discontinued in or about 1960 (T. 758-759) and are now filled. (T. 441) Secondly, according to DER's post-hearing brief, the mine cuts also have been backfilled. (DER Post-Hearing Brief, p.72) The question then becomes, "If the gravity drains and cuts are backfilled, how is it that they continue to direct groundwater to the B seeps?" Mr. Roberts' explanation for this is that the "anisotropic heterogeneous"[24] nature of the mine spoil aquifer affects the flow of the groundwater. (T. 379, 441). Unfortunately, Mr. Roberts' explanation leaves much unexplained. First, although he defines what is meant by "anisotropic" and "heterogeneous", his definitions are unclear and confusing, and this severely limits the Board's ability to fully comprehend Mr. Roberts' explanation.[25] According to Mr. Roberts' definition,

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[24] Page 441 of the transcript refers to the mine spoil zone as being "heterogenesis." Based on Mr. Roberts' testimony elsewhere in the transcript, we find this to be a transcription error and should read "heterogeneous."

[25] While the Board's expertise lies in the field of environmental law, and while its members may be familiar with the technical terminology and scientific principles which frequently arise in this arena, nonetheless, the Board is not a body of geologists, hydrogeologists, and engineers. We are lawyers. Our role is to interpret the law and apply it to the facts established at the hearing. Where the evidence is technical in nature, the Board relies on the testimony of expert witnesses, as elicited through their direct examination by counsel, to explain these matters. This is the role of the expert - to assist the Board in understanding scientific principles applicable to the case and assessing technical data presented as evidence. Where experts insist on using scientific and technical terminology without explaining such matters in laymen's terms,

"anisotropic" means that "any particular location that you measure the flow at, there's going to be a directional component to it." (T. 379) The "[h]eterogeneousness of the spoil aquifer," according to Mr. Roberts, "means that as you move from place to place within the aquifer you'll get different measurements of that hydraulic conductivity." (T. 379) Mr. Roberts further explained the heterogeneous nature of the spoil aquifer as follows:

> If you measure it at one point and make it one measurement at another point another measurement. The flow in that spoil aquifer themselves is complex because you can have flow through the primary porosity which is developed between the individual particles and the spoil. And that's generally referred to as steady state flow versus transient flow, which would be flow through some of the magna pores developed by the larger particles of spoil and the arrangement they are in the degree of interconnectedness.
>
> (T. 379-380)

Not only are Mr. Roberts' definitions unclear, but, when defining these terms, he refers to the mine spoil aquifer, not to the mine spoil itself. Thus, the question of how the backfilled drains and mine cuts cause groundwater to flow to the B seeps still remains unanswered.

In its post-hearing brief, DER states that the backfill itself is anisotropic and heterogeneous. To support this assertion, DER relies again on Mr. Roberts' testimony. During cross-examination, by counsel for Harbison-Walker, Mr. Roberts testified as to the heterogeneity and anisotropic nature of the mine spoil itself. When questioned on cross-examination as to what properties of a material, in this case mine spoil, render it anisotropic, Mr. Roberts stated as follows:

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their "explanation" does little to assist the Board in rendering a decision, and they run the risk of having their expert opinions dismissed as providing little or no assistance to the Board.

> It's a description of the hydraulic conductivity of a material that measured at one specific point the hydraulic conductivity varies in direction --- by direction that if you measure it east and west you may come up with a different value than north and south.
>
> (T. 764-65)

When asked how hydraulic conductivity is measured, Mr. Roberts discussed the various methods for measuring hydraulic conductivity. However, when asked which method he had employed to measure the hydraulic conductivity of the mine spoil at the Smith Mine, Mr. Roberts admitted to using none of them. (T. 765) From this answer, we may infer that Mr. Roberts never measured the hydraulic conductivity of the mine spoil. Given Mr. Roberts' testimony that the hydraulic conductivity of a material determines whether it is anisotropic and given his admission that he never measured the hydraulic conductivity of the mine spoil, there is no basis for his conclusion that the mine spoil is anisotropic, causing groundwater to flow along the backfilled gravity drains and mine cuts in the direction of the B seeps.

DER asserts that artifacts of the mining operation also tend to cause groundwater to flow in the direction of the C seeps. The C seeps consist of several seepage points along the southern edge of the mine site. (T. 346) In Mr. Roberts' opinion, the majority of the C seeps emanate from the southern toe of the mine spoil. (T. 443) Mr. Roberts believes that two artifacts of the mining operation, a haul road and clay stockpiles, contribute to groundwater flow in the direction of the C seeps. The haul road in question travels through what is referred to as the "notch" area and is the central-most haul road depicted on DER Ex.V. (T. 444-45) When the haul road was backfilled, Harbison-Walker cast down spoil with a dragline. (T. 445) According to Mr. Roberts, this resulted in "gravity sorting" or "gravity gradation" of the

materials, whereby larger blocks of material have a tendency to roll downhill. (T. 445-46) The result of this, according to Mr. Roberts, was to create a type of "drain" which captures water from the interior section of the spoil pile and then channels it toward the group of C seeps located at the notch. (T. 446)

According to Mr. Roberts, the effect of gravity sorting the larger material to the bottom is to create an anisotropic zone, like that discussed earlier with respect to the B seeps. (T. 611) It is this anisotropic zone that causes the flow of groundwater to the C seeps. However, as noted above, Mr. Roberts did not measure the hydraulic conductivity of the mine spoil to determine whether it is anisotropic. As a result, we cannot rely on his testimony that the anisotropic condition created by the backfilling of the haul road directs groundwater toward the C seeps.

Mr. Roberts also concluded that clay stockpiles at the site were an artifact of the mining operation causing groundwater to flow toward the group of C seeps located in the vicinity of the stockpile. The clay stockpile was built on a porous sandrock pad. (T. 446) Samples from Harbison-Walker's quality control files showed the clay to have a high sulfur content. (T. 446-47) According to Mr. Roberts, the sulfur oxidized over the years and, as water came into contact with it, the water picked up some of the sulfur and transported it to the area of the C seeps. (T. 447) Harbison-Walker challenges Mr. Roberts' conclusion on a number of grounds. In particular, it challenges the accuracy of DER Ex.Y, which is purported to be a water quality summary of seeps and springs at the southern side of the Smith Mine site prepared by Mr. Roberts. (T. 392-93) On direct examination, Mr. Roberts testified that the summary included the C seeps which Mr. Roberts attributed to the upper clay stockpile. (T. 393) However, on cross-examination, Mr. Roberts admitted that none of the seeps shown

on DER Ex.Y did, in fact, come from the stockpile. (T. 707) Although DER Ex.Y was to be replaced with a revised, accurate summary, designated as DER Ex.Y', the revised summary was never admitted into the record. Thus, there is nothing in the record establishing which seeps are attributable to the clay stockpile.

Moreover, while Mr. Roberts explained how water flowing through the stockpiles could contribute to acid mine drainage due to the high sulfur content of the clay, he never established that groundwater was, in fact, flowing through the clay stockpiles toward the C seeps. Without evidence of this, we have no basis for accepting Mr. Roberts' conclusion that the clay stockpiles are contributing to acid mine drainage emanating from the C seeps.

Testimony of Harbison-Walker's Expert

To rebut Mr. Roberts' conclusions, Harbison-Walker presented the expert testimony of geologist Robert Bellamy. Mr. Bellamy holds a Bachelor of Science degree in geology and geography from the University of Alabama. (T. 1461) In addition, he has studied engineering geology and has taken seminars in hydrogeology. (T. 1462) Prior to the hearing, Mr. Bellamy was associated with EME as a senior hydrogeologist. (T. 1467) Throughout his career, he has conducted hydrogeological studies at surface mines, including clay mines, and has investigated the impact of mining on groundwater. (T. 1464-65) Mr. Bellamy was accepted by the Board to testify as an expert in geology and hydrogeology. (T. 1473-74)

Mr. Bellamy was requested by Harbison-Walker to conduct a hydrogeologic study of the Smith Mine site. Mr. Bellamy began his study in the Fall of 1989, conducted field work through the spring of 1990, and completed the report of his findings in the summer of 1990. (T. 1477) During the course of his investigation, he visited the Smith Mine site hundreds of times. (T. 1477)

Mr. Bellamy agreed with Mr. Roberts that hydraulic potential (or "head") is a factor which determines the direction which groundwater will flow. As noted earlier, hydraulic potential is the energy source which causes the groundwater to move. (T. 1581) A second factor which Mr. Bellamy relied upon in determining the direction of groundwater flow was hydraulic conductivity. "Hydraulic conductivity" is the property of a porous medium which allows it to transmit water. (T. 1509, 1581) There must be sufficient continuity of hydraulic conductivity in the particular stratum to allow water to flow through t. (T. 1581) Mr. Bellamy measured the hydraulic conductivity of the strata at the Smith Mine by using what he referred to as a "slug test". (T. 1509, 1510) This test measures the rate of change in the water level of a well over time. (T. 1510) From this, he was able to determine the transmissivity of the strata. He then divided the transmissivity by the thickness of the particular saturated zone in question to arrive at the hydraulic conductivity. (T. 1510-1511)

Based on his review of the geology and topography of the site and the data he collected with regard to hydraulic potential and hydraulic conductivity, Mr. Bellamy determined that groundwater at the mine site flows in a west-northwest direction, away from the B and C seeps. (T. 1905-1908) Based on this, he concluded to a reasonable degree of scientific certainty that drainage from the permit area did not contribute to the B and C seeps. (T. 1906-1908)

In arriving at his conclusion, Mr. Bellamy stated that he relied in part on potentiometric measurements. However, much of Mr. Bellamy's potentiometric information was inferred or implied, and not based on hard data. The structure contour maps on which Mr. Bellamy relied in presenting his testimony were not admitted into evidence based on the unreliability of the data.

This included HW Ex. 119. Mr. Bellamy's potentiometric map for the Homewood aquifer. When questioned about his findings regarding the potentiometric surface of the mine site in the vicinity of monitoring well 1 through monitoring well 4. Mr. Bellamy stated as follows:

> Q. [by DER counsel] You have constructed --- the blue lines represent your potentiometric contours; correct?
>
> A. [by Mr. Bellamy] Yes.
>
> Q. Other than the points along here, you don't have any other information about the potentiometric surface on this mine site in the Homewood [aquifer] and in the area circled in black [on the eastern side of the site in the vicinity of monitoring well 1 through monitoring well 4]: do you?
>
> A. We just have the information from our well points.
>
> Q. You have no other data to construct the lines shown in that area?
>
> A. We implied or inferred the information of the water contours based on the structure and the thickness of water observed in the well points.
>
> (T. 1720)

With respect to the potentiometric surface of the site south of monitoring wells 4. 5 and 8. Mr. Bellamy admitted he had no data regarding potentiometric head. but had relied solely on the "implied inference" of the structural geology and observations of water levels in the wells. (T.1725) With respect to the structural geology from which he derived his "implied inference", he stated this to be the Upper Freeport formation. a seam which is not present at the site. (T. 1724-1725) Like the Homewood aquifer. Mr. Bellamy had little hard data regarding potentiometric surface for the Clarion aquifer. HW Ex.121 is a potentiometric surface map which Mr. Bellamy created for the Clarion aquifer unit. It. too. was excluded from evidence based on its unreliability. Mr. Bellamy admitted that he had developed contour lines for the Clarion seam without

any potentiometric data, but, again, had relied on information which was inferred. (T. 1731-1732) In constructing the contour line between monitoring wells 1 and 2, Mr. Bellamy admitted he had no potentiometric measurement for the Clarion unit at monitoring well 1 and further admitted that there was some question as to whether the Clarion unit even existed at monitoring well 1. (T-1730) In drawing the contour line between monitoring wells 1 and 2, Mr. Bellamy admitted that he had no actual or surveyed information for that area. (T. 1731) With respect to the contour line drawn between monitoring wells 2 and 3, Mr. Bellamy stated that he interpolated data at 20 foot intervals along the line. Other than the potentiometric surface elevations at monitoring wells 2 and 3, he had no measured potentiometric data. (T. 1732) He admitted that he had assumed the potentiometric surface would take the shape he had indicated and had no data showing the slope of the potentiometric lines toward the southern part of the mine site. (T. 1732-1733) With respect to the contour line between monitoring wells 2 and 3, Mr. Bellamy admitted the following:

> Q. [by DER counsel] You have no quantifiable data to support the shape of the contours between MW-3 and MW-2?
>
> A. [by Mr. Bellamy] I have no quantified information, but, again, the implied structure in what we have seen is the way we interpreted the information.
>
> Q. And the structure and, again, you're relying on a structural map on regionalized 100 foot contours for a unit that doesn't exist in this area; correct?
>
> A. Yes.
>
> Q. You don't have any sort of regional potentiometric surface; do you?
>
> A. No. I don't have a regionalized potentiometric surface.
>
> Q. In your deposition you had --- do you recall stating to me that you made these assumptions because of your lack of data?

A. Yes.

(T. 1734-1735)

HW Ex.121 was not admitted into evidence based on the presiding Board Member's finding that Mr. Bellamy had very little hard data to support it, but relied primarily on inference and interpolation.

The Board recognizes that in many cases an expert may need to extrapolate data or arrive at inferences based on the data before him. Al Hamilton I, 1993 EHB 1651. However, as noted by the presiding Board Member at the hearing, much of Mr. Bellamy's conclusions were based on data extrapolated from data which itself had been extrapolated or on inferences based upon yet further inferences. Without a greater quantity of actual, hard data to support his conclusions, we cannot rely on them.

Mr. Bellamy also based his opinion, in part, on the fact that monitoring well 5B, in the Clarion aquifer in the western portion of the site, was consistently dry. Based on this, and the lithology of the site, he concluded that all of the water passing through the mine spoil aquifer in the permit area is discharging at the A seeps. (T. 1912-1913)

However, while the lack of water at monitoring well 5B is a factor to consider, it does not necessarily lead to the conclusion reached by Mr. Bellamy, particularly since water is present in the well directly above monitoring well 5B at monitoring well 5C, and to the east and west of monitoring well 5B at monitoring well 4B and 8B. Mr. Bellamy himself agreed that monitoring well 5B could simply be an anomaly. (T. 1566)

Although we find Mr. Bellamy to be a credible and competent expert with regard to the subject of hydrogeology, we find his theories to be inadequately supported by the record. Therefore, we cannot rely on his

conclusion that groundwater at the Smith Mine flows away from the area of the B and C seeps.

Circumstantial Evidence

As explained above, the expert testimony on hydrogeology presented by both parties provided little assistance to the Board in determining the direction of groundwater flow at the Smith Mine site and, ultimately, whether Harbison-Walker is the source of the B and C seeps. DER argues, however, that there is overwhelming circumstantial evidence pointing to Harbison-Walker's site as the source of the seeps.

Circumstantial evidence may form the basis for concluding that a hydrogeologic connection exists between a permitted site and an off-site discharge.[26] The question is whether the circumstantial evidence presented by

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[26] C&K Coal, 1992 EHB 1261 (A causal connection between a mining operator's site and an off-site seep can be established by either direct testimony of a factual and expert nature or circumstantial evidence.) In C&L Enterprises, Inc. v. DER, 1991 EHB 514, for example, there was a discharge of gasoline which was discovered in the vicinity of the appellants' gasoline station. DER investigated the discharge and determined the appellants' gasoline station to be the source of the problem. Prior to issuing an order to the appellants, DER investigated and eliminated three other nearby sites as possible sources of the discharge. Although there was no direct evidence demonstrating that the appellants had caused the leak, DER relied on circumstantial evidence, primarily in the form of testimony from its hydrogeologist, as establishing the appellants' site as the source of the discharge. In upholding DER's order, the Board noted that, "although much of the evidence relied upon by [DER] was circumstantial in nature and involved the process of eliminating other possible sources, nevertheless, there was substantial and competent evidence linking the Appellants to the unauthorized discharge." Id. at 541.

Harbison-Walker asserts, however, that we must take note of the Commonwealth Court's ruling in Kerrigan v. DER, ___ Pa. Cmwlth. ___, 641 A.2d 1265 (1994), which overturned a decision of the Board upholding an order of DER on the basis that the Board's finding that a danger of pollution existed was not supported by substantial evidence. The Court defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." 641 A.2d at 1269 (citing A. H. Grove & Sons, Inc. v. Commonwealth, DER, 70 Pa. Cmwlth. 34, 452 A.2d 586 (1982), in which the Commonwealth Court found there was substantial and competent circumstantial evidence to support the Environmental Hearing Board's finding that an automobile service station operator's property was the probable source of oil and gasoline

DER in this matter is such that "a reasonable mind might accept [it] as adequate to support a conclusion" that Harbison-Walker's mine site is the source of the acid mine drainage emanating from the B and C seeps. Kerrigan, ___ Pa. Cmwlth. at ___, 641 A.2d at 1269.

The circumstantial evidence upon which DER relies may be summarized as follows: 1) The Smith Mine site, including Harbison-Walker's bonded area, has the potential to form acid mine drainage, and Harbison-Walker's mining practices allowed this potential to be realized; 2) There is no other source of the acid mine seeps than the Smith Mine.

We conclude that the Smith Mine site has the potential to produce acid mine drainage. Mr. Roberts testified extensively regarding the conditions of the Smith Mine site which have the potential to form acid mine drainage. Acid mine drainage is caused by the oxidation of pyrite and certain secondary reactions. (T. 326) The factors which affect whether acid mine drainage is likely to occur at a mine site are the relative presence of pyrite and the relative absence of various offsetting calcareous (or alkaline) materials, as well as the operational characteristics of the mine. (T. 327) The magnitude of acid mine drainage production is affected by the amount of pyrite present, the amount of calcareous materials present, the amount of water moving through the mine site, and operational characteristics such as good "housekeeping" in the pit, the length of time spoil is allowed to sit and oxidize, and the method of the mining operation itself. (T. 327-28) Mr. Roberts identified materials at the Smith Mine site with the potential to form acid mine drainage. In the spoil, Mr. Roberts observed pieces of coal, black shale, sandstone with coal inclusions, and secondary compounds which form after the

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contamination.)

oxidation of pyrite. (T. 329) These materials are widespread across the mine site. (T. 329) In contrast, Mr. Roberts observed no offsetting calcareous, or alkaline, units at the Smith Mine site. (T. 330)

The Lower Kittanning coal seam also has a potential for the production of acid mine drainage. Analyses of the Lower Kittanning coal which was spoiled during the operation showed it to be of high sulfur content. (T. 334) During his tenure with DER, Mr. Roberts has become familiar with other mining operations in the Lower Kittanning seam in similar stratigraphic settings. (T. 329-30) Of these operations, most have resulted in acid mine drainage. (T. 330)

It also appears that this potential was realized. As noted earlier, the operational characteristics of a mine can also play a part in whether acid mine drainage is likely to result from the mining operation. According to DER, Harbison-Walker's mining methods allowed the potential for acid mine drainage production to be realized. In particular, Harbison-Walker let the spoil sit for long periods of time, allowing it to oxidize. (T. 334) The oxidation of pyrite, which is present in the spoil, leads to the formation of acid mine drainage. (T. 326)

Perhaps just as important as the presence of acid-forming materials at the Smith Mine site and the mining methods employed by Harbison-Walker which allowed acid mine drainage to form is the fact that there are no other possible sources for the production of acid mine drainage at the B and C seeps than the Smith Mine. There is no evidence to suggest that any deep mining took place in the area (T. 75, 201), and, although the record shows that other surface mining was conducted in the area, there is no evidence to link this mining with the B and C seeps. (T. 75, 201)

Other surface mining in the area was conducted by Kaiser Minerals and Chemicals, Inc. ("Kaiser"), which mined coal and clay at the Potato Ridge Mine located to the south- southeast of Harbison-Walker's mine site. (J.S. 14; T. 194)[27] Although there is no evidence to support DER's assertion that the Potato Ridge Mine is hydrogeologically isolated from the B and C seeps,[28] nonetheless, we are able to conclude that, due to its location, the Kaiser Mine site seems an unlikely candidate for having generated the acid mine drainage emanating from the B and C seeps. The B seeps are to the west of Harbison-Walker's affected area, whereas the Kaiser site is to the south-southeast. In order for the Kaiser site to be the source of the B seeps, water would have to travel from the Kaiser site across Harbison-Walker's site to the B seeps. In that case, liability would attach to Harbison-Walker under §316 of the Clean Streams Law, 35 P.S. Section 691.316, on the basis of the contaminated water passing through its property. Thompson & Phillips Clay Co., 136 Pa. Cmwlth. at ___, 582 A.2d at 1164-65; McKees Rocks Forging, Inc. v. DER, 1994 EHB 220, 262-263. As for the C seeps, they are located along the edge of the area which was disturbed by Harbison-Walker. (DER Ex. V) Moreover, in order for the Kaiser site to be the source of either the B or C seeps, groundwater would need to flow in a direction opposite of that described by both DER's and Harbison-Walker's expert hydrogeologists. There is simply no data to suggest that the Kaiser site may be the source of the B and C seeps. Based on the location of the seeps, it

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[27]The record does not clearly indicate when mining was conducted by Kaiser.

[28]In its post-hearing brief, DER asserts that the Potato Ridge Mine is hydrogeologically isolated from the Smith Mine. However, it provides no citation either to the transcript or to any exhibits in support of this assertion. DER also contends that the particular strata in question are not connected between the mines. In support of this contention, DER relies on certain testimony by Mr. Roberts. (T. 452) Unfortunately from DER's standpoint, the testimony to which DER cites is rather disjointed and does not clearly support DER's assertions.

is more probable that they are hydrogeologically connected to the Smith Mine site than to the Kaiser site.

Until 1954, clay surface mining was also conducted at the Smith Mine site by Union Firebrick prior to Harbison-Walker's mining. Based on the evidence before us, we find that Union Firebrick is not the source of the B and C seeps. The evidence indicates that the B seeps did not appear until sometime between 1965 and 1969, more than ten years after Union Firebrick's mining had ended, and during the time Harbison-Walker was operating the site. There is no evidence as to when the C seeps first appeared. However, even if it could be determined that the seeps arose from spoils left behind by Union Firebrick's mining, the areas affected by Union Firebrick's mining were reaffected by Harbison-Walker. (T. 689) Because it reaffected the areas mined by Union Firebrick, liability attaches to Harbison-Walker regardless of whether it was the originator of the discharges. Thompson & Phillips Clay Co., 136 Pa. Cmwlth. at ___, 582 A.2d at 1164-65; Al Hamilton I, 1993 EHB at 1705-1706. Therefore, based on the evidence, we conclude that Union Firebrick is not the source of the acid mine drainage emanating from the B and C seeps.

Harbison-Walker puts forth what it asserts is another equally plausible theory as to the source of the acid mine drainage at the B and C seeps. Harbison-Walker suggests that the acid mine drainage is naturally-occurring, caused by the weathering of pyrite at areas where the coal outcrops. It is Harbison-Walker's contention that pyritic materials in the updip end of the coal outcrops start the formation of acid mine drainage and that as surface water enters the updip end, it recharges the material and then eventually emerges downdip as an acid discharge.

To support its theory, Harbison-Walker relies on Mr. Roberts' testimony on cross-examination. However, we do not agree with Harbison-Walker that Mr. Roberts' testimony provides an adequate basis for this theory. Although Mr. Roberts agreed that weathering of outcrops can and does occur at the site and that the outcrops have acid forming potential (T. 525-27, 682), he dismissed the theory that acid mine drainage is occurring naturally at the site. (T. 683) Mr. Roberts pointed out that the weathering has been occurring "for eons in geologic time" and that the acid-forming material may well have been extinguished by this time. (T. 683) In addition, he noted that the acid discharges appear only in areas where mining has occurred: there are no acid discharges at Hill Two where no mining took place. (T. 684) Finally, Mr. Roberts stated that he has neither heard nor seen any cases of natural acid formation occurring in Pennsylvania. (T. 685) Given his educational background and experience with respect to the formation of acid mine drainage, we accept Mr. Roberts as being qualified to render an opinion that the acid discharges at the Smith Mine site are not occurring naturally. Harbison-Walker provided no other expert testimony which would tend to support its theory or which contradicts Mr. Roberts' opinion. Since expert opinions must be buttressed by sufficient factual foundations to have credence before this Board, Oaks Civic Association v. DER, 1975 EHB 123, 125, we cannot accept Harbison-Walker's theory of natural acid formation at the Smith Mine site as being a plausible explanation for the acid discharges at the B and C seeps.

We conclude that DER has not met its burden of proof under §315 of the Clean Streams Law because it has not introduced evidence of a causal connection. Had Mr. Roberts been able to clearly demonstrate that groundwater flows from the mine site in the direction of the B and C seeps, we might then

have sufficient evidence to conclude that a hydrogeologic connection exists between the site and the seeps. However, Mr. Roberts' testimony failed to establish this.

Proof of such a causal connection in addition to proof of potential and the absence of other sources is established in our prior decision. In C&L Enterprises, 1991 EHB 514, DER determined the source of a discharge through a process of eliminating other possible sources. Nevertheless, there was also evidence pointing to the appellants' gasoline station as the source of the gasoline discharge (an unaccounted for loss of gasoline from the appellants' inventory, a decrease in the gasoline discharge during pumping of the appellants' tanks). There is no such evidence linking Harbison-Walker to the B and C seeps.

A.H. Grove & Sons, Inc. v. DER, 70 Pa. Cmwlth. 34, 452 A.2d 586 (1982), also involved a determination of the probable source of pollution. In that case, several wells in the area of the appellant's property were found to be contaminated with gasoline, oil, and solvents. DER considered possible sources of pollution in the area and concluded that the appellant's automobile service station and dealership was the most probable source. DER ordered the appellant to, inter alia, conduct testing to determine the extent of the pollution. The Board concluded that DER had authority to order reasonable testing, at the appellant's expense, to establish the extent of the pollution.

The issue on appeal before the Commonwealth Court in Grove was whether DER has the authority to order testing when it has identified a "most probable source" of an environmental problem. The Commonwealth Court affirmed the order of the Board, holding that DER had demonstrated with sufficient probability that the appellant was the source of the pollution so as to authorize an order requiring testing.

Unlike the present case, however, DER had established in Grove not just that there was no other likely source of the pollution, but it had also established with sufficient probability that the appellant was the source of the problem. Among the evidence which DER presented was the fact that waste oil and other material had been discarded on the appellant's property, groundwater flowed from the appellant's property toward the affected wells, and petroleum contaminants had been discovered in the groundwater near the appellant's property. Based on this, the Commonwealth Court concluded there was substantial evidence to support the Board's finding.

Because DER has failed to supply substantial evidence of a causal connection, we find that DER has failed to meet its burden of establishing that its order was authorized under Sections 307 and 315 of the Clean Streams Law.

Section 316 of the Clean Streams Law

DER also asserts that Harbison-Walker is liable under Section 316 of the Clean Streams Law, 35 P.S. Section 691.316, as an owner or occupier of property where a pollutional condition exists. Section 316 reads in pertinent part as follows:

> Whenever the department finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the department may order the landowner or occupier to correct the condition in a manner satisfactory to the department... For the purpose of this section, "landowner" includes any person holding title to or having a proprietary interest in either surface or subsurface rights.
>
> 35. P.S. Section 691.316

DER contends that Harbison-Walker qualifies as both a landowner and an occupier of the Smith Mine site. Harbison-Walker is a landowner, asserts DER, pursuant to its mining lease which granted it the right to mine clay and

coal on the Smith Mine. DER argues that it is well-established under Pennsylvania law that a mineral lease is an estate in land, citing the cases of Hutchinson v. Sunbeam Coal Corp., 513 Pa. 192, 195, n.1, 519 A.2d 385, 387, n.1 (1986), and Hummel v. McFadden, 395 Pa. 543, 150 A.2d 856, 860 (1959).[29] Since "Landowner" is defined in Section 316 as anyone "holding title to or having a proprietary interest in either surface or subsurface rights", Harbison-Walker qualifies as a landowner pursuant to its lease granting a proprietary interest in the clay and coal under the surface of the land. Since the lease was still in existence at the time of DER's order in June 1991, Harbison-Walker was a landowner at that time.

DER also contends that Harbison-Walker constitutes an "occupier" of the Smith Mine since it engaged in active mineral extraction between 1954 and 1972 and continues to engage in activities at the site. We agree that Harbison-Walker qualifies as an occupier of the Smith Mine since it continues to store clay and to remove clay from stockpiles at the site.

However, while Harbison-Walker may be held liable under Section 316 for the treatment of any seeps located on its permit site, the B and C seeps are located off the permit area and thus, are not on land owned or occupied by Harbison-Walker. Thus, DER has no authority under Section 316 of the

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[29]In Hutchinson, the Court, in discussing a coal lease entered between the parties, stated as follows:

> The term "lease" is in some respects a misnomer. What is really involved is a transfer of an interest in real estate, the mineral in place. [Citations omitted] Common Pleas' construction gives the transfer involved the characteristics of a fee simple determinable in the coal, which the lease severs from appellees' interest in the surface.

Hutchinson, 513 Pa. at ___, 519 A.2d at 387, n.1.

Clean Streams Law to order Harbison-Walker to treat the B and C seeps absent a showing that they resulted from a condition on Harbison-Walker's land.

Section 610 of Clean Streams Law

Likewise, we reject DER's argument that its order should be sustained on the basis of its power to order the abatement of a nuisance under Section 610 of the Clean Streams Law, 35 P.S. Section 691.610. Since DER has not proven that Harbison-Walker caused or contributed to the B and C seeps, it has no authority under Section 610 to hold Harbison-Walker liable for abating a nuisance not located on its mine site. C&K Coal, 1992 EHB at 1302, n.13.[30]

POLLUTION OF STREAMS

DER contends that acid mine drainage from the Smith Mine site has polluted two nearby streams, Laurel Run and Tributary C. DER bases its contention on chemical, biological, and visual evidence.

Chemical Evidence

As to chemical evidence, DER points to Scott Roberts' water quality summaries for the two streams. The summaries are contained in DER Ex.Z and BB. During Harbison-Walker's cross-examination of Mr. Roberts, it was revealed that the data contained in DER Ex.Z and BB was inaccurate. DER subsequently submitted revised summaries which it believed to be accurate, but these were never admitted into the record.

We may, however, rely on Mr. Roberts' testimony as to the results of the water quality sampling of Laurel Run and Tributary C. Mr. Roberts relied on data contained in the following documents: DER's inspection reports,

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[30] Since we have sustained Harbison-Walker on the issue of whether DER's order was authorized by §§315.316, or 610 of the Clean Streams Law, 35 P.S. §§691.315, 691.316, 691.610, we need not address Harbison-Walker's further contention that DER's order is barred by laches and equitable estoppel.

samples from Harbison-Walker's permit files, and samples contained in the EME report. (T. 391, 393, 403, 404, 406, 409) Harbison-Walker has not disputed the accuracy of these documents.

Based on the samples, Mr. Roberts characterized the water in Tributary C above Harbison-Walker's upper haul road as exhibiting low levels of sulfates and metals, although on some samples, acidity exceeded alkalinity. (T. 404) Moving downstream, there is an increase in acidity and sulfates, a marked increase in metals, and an absence of alkalinity. (T. 405) Below the treatment pond, sulfates remain elevated, metals vary, acidity is reduced somewhat, and some alkalinity is present. (T. 405) Immediately before Tributary C's confluence with Laurel Run, Mr. Roberts observed staining indicative of iron hydroxide. Mr. Roberts characterized the water in Laurel Run as having sulfates elevated above what he would consider to be normal background levels, as well as elevated iron. Alkalinity, however, was greater than acidity. (T. 406-407)

Harbison-Walker argues that the chemical analyses of the water in Laurel Run and Tributary C prove nothing since DER offered no evidence as to the quality of the water in the streams prior to any mining. However, background water quality can be determined by looking at samples taken from Tributary C upstream of the Smith Mine site. Tributary C upstream of the upper haul road of the Smith Mine site exhibits low sulfates and metals, whereas the water downstream of the site contains elevated sulfates and metals. (T. 404-405) The Backside Tributary also provides a source of background water quality for this area since it was not affected by mining. (T. 411) The water in the Backside Tributary exhibits low sulfates, low metals, a slightly depressed pH level, and, in most cases, alkalinity exceeds acidity. Compared to the water quality of the

Backside Tributary and Tributary C upstream of the mine site, the water quality of Laurel Run and Tributary C downstream of the mine site is degraded.

Biological Evidence

DER also points to an aquatic study done by Stephen Kepler as evidence that Laurel Run and Tributary C have been polluted by acid mine drainage from the Smith Mine site. Mr. Kepler is a fisheries biologist with the Fish Commission. (T. 806) In this capacity, he has studied the effect of acid mine drainage on aquatic communities. (T. 809)

In 1982, Mr. Kepler conducted an investigation of the watershed of the Smith Mine site area. (T. 812) The study was done in connection with an application for a permit to mine coal at a site located along Laurel Run upstream of the Smith Mine. (T. 812) Mr. Kepler's study revealed that excellent aquatic communities existed in Laurel Run upstream of the Smith Mine, with numerous benthic macroinvertebrates and a healthy population of brook trout and brown trout. (T. 816, 819) In sharp contrast, immediately downstream of the Smith Mine the aquatic community was depressed and the stream was degraded. (T. 819-820) Based on Mr. Kepler's study, the Fish Commission recommended that no mining be permitted in the upper watershed due to the sensitivity of the lower watershed and the degradation which was already occurring there. (T. 820)

In 1991, Mr. Kepler conducted an aquatic investigation of the Smith Mine site watershed at the request of DER. (T. 820) As part of his investigation, Mr. Kepler conducted sampling at various locations along Laurel Run and unnamed tributaries thereto, including Tributary C and the Backside Tributary. Mr. Kepler chose the Backside Tributary as a representative station which did not appear to have any effects from mining and which had a watershed

comparable in size to that of Tributary C. (T. 822-823) Mr. Kepler also chose as another background station an area along an unnamed tributary to Laurel Run upstream of any impact of mining. (T. 821-822)[31] Mr. Kepler also chose a location on Laurel Run upstream of its confluence with Tributary C and above any impact from mining. (T 821-822) The sampling stations on the Backside Tributary and the unnamed tributary exhibited high numbers of macroinvertebrates. The upstream sampling station on Laurel Run also exhibited relatively high numbers of macroinvertebrates, although not as high as Mr. Kepler would have expected to find at an upstream station. (T. 827, 847)

Mr. Kepler also sampled at locations on Tributary C[32] and Laurel Run downstream of the site. In sharp contrast to the above-mentioned sampling stations, these stations exhibited a depressed macroinvertebrate community. (T. 827)

In addition, the lower portion of Tributary C, at its downstream station, was coated with iron precipitate. Likewise, Laurel Run, immediately above its downstream sampling station, was coated with iron precipitate and aluminum hydroxide precipitate. (T. 828) In addition, water quality samples at Mr. Kepler's sampling locations revealed increased metal concentrations and depressed pH levels downstream of the mine site. (T. 833, 836)

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[31] There is some confusion in the transcript with respect to the exact location of this sampling station. Based on subsequent testimony, it would appear that the station is located on Tributary C. However, this is never clearly stated in the record. In addition, although page 821 of the transcript refers to this station as "LR-01," this is an error since the station is located along an unnamed tributary and not on Laurel Run and because a different sampling station on Laurel Run is subsequently referred to on page 821 as "LR-01."

[32] Page 822 of the transcript does not specify "Tributary C" but refers only to an "unnamed tributary." However, subsequent testimony reveals this to be Tributary C.

Based on the results of his investigation, Mr. Kepler concluded to a reasonable degree of scientific certainty that discharges from the Smith Mine site were degrading the aquatic communities of Laurel Run and Tributary C. (T. 835)

Harbison-Walker argues that Mr. Kepler failed to consider the possible impact of other sources of degradation to the streams, and, therefore, his testimony should be discredited. In particular, Harbison-Walker contends that Mr. Kepler failed to consider the impact of discharges from the Kaiser site and an area designated as the "park seeps." However, there are two flaws in Harbison-Walker's argument. First, although there is testimony by Mr. Roberts that acid mine drainage from the park seeps enters Laurel Run (T. 407) and testimony by Mr. Kepler that a discharge of treated ethylene, which he believes originates from the Kaiser site, enters Laurel Run, there is no evidence that discharges from either of these areas enters Tributary C and, thus, could not contribute to the degradation of Tributary C. Second, the points at which these discharges enter Laurel Run are downstream of Harbison-Walker's mine site; therefore, even if these discharges do have an impact on the stream, this does not explain the degradation which exists in that portion of Laurel Run downstream of the mine site but upstream of the park seeps and ethylene discharge. Nor did Harbison-Walker offer any evidence which would rebut Mr. Kepler's findings.

Visual Evidence

As a final means of establishing that Laurel Run and Tributary C have been degraded by acid mine drainage from the Smith Mine site, DER points to the visual observations of Scott Roberts. While walking the site, Mr. Roberts has observed seepage from the toe of Harbison-Walker's mine spoils flowing into Tributary C. (T. 406) In addition, he has observed iron hydroxides coating the

bottom of Tributary C immediately before its confluence with Laurel Run. (T. 408)

Based on the chemical, biological and visual evidence presented by DER, we find that there is sufficient evidence to conclude that surface discharges in the form of acid mine drainage from Harbison-Walker's mine site has degraded the water quality of Laurel Run and Tributary C downstream of the site. Mr. Roberts observed seepage from Harbison-Walker's mine spoils flowing into Tributary C. The water downstream of the mine site exhibits a marked increase in acidity, sulfates, and metals, as compared to background water quality levels exhibited upstream of the site and in the Backside Tributary, where no mining took place. Finally, Mr. Kepler's study revealed that a healthy fish and macroinvertebrate population existed upstream of the site, while the aquatic community downstream of the site was depressed. Harbison-Walker did not refute this evidence. Therefore, we uphold that portion of DER's order requiring Harbison-Walker to submit a plan to abate acid mine drainage to Laurel Run and Tributary C in order to ensure that the water quality of the streams is in compliance with the standards set forth in 25 Pa. Code Sections 93.6, 93.7.

RECLAMATION

The remainder of DER's order addresses alleged reclamation violations at the Smith Mine site. DER contends that there are three groups of reclamation violations at the site: 1)failure to maintain adequate erosion and sedimentation controls, 2) failure to backfill and to reclaim highwalls, and 3) failure to preserve topsoil.

Prior to the hearing, the parties entered into an Agreement in which they stipulated that the only issue on appeal concerning reclamation is whether DER had the authority to order reclamation at the site. If it is

determined by the Board that DER did have the authority to order reclamation at the site, then the parties have agreed to conduct the reclamation work set forth in the Agreement. In other words, neither party may challenge the type of reclamation work to be done at the site but only whether DER had the authority to order reclamation. Therefore, the only matters which we must address are whether DER had the legal authority, pursuant to statute and regulation, to order Harbison-Walker to conduct reclamation at the site and whether reclamation violations existed at the site.

Erosion and Sedimentation

DER cites the following statutory and regulatory provisions as authority for ordering Harbison-Walker to maintain erosion and sedimentation control measures at the site: Sections 401 and 610 of the Clean Streams Law, 35 P.S. Sections 691.401 and 691.610; 25 Pa. Code Section 102.4; former 25 Pa. Code Section 77.102; the Surface Mining Act, 52 P.S. Section 1396.1 et. seq.; and the Non-Coal Act, 52 P.S. Section 3301 et. seq. DER also cites Harbison-Walker's Mine Drainage Permit in support of its order.

We first turn to the question of whether the Clean Streams Law provides support for DER's order. Section 401 of the Clean Streams Law prohibits the pollution of Commonwealth waters as follows:

> It shall be unlawful for any person or municipality to put or place into any of the waters of the Commonwealth, or allow or permit to be discharged from property owned or occupied by such person or municipality into any of the waters of the Commonwealth, any substance of any kind or character resulting in pollution as herein defined. Any such discharge is hereby declared to be a nuisance.
>
> 35 P.S. Section 691.401

It is DER's contention that erosion and sedimentation at the site are causing pollution or a danger of pollution to waters of the Commonwealth.

Harbison-Walker contends that DER's order gave no notice that it considered erosion or sedimentation to constitute pollution to waters of the Commonwealth. This is simply untrue. Paragraph V of DER's order states that the violations set forth in Paragraph U of its order constitute public nuisances pursuant to, *inter alia*, Section 401 of the Clean Streams Law. Paragraph U discusses Harbison-Walker's failure to maintain adequate erosion and sedimentation controls. Thus, Paragraphs U and V of DER's order clearly set forth DER's contention that the lack of erosion and sedimentation controls at the site violated Section 401 of the Clean Streams Law.

Harbison-Walker then asserts that DER did not intend the violations of Paragraph U, i.e. erosion and sedimentation, to be covered under Section 401. (H-W Post Hearing Brief, p. 201) This argument is unconvincing since DER's order clearly states that it considered erosion and sedimentation at the site to constitute nuisances in violation of Section 401 of the Clean Streams Law.

DER also relies on Section 610 of the Clean Streams Law in support of its order concerning erosion and sedimentation control. This provision authorizes DER to "issue such orders as are necessary to aid in the enforcement of the provisions of" the Clean Streams Law. 35 P.S. Section 691.610. Such an order may be issued if DER finds that a condition is causing or creating a danger of pollution to Commonwealth waters. Harbison-Walker argues that, because DER did not invoke Section 610 in its order with respect to erosion and sedimentation control, it is precluded from relying on it now. Harbison-Walker provides no support for this proposition, nor are we aware of any. Here, DER determined that erosion and sedimentation at the site created a danger of pollution under Section 401, and it acted in accordance with Section 610 in

issuing the order in question. Harbison-Walker has given us no basis for finding that an order issued under the Clean Streams Law is invalid simply because it does not recite Section 610 as a basis for the order.

DER also cites 25 Pa. Code Section 102.4 of the regulations as authority for requiring Harbison-Walker to maintain erosion and sedimentation control. That section states in relevant part:

> (a) Earthmoving activities within this Commonwealth shall be conducted in such a way as to prevent accelerated erosion and the resulting sedimentation. To accomplish this...a... person...engaged in earthmoving activities shall develop, implement and maintain erosion and sedimentation control measures which effectively minimize accelerated erosion and sedimentation.
>
> 25 Pa. Code Section 102.4(a)

In response, Harbison-Walker argues that it is not required to comply with 25 Pa. Code Section 102.4 because it is not currently engaged in earthmoving activities. Harbison-Walker asserts that Section 102.4 applies only to ongoing earthmoving activities and not to "past conditions."

Harbison-Walker is incorrect in asserting that the violation in question is a "past condition". Rather, it is a current condition resulting from past activity. As DER notes in its reply brief, the present effects of past activity are subject to regulation. Commonwealth v. Barnes and Tucker Co., 472 Pa. 115, 371 A.2d 461, 467 (1977); Ingram v. DER, 141 Pa. Cmwlth. 324, 595 A.2d 733, 737 (1991), alloc. denied, _____ Pa. _____, 607 A.2d 257 (1992).

Harbison-Walker argues, however, that the predicate for the application of Section 102.4 is "earthmoving" and that since Harbison-Walker is not currently engaged in earthmoving activity, Section 102.4 is not applicable. We agree with Harbison-Walker that Section 102.4 applies only to persons currently engaging in earthmoving activity. This is clear from its language:

"Earthmoving activities...shall be conducted in such a way..." and "a...person...engaged in earthmoving activities shall..." However, Harbison-Walker is incorrect in its assertion that it is not currently engaging in earthmoving activity. The term "earthmoving activity" is defined in Chapter 102 of the regulations as follows:

> **Earthmoving activity** - A construction or other activity which disturbs the surface of the land, including, but not limited to, excavations, embankments, land development, subdivision development, mineral extraction, and the moving, depositing, or storing of soil, rock or earth.
>
> 25 Pa. Code Section 102.1
> (emphasis added)

The record indicates that, at the time of DER's order and at least up until the time of the hearing, Harbison-Walker maintained clay stockpiles at the Smith Mine site. (T 879) The evidence further indicates that piles of spoil still existed at the site at the time of DER's order. Thus, according to the definition set forth above, Harbison-Walker was engaging in earthmoving activity at the time of DER's order and, as a result, is subject to the requirements of Section 102.4. Accordingly, Harbison-Walker is required, pursuant to Section 102.4, to "implement and maintain erosion and sedimentation control measures which effectively minimize accelerated erosion and sedimentation."

DER also points to Harbison-Walker's Mine Drainage Permit as requiring it to maintain adequate erosion and sedimentation controls. Standard Condition Three of Harbison-Walker's amended permit states, "No silt, coal mine solids, rock debris, dirt and clay shall be washed, conveyed or otherwise deposited into the waters of the Commonwealth." In addition, Supplemental B to the permit states, "Siltation from the spoil on the affected area will be stopped by planting affected areas and terracing concurrently with stripping and

backfilling." Harbison-Walker does not dispute that its permit requires erosion and sedimentation control.

In conclusion, we find that, pursuant to Sections 401 and 610 of the Clean Streams Law, 35 P.S. Sections 691.401 and 691.610; 25 Pa. Code Section 102.4; and Standard Condition Three and Supplemental B of Harbison-Walker's Mine Drainage Permit, Harbison-Walker is required to implement and maintain adequate erosion and sedimentation controls at the site so as to prevent accelerated erosion and sedimentation.[33]

The next question is whether sedimentation and erosion violations exist at the site. "Erosion" is the wearing away of surface materials by water. "Sedimentation" is the resultant deposition of those materials on land or stream bottoms. (T. 902) Harbison-Walker argues that DER has failed to establish that ongoing, accelerated erosion is occurring at the site or that sediment is being discharged to waters of the Commonwealth. Each side presented conflicting testimony as to conditions at the site at the time of DER's order. In support of its position, DER relied on the testimony of Compliance Specialist Robert Musser and photographs taken by Mr. Musser which DER asserted showed signs of erosion and sedimentation. Harbison-Walker relied on the testimony of its expert in environmental science, Gene Gonsoulin, who testified that he observed no signs of accelerated erosion or sedimentation at the site and that DER's photographs did not show signs of accelerated erosion or sedimentation.

Compliance Specialist Robert Musser served as DER's mine inspector for the Smith Mine site from 1988 to 1992. (T. 863) During inspections of the site, it was his responsibility to note whether erosion and

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[33]In reaching this conslusion, we need not address the other statutory and regulatory provisions cited by DER in support of its order.

sedimentation were occurring. (T. 902) Mr. Musser testified that he observed various areas where erosion and sedimentation were occurring at the Smith Mine site in the course of his inspections. (T. 903-17) One condition which Mr. Musser observed was a series of deep erosion gullies emanating from several diversion ditches in the northeast portion of the bonded area. (T. 902-03) Mr. Musser described the gullies as extending for approximately 400 to 500 feet in length to the Backside Tributary. (T 903) Two of the gullies, approximately five feet in width are depicted in photographs taken by Mr. Musser in May 1992. (DER Ex.M-4, M-5; T. 904) Mr. Musser observed a delta of sediment on the stream bottom at the locations where the gullies ran to the stream. (T. 905)

An aerial photograph of the northern end of the site taken by Mr. Musser in December 1988 also shows a network of erosion gullies, with a large gully running through the center and exiting the site. (DER Ex.M-1; T. 907) Mr. Musser testified that, although Harbison-Walker had undertaken some effort at erosion and sedimentation control in a portion of this area, it had not done so in all of the areas portrayed in the photograph.

Mr. Musser testified that he also observed signs of erosion in the area of the northern clay stockpile. He described the stockpile and spoil below it as "eroding heavily" and he observed a large band of sedimentation in the woods below the stockpile. (T. 908) DER Ex.M-2 is a photograph taken by Mr. Musser in 1988 in the area of the clay stockpile. (T. 908) The photograph depicts the slope of the stockpile as containing no vegetation, and there is a heavy gray layer of sediment in the woods below the stockpile. (DER Ex.M-2; T. 909)

Mr. Musser testified that he observed erosion and sediment in the area of the outslopes and described this area as containing little vegetative

cover. (T. 910) In addition, he observed what he described as a "heavy delta" of sediment below the outslopes. (T. 910) DER Ex.K-1 and K-2 are photographs of the outslopes taken by Mr. Musser in November 1990. These photographs portray an area of severe erosion. (DER Ex.K-1 and K-2; T. 911) A few sparse trees appear on the slopes, but for the most part, there is no vegetation. (DER Ex.K-1 and K-2) The slopes are covered with spoil material and contain erosion gullies. (DER Ex.K-1, K-2; T. 912) DER Ex.I-2 is a photograph taken by Mr. Musser in May 1992, depicting the area below the outslopes where Mr. Musser observed deposits of sediment. (T. 912) This area is within 30 to 40 feet of Tributary C. (T. 913) The photograph depicts an area of heavy sedimentation. A few dead trees appear in the left of the photograph. (DER Ex.I-2) In addition, water appears across the bottom of the photograph. DER Ex.I-3 is a photograph of the notch area of the outslopes. This, too, depicts, a deposit of sediment running through a group of trees. Water again appears at the bottom of this photograph. According to Mr. Musser's testimony, the water which appears at the bottom of both photographs originates from the C seeps. (T. 913-914)

Mr. Musser also testified that he observed signs of erosion and sedimentation below the upper and lower C clay stockpiles. (T. 917) In this area, Mr. Musser states that he observed a series of gullies traveling from below the stockpiles to Tributary C. (T. 917) DER Ex.N-3 is a photograph of one of the gullies, taken by Mr. Musser in May 1992. (T. 919) The photograph depicts a gully with water running through it. The gully also contains gray material, which Mr. Musser identified as sediment from the clay stockpile. (DER Ex.N-3; T. 921)

Finally, Mr. Musser noted signs of erosion and sedimentation along the upper access road. (T. 922) Along the road, he observed a deep gully

extending approximately 600 to 800 feet from the toe of spoil along the northern side of the road to an area above the upper C clay stockpile. (T. 922, 923) DER Ex.N-2 is a photograph of a section of the gully, taken by Mr. Musser in March 1991. (T. 922) At this section, the gully is approximately three to four feet deep. (T. 923)

Harbison-Walker disputes Mr. Musser's testimony on two grounds. First, it asserts that it implemented approved erosion and sedimentation control measures as indicated by earlier inspection reports. Second, the testimony of its expert witness, Gene Gonsoulin, contradicts Mr. Musser's testimony that erosion and sedimentation problems exist at the site.

We first address Harbison-Walker's contention that earlier inspection reports by DER did not indicate that erosion or sedimentation control problems existed at the site. On cross-examination, Mr. Musser admitted that his inspection reports for the years 1988, 1989, and 1990 made no mention of erosion or sedimentation violations at the site. (T. 1036) He was not certain whether his 1991 reports contained any mention of erosion or sedimentation violations. (T. 1037) Mr. Musser explained, however, that while DER was aware that erosion and sedimentation control problems did, in fact, exist at the site during the time period in question, he did not reference these conditions in his inspection reports because they were being evaluated by DER's legal staff to determine Harbison-Walker's liability and the appropriate course of action. (T. 1051) Indeed, Mr. Musser's inspection report covering August 31 through September 2, 1988 states as follows:

> Several other environmental problems and possible mining violations including backfilling of the site, topsoiling, and erosion and sedimentation controls are being evaluated with the Department's legal staff to determine the operator's liability and the appropriate enforcement actions to be taken. (BE-1, Tab 116)

Harbison-Walker contends, however, that the reclamation work done by it at the site has already been approved by DER, pointing to inspection reports prepared by DER inspector James King at the completion of mining. In particular, Harbison-Walker points to the July 31, 1973 inspection report following the submission of Harbison-Walker's final completion report for mining at the site. In response to the question "Has planting been done?", Mr. King marked "yes". (BE-1, Tab 34) In response to the question "Has operator fulfilled all legal requirements except planting?", Mr. King also checked "yes". (BE-1, Tab 34)

However, we cannot accept Mr. King's 1973 inspection reports as evidence that erosion and sedimentation were not occurring at the Smith Mine site nearly twenty years later, at the time of DER's order in 1991. Although clay extraction had ceased at the time of Mr. King's July 31, 1973 report, Harbison-Walker continued to conduct mining activities at the site, including the storage of clay, after 1973. Thus, even if no erosion or sedimentation problems were occurring at the site in 1973 when Mr. King conducted his inspection, that does not preclude the possibility that such violations were occurring fifteen to twenty years later, particularly in light of Mr. Musser's testimony that the erosion and sedimentation control measures implemented by Harbison-Walker as part of its reclamation plan were not maintained.

Harbison-Walker, however, points to the testimony of its expert witness, Dr. Gene Gonsoulin, as evidence that erosion and sedimentation violations do not exist at the mine site. Dr. Gonsoulin is the owner and president of EME, an engineering consulting firm, which is involved in studying mine sites. (T. 2029, 2043) He holds a Bachelor of Science degree in wildlife biology, a Master of Science degree in aquatic biology, and a Ph.D. in science,

with a specialization in environmental science. (T. 2030) He was accepted by the Board to testify as an expert on the reclamation of mine sites. (T. 2043)

Dr. Gonsoulin first visited the Smith Mine site in September 1988, in response to a request by Harbison-Walker. (T. 2050) Dr. Gonsoulin described the bonded area at that time as being "well on its way" to vegetative recovery. (T. 2051) Trees which had been planted in 1972 were producing viable seed, and the site had been invaded by conifers and deciduous trees. (T. 2051-52) He also described the bonded area as exhibiting a "reasonably healthy component" of herbaceous, non-woody plants (T. 2052), and testified that he observed at least ten to twelve species of woody plants growing on the bonded area and south of it. (T. 2056) According to Dr. Gonsoulin, erosion is a naturally-occurring, constant process. (T. 2045) He defined "accelerated erosion" as that which is beyond the normal, naturally-occurring erosion expected for a certain area. (T. 2046) He testified that he saw no evidence of accelerated erosion during his September 1988 visit, except for an area outside the permit area. (T. 2053-54)

Dr. Gonsoulin took no field notes during his visit to the site in September 1988, nor on any subsequent visit. He testified that his description of conditions at the site in 1988 is based on his memory and photographs. However, during his deposition by counsel for DER, Dr. Gonsoulin stated that his first visit to the Smith Mine site had been in January 1991. He later admitted at the hearing that, at the time of his deposition, he had forgotten about the September 1988 visit. (T. 2111) Nor did Harbison-Walker introduce into evidence any photographs taken at the site during Dr. Gonsoulin's September 1988 visit to support his testimony. Given Dr. Gonsoulin's earlier failure to recall the September 1988 visit and his lack of any photographs to

support his testimony; we can place very little weight on his testimony as to conditions of the site at that time.

Dr. Gonsoulin also visited the Smith Mine site on five occasions between June 1991 and October 1992 and three times subsequent to October 1992. (T. 2050) However, he provided little testimony at the hearing as to what he observed during these visits. Instead, Dr. Gonsoulin's testimony centered on the photographs taken by Mr. Musser during his inspection of the site between 1988 and 1992.

DER Ex.I-2 and I-3 depict the area below the outslopes. In Dr. Gonsoulin's opinion, these photographs show an area experiencing the effects of acid mine drainage rather than accelerated erosion. (T. 2064-65) It is his opinion that this area may have experienced accelerated erosion in the past but is now beyond that stage. (T. 2064) He did, however, acknowledge the heavy sediment deposits which appear in both photographs.

DER Ex.K-1 is a photograph of the outslope. Dr. Gonsoulin asserts that the manner in which this photograph was taken, across from the slope and on a hill, may distort the steepness of the slope and the erosional components. However, he did admit that some "erosional components" do appear on the outslope in the photograph. (T. 2066)

In examining DER Ex.K-1, Dr. Gonsoulin pointed out that there was quite a bit of tree growth on the acreage just above the notch area. (T. 2067) This is apparent from the photograph. However, what is also evident from the photograph is that the portion of the slope where the erosion gullies are located is completely devoid of vegetation.

In DER Ex.M-4 and M-5, the photographs of an erosion gully at the site, Dr. Gonsoulin points out that herbaceous plants and grasses are growing

along the banks and bottom of the gully. In his opinion, the gully area is not as likely to experience accelerated erosion because of the plant growth. (T. 2067-2070) However, Mr. Musser had testified that he observed a delta of sediment on the bottom of the Backside Tributary where the gullies met the stream. (T. 905) Therefore, some erosion and sedimentation is occurring.

Harbison-Walker also introduced a set of photographs taken by Dr. Gonsoulin of various sections of the site. One group of photographs shows portions of the bonded area which have been replanted and where there is full growth of trees and other vegetation. However, these photographs were taken in July 1992 (HW Ex.124 U) and October and December 1992 (HW Ex.124 P, AA, S, R, AB, AJ, V, Q, M, N), more than one year after DER had issued its order and after Harbison-Walker had begun to implement some of the erosion and sedimentation control measures required by DER. Another set of photographs, taken in October 1991 and June and October 1992, portray sections of the highwall and outslope area. (HW Ex.124 AL, Y, AN, AO, AE, AD, AG, AM, Z, AP, AH, AF, B, AI, W, AK) Signs of erosion and sedimentation are apparent in the photographs. In addition, the photographs marked HW Ex.124 AL and 124 Y (taken in October 1991) HW Ex.124 AD, 124 AG, and 124 AM (taken in June 1992) and HW Ex.124 K (taken in October 1992) depict areas of inadequate vegetation. Thus, Dr. Gonsoulin's photographs do not support his testimony that the area is well-vegetated and exhibits no signs of erosion or sedimentation.

Dr. Gonsoulin also relies on a study done by Craig Ray, a hydrogeologist and archeologist with EME. Between June 1992 and October 1992, Mr. Ray visited the Smith Mine site to determine the rate of vegetative success in the bonded area. Using the method employed by the federal Office of Surface Mining ("OSM") for estimating vegetative growth, he calculated that, at that

time, 87% of the bonded area had vegetative cover. (T. 2011-13) This exceeded OSM's requirement of 70% vegetative recovery for a reclaimed mine site. (T. 2063) In addition, the photographs taken by Mr. Ray in October 1992 exhibit substantial vegetative cover. (HW Ex.2) Again, however, Mr. Ray's study was done more than one year after DER's order and after Harbison-Walker had begun to implement the requisite erosion and sedimentation control measures. Moreover, although Mr. Ray's photographs portray areas of substantial vegetative cover, the photographs taken by Dr. Gonsoulin from approximately the same time period and those taken by Mr. Musser prior to DER's order show that portions of the permit area had either inadequate or no vegetative cover. Therefore, we do not find that Mr. Ray's study presents an accurate portrayal of conditions at the site at the time of DER's order.

Additionally, in comparing the testimony of Dr. Gonsoulin with that of Mr. Musser, we must assign greater weight to the latter. Mr. Musser testified extensively as to the conditions of the permit area at the time DER issued its order and in the four-year timespan leading up to the order's issuance. In sharp contrast, Dr. Gonsoulin visited the site only once prior to DER's order, and admitted in his deposition that he had forgotten about that visit. Although he visited the site several times subsequent to the issuance of DER's order, he provided little testimony which was helpful in understanding the conditions of the site at that time. In addition, as noted earlier, Dr. Gonsoulin's photographs did not support his testimony that the site was well on its way to full vegetative recovery, while Mr. Musser's photographs clearly depicted areas of erosion and sedimentation at the site. As to Harbison-Walker's contention that Mr. Musser never documented any erosion or sedimentation problems in his inspection reports, this is untrue. As we noted earlier, the August 31 -

September 2, 1988 inspection report stated that erosion and sedimentation problems at the site were being investigated.

Based on the evidence before us, and particularly Mr. Musser's testimony and photographs as to the conditions at the site, we find that DER has met its burden of proof with respect to that portion of its order requiring Harbison-Walker to implement and maintain erosion and sedimentation controls.

Reclamation and Backfilling of Highwalls

DER relies on the following authorities to support that portion of its order requiring Harbison-Walker to conduct additional reclamation and backfilling at its mine site: Section 3 of SMCRA, 52 P.S. Section 1396.3; Section 3 of the Non-Coal Act, 52 P.S. Section 3303; DER's Guidelines for Backfilling; and Harbison-Walker's reclamation plan. On pages 106 to 107 of its post-hearing brief, DER also names the "Open Pit Bituminous Act" or the "Open Pit Act" as a source of authority. Although DER did not include the full name of the act or a citation to it, we understand DER to be referring to the "Bituminous Coal Open Pit Mining Conservation Act", Act of May 31, 1945, P.L. Section 1198, which was amended by SMCRA in 1971.[34] Harbison-Walker argues that none of the authorities cited by DER provides any basis for ordering it to conduct further reclamation at the site.

We shall first turn to DER's contention that Harbison-Walker's reclamation plan required the final highwall to have a uniform slope of no more than 30 degrees. We shall consider this argument first since it would require Harbison-Walker to comply with a stricter standard than any of the other authorities cited by DER.

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[34]Our finding that DER intended to refer to this act is based on DER's reference to the "Bituminous Coal Open Pit Act" in footnote 19 of its reply brief.

DER contends that Harbison-Walker submitted reclamation plans with its applications for Mining Permit No. 266-3 and Mining Permit No. 266-3A. In discussing the aforesaid reclamation plans, DER references Exhibits BE-8 and BE-9. However, while BE-8 and BE-9 consist of Harbison-Walker's applications and mining permits for No. 266-3 and No. 266-3A, these exhibits contain no reclamation plans. The only reference to reclamation is the following statement which appears in both permits:

> Restoration is approved for terracing as indicated on the maps and in agreement with Supplemental B... The terracing as approved above shall be in accordance with the guidelines of the Land Reclamation Board as amended June 7, 1967...[T]erracing approved for this area is subject to change to an approximate original contour if subsequent amendments alter present guideline conditions... (BE-8, BE-9)

The only reference to reclamation in Supplemental B, attached to the application for Mining Permit No. 266-3A, is that the affected area is to be "terrace backfilled and graded in such a manner to drain away from the highwall." (BE-9) No reference is made to the required angle of the slope.

DER also cites to DER Ex.BBBB as being Harbison-Walker's reclamation plan. This exhibit is a cross section of a mining cut prepared for Harbison-Walker on September 11, 1969 and revised on September 8, 1970 to include the amended permit area. Harbison-Walker disputes that DER Ex.BBBB is its reclamation plan or that it was a part of its mining permits.

We must agree with Harbison-Walker, as there is nothing in the record to substantiate DER's claim that DER Ex.BBBB is Harbison-Walker's reclamation plan or a part of its permits. DER's only basis for finding that the map is a part of the permits is that the map contains a date-stamp of September 24, 1969, the date on which DER received Harbison-Walker's application for Mining Permit No. 266-3. In addition, Mining Permit No. 266-3, in the section dealing

with reclamation, refers to "maps." These two facts by themselves are insufficient to prove that DER Ex.BBBB is the reclamation plan approved by DER for the Smith Mine site.

Since DER has failed to establish that the reclamation plan is part of the record, we cannot rely on it as providing authority for DER's order.

As noted above, Harbison-Walker's mining permits, No. 266-3 and No. 266-3A, are silent with respect to the angle to which the highwalls must be reclaimed. However, both permits state that the site is to be reclaimed in accordance with the guidelines of the Land Reclamation Board for terrace backfilling. These guidelines are contained in Exhibit BE-19. According to the guidelines, "the steepest slope of the highwall and of the outer slope of the spoil bank shall be no greater than 45 degrees from the horizontal." (BE-19) Thus, Harbison-Walker's permits require that the slope of the highwalls at the mine site must not exceed 45 degrees.

DER asserts that Harbison-Walker should be held to a more stringent standard of 35 degrees, contained in the definition of "terracing" in SMCRA. 52 P.S. Section 1396.3. We need not reach this question, however, since the evidence indicates that highwalls at the Smith Mine site exceed even the less stringent 45 degree standard. Since we are not being asked to determine to what extent Harbison-Walker must complete reclamation at the site, as per the parties' Agreement, but only whether DER may order further reclamation, we need only determine whether any backfilling violations exist at the site, not the manner in which they must be corrected. Because we find that Harbison-Walker did not comply with the terms of its permit in reclaiming the Smith Mine site, we conclude that DER's order, directing further reclamation to be conducted, was not an abuse of discretion.

DER relies primarily on the testimony of DER inspector Robert Musser to establish that the highwalls, at the time of its order, did not meet the reclamation standards set forth above. Mr. Musser used an Abney Level[35] to measure the slopes of the highwalls at the site. (T. 893) An Abney Level is an instrument commonly used in the field of mining for measuring slopes, and Mr. Musser is trained in its use. (T. 894) The evidence shows that portions of the site outside the bonded area but within the area of Harbison-Walker's Mine Drainage Permit contained highwalls with slopes exceeding 45 degrees. (T. 899, 900) This is indicated by Mr. Musser's testimony, as well as DER Ex.J-3, a photograph of the lower highwall taken in April 1991. (T. 889,900) Although the slope in the bottom right of DER Ex.J-3 is rather gentle, the middle and left-hand side of the photograph depict sheer rock faces, which clearly appear to be at an angle far exceeding 45 degrees. (DER Ex.J-3; T. 890, 900) Mr. Musser testified that he did not take measurements of the steepest parts of the highwall shown in DER Ex.J-3 because safety considerations precluded taking a measurement there. (T. 900) In addition to its steepness, the highwall portrayed in DER Ex.J-3 is entirely devoid of vegetation, with the exception of a few sparse trees, and is covered with loose rocks. Since the issuance of DER's order, this highwall has been graded to a slope acceptable to DER, pursuant to the terms of the parties' Agreement. (T. 901-02)

Mr. Musser also testified that the highwalls at the site did not represent an adequate terrace backfill as of June 1991. (T. 897) A "terrace backfill" involves the construction of a relatively uniform steeper slope near the final highwall, with a flat table portion at the side away from the highwall.

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[35]Although the transcript refers to the measuring device used by Mr. Musser as an "acculevel", DER, on page 108 of its post-hearing brief, states that the proper name for this device is an "Abney Level".

(T. 897) According to Mr. Musser, some of the highwalls did not have a uniform slope and contained exposed parts which were never backfilled. (T. 897). This is also evidenced in the photograph marked DER Ex.J-3.

Mr. Musser also testified that portions of the site have not been reclaimed at all. Unreclaimed clay stockpiles still existed at the site at the time of the hearing. (T. 886) DER Ex.J-2 is an aerial photograph of the center section of the upper highwall of the mine site taken in February 1992. The slope of the upper highwall is fragmented and contains a rock ledge which is under cut. (T. 889; DER Ex.J-2) DER Ex.J-4 is an aerial photograph of the lower highwall, taken in February 1992. (T. 890) Sheer rock faces at the top of the highwall are evident from the photograph. (T. 891; DER Ex.J-4) DER Ex.J-6 and J-7 are photographs of the lower highwall taken at ground-level in October 1991. (T. 891-92) The sheer steepness of the highwall is evident from DER Ex.J-7, while DER Ex.J-6 reveals the nature of the highwall as blocky and fragmented. (T. 891-92) In addition, DER Ex.J-7 shows signs of erosion occurring on the highwall. (T. 892)

From these photographs, it is clear that sections of the Smith Mine site remained unreclaimed or were inadequately reclaimed at the time of DER's order and for months afterward.

In response, Harbison-Walker asserts 1) that it did properly reclaim the site in accordance with its reclamation plan, 2) it is not required to reclaim certain sections of the site addressed by DER, and 3) its reclamation of the site was approved by earlier DER inspectors.

We dismiss Harbison-Walker's first contention that it has complied with the requirements of its reclamation plan. As noted above, the reclamation plan was not submitted into evidence and, therefore, we have no way

of knowing what it required with respect to backfilling. Moreover, Harbison-Walker's mining permits require it to comply with the reclamation guidelines of the Land Reclamation Board, contained in DER Ex.BE-19, which require terrace backfilling to be at an angle no steeper than 45 degrees. As we have discussed, the evidence indicates that highwalls at the site exceeded 45 degrees, in violation of the guidelines and Harbison-Walker's permits. In addition, Supplemental F to Harbison-Walker's Mine Draining Permit application states that backfilling is to be done in accordance with the guidelines established in the Bituminous Coal Open Pit Operator's manual. (BE-6) These are the same guidelines as those set forth in BE-19. These guidelines prohibit the existence of any depressions, which might retain water or any lateral depressions or drainage ditches of sufficient length to cause erosion of the restored area. As noted earlier, DER Ex.J-7 clearly exhibits signs of erosion on the highwall. Thus, contrary to Harbison-Walker's assertions, these sections of the site have not been reclaimed in accordance with the terms of its permits.

Harbison-Walker also asserts that certain sections of the site addressed by DER need not be reclaimed. Harbison-Walker argues, first, that it cannot be required to reclaim its clay stockpiles pursuant to SMCRA since, following passage of the Non-Coal Act in 1984, SMCRA was no longer applicable to non-coal mining operations. Yet, Harbison-Walker also asserts that it does not fall within the purview of the Non-Coal Act since the Non-Coal Act does not apply to operations which ceased prior to its passage. However, as noted earlier, the definition of "surface mining activity" includes the act of storing or removing clay from the site and, therefore, as of the date of DER's order, Harbison-Walker was still subject to the Non-Coal Act.

Harbison-Walker also argues that DER has no authority to act pursuant to the Non-Coal Act since Section 4 of the Act, cited by DER in its order, simply sets forth what must be contained in a reclamation plan submitted to DER and does not provide the basis for an enforcement order. While that is true, Section 11 (b) of the Non-Coal Act empowers DER to issue orders necessary to aid in the enforcement of the provisions of the Act, including orders for the abatement and removal of nuisances. Harbison-Walker's failure to reclaim the stockpiles is resulting in a nuisance in the form of erosion and sedimentation violations. (T. 917) Therefore, DER may require reclamation of the clay stockpile area pursuant to the Non-Coal Act.

Additionally, Harbison-Walker argues that there is no basis for requiring it to backfill and reclaim the area surrounding the "A" Drain. Harbison-Walker contends that DER has fabricated that any problem exists in the area of the "A" Drain. Although DER fails to respond to this argument in its reply brief, we disagree with Harbison-Walker's contention. Mr. Musser testified that this area has never been backfilled. (T. 936) This is clearly evidenced by a photograph of this area admitted as DER Ex.G-1, taken in May 1992 (T. 935). DER Ex.G-1 depicts an area that clearly has not been backfilled and which exhibits signs of severe erosion, sedimentation and depressions collecting water. (DER Ex.G-1; T. 936-37) Harbison-Walker then argues that it should not be required to backfill the A Drain area since the treatment facilities will collect everything running through or emerging from the drain. However, while the treatment facilities may collect whatever travels through the drain, any sediment that is not intercepted by the drain will leave the site. Moreover, as Mr. Musser noted, it is difficult to stabilize an area that has never been

backfilled. (T. 936) Therefore, Harbison-Walker has provided no basis for finding that it should not be required to reclaim the "A" Drain area.

Finally, Harbison-Walker asserts that DER has already approved its reclamation of the site on the basis of James King's July 1973 inspection report, prepared in response to the completion report filed by Harbison-Walker. (Ex.BE-1, Tab 34) In response to the question, "Has reclamation been completed in conformance with approved restoration plan?", Mr. King marked "yes". Regardless of Mr. King's report, however, Mr. Musser's photographs of the site taken at the time of DER's order and several months after the order show areas that have not been reclaimed or backfilled. These photographs speak for themselves and clearly demonstrate that reclamation had not been completed.

We have no way of knowing whether any reclamation violations were present when Mr. King conducted his inspection in 1973 or whether Mr. King simply failed to note that violations existed at that time. Even if the latter is true, prior lax enforcement by a DER inspector does not prevent DER from subsequently enforcing the statutes, regulations, and permit conditions it is charged with enforcing. Lackawanna Refuse Removal, Inc. v. DER, 65 Pa. Cmwlth. 372, 442 A.2d 423, 426 (1982); F.A.W. Associates v. DER, 1990 EHB 1791, 1796. Since we have determined that reclamation violations exist at the site, DER may not be estopped from requiring Harbison-Walker to reclaim the site solely on the basis of Mr. King's 1973 inspection report.

Topsoil

Finally, DER asserts that Harbison-Walker failed to preserve topsoil or top strata at the site in accordance with the terms of its Mine Drainage Permit and the applicable regulations. Special Condition No. 7 of the amended Mine Drainage Permit required Harbison-Walker to maintain a minimum of

12 inches of topsoil or top strata for replacement after the completion of backfilling. (BE-7) The Mine Drainage Permit was amended to add Hill No. 2 to the area covered by the permit. Because Hill No. 2 was never mined, Harbison-Walker asserts that Special Condition No. 7 is "meaningless". (H-W Post-Hearing Brief, p. 133, Response to DER Proposed Finding of Fact 269) However, the amended Mine Drainage Permit did not apply only to the newly-added Hill No. 2, but to the entire area previously covered by Harbison-Walker's original Mine Drainage Permit, with the addition of Hill No. 2. Thus, Special Condition 7 applied not just to Hill No. 2, but to the entire permit area.

Harbison-Walker next asserts that there was no topsoil or top strata to be preserved at the site and that this was noted in its application for its original Mine Drainage Permit. It is true that on the Supplemental F form submitted by Harbison-Walker with its Mine Drainage Permit application, in response to the question, "Will top soil be segregated for later placement over the backfilled area?", Harbison-Walker responded, "There is little or no top soil available." (BE-6) However, this contradicts the testimony of Mr. Musser who found topsoil to be present at the site.

The record shows that Mr. Musser is trained in soil classification and interpretation. (T. 94) In February 1989, he took core soil samples in five areas at the Smith Mine site. (T. 943, 946) His sampling revealed that top soil existed at each of the five locations sampled. Two locations had 12 inches of soil, two had six inches, and one had nine inches. (DER Ex.DD) DER Ex. N-2 is a photograph taken by Mr. Musser just below the toe of spoil of the Smith Mine along the upper access road. (T. 948)[36] The

[36]Although the record does not clearly state when the photograph was taken, we presume it to be at the same time as Mr. Musser's sampling in February 1989.

photograph portrays a layer of topsoil which Mr. Musser testified was approximately one foot in thickness. (T. 948; DER Ex. N-2) In addition, Mr. Musser found approximately two to three feet of subsoil to be present at that location. (T. 948) Based on Mr. Musser's testimony, sampling results, and DER Ex.N-2, we find that topsoil was present at the site and that, by failing to preserve it, Harbison-Walker failed to comply with the requirement of Special Condition No. 7 of its amended Mine Drainage Permit.

CONCLUSION

In conclusion, we find that DER has met its burden of proof with respect to those portions of its order requiring Harbison-Walker to treat the A seeps, to submit a plan for the abatement of acid mine drainage flowing from the Smith Mine site to Laurel Run and Tributary C, and to complete reclamation of the mine site as set forth in the parties' Agreement. DER has failed to meet its burden of proof with respect to that portion of its order directing Harbison-Walker to treat the B and C seeps. After making the following conclusions of law, we enter the appropriate order:

CONCLUSIONS OF LAW

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

2. DER bears the burden of proving its order was authorized by law and not an abuse of discretion. 25 Pa. Code Section 21.101(b)(3).

3. The presiding Board Member did not err in admitting DER Ex.JJJ and DER. Ex.V.

4. The presiding Board Member did not err in excluding from evidence HW Ex.92, 93, 101, and 118-123 and the testimony of Dr. Gonsoulin with respect to reclamation work performed at the site.

5. DER's order does not involve an improper commingling of prosecutorial and adjudicative powers.

6. The Board's review of DER's action is de novo. Warren Sand & Gravel, 20 Pa. Cmwlth. at 203-04, 341 A.2d at 565.

7. DER met its burden of proof under Sections 307 and 315 of the Clean Streams Law in ordering Harbison-Walker to treat the A seeps.

8. DER failed to meet its burden of proof under Section 307 and 315 of the Clean Streams Law, 35 P.S. Sections 691.307 and 691.315, in ordering Harbison-Walker to treat the B and C seeps.

9. Sections 316 and 610 of the Clean Streams Law, 35 P.S. Sections 691.316 and 691.610, do not support DER's order to Harbison-Walker to treat the B and C seeps.

10. DER met its burden of proving that acid mine drainage from Harbison-Walker's mine site has degraded Laurel Run and Tributary C, and DER is authorized to order Harbison-Walker to submit a plan for the abatement of acid mine drainage to the streams.

11. DER's order to Harbison-Walker to reclaim and install erosion and sedimentation controls at the Smith Mine site was a proper exercise of authority under Sections 401 and 610 of the Clean Streams Law, 35 P.S. Sections 691.401 and 691.610.

ORDER

AND NOW, this 23rd day of February, 1996, it is hereby ordered that the appeal filed by Harbison-Walker at EHB Docket No. 91-268-MJ is sustained in part and dismissed in part. Harbison-Walker's appeal is sustained with respect to that portion of DER's order requiring Harbison-Walker to treat the B and C seeps. Harbison-Walker's appeal is dismissed with respect to the remainder of DER's order, and Harbison-Walker is ordered to comply with those portions of DER's order upheld by the Board.

ENVIRONMENTAL HEARING BOARD

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MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: February 23, 1996

See following page for service list.

EHB Docket No. 91-268-MJ
Service List

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M. DIANE SMITH
SECRETARY TO THE BOA

GLENN O. HAWBAKER, INC.	:	
	:	
v.	:	**EHB Docket No. 95-014-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 5, 1996**

OPINION AND ORDER SUR MOTION FOR RECONSIDERATION

By: Robert D. Myers, Member

Synopsis:

An order dismissing an appeal as a sanction for failure to comply with a Board order is reconsidered and withdrawn when the Board's prior treatment of a status report as covering two appeals, although bearing only one caption, misled Appellant into believing that a later status report would receive the same treatment.

OPINION

On December 4, 1995 we entered an Order dismissing the appeal of Glenn O. Hawbaker, Inc. (Appellant) as a sanction for Appellant's failure to comply with a prior order of the Board and a "default letter" issued on November 16, 1995. Appellant filed a Motion for Reconsideration on December 13, 1995, raising a number of issues. In order to give these issues fair consideration, we entered an order on December 19, 1995 granting Appellant's Motion, directing reconsideration of the December 4 Order and staying all proceedings in the interim. The Department

of Environmental Protection (DEP) filed its Answer to Appellant's Motion on December 27, 1995.

Appellant has filed three separate appeals with respect to its quarrying operations at White Rock Quarry in Spring Township, Centre County. The first, at Board Docket No. 94-278-MR, challenged a DEP letter of September 20, 1994. The second, at Board Docket No. 94-288-MR, challenged a DEP October 18, 1994 compliance order. Upon Appellant's motion, these two appeals were consolidated at Board Docket No. 94-278-MR on November 16, 1994. On December 6, 1994 the Pennsylvania Fish and Boat Commission (Commission) was allowed to intervene on DEP's side.

The parties engaged in settlement discussions. As a result of these discussions, DEP issued a new compliance order on December 29, 1994 specifically superseding that issued on October 18, 1994 and forming the basis of the appeal at Board Docket No. 94-288-MR. Thereupon, on January 23, 1995 Appellant filed the following with the Board:

(1) a "Protective Appeal" of the December 29, 1994 compliance order (which appeal was given Board Docket No. 95-014-MR);

(2) a motion to unconsolidate the two appeals consolidated at Board Docket No. 94-278-MR;

(3) a withdrawal of the appeal at Board Docket No. 94-288-MR (from the superseded compliance order); and

(4) a motion to continue the two surviving appeals.

The Board acted on Appellant's filings, accepting the new appeal on January 23, 1995, unconsolidating the two prior appeals on January 31, 1995 and closing the docket on the appeal filed at Board Docket No. 94-288-MR on February 1, 1995. On February 13, 1995, the Board issued an order continuing the appeals at Board Docket Nos. 94-278-MR and 95-014-MR until June

1, 1995 to effect settlement or file a status report. Note that these appeals were not consolidated; no party had asked for them to be consolidated and the Board did not do so on its own.

On June 8, 1995 the Board notified the parties by letter (referencing both docket numbers) that a settlement or status report had not been filed as required by the February 13, 1995 order. If there was no compliance by June 19, 1995, the parties were told, sanctions (including dismissal of the appeals) could be applied pursuant to the Board's Rules of Practice and Procedures. The parties complied on June 12, 1995 in a letter from Appellant's legal counsel containing a joint request for an additional sixty days to effect settlement or file a status report. The letter referenced both docket numbers. Responding to this status report, the Board issued an order on June 15, 1995 (captioned with both docket numbers) continuing proceedings to August 18, 1995, by which date the parties were to effect settlement or file another status report.

Appellant's legal counsel filed a status report on August 21, 1995 bearing the following docketing information:

> EHB Docket No. 94-278-MR
> (Consolidated)[1]

The body of the report indicated that discussions were continuing and that another meeting was scheduled for mid-September.

The Board sent a letter to Appellant's legal counsel on August 25, 1995 (bearing only the caption 94-278-MR) requesting a fuller explanation of settlement discussions and progress. The concluding paragraph read as follows:

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[1]As noted earlier, the appeal at Board Docket No. 94-278-MR was no longer consolidated with any other appeal. It and the appeal at Board Docket No. 95-014-MR were separate unconsolidated proceedings.

This requirement also applies to the appeal at
Board Docket No. 95-014-MR.
(underlining in original).

Appellant's response, received on September 11, referred only to the appeal at Board Docket No. 94-278-MR. Despite this circumstance, the Board issued an order on September 14, 1995 continuing both appeals until November 10, 1995 to effect settlement or file a status report. Appellant filed a status report on November 14, 1995 requesting another 60-day continuance. The docket reflected on the report was

EHB Docket No. 94-278-MR
(Consolidated)
(see footnote 1)

As a result, the Board issued an order on November 20, 1995 continuing the proceedings at Board docket No. 94-278-MR to January 22, 1996.

In the meantime, on November 16, 1995, the Board sent a notice to the parties' legal counsel (reflecting Board Docket No. 95-014-MR) stating that a status report had not been filed in that proceeding by November 10, 1995, and admonishing that, if there was no compliance by November 27, 1995, the Board might apply sanctions which could include dismissal of the appeal. Nothing having been filed with the Board, an Order was issued on December 4, 1995 dismissing the appeal at Board Docket No. 95-014-MR as a sanction. It is this Order that Appellant seeks to overturn on reconsideration.

Appellant contends that, when it received the Board's letter of November 16, 1995, it did nothing because it believed that the November 14 status report covered both appeals, "just as it had in the past." While that is not completely accurate, it is true with respect to Appellant's September 11 response to the Board's August 25 letter. As noted above, that letter requested a fuller

explanation of settlement discussions with respect to both appeals. Appellant's response bore only docket number 94-278-MR. Despite uncertainty whether the response applied to both appeals, the Board gave Appellant the benefit of the doubt and issued an order granting continuances in both appeals.

This indulgence apparently led Appellant to conclude that its November 14 status report could also be filed only under docket number 94-278-MR, adding the word (Consolidated) this time; and so lulled Appellant to sleep that it completely ignored the Board's continuance in 94-278-MR and the Board's default letter in 95-014-MR.

A litigant who invokes our jurisdiction is expected to use the correct caption on the documents filed with us. When multiple appeals are filed, an even greater attention to captioning is required.[2] Legal counsel are well aware of docketing demands because they deal with them regularly. The Board, therefore, can reasonably expect that the documents coming before it will bear the caption intended by the filing party and should not be forced to speculate on that intent. Appellant carefully set forth both docket numbers in its first (June 12, 1995) status report but failed to do so at any time subsequent. Its later filings bore either docket number 94-278-MR alone or with the term (Consolidated) added to it. The orders and letters issued by the Board in response to these filings carefully distinguished between the two appeals.

While we criticize Appellant for its failure to use correct captioning,[3] we realize that

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[2]Often the appeals involve the same parties with the docket numbers being the only distinguishing feature of the caption. Many times the docket numbers are successive, adding to the potential confusion.

[3]Our criticism extends also to Appellant's failure to make any inquiry (oral or written) to the Board upon receipt of the November 16, 1995 default letter in docket number 95-014-MR.

our tacit acceptance of it in response to Appellant's September 11 filing may have been misleading. Under our procedural rules at 25 Pa. Code §1021.122 we may grant reconsideration in limited circumstances - the presence of compelling and persuasive reasons. We have found those reasons to be present where the Board itself has made a mistake: *James E. Fulkroad et al. v. DER*, 1993 EHB 1630; *Carl Oermann v. DER*, 1991 EHB 1943. We believe the same result should apply where the Board misleads a litigant in a significant way. We are satisfied that our action here falls within the scope of that principle.

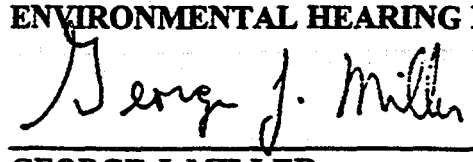
We admonish the parties - especially Appellant - that we will demand complete accuracy in captioning in the future. We will make no presumptions or speculations about what appeals are intended to be covered by a document. We also admonish Appellant that, since it is the party that invoked our jurisdiction, it has the most to lose by failing to maintain it. Even though our orders for status reports were directed to all parties, Appellant was the one primarily responsible for seeing that the orders were obeyed. It cannot hide behind the failure of the other parties to respond.

ORDER

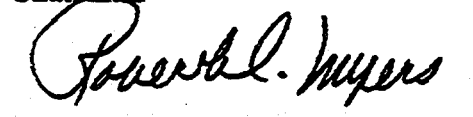
1. The Board's order of December 4, 1995 at Board Docket No. 95-014-MR is reconsidered.

2. Said Order is withdrawn and replaced with the following Order: All proceedings are continued until further order of the Board.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 5, 1996

cc: **Bureau of Litigation:**
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Central Region
For Appellant:
Robert W. Thomson, Esq.
Neva L. Stotler, Esq.
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M. DIANE SMITH
SECRETARY TO THE BC

GLENN O. HAWBAKER, INC.	:	
	:	
v.	:	**EHB Docket No. 95-014-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 5, 1996**

CONCURRING OPINION OF BOARD MEMBER THOMAS W. RENWAND

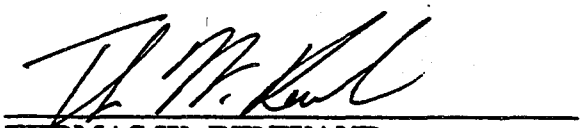
I concur in the result only. I agree that our order dismissing Appellant's appeal for its failure to file a status report should be withdrawn. However, the record does not reveal that the Board misled anyone, let alone in a significant way. Instead, the record reveals that all three parties were ordered to file status reports in this appeal. None of the parties complied with the order. Since none of the parties filed the necessary reports it does not seem fair to reward the Department and the Fish Commission for their inaction and yet penalize the Appellant with the severe sanction of dismissal of its appeal.

A system that severely punishes lawyers for such a mistake, even if an entirely avoidable one, brutalizes the practice of law and turns the search for justice and truth into a game. Appeals should be decided on their merits.

Although I do not condone counsel's failure to follow an order of this Board a sanction less severe than dismissal should be imposed. This is especially true where all parties fail to do

something and only one suffers the consequences. In such instances, I would allow counsel an opportunity to present argument and determine whether a sufficient excuse exists.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: March 5, 1996

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M. DIANE SMITH
SECRETARY TO THE BOA

BERNIE ENTERPRISES, INC.	:	
	:	
v.	:	**EHB Docket No. 95-100-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 5, 1996**

OPINION AND ORDER SUR MOTION TO DISMISS APPEAL

By: Robert D. Myers, Member

Synopsis:

Where DEP issues permits under the Dam Safety and Encroachments Act for the repair and installation of surface water drainage facilities across Appellant's land to a discharge point in a stream, the issuance has no impact on the ownership of the land and imposes no burden on the land to accept the drainage patterns giving rise to the need for the facilities. Since this is the only issue raised in the appeal, the appeal is dismissed. It is not dismissed for mootness, however, because even though the work has been done, the permits authorize the permittee to operate and maintain the facilities.

OPINION

Bernie Enterprises, Inc. (Appellant) filed a Notice of Appeal on June 12, 1995 seeking Board review of the April 14, 1995 issuance by the Department of Environmental Resources (now known as the Department of Environmental Protection (DEP)) of GP040995304 and

GP050995316 to Glen Hollow Apartments (Permittee). These are General Permits authorized by the Dam Safety and Encroachments Act (DSEA), Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.*, and the regulations at 25 Pa. Code §105.441 *et seq.*

GP040995304 is in the style of General Permit BDWM-GP-4 (Intake and Outfall Structures), Appendix D to Chapter 105 of the regulations. GP050995316 is in the style of General Permit BDWM-GP-5 (Utility Line Stream Crossings), Appendix E to Chapter 105 of the regulations. The Permits authorize Permittee to repair an existing 24" corrugated metal storm sewer pipe under a portion of Newportville Road, connecting to a drop inlet, and then discharging through a 24" corrugated metal pipe and rip-rap to Neshaminy Creek.

Appellant owns the land on which these surface water drainage facilities are to be installed. It contends that it was never advised of the applications and never consented to the use of its land for drainage purposes. It submits further that Permittee has no right to install these facilities on Appellant's land or to discharge drainage onto Appellant's land.

On August 24, 1995, Permittee filed a Motion to Dismiss the Appeal because (a) Appellant's property rights (the sole basis for the appeal) are unaffected by the General Permits and are being litigated in the Court of Common Pleas of Bucks County, and (b) the appeal is moot because all the work was completed on March 8, 1995 before the appeal was filed. DEP joined in the Motion but did not file a formal response. Appellant's Response, docketed September 8, 1995, argued that DEP has no legal right to issue permits approving surface water drainage facilities without the consent of the landowner.

Because neither party submitted a legal memorandum, the Board ordered them to do so on September 21, 1995. Permittee's was filed on October 4, Appellant's on October 23.

Piecing together the facts in the documents filed by the parties it appears to be undisputed that Permittee owns an apartment complex on the east side of Newportville Road and that surface water drainage facilities serving that complex have drained historically[1] under Newportville Road, across a narrow strip of land now owned by Appellant, and into Neshaminy Creek. In late summer 1994 Permittee's apartment manager was advised by officials of the Pennsylvania Department of Transportation (PennDOT) that the drainage facilities on Appellant's land had collapsed and that the embankment supporting Newportville Road had eroded to the point where the stability of the road was threatened. Permittee was willing to do the repair work but was unable to get Appellant's consent to enter on the land.

By January 1995 the embankment had completely collapsed, undermining Newportville Road and sewer and gas mains located in the roadbed, prompting PennDOT to close the road. Permittee filed for a Highway Occupancy Permit from PennDOT and obtained from DEP on January 30, 1995 Emergency Permit No. EP0995302 authorizing repair of the drainage facilities on Appellant's land. One of the special conditions to the Emergency Permit required Permittee to apply for the General Permits that were later obtained and which form the subject matter of this appeal.

Appellant sought injunctive relief by filing an action in the Court of Common Pleas of Bucks County at No. 95-01152 and obtained a preliminary injunction *ex parte* on February 13, 1995. The preliminary injunction was dissolved on February 21, 1995 without prejudice to

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[1]Apparently, when the apartment complex was built, the land on both sides of Newportville Road was in common ownership. It is alleged by Permittee that the surface water drainage facilities were first installed at that time.

Appellant's right to continue the action for a permanent injunction.[2] Permittee proceeded with the work under the Emergency Permit and completed it on March 8, 1995. Appellant appealed the issuance of the Emergency Permit to this Board on March 30, 1995 (Board Docket No. 95-062), which appeal was dismissed on August 3, 1995 as a sanction for failing to comply with a Board order.

In its legal memorandum, Appellant concedes that the DEP Permits did not confer any property rights upon Permittee. The concession is appropriate. Each Permit states specifically that it "does not convey any property rights, either in real estate or material, or any exclusive privileges; nor does it authorize any injury to property or invasion of rights or any infringement of Federal, State or local laws or regulations." Nothing could be clearer. Moreover, we are unaware of any provision of the DSEA or the regulations at 25 Pa. Code Chapter 105 to the contrary.

Nonetheless, Appellant contends that the very issuance of the Permits constitutes an administrative determination that Appellant's land is subject to the drainage plan contemplated by the Permits and remains perpetually subject to that plan. Consequently, Appellant has the right to continue with its appeal even though the work is completed. Appellant cites no judicial or statutory authority for these propositions. We are convinced, however, that the matter is not moot. The Permits authorize the "installation, operation and maintenance" of the surface water drainage facilities. Thus, Permittee may do additional work under the Permits at any time necessary for operation and maintenance. We held in *Theodore v. Skotedes et al. v. DER et al.*, 1988 EHB 760, that this factor prohibited a finding of mootness.

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[2]Apparently, this proceeding is still pending in Bucks County.

We are not convinced that Appellant's contention as to the effect of the Permits is correct. The purposes of the DSEA, set forth in section 2, 32 P.S. §693.2, focus on public safety, navigation and environmental conservation promoted by "proper planning, design, construction, maintenance and monitoring" of water obstructions and encroachments. The regulations for the type of encroachment authorized by the Permits (stream crossings, outfalls and headwalls) at 25 Pa. Code Chapter 105, Subchapter A, Subchapter G and Subchapter L, are primarily concerned with impact upon the stream, its flood waters and its ecology. The discharge capacity of the outfall and the type of cover material proposed to be used are, thus, important factors; but the surface water drainage patterns and the adequacy of the facilities to handle the flows are not even mentioned.

The limited scope of the DSEA and its regulations was pointed out *in Welteroth v. DER et al.*, 1989 EHB 1017, where the Board held that DEP's authority in reviewing an application for a culvert did not extend to passing upon the suitability of the road design. "We find nothing in the [DSEA] which would extend [DEP's] authority in reviewing an encroachment application to all aspects of the project or activity associated with the encroachment," we said at page 1024.

We find nothing in the DSEA or the regulations that would result, simply from the issuance of the Permits at issue in this appeal, in the burdening of Appellant's land either with the specific facilities authorized by the Permits or with the surface water drainage pattern giving rise to the need for these facilities. The issuance of the Permits is DEP's decision that the proposed facilities satisfy the public's concern for safety, navigation and environmental conservation. It goes no further. Permittee's right to enter upon the land and install the facilities must be established independent of the Permits. That issue is properly left to the Court of Common Pleas of Bucks County.

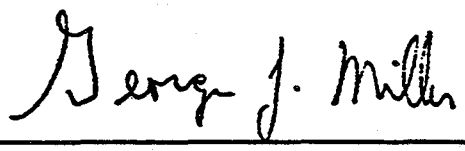
This is not a case like *George M. Lucchino v. DER et al.*, 1994 EHB 380, and *Croner, Inc. and Frank Popovich v. DER*, 1993 EHB 271, where the statute required the permittee to present proof of ownership or other right of entry before a permit could be issued. No such requirement exists in the DSEA. Nor is it a case like *Swanson v. DER*, 1984 EHB 681, and *Cooper v. DER*, 1982 EHB 250, where similar requirements were set forth in the regulations. Some proof of ownership is required by the DSEA regulations at 25 Pa. Code Chapter 105 with respect to certain permit categories[3] but not for the ones involved here.

Since the only issue raised in the appeal is irrelevant to the Permits, we will dismiss the appeal.

ORDER

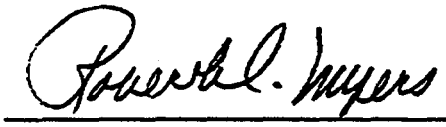
AND NOW, this 5th day of March, 1996, it is ordered that the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



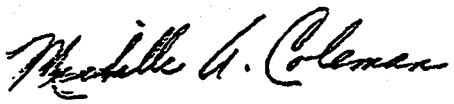
GEORGE J. MILLER
Administrative Law Judge
Chairman

[3]dams (§105.81(a)(10)); stream enclosures (§105.191(7)); channel changes (§105.231(a)(1)(iii); and docks, wharves and bulkheads (§105.332).



ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 5, 1996

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M. DIANE SMITH
SECRETARY TO THE BOA

HAROLD WEISS, et. al.	:	
	:	
v.	:	**EHB Docket No. 94-283-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARTIN STONE QUARRIES, INC.	:	**Issued: March 6, 1996**

OPINION AND ORDER ON MOTIONS TO DISMISS AND DISCOVERY MOTIONS

By George J. Miller, Chairman

Synopsis:

Before the Board are two motions to dismiss by Martin Stone Quarries, Inc. (MSQ) which seeks to dismiss the appeal of Concerned Citizens of Washington Township on the grounds that it is not a association cognizable by the Board, has not filed a prehearing memorandum and it has refused to comply with the orders of the Board. MSQ also seeks sanctions for failure to answer certain interrogatories and produce documents, and lodges objections to Concerned Citizens document request.

We deny MSQ's motion because Concerned Citizens is an entity recognizable by this Board, and in view of the unique circumstances presented by this case, dismissal and the requested sanctions are too harsh. We also overrule MSQ's objection to Concerned Citizens' discovery request.

BACKGROUND

Concerned Citizens of Washington Township is comprised of a group of individuals claiming to reside within 1, 000 feet of the Gabel Quarry. It filed a Notice of Appeal from a noncoal surface mining permit issued to MSQ by the Department of Environmental Protection for this quarry. Based upon a November 8, 1994 letter from the group which explained that their position was represented by the grounds stated in a similar appeal filed by Washington Township, this Board consolidated the appeal of Concerned Citizens with that of Washington Township. (Order dated 11/28/94.)

Concerned Citizens chose to proceed without the benefit of counsel. As the case progressed Concerned Citizens relied upon the Township's prosecution of the case; the Township supervisors permitted their counsel, John Wilmer, to explain the Township's position where the permit was concerned. On January 11, 1995, MSQ filed its first motion to dismiss Concerned Citizens on the grounds that it had failed to properly supply all of the information which is required for a notice of appeal. The Township opposed this motion. This motion was denied by Order dated April 3, 1995, and Concerned Citizens were subsequently permitted to perfect their appeal. Discovery was commenced by interrogatory and deposition.

However, beginning in April of 1995, the Township, through its solicitor, James Scheffey, entered into settlement negotiations with MSQ.[1] Concerned Citizens were not privy to these discussions. On October 27, 1995 the Township withdrew its appeal, leaving Concerned Citizens with the responsibility of pursuing its case on its own.[2]

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[1] John Wilmer withdrew his appearance from the case.

[2] See Order dated 11/23/95. The case proceeded under docket number 94-283.

OPINION

The Board currently has before it two motions to dismiss Concerned Citizens' appeal, and several motions relating to discovery. Concerned Citizens has filed timely responses to each of these motions. We first turn to the motions to dismiss.

Second Motion to Dismiss: Citizens' Failure to File a Prehearing Memorandum

MSQ's second motion to dismissed is based on the fact that Concerned Citizens has failed to file its prehearing memorandum by October 27, 1995.[3] This contention is based on Prehearing Order No. 1 which was originally issued to Washington Township at docket number 94-316 on November 8, 1994. This order was amended six times, ultimately setting a discovery deadline for October 27, 1995. Washington Township withdrew its appeal shortly thereafter.

Concerned Citizens responded that it was not aware that the prehearing orders setting the deadline for the prehearing memorandum applied to them. Each of these extensions was filed at the behest of either MSQ or the Township, without the explicit consent of Concerned Citizens. In its response Concerned Citizens requested an extension of time for filing their memorandum, to which MSQ objected.

MSQ's second motion to dismiss is denied. Dismissal is a drastic sanction; the circumstances of this case do not justify such action. MSQ has not alleged any specific prejudice which it has suffered. Concerned Citizens has repeatedly represented that it intends to rely upon discovery already obtained by and from Washington Township. While it is true that MSQ has

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[3]By order dated December 1, 1995, Concerned Citizens was ordered to designate a spokesperson or secure counsel. Concerned Citizens responded by notifying the Board that Michael Thrasher was the spokesperson for the group.

incurred expense in defense of this case, much of this time is due to its own decisions to request discovery extensions and file piecemeal motions. It also chose to exclude Concerned Citizens from its settlement negotiations with the Township. Finally, no hearing date has yet be set, therefore MSQ has not been deprived of time to prepare its defense.

Moreover, our review of the docket of Concerned Citizens' appeal reveals that it was not, in fact, issued a prehearing order directing them to file a prehearing memorandum. Prehearing Order No. 1, relied on by MSQ, was issued to Washington Township before the two cases were consolidated. Although the practice before the Board has since changed, at the time this appeal commenced, there was no reference in the rules to prehearing memoranda; Concerned Citizens had no way of knowing it would be expected to file one.[4] At the present time, we believe that Concerned Citizens should have an opportunity to present their case. MSQ has failed to convince this Board that it will be unduly prejudiced by so proceeding.[5]

MSQ has also filed an objection to Concerned Citizens' request for documents based on its contention that discovery has been closed since October 27, 1995, the date the Washington Township prehearing memorandum was issued. This objection is denied for the reasons described above. MSQ shall produce the documents requested by Concerned Citizens.

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[4] Current prehearing procedures are found at 25 Pa. Code §§ 1021.81-.84.

[5] We would caution Concerned Citizens that our disposition of this matter should not be an indication that the Board will make allowances its failure to follow the procedural rules of practice. We have repeatedly warned appellants that by opting to appear before this Board without counsel that it assumes the risk of their risk of their lack of legal expertise. See, e.g., Taylor v. DER, 1991 EHB 1926; Santus v. DER, EHB Docket No. 94-163-E (Adjudication issued August 18, 1995). Concerned Citizens is bound by the same obligations to follow the rules as parties which are represented by counsel. Leonardi v. DER, 1991 EHB 699.

Third Motion to Dismiss: The Party Status of Concerned Citizens

The third motion to dismiss is based on MSQ's contention that (1) Concerned Citizens is not recognizable by this Board, and is not a proper party to this appeal; and (2) that Concerned Citizens has failed to comply with orders and rules of this Board. Concerned Citizens has filed a timely response to this motion, contending that it is an "ad hoc citizens group formed precisely to address the introduction of a nuisance use into a residential neighborhood." (Response the Third Motion to Dismiss ¶6.) It also contends that it has complied with the orders and rules of this Board.

MSQ contends that Concerned Citizens is not a group cognizable by the Board because Concerned Citizens is not properly organized as an "unincorporated association." We disagree. Our research revealed no case or statutory law which requires a group of people to formally create an unincorporated association in order to be recognized as a party before the Board. Board regulations do not define "association." "Party" is defined as "a person with the right to institute or defend . . . in proceedings before the Board." 25 Pa. Code § 1021.2. See also Section 102 of the Judicial Code, 42 Pa. CS. § 102; Section 101 of the Administrative Law, 2 Pa. C.S. § 101 (similarly defining party).

However, "association" is a defined term in the Associations Code, 15 Pa. C.S. §§ 101-10. Specifically, an association is "[a] corporation, a partnership, a limited liability company, a business trust or two or more persons associated in a common enterprise or undertaking. . . . " 15 Pa. C.S. § 102 (emphasis added). An unincorporated association is simply a voluntary group of persons without a charter, formed by mutual consent for a common objective. Paoletta v. Aetna Casualty and Surety, 44 D & C3d 230 (Mercer 1986)(holding that a musical group had the capacity to sue even though it had not registered its fictitious name); 13 Summary of Pennsylvania Jurisprudence

2d, Business Relationships §20:1 (1993). Associations are formed for social or patriotic purposes, or any other purpose mutually agreed upon by its members. Id. Since Concerned Citizens is a group of individuals "associated in a common enterprise or undertaking,"namely, the appeal of the permit, it qualifies as an association.

There is no basis for MSQ's contention that Concerned Citizens has no by-laws and is therefore not a recognizable association. There is no requirement that only formal organizations with written by-laws may be recognized as party litigants. Associations formed for any purpose other than for doing business for profit are largely governed by common law principles. Registration of a fictitious name is voluntary. Section 303(a) of the Fictitious Name Act, 54 Pa. C.S. §303(a). Contrary to the assertion of MSQ, Gordon v. Tomei, 19 A.2d 588 (Pa. Super. Ct. 1941), does not hold that written by-laws are mandatory to create an association. Rather, the case holds that by-laws regulate the relationships among association members, and may be enforceable in court according to principles of contract. By-laws do not define the association's relationship with those outside of it. Further, an association's constitution or by-laws may be in the form of an oral agreement. Pa. Jurisprudence §20:7. There is no evidence currently before this Board that Concerned Citizens have not agreed to conduct themselves as an association.[6]

MSQ also contends that Concerned Citizens is not a party to this action because it is not specifically named in the caption, or referenced in the notice of appeal as Concerned Citizens. This fact is an oversight, since these individuals have consistently referred to themselves as an association

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[6]A moving party bears the burden of proving that it is entitled to the relief requested. Green Thornbury Committee v. DER, EHB Docket No. 93-271-W (Opinion issued February 17, 1995.)

known as Concerned Citizens of Washington Township. The omission of the name of the appellants as an association can certainly be cured with an amendment to the caption. In In re Francis Edward McGillick Foundation, 594 A.2d 322 (Pa. Super. Ct. 1991), affirmed in part and reversed in part on other grounds, 642 A.2d 467 (Pa. 1994), the court held that although the suit should have been commenced by the Bishop rather than the Diocese, this defect was technical in nature; such defect could be cured by amendment where there was no prejudice to the opposing party, no new party was added, and no new theory of liability was presented. In this case, MSQ has not alleged that it has been prejudiced by Concerned Citizens' failure to file its appeal as the association rather than as individuals. Concerned Citizens has referenced itself as such in most correspondence and pleadings before the Board. See. e.g. , Letter from Concerned Citizens to Environmental Hearing Board 11/8/94; Letter from Concerned Citizens to Environmental Hearing Board 3/6/95. Even MSQ has acknowledged them as a "citizens group" as evidenced by its first set of interrogatories served on the association dated December 15, 1994, and paragraph 2 of both the first and second motions to dismiss identify "Respondents are Harold Weiss, et. al., a citizens group . . . ." (Emphasis added.)[7]

MSQ also contends that Michael Thrasher can not represent other members of Concerned Citizens as individuals. Of course we agree, but Mr. Thrasher has never purported to represent individuals, but only serves as the spokesperson for the association. There is nothing in this record

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[7]We note that MSQ has had ample opportunity to raise this objection in its previous motions to dismiss. Although this Board has no specific rule requiring all grounds for dismissal to be raised in a single motion, we certainly frown upon a practice of filing piecemeal motions as an inefficient use of this Board's scarce resources. Such action belies MSQ's allegations of prejudice based on time expended in defending this appeal.

to suggest that he is not authorized to do so. The Board rules clearly permit an association to be represented by one of its officers. 25 Pa. Code § 1021.21(a).

In sum, Concerned Citizens is an entity with the right to institute or defend a cause of action, and may be recognizable by the Board as an association and therefore as a party.

MSQ's motion to dismiss also urges this Board to dismiss Concerned Citizens appeal because it has failed to comply with orders of the Board. Such dismissal is a discretionary power of the Board, and at this time we decline to dismiss Concerned Citizens' appeal.

Motion for Sanctions

MSQ has also filed a motion for sanctions against Concerned Citizens for failure to answer certain interrogatories and two requests for production of documents. Specifically MSQ asks that Concerned Citizens appeal be dismissed, or in the alternative that it be precluded from offering documentary and testimonial evidence and that the Board award MSQ counsel fees. Concerned Citizens responds that it has offered adequate responses to all of MSQ's discovery requests.

On February 17, 1995, MSQ served interrogatories and three requests for production of documents on Concerned Citizens. Concerned Citizens served responses to the interrogatories that were incomplete or nonresponsive. By order dated June 8, 1995, Concerned Citizens were ordered to respond to two of MSQ's document requests and to answer interrogatories 8,9,10, 11 and 13.

Concerned Citizens supplemented their interrogatory answers on July 25, 1995,[8] but have not produced the documents requested by MSQ.

MSQ contends that Concerned Citizens answer to interrogatory 8, requesting identification of the individuals who signed the notice of appeal. Concerned Citizens has provided the names and most of the addresses for all but two of the individuals, noting that "[a]ll street addresses immediately surround the quarry site." Its response substantially answers the interrogatory.

MSQ also argues that Concerned Citizens responses to interrogatories 9,10, and 11 are inadequate. These interrogatories ask Concerned Citizens to identify individuals who made comments or complaints during the permit application process. MSQ objects to Concerned Citizens reference to information on file with the Department in this matter. However, in reviewing Concerned Citizens responses, it only directs MSQ to the Department's files in addition to providing specific names and dates as requested. We also note that a party will not be compelled to answer interrogatories when the information sought is at least equally within the knowledge of the opposing party. See Boyle v. Steiman, 631 A.2d 1025 (Pa. Super. Ct. 1993).

MSQ additionally charges that Concerned Citizens answer to interrogatory 15 "attempts to assert an objection." This interrogatory asked if Concerned Citizens intended to obtain appraisals of their property. Concerned Citizens responded that "[f]or the purposes of this particular litigation the answer is no." We fail to see how this answer frames an objection or is otherwise inadequate.

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[8] We question MSQ's motivation in waiting for over six months to object to Concerned Citizens' supplemental responses to interrogatories. We note that the purpose of discovery is to expedite the process of litigation and not to provide "an intermediate arena for jousting in the time between the pleadings and the actual trial." Boyle v. Steiman, 631 A.2d 1025, 1031 (Pa. Super. Ct. 1993).

However, we must agree with MSQ that Concerned Citizens answer to interrogatory 13, requesting the amount each property owner paid for their property, is inadequate. Concerned Citizens response is framed as an objection to the question on the grounds that it is irrelevant. The time for posing this objection has long past. Johnson v. DER, 1986 EHB 1106 (failure to object to an interrogation within thirty days waives any future objection to its relevancy). This Board has already ordered Concerned Citizens to answer this interrogatory, and we will not disturb that determination. See Boyle v. Steiman, 631 A.2d 1025, 1031 (Pa. Super. Ct. 1993) (it is improper to overrule and interlocutory order of another judge in the same case).

MSQ's motion for sanctions for Concerned Citizens' failure to answer interrogatories is denied. However, as to interrogatory 15, we will view the motion for sauctions as a motion to compel. See Leonardi v. DER, 1991 EHB 699. Concerned Citizens must answer interrogatory 15.

MSQ has also requested the curricula vitae of any experts Concerned Citizens whom it intends to call at the hearing on this matter, and any documents that Concerned Citizens relied upon in answering interrogatories. Concerned Citizens argues that this information is already in possession of MSQ, since it has informed MSQ that it intends to use the expert material assembled by Washington Township.

Washington Township is no longer a party in this matter; Concerned Citizens is responsible for prosecuting its own case. Thus it must produce the requested information, even if it is identical to that produced by the Township when it was a party.

However, preclusion of expert testimony is a drastic sanction and we are disinclined to impose such a penalty upon Concerned Citizens. MSQ's motion for sanctions for failure to produce

documents is denied, but Concerned Citizens will be compelled to provide the requested information.

ORDER

AND NOW, this 6th day of March, 1996, it is ordered as follows:

1. Martin Stone Quarry's second motion to dismiss the appeal of Concerned Citizens of Washington Township is denied.

2. Martin Stone Quarry's third motion to dismiss the appeal of Concerned Citizens of Washington Township is denied.

3. Martin Stone Quarry's objections to Concerned Citizens request for production of documents is overruled. Martin Stone Quarry shall produce the requested documents within 15 days of the issuance of this Order.

4. Martin Stone Quarry's motion for sanctions for failing to answer interrogatories 8, 9, 10, and 11 is denied.

5. Martin Stone Quarry's motion to compel Concerned Citizens to answer interrogatory 13 is granted. Concerned Citizens shall supplement their response within 15 days of the issuance of this Order.

6. Martin Stone Quarry's motion to compel production of documents is granted. Concerned Citizens shall provide the requested information within 15 days of the issuance of this Order.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: March 6, 1996
See following page for service list.

cc: **Bureau of Litigation:**
(Library: Attn: Brenda Houck)
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Marc A. Ross, Esq.
Central Region
For Appellants:
Michael O. Thrasher
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For Permittee:
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THORNHURST TOWNSHIP, LACKAWANNA COUNTY, et al.	:	
v.	:	**EHB Docket No. 95-070-MG**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and LOBOLITO SERVICE CORPORATION	:	**Issued: March 6, 1996**

OPINION AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT

Syllabus:

Before the Board is Appellants'[1] motion for summary judgment and Lobolito Service Corporation's motion for partial summary judgment and motion in limine. The motion of Lobolito for partial summary judgment is denied to the extent it is inconsistent with the Board's Opinion and Order of October 20, 1995 in which the Board held that the Department could consider new matters relating to economic or social justification at the NPDES permitting stage in the case of high quality waters which were not or could not have been considered in Act 537 planning. The motion for summary judgment is granted as to portions of Appellants' pre-hearing memorandum which contend that the Department must consider alternatives previously considered in the Act 537 planning process or that it must determine that the project is necessary

[1]Appellants consist of Thornhurst Township, Pocono C.A.R.E. and several individuals.

for the benefit of the community as a whole. Appellants' motion which requests this Board to remand this matter to the Department of Environmental Protection for further consideration of its issuance of an NPDES permit is granted, as a result of a **significant** change in the need for the proposed sewage treatment plant which presents the Department with an alternative in minimizing environmental incursion which it previously could not have considered.

OPINION

The subject of the appeal is the issuance of an NPDES permit by the Department for a sewage treatment plant designed to serve both a proposed residential housing development known as Rainbow Run and a proposed Clifton Elementary School. [2] This project has been the subject of an Act 537 Plan[3] adopted by Thornhurst Township,[4] Lackawanna County, and approved by the Department on August 17, 1993. The NPDES permit, approved thereafter by the Department, would authorize the discharge of 82,000 gallons per day from the proposed treatment plant to the high quality waters of the upper Lehigh River, of which no more than 14,000 gallons per day would be from the proposed Clifton Elementary School.

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[2] The background of this appeal is set forth in the Board's previous opinion relating to Lobolito's motion to dismiss. Lehigh Township v. Department of Environmental Protection, Docket No. 95-070 (Issued October 20, 1995). Those facts will not be restated in full here.

[3] An Act 537 Plan is the official plan required of municipalities by the Sewage Facilities Act, Act of January 24, 1966, P.L. 1535 (1965), as amended, 35 P.S. § 750.1- .20a. This Act requires every municipality in Pennsylvania to have in place a current, comprehensive sewage facilities plan, and to implement the plan.

[4] At the commencement of this appeal, Thornhurst Township was known as Lehigh Township. On December 11, 1995, Lehigh Township changed its name, and on motion by the Township this Board amended its caption accordingly.

Lobolito has filed a motion for partial summary judgment.[5] There are two broad grounds for this motion. The first is that certain of the alleged statements of fact and legal issues set forth in Appellants' prehearing memorandum are planning issues relating to the economic or social justification for the discharge which may not be raised in this appeal from the issuance of the NPDES permit. The second ground is that Appellants' claim that the Department abused its discretion in failing to apply its Special Protection Waters Implementation Handbook to the permit application must be dismissed as a matter of law.

Appellants' motion for summary judgment is based on the fact that after the appeal was taken from the issuance of the permit, the North Pocono School District resolved not to construct the school or to use the capacity offered by the proposed treatment plant. As a result of this decision, Appellants claim that there can be no economic or social justification for the discharge as required by 25 Pa. Code §95.1(b) of the Department's regulations. In the alternative, Appellants ask that this matter be remanded to the Department for reconsideration of the economic or social justification for the project and alternatives to the proposed instream discharge to high quality waters in view of the School District's decision not to build the school.

Although the Board has decided to remand this matter to the Department's further consideration for the reasons discussed below, a discussion of the legal principles raised by the parties in their respective motions will provide guidance for the Department's subsequent action on Lobolito's permit application.

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[5]Lobolito has additionally filed a motion in limine which addresses its objections to certain exhibits proposed by the Appellant's prehearing memorandum. Because of our disposition of the motion for summary judgment and the motion for partial summary judgment, we need not reach this motion.

The Board is empowered to grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Snyder v. Department of Environmental Resources, 588 A.2d 1001 (Pa. Commw. Ct. 1991). Summary judgment may be entered only in those cases where the right is clear and free from doubt. Hayward v. Medical Center of Beaver County, 530 Pa. 320, 608 A.2d 1040 (1992).

Claims Based Upon Economic or Social Justification

We first turn to the issues concerning economic and social justification raised by the parties. Lobolito contends that the Department has no authority to consider any issue or economic or social justification of a discharge to "high quality waters" in connection with NPDES permitting where economic or social justification for the project was considered in Act 537 planning. [6] This argument is based, in part, on the contention that the Department was without power under the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§ 691.1 et seq., to issue its regulation, 25 Pa. Code §95.1, requiring an applicant for a

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[6] The Board's October 20, 1995 opinion addressed this issue, therefore Lobolito has requested reconsideration of the issue as a footnote to its current motion. We held that issues of economic and social justification as they relate to water quality do not become final at the Act 537 planning stage. This is particularly true with respect to determinations as to whether the discharge permitted by the effluent limits in the NPDES permit can meet the special protection requirements contained in the Department's water quality regulations. (Slip op. at 14). We also held that alternatives to discharge not considered in the Act 537 planning may be considered by the Department in connection with the issuance of the NPDES permit. (Slip op. at 16-18).

Both Appellants and the Department state that the request for reconsideration is untimely under the Board's rule at 25 Pa. Code § 1021.122. We agree that the request is untimely, but revisit the issue as an elaboration of the legal principles underlying our prior opinion.

permit involving a discharge to "high quality waters" to provide economic or social justification for that discharge. Indeed, Lobolito contends that matters of economic or social justifications are planning issues that can only be considered by local officials.

It is true, as Lobolito contends, that the Department has only the powers delegated to it by statute or the Pennsylvania Constitution. However, we do not agree that the Department has no power under the Clean Streams Law, to consider any new issues relating to economic and social justification that may be offered pursuant to the provisions of 25 Pa. Code §95.1 in connection with NPDES permitting even though the Department has considered issues of economic or social justification in Act 537 planning related to the project pursuant to the provisions of the Sewage Facilities Act.

We reject Lobolito's contention that Section 95.1 of the regulation was issued under the authority of the Sewage Facilities Act and cannot be within the powers of the Department under the Clean Streams Law. Section 95.1 of the Department regulations was in fact promulgated solely under the authority of Section 5 of the Clean Streams Law, 35 P.S. §691.5. 9 Pa. Bulletin 3051 (1979). The regulation provides, in relevant part:

> (b) Waters having a water use designated as "High Quality Waters" in §§ 93.6 and 93.9 (relating to general water quality criteria; and designated water uses and water quality criteria) shall be maintained and protected at their existing quality or enhanced, unless the following are affirmatively demonstrated by a proposed discharger of sewage, industrial wastes, or other pollutants:
>
> (1) The proposed new, additional or increased discharge or discharges of pollutants is justified as a result of necessary economic or social development which is of significant public value.
>
> (2) The proposed discharge or discharges, alone or

> in combination with other anticipated discharges of pollutants to the waters will not preclude any use presently possible in the waters and downstream from the waters, and will not result in a violation of any of the numerical water quality criteria specified in § 93.9 which are applicable to the receiving waters.

This regulation is fully authorized by Section 5 of the Clean Streams Law. That provision grants the Department the power and the duty to issue permits which in its sound judgment and discretion achieve the objectives of Section 4 of the Law, 35 P.S. § 691.4. Factors which the Department must consider pursuant to Section 5 include, among other things, (1) water quality management and control in the watershed as a whole, (2) the present and possible future uses of particular waters, and (3) the immediate and long-range economic impact upon the Commonwealth and its citizens. Section 5(a) of the Law. As indicated by the text of the Act, and as interpreted by the Commonwealth Court in Community College of Delaware County v. Fox, 342 A.2d 468 (Pa. Commw. Ct. 1975), the grant of these powers is to be read in connection with the objectives of the Law as set forth in Section 4, which include the **prevention of further pollution to the waters of the Commonwealth** so as to attract new manufacturing industries and develop Pennsylvania's full share of the tourist industry, the assurance of adequate out of door recreational facilities in the decades ahead, and the promotion of the economic future of the Commonwealth. Thus, the Department is clearly authorized to promulgate a regulation requiring a showing of economic justification for any additional discharge of pollutants to high quality waters.

This power has been impliedly recognized by the Commonwealth Court in three decisions, two of which are relied upon by Lobolito to demonstrate that the Department has no such power. In Big B Mining Company, Inc., 554 A.2d 1002 (Pa. Commw. Ct. 1989), the

Commonwealth Court upheld the Board's approval of a permit applied for by the mining company in determining that a discharge to high quality waters was justified by necessary economic development in compliance with 25 Pa. Code §95.1(b). Judge Roth, in the Board opinion, stated that such a "justification is shown when the applicant demonstrates that net economic benefits of significant public value are likely to be realized." 1987 EHB 815.[7] Contrary to suggestions by Lobolito, the case did not involve Act 537 planning. In Marcon, Inc. v. DER, 462 A.2d 969 (Pa. Commw. Ct. 1983), the Commonwealth Court approved the Board's adjudication which applied 25 Pa. Code §95.1(b) and set aside the Department's issuance of an NPDES permit to the developer of a residential community for absence of proof of a justification for the discharge to high quality waters where the appellants had presented evidence that the permit would have a deleterious effect on the receiving waters. Finally, in Fox, the court held that the Board had properly exercised its discretion under the requirements of Article I, Section 27 of the Pennsylvania Constitution and Section 5(a)(5) of the Clean Streams Law by properly considering the economic impact of the sewer extension project as a financial concept in issuing the permit to construct. That case did not involve a discharge to any stream.

Lobolito contends, however, that the Department has no authority to require a demonstration of "social" justification for a discharge to high quality waters because the Clean Streams Law does not authorize the Department to consider anything other than financial matters. First, Lobolito charges that Appellants' and the Department's reliance on Article I,

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[7]Judge Roth, an engineer by training, was the sole member of the Board who decided this case as a result of an agreement of the parties because the only other Board member was recused, making it impossible for the Board to comply with the requirement that its decision be based on a majority vote.

Section 27 of the Pennsylvania Constitution is misplaced because Section 27 can not operate to expand the powers of an agency. We agree that this section of the Pennsylvania Constitution can not expand the statutory authority of the Department in the sense meant by Lobolito. In fact, Section 27 **restricts** the discretionary authority of the Department by imposing a duty to minimize environmental incursion. This necessarily requires the Department to consider justifications for discharges of pollutants to streams, and all reasonable alternatives which would reduce the environmental impact of such a discharge in the exercise of the Department's discretion under the Clean Streams Law. Payne v. Kassab, 312 A.2d 86 (Pa. Commw. Ct. 1973), *aff'd*, 468 Pa. 226, 361 A.2d 263 (1976).

Second, Lobolito's argument relies on the statement in Fox that under Section 5(a)(5) of the Clean Streams Law, the Department's consideration of economic impact need be "only matters clearly financial in nature as for example, the impact a given action might have upon a local tax base, the level of industrial activity, or local employment." 342 A.2d at 481. Such reliance is misplaced. This decision was limited to what the Department had to consider under Article I, Section 27 of the Pennsylvania Constitution in connection with a sewer extension project not involving a discharge to any stream. That court could not have considered whether the Department had authority to permit a developer to justify a discharge into high quality waters based on "social" considerations because the regulation in issue was not even promulgated until years after the Commonwealth Court decision in Fox.

Moreover, we believe that there is ample authority in Section 5 of the Clean Streams Law for the Department to permit justifying a discharge to high quality waters based on some considerations that may be primarily social. The goal of Section 4 of the Clean Streams Law to

have adequate out of door recreational facilities in the decades ahead may be viewed as primarily social in nature. This is one of the goals that Section 5 of the Clean Streams Law directs the Department to consider in taking permitting or other action under the Law. Similarly, social considerations of a project may well be involved in projects which may aid in attracting new manufacturing industries and in developing Pennsylvania's full share of the tourist industry. Providing the infrastructure to meet these goals, such as adequate school facilities, may well constitute both necessary social and economic development. Adequate housing or other accommodations and nearby recreational facilities for prospective employees or tourists, to cite only a few examples, may well constitute necessary social development that might be used to justify a discharge.[8]

We agree with Lobolito that economic and social justification determinations made in Act 537 planning should be given as much administrative finality as is possible. In absence of some new matters which could not have been considered in the course of Act 537 planning, the Department normally should, and presumably will, accept the prior determination of economic or social justification for the project. In our prior opinion, for example, we said that consideration of matters of economic or social justification at the NPDES permitting stage would have to be limited to water quality issues or to no-discharge alternatives that were not considered at the Act 537 planning stage.

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[8]Social justification may also be required for the state to comply with federal Clean Water Act requirements. The NPDES permit must comply with federal anti-degradation requirements. See 25 Pa. Code §92.31(7). This presumably includes 40 CFR §131.12(2) which requires that water quality above and beyond protected uses be maintained and protected unless "allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located."

The application of administrative finality to Act 537 planning, however, must be consistent with the Department's authority and duties under the Clean Streams Law when it comes to the issuance of an NPDES permit for a discharge to high quality waters. For example, if at the time of the issuance of the NPDES permit there are changed conditions indicating that there is no longer either a necessary economic or social justification for the project, then the Department has an obligation to exercise its discretion in deciding whether to issue the permit.[9] Cf. Estate of Peters v. Department of Environmental Resources, 1992 EHB 358 (refusing to adopt an interpretation of the Sewage Facilities Act regulations which would support a position that planning approval encompasses all other applicable approvals, rendering NPDES and water quality management permit processes mere formalities.)

We also reject Lobolito's contention that the determination of "necessary economic or social development" can only be made in the context of evaluation of local land use and development planning decisions by government officials other than the Department. The Commonwealth Court in Fox clearly understood that it is the duty of the Department to exercise its powers and duties under the Clean Streams Law "to control and eliminate water pollution in a manner consistent with technology, community economy, feasibility of treatment, and the uses of the waters." 342 A.2d at 468. While planning issues may well be the province of local officials, and the Department must consider the views of those officials, that planning alone cannot

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[9]Specifically, Section 5 of the Clean Streams Law says that the Department's discretion must be exercised consistent with the goals set forth in Section 4 of the Law which may involve both economic and social concerns. Of course, that discretion must also be exercised consistently with the Department's duties under Article 1, Section 27 of the Pennsylvania Constitution to minimize adverse impacts to the environment. See Discussion above.

deprive the Department of the powers and duties given it by the Clean Streams Law. It is significant that no provision of the Sewage Facilities Act which governs the Act 537 planning process for sewage facilities, in any way restricts the Department in the exercise of its powers under the Clean Streams Law. In absence of such a statutory directive, we cannot hold that the Department is barred from exercising its powers under the Clean Streams Law because of the desired administrative finality of Act 537 planning decisions.

If anything, this statement supports the conclusion that the Department has a duty to continue to consider new information in connection with NPDES permitting which was not, or could not, be considered in the Act 537 planning process.

The Department's practice in this case reflects that it has an understanding of this duty. As Lobolito acknowledges, Kenneth A. Bartal and Kate Crowley of the Department said on deposition that economic or social justification is reconsidered at the permitting stage "if new information is provided." (Lobolito Memorandum of Law at 9-10). Ms. Crowley clearly acted on what appeared to be new information that the School District might not build the school in requesting, and receiving, at the NPDES permitting stage, a confirmation from the School District that it did intend to build the school and make use of the proposed sewage treatment facility. (See Exhibits G and H to Appellants' Memorandum in Support of Motion for Summary Judgment.)

Based on these considerations, we turn to Lobolito's specific claims in its motion for partial summary judgment. Lobolito's motion is essentially a motion to strike Appellants' prehearing memorandum, Part A, Statement of Facts in Dispute, paragraphs 7, 8, 9, 10, 11, 12 and 15, and Part B, Statement of Legal Issues in Dispute, paragraphs 3, 4, 7, 8, 9 and 10.

Lobolito says that all of these allegations and legal issues relate to Appellants' contention that the standards of 25 Pa. Code §95.1(b) relating to economic or social justification, and analysis of alternatives for the proposed discharge were not properly considered by the Department in connection with the issuance of the NPDES permit.

Statement of Facts in Dispute

Paragraph 7 of the Appellants' Statement of Facts in Dispute states: "If the school is not built on the Lehigh River Site, there is no need for the stream discharge." The motion is denied as to this paragraph. As we held in our prior opinion, this contention may be considered because it appears that the alternative of only the residential development was not considered by the Department in connection with the NPDES permit and there may be insufficient economic or social justification for the discharge based only on the construction of the Rainbow Run residential development.

Paragraph 8 of the Statement of Facts in Dispute states: "Even if the school is built on the Lehigh River Site, the numbers of the students can be kept to a point where a nonstream discharge can be obtained." The motion is denied as to this claim but only to the extent Appellants can demonstrate that this alternative was not considered during the course of the Act 537 planning process. Of course, this issue may be moot as a result of the School District's decision not to construct the school.

Paragraphs 9-10 of the Statement of Facts in Dispute relate to the Appellants' claim that there is no need for the Rainbow Run Development. The motion is denied as to these paragraphs because there are material issues of fact as to whether the discharge may be justified by this development.

Paragraphs 11-12 of the Statement of Facts in Dispute relate to the Covington Township Sewage Treatment Plant. These appear to be issues which relate only to Act 537 planning and may not be raised in this appeal. The affidavit of Samuel M. D'Alessandro, submitted by Lobolito, leaves no doubt that the alternative was considered in the Act 537 process. See D'Alessandro Affidavit Exhibit 6 at 5-26A-27. Accordingly, Lobolito's motion with respect to these paragraphs is granted.

Paragraph 15 of Appellants' prehearing memorandum states as follows:

> 15. The North Pocono School District has, on December 6, 1995, passed a resolution that there is no compelling justification to build the Clifton Township School; that the School District and Board will take no action toward construction of the Clifton School until a need for the school is determined; that if the Board decides a facility on the Clifton site is necessary; that the Board will try to ensure that no sewage effluent from the school is discharged into the Lehigh River; and therefore, the North Pocono School District has no need and will not use the proposed sewage treatment plant proposed by Lobolito Service, Inc.

The motion for partial summary judgment with respect to this paragraph of the prehearing memorandum is denied because there are material issues of fact and law in dispute as to whether or not the decision not to construct the school did or should affect the Department's decision to issue the NPDES permit and whether the proposed discharge is justified by the Rainbow Run development alone. Documents submitted by both parties suggest that the social and economic justification for the project was considered and decided to be justified, based in part on the construction of the school facility both at the Act 537 planning phase and at the time of the issuance of the NPDES permit. More specifically, the memorandum from Mr.Bartal to Scott Novatak dated July 19, 1994 indicates that the Department's approval of the social and economic justification of the project was "based on the assumption that this project is the only

feasible and cost-effective alternative available for providing sewer service to the proposed North Pocono Elementary School, which appears to be a significant social need for this area." Appellants' Motion for Summary Judgment Exhibit E. In addition, the letter from Ms. Crowley of the Department to the North Pocono School District dated October 14, 1994 suggests that the continued intent of the School District to build the school was an important part of The Department's determination in determining whether or not to issue the NPDES permit. See Exhibit G to Appellants' memorandum in support of motion for summary judgment.

Statement of Legal Issues In Dispute

Paragraph 3 of Appellants' statement of legal issues in dispute claims that the Department failed to fully evaluate the nonstream discharge alternative and itemizes a number of alternatives, most of which appear to be alternatives which were considered during the course of Act 537 planning. See Exhibit 6 of D'Alessandro Affidavit. In our October 20 opinion, we held that Appellants could raise only those discharge alternatives which were not considered at the planning stage in this proceeding. (Slip op. at 17.) The prehearing memoranda make no claim that the suggested alternatives were not considered in the previous Act 537 planning. Accordingly, to the extent that Paragraph 3 alleges that the Department failed to consider alternatives which were evaluated during the sewage planning phase, Lobolito's motion is granted. To the extent alternatives were not considered, such as the need for the school next to the river, and analysis of a school with fewer students, were not addressed at the planning stage, the motion is denied.[10]

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[10]As we stated before, these points may be moot. See discussion of Paragraphs 7 and 8 of Facts in Dispute, above.

Paragraph 4 of the Appellants' Statement of Legal Issues in Dispute says that the Department did not use a review procedure that required a determination that the project would be necessary for the benefit of the community as a whole. Lobolito's motion for partial summary judgment with respect to this paragraph is granted because the Department is not required to make such a determination under Section 95.1 of the regulations, the Clean Streams Law or Article 1, Section 27 of the Pennsylvania Constitution. Rather, the Department must determine that there will be a net benefit to the community; the project need not benefit each and every member of the community.

Paragraph 8 of the Appellants' Statement of Legal Issues charges a failure to continue to examine whether the North Pocono School District actually intended to build the school on the Clifton Township, Lehigh River Site after being notified during the permit review process that there was some doubt of the necessity of the project.

Lobolito's motion for partial summary judgment as to this paragraph is denied. It appears from some documents that the construction of the school was an important factor in the determination that the project was economically or socially justified. We have previously held that the Department as an administrative agency is required to consider all appropriate alternatives in exercising its discretion under the Clean Streams Law. Refusing to permit the discharge, only to permit the construction of the Rainbow Run development may be an important alternative which may properly be considered by the Department at the NPDES permitting stage. In our prior opinion, we held that no-discharge alternatives not considered in the Act 537 Plans approval were still open for consideration at the NPDES permitting stage. This appears to be

such an alternative.[11]

Paragraph 9 of the Appellants' Statement of Legal Issues claims that because the School District has now determined by resolution not to build the school on the Lehigh River and has concluded that the School District will not use the proposed sewage treatment plant means that there is no socioeconomic necessity for the discharge permit.

Lobolito's motion for partial summary judgment with respect to this paragraph is denied. As indicated above, there are material issues of fact and law as to whether this decision by the School District is determinative of the economic or social benefits of Lobolito's Rainbow Run project. It is possible that the discharge can be justified only if the treatment plant was necessary for the school. However, it may well be, as Lobolito contends, that the discharge is justified by the housing development alone.

Appellants' Motion for Summary Judgment

Based on the foregoing discussion, we must also deny Appellants' motion for summary judgment to the extent the motion seeks a judgment that the issuance of the permit was not a proper exercise of the Department's discretion. The documents presented in Appellants' memorandum in support of its motion clearly show that the Department was careful to assure itself that the School District intended to build the school prior to issuing the NPDES permit. Disposition of Appellants' argument concerning the Department's failure to apply the Special Protection Waters Handbook to Lobolito's permit application is dealt with below.

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[11]The Board notes, however, that the claim that the Department failed to continue to examine this possibility appears to be refuted by the documents attached to Appellants' memorandum in support of motion for summary judgment attached as Exhibits E, F and G.

Appellants' Motion to Remand

Appellants contend, in the alternative, that the matter should be remanded to the Department for further consideration of the issuance of the permit to enable the Department to determine whether or not the permit should now be issued in light of this change in the project. Appellants claim that the Department has not considered whether the permit could be economically or socially justified based on the housing development alone, and that as an administrative agency it is required to reconsider its issuance of the permit with the housing development as the only justification for the proposed discharge.

Lobolito, on the other hand, argues that the case should not be remanded because the Department considered the data for the school project separately from the residential project and there is no basis or authority for revocation of the permit. In addition, Lobolito contends that even if the Department's review was improper, this Board should exercise its authority to make a de novo determination of whether social and economic justification has be established in connection with the permit.

The position of the Department is set forth in the Commonwealth's omnibus memorandum of law in response to all of the pending motions. The Department reluctantly asks that the matter be remanded to enable it to determine whether the NPDES permit is still valid in light of the School District's withdrawal from the project. If its request were granted, the Department says its review would include a determination of whether or not the NPDES permit is significantly inconsistent with the Act 537 planning. If the permit is inconsistent, it would be denied. In addition, it would consider whether the NPDES permit comports with Section 95.1 of the Department's regulations without the school being involved in the project. (Omnibus

Memorandum at 28).

In support of its request for remand, the Department properly says that it has a duty to comply with all applicable laws and regulations for environmental protection. The Department also says that without the school the project has changed from the project approved in the Act 537 Plan. The Department disagrees with Lobolito that the school and the housing development were always treated separately and says that the planning modules and that the Social and Economic Justification ("SEJ") Report addresses both the school and the housing development together. The Department further says that there is no support for the claim that the Department approved the SEJ Report for the school and the development separately. Indeed there is some support in the record that the project was justified from the Department's point of view as a means of providing sewage service to the proposed school which appeared to serve a public need in the area. (Omnibus Memorandum at 9-11).

The Board's review of the permit, the factual record and the contentions of the parties leads us to believe that the Department has a duty to reconsider the issuance of the permit as a result of the changes in the project relating to the decision of the School Board not to utilize the treatment facility. As the Department points out, it has not had an opportunity to consider the economic or social justification of the project as it now exists without the school. This change in circumstances certainly raises material issues with respect to the propriety of the permit as issued. The permit authorizes the discharge by the housing development of up to 68,000 gallons per day to the Lehigh River. The proposed discharge from the school might be as high as an additional 14,000 gallons per day. (D'Alessandro Affidavit, ¶ (8)). This is a material part of the total discharge allowed by the permit. Estate of Peters v. Department of Environmental

Resources, 1992 EHB 358 .

Also, the decision of the School District to not build the school is a change in circumstances which is material to the Department's consideration of the economic or social justification for the project under 95.1 of its regulations. While Lobolito sees the economic justification for the project flowing predominantly from the housing development (D'Alessandro Affidavit, ¶¶31-33), the Department considered both the school and the housing development to be a joint project. In addition, the Department says that it has not had an opportunity to make a determination whether the discharge could be justified by the housing development alone. Its actions in the course of considering the issuance of the NPDES permit indicate that it believed the existence of the school project to be a very material consideration. (Exhibits G & H of Appellants Memorandum of Law in Support of Motion for Summary.) The view of the Department's Central Office at the time of the issuance of the NPDES permit appears to have been that the economic or social justification for the project lay in providing sewage service for the proposed North Pocono Elementary School because there appeared to be a significant public need for the school in this area. (See Exhibit E to Appellants' Motion in Support of its Motion for Summary Judgment; Omnibus Memorandum at 11).[12]

In response to Lobolito's contention that the Board should exercise its de novo review authority to decide that the project is justified, the Department supports the position of Appellants because the decision by the School District to not build the school was not made until

[12]The Department also says that the changed circumstances may also affect the Department's consideration with respect to the consistency of the permit with the existing Act 537 Plan and with respect to required financial assurances. (Omnibus Memorandum at 10-11).

after the permit was approved, therefore reviewing the permitting decision "moves away from reviewing a Department action and toward making an initial decision . . . . "

We believe that the Department's duty to evaluate significant and reasonable alternatives to minimize environmental incursion and to see that the issuance of the NPDES permit comports with previous Act 537 planning requires the Department to reconsider the issuance of the permit to Lobolito under the changed circumstances. We therefore remand the matter to the Department for further consideration as to what changes, if any, should be made in its action approving the issuance of the NPDES permit to Lobolito as a result of the decision of the North Pocono School District not to construct the previously proposed elementary school as a part of the proposed project.[13] In the course of its reconsideration of the issuance of the permit, the matters previously resolved in the course of Act 537 planning should not be reconsidered by the Department unless it is presented with other changed circumstances or alternatives to in stream discharges which are material to its decision and which were not previously considered in the course of Act 537 planning. While we might exercise our power to substitute our discretion for the Department, we decline to do so until after the Department has had an opportunity to reconsider its action in light of the changed circumstances of the project.

The Applicability of the Handbook

Both parties seek summary judgment on the issue of the Department's failure to apply the Special Protection Waters Handbook. All agree that the Handbook is not a binding regulation.

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[13] We note that the Department does not need to seek permission from the Board to reconsider the permit; it is not prohibited from issuing an order suspending it for reconsideration by the pendency of this litigation. See Back v. DER, 1991 EHB 1667; Pequea Township v. DER, 1994 EHB 755.

However, in view of our remand of the permit to the Department for further consideration of the issuance of the NPDES permit, we do not rule on the various contentions of the parties with respect to the applicability of the Special Protection Handbook to this NPDES permit application or with respect to whether or not the provisions of that Handbook are in any way binding on the Department's action.

While Appellants sought an order from the Board requiring Lobolito to resubmit its alternative analysis and SEJ Study to the Department, Lobolito argues forcefully and with good reason that the Department properly exercised its discretion in not applying the Handbook to this case. As the Commonwealth Court said in Hatchard v. Department of Environmental Resources, 612 A.2d 621(Pa. Commw. Ct. 1992), the Department has broad discretion when interpreting its regulations and regulatory scheme and also in the performance of its administrative duties and functions. Because the issues raised in this appeal appear to be primarily issues of departmental policy, we leave to the proper exercise of the Department's discretion the application of the Clean Streams Law and the applicable regulations, to its reconsideration of the issuance of the permit. Id.

While the Board has the power to substitute its discretion for that of the Department, its practice has been not to do so when there is no indication that the Department has abused its discretion in reviewing facts available to it at the time the permitting decision was made. See Western Hickory Coal Co. v. Department of Environmental Resources, 485 A.2d 877 (Pa. Commw. Ct. 1984); Warren Sand & Gravel Co., Inc. v. Department of Environmental Resources, 341 A.2d 556 (Pa. Commw. Ct. 1975); Sussex Incorporated v. Department of Environmental Resources, 1986 EHB 350.

In sum, if the Handbook is no more than a statement of policy of the Department, then it is not binding on the Department in issuing the permit at issue. Department of Environmental Resources v. Rushton Mining Company, 591 A.2d 1168 (Pa. Commw. Ct. 1991). However, if the criteria or procedure set forth in the Handbook, particularly with respect to the consideration of nondischarge alternatives, is required by the Clean Streams Law, the Department's regulations with respect to permitting discharges to high quality waters, or by Article 1, Section 27 of the Pennsylvania Constitution, as Appellants contend, then the Department should apply the criteria and procedures required by law. The importance of giving administrative finality to Act 537 planning determinations and providing a reasonable transition from previous procedures may well mean that the Handbook should not be applied to the issuance of this NPDES permit even if it is concluded that it is more than a statement of policy. We have left those issues to the Department's discretion.

ORDER

AND NOW, this 6th day of March, 1996, upon consideration of Appellant, Thornhurst Township, Lackawanna County's motion for summary judgment and Lobolito Service Corporation's motion for partial summary judgment, IT IS HEREBY ORDERED that:

1. Appellants' motion for summary judgment seeking a determination that the Department of Environmental Protection abused its discretion in issuing the NPDES permit to Lobolito Service Corporation is hereby DENIED.

2. Lobolito's motion for partial summary judgment is GRANTED with respect to Paragraphs 11-12 of Appellant's Statement of Facts in Dispute of their Pre-Hearing Memorandum.

3. Lobolito's motion for partial summary judgment is GRANTED with respect to Paragraph 4 of Appellants Statement of Legal Issues in Dispute of their Pre-Hearing Memorandum. Lobolito's motion for partial summary judgment is

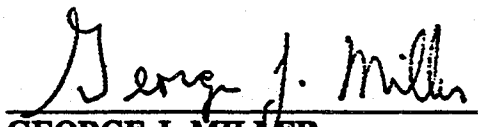
GRANTED IN PART with respect to Paragraph 3 of Appellants Statement of Legal Issues in Dispute of their Prehearing Memorandum.

4. Lobolito's motion for partial summary judgment is denied in all other respects.

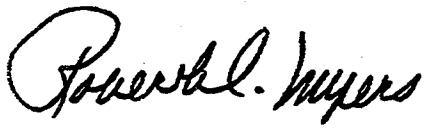
5. Appellants' motion to remand the above captioned matter to the Department of Environmental Protection is GRANTED. The Department shall promptly consider what changes, if any, should be made in its action approving the issuance of the NPDES permit to Lobolito Service Corporation as a result of the decision of the North Pocono School District not to construct the previously proposed elementary school, and consistent with the foregoing opinion.

Jurisdiction relinquished.

ENVIRONMENTAL HEARING BOARD

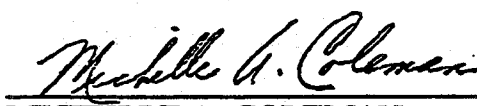


GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 6, 1996
See following page for service list.

EHB Docket No. 95-070-MG
Service List

cc: **Bureau of Litigation:**
(Library: Attn: Brenda Houck)
For the Commonwealth, DEP:
Daniel Dutcher, Esq.
Northeast Region
For the Appellants:
John Childe, Esq.
Hummelstown, PA
For the Permittee:
Robyn Katzman, Esq.
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M. DIANE SMITH
SECRETARY TO THE BOAR

FLORENCE TOWNSHIP AND DONALD MOBLEY, et al.	:	
	:	
v.	:	**EHB Docket No. 95-121-MG**
	:	**(Consolidated Docket)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION AND WASTE MANAGEMENT OF PENNSYLVANIA, INC.	:	**Issued:** March 6, 1996

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

By George J. Miller, Chairman

Synopsis

A motion to dismiss for lack of standing is denied in part and granted in part. The motion is denied where it appears that appellants are likely to have direct, immediate and substantial interests in the granting of a permit for the expansion of a landfill which they claim was not provided for in the host county municipal waste plan or did not meet alternate proof requirements required by the Department of Environmental Protection's ("Department") regulations. The motion is also denied with respect to objections concerning the potential contamination of the water supply because the appellants are likely to have substantial, direct and immediate interests which can be affected by the issuance of the permit. Whether appellants in fact have made a substantial, direct and immediate interest may be considered again on a motion for summary judgment after discovery has been completed.

The motion to dismiss is granted with respect to objections that the permittee failed to affirmatively demonstrate compliance with solid waste management plans of counties other than the host municipality because appellants have no interest in the regulation of waste flow in those other counties which surpass the interests common to all citizens in ensuring compliance with the law.

The motion to dismiss a claim that the Board has no jurisdiction over the Department's failure to impose environmentally protective provisions in a permit is denied because the issuance of the permit is an action over which the Board has jurisdiction.

A request for judgment on the pleadings contained in motions to dismiss which is based on materials other than the notice of appeal and the answer to the motion is denied where the appellant raises valid objections in its notice of appeal and it is likely that material issues of fact will be raised as a result of discovery proceedings. These matters may be raised again before the hearing on the merits by an appropriate motion for summary judgment.

OPINION

These consolidated appeals were filed by the Township of Florence (Florence) as well as by Clean Land, Air and Water, Inc. (CLAW) and its President, Donald Mobley (Mobley). The appellants challenge the Department's May 23, 1995, issuance of a solid waste permit for the expansion of Waste Management of Pennsylvania, Inc.'s (WMPI) Tullytown Resource Recovery Facility Landfill in the Borough of Tullytown and Falls Township in Bucks County. Florence, a municipal corporation of the state of New Jersey, is located across the Delaware River from the proposed Southern Expansion of the landfill. CLAW is an environmental organization, some of

whose members, including its President are said to be residents of Bucks County.

All three appellants state that the Department abused its discretion and acted contrary to law by issuing the permit because WMPI has not affirmatively demonstrated:

- that the permitted facility is provided for in the approved Bucks County Municipal Waste Management Plan, or that the facility is expressly provided for in said Plan, or that said Plan designates the facility to receive the waste volume approved in the permit (Florence appeal par. 3(2); CLAW and Mobley appeal par. 3(1));

- that the permit application contained the information required by 25 Pa. Code §273.139 relating to the host county's Municipal Waste Management Plans (Florence appeal par. 3(4); CLAW and Mobley appeal par. 3(4))[1];

- that no other sites in the counties wherein the waste is generated are more suitable for a municipal waste disposal facility than the proposed location of the permitted facility (Florence appeal par. 3(5); CLAW and Mobley appeal par. 3(2)); and

- that the applicant did not prepare a mitigation plan including, *inter alia,* an analysis of alternate locations for the facility in accordance with 25 Pa. Code §271.127 (Florence appeal par. 3(6); CLAW and Mobley appeal

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[1] 25 Pa. Code §273.139 requires submission of certain information in the permit application when the Department has given final approval to a municipal waste management plan for the county in which the facility will be located or proposed additional capacity for a facility would be located. The application must state whether the proposed facility is expressly provided for in the approved plan. If the proposed facility is not expressly provided for in the approved host county plan, then a detailed statement must be provided as to whether the proposed facility will interfere with the implementation of the approved plan. If the proposed facility is not expressly provided for in the host county plan then the application must contain an environmental siting analysis demonstrating that the proposed location of the facility is at least as suitable as alternative locations within the generating county. The location of an existing permitted facility not expressly provided for in the host county plan will be considered at least as suitable as alternative locations within the generating county to the extent the implementing documents submitted by the county designate the facility to receive waste under one or more county plans. 25 Pa. Code §273.139

par. 3(3)).[2]

In addition to these common claims, Florence states that WMPI has failed to meet the required demonstration:

- that the permitted facility is provided for in municipal waste management plans of Philadelphia, Morris (NJ) and Mercer (NJ) counties, or that the facility is expressly provided for in said plans, or that said plans designate the facility to receive the waste volume approved in the Permit (Florence appeal par. 3(3));

- that the permitted facility has complied with the requirements of the Air Pollution Control Act and the Federal Clean Air Act and their implementing regulations (Florence appeal par. 3(1));

- that the Department determined that the need for the facility outweighs its potential harm (Florence appeal par. 3(6));

- that alteration and/or removal of fill required by the construction of the facility has been properly authorized by state, regional or federal permits as required by the Municipal Waste Regulations (Florence appeal par. 3(7)); and

- that the applicant has the legal right to operate a municipal waste disposal facility within the proposed permit area (Florence appeal par. 3(8)).

CLAW and Mobley also stated additional objection to the Department's action on the grounds:

- that the permit application did not contain the information required under 25 Pa. Code §273.119 relating to alternative waters supplies (CLAW and Mobley appeal par. 3(4))[3]; and

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[2] If the Department or the applicant determines that the proposed operation may cause environmental harm, this regulation requires the applicant to provide the Department with a written explanation of how it plans to mitigate the potential harm, through alternatives to the proposed facility or portions thereof, including alternative locations, traffic routes or designs or other appropriate mitigation measures. 25 Pa. Code §271.127

[3] The applicant will provide the following alternative water supply information: determine whether the proposed facility is within the groundwater recharge area for public or private water supply, delineate the position of the proposed permit area within relevant

- that the Department's issuance of the permit without terms and conditions to insure that the drinking water supplied to residents of the surrounding communities by the Lower Bucks Municipal Authority will be safe for the residents for their use and consumption was arbitrary and capricious and contrary to the purposes of the Municipal Waste Regulations (CLAW and Mobley appeal par. 3(5)).

On September 25, 1995, the Board consolidated the appeals at EHB Docket 95-121-MG.

The Motions to Dismiss

WMPI filed motions to dismiss[4] both appeals with supporting memoranda of law and supporting exhibits drawn principally from the permit application[5]. The motion to dismiss the Florence appeal stated:

(1) Florence lacks standing to raise objections concerning other County Municipal Waste Management Plans or to challenge the adequacy of the application;

(2) Florence lacks standing to challenge WMPI's right to operate the Southern Expansion of the landfill;

(3) Florence's objection that the construction of the expansion would require alteration

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groundwater flow systems, and identify public and private water supplies which may potentially be adversely affected by groundwater flow associated with the proposed facility. For water supplies which may be affected, the applicant must submit a detailed hydrogeologic study addressing potential effect of the proposed facility on the water supplies and demonstrate the following: (1) the hydrogeologic characteristics of the proposed permit area and adjacent area assure the applicant's groundwater monitoring plan will protect water supplies from potential degradation or pollution, and (2) the feasibility of permanently replacing or restoring the water supply to like quantity and quality. 25 Pa. Code §273.119

[4] Although WMPI's motion is only titled as a motion to dismiss, it also asked for a judgment on the pleadings for several objections. The Board will consider the motion as a motion to dismiss as well as a motion for judgment on the pleadings based on the contents of the motion and supporting memorandum.

[5] The Department joined in the motion to dismiss with respect to additional permit conditions concerning drinking water supplies which CLAW and Mobley claim should be added to the permit.

and/or removal of fill which has not been properly authorized fails to state a valid cause of action;

(4) Florence's contention that the application does not contain a description of the documents upon which the applicant bases the legal right to operate a municipal waste disposal facility within the proposed area in accordance with 25 Pa. Code §§ 271.201(a)(2)[6] and 123[7] is contrary to the available factual record;

(5) Florence's contention that the permit is deficient because the application allegedly does not comply with 25 Pa. Code §271.201(a)(3)[8] in that the application allegedly does not affirmatively demonstrate compliance with the requirements of the Air Pollution Control Act and the Federal Clean Air Act is contrary to the available factual record; and

(6) Florence's contentions that WMPI did not prepare a mitigation plan including an analysis of alternative locations for the facility in accordance with 25 Pa. Code §271.127 and the Department did not determine that the need for the expansion outweighs the potential harm are contradicted by the public record.

The motion to dismiss the appeal of CLAW and Mobley states:

(1) that CLAW and Mobley lack standing to raise the objections

- that the applicant has not affirmatively demonstrated that the permitted facility is provided for in the approved Municipal Waste Management Plan of Bucks County, or that the facility is expressly provided for in said Plan, or that said Plan designates the facility to receive the waste volume approved in the permit;

- that the applicant has not affirmatively demonstrated that no sites in the

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[6] The permit application will not be approved unless the applicant affirmatively demonstrates the permit application is complete and accurate. 25 Pa. Code §271.201

[7] 25 Pa. Code §271.123 states that an application shall contain a description of the documents upon which the applicant bases the legal right to... operate a municipal waste processing or disposal facility within the proposed permit area. 25 Pa. Code §271.123

[8] Under 25 Pa. Code §271.201(a)(3), a permit application will not be approved unless it affirmatively demonstrates the requirements of the act, the environmental protection acts, Title 25 and Pa. Const. Art. I, § 27 have been complied with. ...., and the need for the facility (municipal waste landfill) shall clearly outweigh the potential harm posed by operation of the facility....25 Pa. Code §271.201(a)(3)

counties where the waste is generated are more suitable for a municipal waste disposal facility than the proposed facility;

- that the issuance of the permit did not comply with the applicable criteria for permit issuance insofar as (1) the Department determined that the facility has the potential for environmental harm, (2) the applicant did not prepare an adequate mitigation plan and (3) the Department did not determine that the need for the facility outweighs its potential harm.

(2) that the Board lacks jurisdiction to address the objection that the Department's failure to include additional terms and conditions to insure the water supply of the Lower Bucks Joint Municipal Authority;

(3) that WMPI is entitled to judgment on the pleadings regarding applicant's contentions that (1) the application did not contain hydrologic condition and required water resource information required under §273.139 and §.273.119, (2) that WMPI did not prepare a mitigation plan and the Department did not determine that the need for the facility outweighs potential harm, and (3) that the application did not contain information required under §273.139 and §273.119.

The appellants have filed answers and supporting memoranda of law in opposition to WMPI's motion to dismiss. All appellants contend they have standing to raise the objections to the Department's action set forth in the notices of appeal and that all of their objections to the Department's action have merit. WMPI has contended to the contrary in its memorandum of law filed in reply.

Legal Standard for Motion to Dismiss

We must assess the motion to dismiss in a light most favorable to the non-moving party. *Solar Fuel Company, Inc. v. DER*, 1994 EHB 737. The Board treats motions to dismiss the same way as it treats motions for judgment on the pleadings; we will dismiss the appeal only where the moving party is entitled to judgment as a matter of law. *Lehigh Township v. DEP*, EHB Docket No. 95-070-MG (Opinion issued October 20, 1995); *City of Scranton, et al. v. DER, et al.*, EHB Docket No. 94-060-W (Consolidated Docket) (Opinion issued January 25, 1995); *Snyder*

Brothers, Inc. v. DER, 1994 EHB 1888.

Standing

The appellants have standing to challenge the Department's action only if they are "aggrieved" by that action. They must have a direct, immediate and substantial interest in the litigation challenging that action. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 280 (1975); *Fred McCutcheon and Rusmar Incorporated v. DER, et al.*, EHB Docket No. 94-096-W (Opinion issued January 5, 1995). A "substantial" interest is "an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law." *Press-Enterprise, Inc. v. Benton Area School District*, 604 A.2d 1221,1223 (1992); *South Whitehall Twsp. Police Service v. South Whitehall Twsp.*, 555 A.2d 793, 795 (1989). An interest is "direct" if the matter complained of caused harm to the party's interest. *South Whitehall Twsp. Police Service v. South Whitehall Twsp.*, 555 A.2d 793, 795 (1989). An "immediate" interest means one with a sufficiently close causal connection to the challenged action, or one within the zone of interests protected by the statute at issue. *Empire Sanitary Landfill, Inc. v. DER, et al.*, 1994 EHB 1395. We have held that residents of a community surrounding a proposed industrial facility have such a substantial interest. *S.T.O.P., Inc. v. DER, et al.*, 1992 EHB 207. An organization has standing if one of its members has standing. *RESCUE Wyoming, et al. v. DER, et al.*, 1993 EHB 839.

The Board scrutinizes individual allegations within an appeal to determine whether the appellant may raise those issues even though the appellant has overall standing to appeal the Department action. *Borough of Glendon v. DER, et al*, 1990 EHB 1501. Rather, it can only raise those factual or legal objections which are relevant to the allegations which conferred

standing to appeal. *Estate of Charles Peters, et al v. DER, et al*, 1992 EHB 358. Every allegation must be related to the alleged injuries under the standard set forth in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (1975).

Bucks County Municipal Waste Plan

WMPI contends that appellants do not have the required substantial or immediate interests in the implementation of the approved municipal waste management plan of Bucks County as it relates to the Southern Expansion to pursue the objection that the Southern Expansion is not provided for in the Bucks County Plan set forth in paragraph 3(2) of the Florence appeal and paragraph 3(1) of the CLAW and Mobley appeal.

WMPI acknowledges that this plan was created by Bucks County and approved by the Department pursuant to the requirements of the Municipal Waste Planning Recycling and Waste Reduction Act, Act of July 28, 1988, PL. 556, No. 101. 53 P.S. §4000.101 *et seq.* ("Act 101"). WMPI contends that the purpose of Act 101 was to authorize counties to control waste flow, a subject in which Florence could have no interest. (Motion to Dismiss, pp. 4-5). If this were the only purpose of Act 101, WMPI would have a point. *See, e.g., Tessitor v. DER*, EHB Docket No. 95-352-E (Opinion Issued May 8, 1995); *Heasley v. DER*, 1991 EHB 772.

Another purpose of Act 101 was to require that municipal waste planning be done to meet constitutional and statutory requirements relating to environmental protection. Act 101 was based on numerous findings by the legislature, including but not limited to:

(1) Improper municipal waste practices create public health hazards, environmental pollution and economic loss, and cause irreparable harm to the public health, safety and welfare; and

(7) It is appropriate to provide those living near municipal waste processing and disposal facilities with additional guarantees of the proper operation of such facilities and to provide incentives for municipalities to host such facilities.

53 P.S. §4000.102(a)(1) and (7).

The Act sets forth several purposes such as establishing and maintaining programs of planning comprehensive municipal waste management, as well as encouraging the development of waste reduction and recycling. In addition, the Act also states its purpose to be to:

(3) Protect the public health, safety and welfare from the short- and long-term dangers of transportation, processing, treatment, storage and disposal of municipal waste; and

(13) Implement Article I, Section 27 of the Constitution of Pennsylvania.

53 P.S. §4000.102(b)(3) and (13).

These purposes are given effect in various provisions in the Act. For instance, each county is required to adopt a municipal waste management plan considering environmental factors and existing plans affecting the development, use and protection of air, water, land or other natural resources. 53 P.S. §4000.502 In addition, following the Department's approval of a plan, the Department may not issue a permit which results in additional capacity for a municipal waste landfill in the county unless the facility is provided for in the plan, or unless the proposed facility will, among other things, comply with alternate environmental, public health and safety requirements, such as the requirement that the proposed location of the facility be at least as suitable as alternative locations giving consideration to environmental and economic factors. 53 P.S. §4000.507(a).

Consistent with these requirements, the Department's regulations promulgated thereunder provide that if a proposed facility is not provided for in the host county plan then (1) the application for approval of such a facility must contain a detailed statement as to whether the proposed facility will interfere with the implementation of the approved plan and (2) the application must contain an environmental siting analysis demonstrating that the proposed location of the facility is at least as suitable as alternative locations in the generating county. 25 Pa. Code §273.139.

Florence contends its interests are within the zone of interests protected by the Bucks County Plan and the Department's regulations implementing Act 101 because it has a substantial and direct interest in the environmental impact of the facility by reason of its proximate location to the facility. (Florence Memorandum of Law, pp. 4-7) Florence argues that its interests are within the scope of interests protected by Act 101 because its interests - visual aesthetics, dust, landfill gases, odors, water quality, noise and proximity - are matters regarding protecting its environmental concerns.

We deny the motion to dismiss paragraph 3(2) of the Florence appeal based on appellant's claimed lack of standing because there appear to be outstanding issues of material fact as to whether or not Florence has a direct interest in the issuance of the permit so that it is not clear that WMPI is clearly entitled to judgment as a matter of law. Florence's interest may well be "substantial." Florence is a N.J. township located across the Delaware River within 1400 feet of the Tullytown Landfill (Florence's Reply Memorandum, p. 4). Florence's reply to the motion to dismiss asserts that the Expansion will result in several significant adverse impacts on Florence as indicated by the Tullytown Resource Recovery Facility's own Permit Amendment

Application (Florence's Reply Memorandum, Exhibit A). These impacts include aesthetics. The proposed project is said to be primarily visible from two parks, Volunteer's and River Edge Parks, in Florence. Air quality may also be affected by dust, odor and landfill gases. Water quality may be affected because one of the main aquifers in the vicinity of the landfill is said to be the same aquifer for the majority of wells in Burlington County in which Florence is a township (Florence's Reply Memorandum, Exhibit B). Water supply wells are said to be within approximately 4000 feet of the site (Florence's Reply Memorandum, p.5). These possible impacts of the project indicate that Florence is likely to have an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law.

Florence's interest appears also to be "direct" and "immediate." The interest is "direct" because these impacts would not occur if the permit were not issued either because the facility was not provided for by the Bucks County Plan or because alternate environmental requirements could not be met. These interests appear to be "immediate," because, if Florence's assertions are true, there is a close causal connection between the approval of the Southern Exposure and the injury to Florence interests. Furthermore, Florence's interest is "immediate" as it is within the zone of interests covered by Act 101 and the Department's implementing regulations. *See, S.T.O.P., Inc. v. DER*, 1992 EHB 207; *Del-Aware, Unlimited v. DER*, 1986 EHB 221.

The motion to dismiss the appeal of CLAW and Mobley with respect to its identical objection to paragraph 3(1) of its appeal relating to the Bucks County plan is also denied on the present state of the record. CLAW will have standing if one of its members can satisfy the standing criteria. *RESCUE Wyoming, et al v. DER, et al*, 1993 EHB 839.

The affidavit of Donald Mobley, President of CLAW states:

> .... I further state that I am the President of Clean Land Air & Water, Inc. And (sic) environmental activist group, organized as a not for profit corporation, under the corporation laws of the Commonwealth of PA. Additional members and supporters of this organization are residents of Bucks County in and from the impacted communities relative to the instant Appeal.

CLAW appears to have representational standing on behalf of at least one member. The Mobley, affidavit also states:

> .... I am a party in interest in this Appeal, in that I am a resident of Bristol Township, Bucks County, PA, a community whose drinking waters supply is provided by the Lower Bucks Joint Municipal Authority. The Permit which is the subject of the instant Appeal will or has the potential to directly impact the quality of the drinking water provided to customers of the Lower Bucks Joint Municipal Authority.

Viewing the information in the light most favorable to CLAW, it is likely that CLAW and Mobley may have substantial interests which surpass that of the interest common to all citizens in the enforcement of the law. Mobley and other members of CLAW are residents of Bucks County, the host county for the permitted facility. Their interest appears to be direct as the permit has the potential to cause harm to their interests as residents of communities affected by the expansion. Furthermore, CLAW and Mobley have an immediate interest because if the assertions in the notice of appeal are true, there is a close causal connection between the action complained of and potential injury to CLAW and Mobley. CLAW and Mobley assert that the expansion could potentially impair the health of CLAW members as well as Mobley (Affidavit of Donald Mobley) and that measures in the permit are not sufficient to safeguard the health, safety and welfare of the residents of the community. (Notice of Appeal, par.5). These claims of

injury, if substantiated by evidence, are sufficient to confer standing. *Solomon Run Community Action Committee v. DER*, 1992 EHB 39; *S.T.O.P., Inc. v. DER*, 1992 EHB 207; *Pohoqualine Fish Association v. DER*, 1992 EHB 502.

Municipal Waste Plans for Philadelphia, Mercer and Morris Counties

The Board grants WMPI's motion to dismiss Florence's appeal with respect to the municipal waste plans of other counties. Paragraph 3(3) of the Florence appeal asserts that the permit was improperly issued because WMPI failed to establish that the Southern Expansion was provided for in the municipal waste plans of Philadelphia, Morris (NJ) and Mercer (NJ) counties. WMPI argues that Florence does not have standing to assert this objection because it does not have a substantial, direct or immediate interest. Florence does not address this issue in its response.

We agree with WMPI because Act 101 appears to be designed to provide protection to citizens from the environmental effects only of the plan of the host municipality. While Florence may be adversely affected by the permit issued for this facility located in Bucks County because of Florence's proximity to it, the provisions of plans of other counties, including those of New Jersey do not directly affect the proposed location of the facility so that the provisions of these plans could only have, at most, an indirect effect on appellant's interests. Accordingly, paragraph 3(3) of the Florence appeal will be dismissed.

Alternative Requirements

Florence says in Paragraphs 3(4) and 3(5) of its appeal the Department's action was improper because WMPI's application failed to meet the alternate requirements of the regulations (which are applicable when the proposed facility is not provided for in the county

plan) by demonstrating that no sites in the counties where the waste is generated are more suitable for a municipal waste disposal facility than the proposed location of the permitted facility.[9] CLAW and Mobley raised similar objections in paragraphs 3(2) and 3(4) of their appeal.

WMPI argues that Florence has no legal interest in these claims because it is not located in the host county and that CLAW and Mobley do not have standing as they do not have a substantial interest in the implementation of the Department's "flow control" regulations different from the interest of the general public in the enforcement of the law.

Florence contends that it has standing to raise issues regarding the deficiency of the application. Florence argues that the presumption of site suitability which is expressly provided for in a county plan carries over to accompanying regulations such as 25 Pa. Code §273.139 and §271.201(b)(2). Florence contends that these matters are important in the ultimate balancing of the facility's need against the potential harm to the environment which is the central issue in the permit issuance process. Florence says it has standing because it is a party which will suffer a substantial portion of the harm which will result from the existence of the facility near Florence

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[9] Under §271.201(b)(2) a permit application for a municipal waste landfill or resource recovery facility will not be approved unless the applicant affirmatively demonstrates to the Department's satisfaction that:

i) the proposed facility will not interfere with implementation of the approved host county plan or another county, ... plan approved under applicable law.
ii) the proposed facility will not interfere with municipal waste collection, storage, transportation, processing or disposal in the host county.
iii) no site in a county where the waste was generated is more suitable for a municipal waste disposal facility or resource recovery facility than the proposed location of the facility.

Township. CLAW and Mobley assert that they will be harmed by the existence of the facility in their community.

On the present state of the record we cannot dismiss appellants' claims. The fact the Florence is not located in the host municipality is not relevant to standing if its interests in the Department's action are substantial, direct and immediate. One of the purposes of Act 101 is to protect those near a waste disposal facility from adverse environmental effects. Nothing in Act 101 indicates that only Pennsylvanians need such protection. In addition, Florence, CLAW and Mobley are likely to have a substantial, direct and immediate interest in whether waste should be disposed of at the proposed Southern Expansion. The location of the disposal site gives them an interest in meeting permit application requirements which are different from the general interest of every citizen in enforcing the law. Therefore the objections regarding the permit application's failure to comply with supplying information required by §273.139 and by not affirmatively demonstrating that no sites in the counties wherein the waste is generated are more suitable than the proposed location of the permitted facility may not be dismissed on this state of the record..

Water Supply

CLAW and Mobley object in paragraph 3(4) of their appeal that the application did not contain information required under 25 Pa. Code §273.119 concerning the public or private water supply that may be adversely affected by groundwater flow associated with the proposed facility.

The affidavit of Donald Mobley indicates that appellants CLAW and Mobley are likely to be able to prove a substantial, direct and immediate interest.

The affidavit states:

> .... I am a party in interest in this Appeal, in that I am a resident of Bristol Township, Bucks County, PA, a community whose drinking waters supply is provided by the Lower Bucks Joint Municipal Authority. The Permit which is the subject of the instant Appeal will or has the potential to directly impact the quality of the drinking water provided to customers of the Lower Bucks Joint Municipal Authority. I further state that I am the President of Clean Land Air & Water, Inc. And (sic) environmental activist group, organized as a not for profit corporation, under the corporation laws of the Commonwealth of PA. Additional members and supporters of this organization are residents of Bucks County in and from the impacted communities relative to the instant Appeal.

(Affidavit of Donald Mobley). At this point in the litigation, viewing the information in the light most favorable to CLAW and Mobley, it appears both have met the criteria for standing regarding the water supply issues. As customers of Lower Bucks Joint Municipal Authority Mobley and CLAW's members are likely to have an interest which surpasses the interests of all citizens in law enforcement. (Affidavit of Donald Mobley). By claiming that the Department failed to adequately protect the health, safety, and welfare of the community, CLAW and Mobley have asserted that the permit issuance harmed their interest. Their interest is also immediate because if the assertions in the notice of appeal are true, there is a close causal connection between the action complained of and the potential injury to CLAW's members and Mobley. CLAW and Mobley assert that measures in the permit are not sufficient to safeguard the health, safety and welfare of the residents who are customers of Lower Bucks Joint Municipal Authority for their water. (Notice of Appeal, par.5; Affidavit of Donald Mobley). Therefore, the Board denies WMPI's motion to dismiss on this issue.

Future Proceedings

While we have held that it is likely that appellants have standing to raise these objections, discovery may prove that in fact some or none of them have such a substantial, direct and immediate interest. Accordingly, WMPI may want to raise the standing issue again after discovery has been completed either by way of a motion for summary judgment or by way of a hearing on standing prior to a hearing on the merits of appellants' claims.

Legal Right to Operate

Florence also alleges in paragraph 3(8) of its appeal that the application does not contain a description of the documents upon which the applicant bases the legal right to operate a municipal waste disposal facility within the proposed permit area under 25 Pa. Code §271.123. WMPI contends the Board lacks jurisdiction because Florence cannot assert a legal claim to the property on which the municipal waste activity will be conducted nor a legal interest in any area adjacent to the proposed area as the township is located on the opposite side of the Delaware River from the expansion. Florence contends that it does have standing. Florence argues that it has substantial, direct and immediate interest because the proposed expansion site will result in eliminating the area as a repository for dredging fill from the Florence Bend portion of the River as well as the plans for the expansion call for the removal of current fill which will place an area of the expansion in the 100 year flood plain. Furthermore, Florence contends it has standing to challenge WMPI's failure to comply with applicable local zoning requirements as a portion of the site lies within a municipality that does not permit landfilling.

We reject Florence's arguments. Florence has not demonstrated that it has legal rights to the property in question to give it a substantial, direct or immediate interest in either the

elimination of the area as a repository for dredging fill or in a claim that the area of the expansion will be in the 100 year floodplain. In fact Florence raises only a general interest in law enforcement which is not more than that of any other person.

Florence does not have standing before this Board to raise issues of violations of zoning requirements. This Board does not have jurisdiction over the claimed violation of local zoning requirements. The Board has jurisdiction to hear appeals from the Department of Environmental Protection "actions" and "adjudications" as those terms are defined in its rules and the Administrative Agency Law. *Mrs. Peggy Ann Gardner, et al v. DER*, 1994 EHB 529. Disputes over compliance with local zoning issues are not Department actions. *South Fayette Township v. DER, et al.,* 1991 EHB 900. Therefore, the Board lacks jurisdiction over these claims.

Jurisdiction Over Permit Conditions

The Board must reject WMPI's motion to dismiss paragraph 3(5) of the CLAW and Mobley appeal based on the contention that the Board does not have jurisdiction over the Department's decision not to incorporate permit conditions designed to protect drinking water supplies. WMPI and the Department claim that because any such condition is not a "mandatory" permit condition required by 25 Pa. Code §271.212, such a failure does not qualify as an action reviewable by this Board. The Commonwealth Court has stated that "....Its (the EHB) power and duty are to hold hearings and issue adjudications on DER's orders, permits, licenses or decisions." *Marinari v.Cmwlth., Dept. of Environmental Resources,* 566 A.2d 385, 387 (1989); *David C. Palmer v. DER, et al.*, 1993 EHB 1247, 1248. In this instance, the Department has taken action by reviewing permittee's application and issuing a permit. Contrary to permittee's belief, the issuance of a permit is a final action by the Department as it affects personal or

property rights, privileges, immunities, duties, liabilities and obligations. The Board has noted that it has jurisdiction to review the Department's imposition of conditions in a solid waste disposal permit. *Bethlehem Steel Corp. v. DER,* 1994 EHB 1371. The Board can also review the Department's failure to include appropriate conditions because the selection of permit conditions is a discretionary act, and that discretion may be abused. Indeed, in the case of permit conditions, the Board may substitute its discretion for that of the Department because the imposition of permit conditions is discretionary. *Warren Sand & Gravel Co., Inc. v. DER,* 341 A.2d 556, 565 (1975).

The Board's jurisdiction over a failure to include environmentally protective provisions in a permit is an important element of the Board's power to protect the public against abuses of discretion. While the permit does contain conditions requiring monitoring of ground water, for example, the Board would have no jurisdiction to direct the Department to take any specific action should future monitoring disclose an imminent impairment of drinking water supplies.

Claims Contrary to the Public Record

The motions to dismiss are accompanied by many exhibits excerpted from WMPI's application for the permit. The motions seek dismissal of a number of grounds for appeal on the theory that the grounds for appeal are contradicted by the excerpts from the public record. In the case of these claims, WMPI seeks a "judgment on the pleadings" on the theory that the application cannot be deficient as failing to meet specified requirements of the regulations where the application clearly contains some material responsive to the requirements of the cited regulation.

This approach to appellants' grounds of appeal for claims relating to matters other than the Board's jurisdiction does not permit either a dismissal of appellants' claims or a judgment on the pleadings. Neither the Board's rules nor the Pennsylvania Rules of Civil Procedure expressly provide for a "motion to dismiss." Board Rule 73 (25 Pa. Code §1021.73) provides for "dispositive motions" which includes a Board recognized motion to dismiss and a motion for summary judgment. Rule 73(b) expressly provides that a motion for summary judgment or partial summary judgment shall conform to Pa. R.C.P. No. 1035 (relating to motions for summary judgment). A response to a dispositive motion must be filed within 25 days of service, but the Board's rules in effect at the time these appeals and the motions to dismiss were filed provided no standard with respect to the contents of such a response other than in the case of a motion for summary judgment.[10] In the case of a motion for summary judgment, Pa. R.C.P. No. 1035 provides that a motion for summary judgment supported by affidavits based on personal knowledge as well as the pleadings and discovery materials can be granted unless responsive affidavits based on personal knowledge, or other discovery materials, raise material issues of fact.

As a matter of practice, the Board has authorized motions to dismiss as a "dispositive motion" and has permitted the motion to be determined on facts outside those stated in the appeal when the Board's jurisdiction, including issues of "standing" to appeal, is in issue. Accordingly, in the case of WMPI's motion with respect to standing, the Board has considered the statements of fact in the motions to dismiss and in the appellants' responses in resolving the motions to

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[10]Rule 70(e) now requires that a response to a motion "shall set forth in correspondingly-numbered paragraphs all factual disputes and the reason the opposing party objects to the motion.

dismiss relating to appellants' standing to appeal.

However, the only vehicle in the Board's procedure to dispose of an appeal based on facts outside the appeal at the time the appeal and the notices to dismiss were filed was a motion for summary judgment. Such a motion would have placed the other party on notice that judgment may be entered against it unless it submits affidavits based on personal knowledge, or other material developed in discovery, which raise issues of material fact. While the appellants responded to WMPI's motion with many statements of fact at least in their brief, nothing in the Board's rules then required them to raise all issues of material fact in their responses.[11]

A motion for judgment on the pleadings is in the nature of a demurrer and is used to determine whether a cause of action, as pleaded, exists at law. *Bensalem Twsp. School Dist. v. Commonwealth of Pennsylvania, et al*, 544 A.2d 1318, 1321 (1988); *see also*, *Kerr v. Borough of Union City*, 614 A.2d 338 (1992), *alloc. denied*, 627 A.2d 181 (1993). In resolving such a motion, the Board must accept as true all of the well-pleaded facts contained in the notice of appeal, and may not consider any facts not contained in the notice of appeal. *Bensalem Twsp. School Dist. v. Commonwealth of Pennsylvania, et al.*, 544 A.2d 1318, 1321; *Joseph F. Cappelli & Sons, Inc. v. DER*, 1994 EHB 1835.[12] The Board will enter judgment on the pleadings only if

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[11]Appellants' responses to the motion to dismiss fail to respond to many of the most important statements in the motions on the ground that they are conclusions of law which require no answer. As to appeals and motions filed prior to September 9, 1995, this type of response was permitted by the Board. 25 Pa. Code §1021.70(e) now requires that a response to a motion set forth "all factual disputes and the reason the opposing party objects to the motion."

[12]Although a notice of appeal is technically not a "pleading" under Pa. R.C.P. 1019(a), the Board treats it as such for purposes of a motion for judgment on the pleadings. *Huntington Valley Hunt v. DER*, 1993 EHB 1533, 1538, note 4.

there are no material facts in dispute and a hearing is pointless because the law on the issue is clear. *Joseph F. Cappelli & Sons, Inc. v. DER*, 1994 EHB 1835,1838; *see also, Kerr v. Borough of Union City*, 614 A.2d 338, 339 (1992), *alloc. denied*, 627 A.2d 181 (1993). Since appellants' notices of appeal raise objections which the Board should consider, discovery has not yet been conducted so that a fair determination can be made as to whether or not material facts remain in dispute, WMPI's motion based on the documents attached to its motion must be denied.

The specific reasons for the Board's rulings as to these matters are set forth below.

Removal of Fill

With respect to the removal of fill as an encroachment affecting the floodplain, Florence asserts in Paragraph 3(7) of its notice of appeal:

> The issuance of the Permit does not comply with the "Criteria for Permit Issuance" set forth in the Municipal Waste Regulations, 25 Pa. Code §271.201(a)(3), insofar as the construction of the permitted facility will require the alteration and/or removal of fill, specifically dredge spoil material, previously placed within the floodplain of the Delaware River, and insofar as the applicant has not affirmatively demonstrated that said alteration and/or removal of fill has been properly authorized by State, regional, and Federal permits.

Florence argues that under the Dam Safety and Encroachment Act regulations, a permit is required to modify or abandon an encroachment within the natural 100 year floodplain as it contends is proposed with the expansion.

WMPI responds by claiming that the Department did not abuse its discretion in issuing the permit since the expansion of the landfill does not involve an activity which changes a watercourse or encroachment. Accordingly, the regulations promulgated under the Dam Safety

and Encroachment Act, the Act of November 26, 1978, PL. 1375, as amended, 32 P.S. §693.1 *et seq*., are said to be inapplicable. In addition, WMPI says that authorization would be unnecessary regarding the fill placed in the floodplain. However, the material on which WMPI relies as a basis for these contentions presents only WMPI's contentions as to the facts. Discovery can determine whether Florence has any material facts to present, the absence of which would permit the Board to enter judgment against Florence as a matter of law.

The Board believes that Florence's objection about the removal of fill which it states is a cause of action which the Board must consider. Accepting the statements by Florence as true, and construing the allegations broadly, *see, Croner, Inc. v. DER*, 589 A.2d 1183 (1991), it appears that issuance of the permit was in violation of the Department's regulations. The notice of appeal does not contain any documents which may be considered in resolving this motion. *See, Bensalem Twsp. School Dist. v. Commonwealth of Pennsylvania, et al.*, 544 A.2d 1318, 1321.

Air Pollution Requirements

Florence asserts in Paragraph 3(1) of its notice of appeal:

> The issuance of the Permit does not comply with the "Criteria for Permit Issuance" set forth in the Municipal Waste Regulations, 25 Pa. Code §271.201(a)(3), insofar as the applicant has not affirmatively demonstrated that the permitted facility has complied with the requirements of the Air Pollution Control Action (sic) (35 P.S. §§4001, *et seq* and its implementing regulations, and the Federal Clean Air Act (42 U.S.C. §7401 *et seq* and its implementing regulations.

WMPI contends that it did comply as demonstrated by the extensive documentation in the public record.

The Board denies WMPI's motion with respect to this contention and will consider this objection to the issuance of the permit principally because the application materials referred to in the motion cannot be considered to be dispositive at this stage of the litigation.

Construing the notice of appeal most favorably to the appellant, Florence claims that the Department abused its discretion in issuing the permit since the permit application did not meet the requirements of the Solid Waste Management Act as it relates to air pollution regulations. Under 25 Pa. Code §271.201(a)(3), a permit application will not be approved unless the applicant affirmatively demonstrates, among other things, that the requirements of the Solid Waste Management Act, the environmental protection acts, Title 25 and Art. I, Section 27 of the Pennsylvania Constitution have been complied with.

Section 502(d) of the Solid Waste Management Act, Act of July 7, 1980, PL. 380, 35 P.S. §6018.502(d) requires only that the application for a permit "set forth the manner in which the operator plans to comply with. . .the Air Pollution Act. . ." Compliance with the Solid Waste Management Act will constitute compliance with the provisions of Article I, Section 27 of the Constitution. *National Solid Waste Management Associates v. Casey*, 600 A.2d 260 (1991), *aff'd, per curiam*, 619 A.2d 1063 (1992). Accordingly, to the extent that Florence contends that applicable air permits must be obtained before the Solid Waste Permit could issue, that claim is rejected. We held in *Lower Windsor Township v. DER*, 1993 EHB 1305, that there is nothing in the Solid Waste Management Act that precludes the Department from issuing an approval of a landfill expansion prior to requiring a plan approval and operating permit under the Air Pollution Control Act.

While WMPI points to extensive information in the permit application which suggests

that the permit application may meet this requirement, this documentation is not contained in the notice of appeal and it may not be considered in resolving this motion. In addition, the Board's review of this documentation leads it to believe that material issues of fact relating to this requirement may be raised by appellants in discovery proceedings.

Mitigation Plan

Florence asserts in paragraph 3(6) of its notice of appeal:

> The issuance of the Permit does not comply with the "Criteria for Permit Issuance" set forth in the Municipal Waste Regulations, 25 Pa. Code §271.201(a)(3) and §271.127, insofar as the Department determined that the permitted facility has the potential to cause environmental harm and notified the applicant of said determination, pursuant to 25 Pa. Code §271.127(b), in its "Notice of Intent to Deny" letter dated October 4, 1994, and insofar as the applicant did not prepare a mitigation plan insofar as the applicant did not prepare a mitigation plan including *inter alia* an analysis of alternate locations for the facility in accordance with 25 Pa. Code §271.127(c), and insofar as the Department did not determine that the need for the facility outweighs the potential harm.

A similar claim is made by Mobley and CLAW in paragraph 3(3) of their notice of appeal.

WMPI claims that the Department did not abuse its discretion in issuing the permit because documents of public record "conclusively demonstrate" that the Department considered all of these matters prior to issuing the permit. The documents submitted with the motion indicate that the Department withdrew its tentative determination that the permitted facility has the potential to cause environmental harm as a result of the mitigation plan submitted by WMPI. This documentation consists of the Department's Public Comment Response Document as well as WMPI's plan and analysis of potential environmental harm in WMPI's response to the Department's Notice of Intent to Deny letter.

The Board denies the motion to dismiss since the claimed lack of a mitigation plan and

the claimed failure to determine whether the need for the expansion outweighs the potential harm, if true, states a valid cause of action. Under 25 Pa. Code §271.127(c), if the Department or the applicant determines that the proposed operation may cause environmental harm, the applicant shall provide the Department with a written explanation of how it plans to mitigate the potential harm, through alternatives to the proposed facility or portions thereof, including alternative locations, traffic routes or designs or other appropriate mitigation measures.

If we were entitled to grant WMPI's motion based on the application materials submitted with the motions to dismiss, we would be inclined to grant WMPI's motion because it appears that appellants cannot sustain their claims. However, appellants have not yet engaged in discovery or been required to state what material facts might prevent the dismissal of this ground for appeal. In the procedural state of WMPI's motions, we must accept the facts averred by the appellants as true and construe the allegations broadly, *see, Croner, Inc. v. DER*, 589 A.2d 1183 (1991). Because the documents WMPI cites are not contained in the notice of appeal, they may not be considered in resolving this motion. *See, Bensalem Twsp. School Dist. v. Commonwealth of Pennsylvania, et al.*, 544 A.2d 1318, 1321 (1988). Therefore, the Board will consider appellants' objection to the claimed lack of a mitigation plan and the Department's claimed failure to determine if the need for the Expansion outweighs the potential harm. Of course, discovery may show whether material facts do exist as to these claims.

Alternative Water Supply

With respect to the alternative water supply, CLAW and Mobley assert in paragraph 3(4) of their notice of appeal:

> The issuance of the Permit does not comply with the "Criteria for Permit Issuance" set forth in the Municipal Waste Regulations, 25 Pa. Code §271.201(a)(2), insofar as the Permit application did not contain the information required under ...25 Pa. Code §273.119, respectively.

This portion of the Department's regulation requires information relating to alternative water supplies, including any adverse effect on existing water supplies and the feasibility of replacing or restoring affected water supplies.

WMPI says that this contention is contrary to the public record because there is extensive documentation in the application, in the way of submitted forms[13], which evaluate regional hydrogeologic conditions as well as WMPI's response to the Department's Notice of Intent to Deny.

Under 25 Pa. Code §273.119, the applicant is to (1) determine whether the proposed facility is within the groundwater recharge area for public or private water supply and (2) delineate the position of the proposed permit area within relevant groundwater flow systems. In addition, the application is to identify public and private water supplies which potentially may be adversely affected by groundwater flow associated with the proposed facility. In the case of supplies which may be affected by the proposed facility, the applicant shall submit a detailed hydrogeologic study addressing, among other things, the potential effect of the facility.

The Board denies WMPI's motion with respect to this portion of the appeal. Accepting the facts averred by CLAW and Mobley as true, and construing the allegations broadly, *see, Croner, Inc. v. DER*, 589 A.2d 1183 (1991), it is clear that CLAW and Mobley assert that WMPI's application did not contain the required information on water supply. Because none of

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[13] These forms include Forms D,7,8,12, and 18.

the documents were contained in the notice of appeal, they may not be considered in resolving this motion. *See, Croner,Inc. v. DER,* 589 A.2d 1183 (1991). In addition, appellants may be able to demonstrate that there are material issues of fact as to the adequacy of the information contained in WMPI's application.

ORDER

AND NOW, this 6th day of March, 1996, it is ordered that:

1. WMPI's motion to dismiss paragraphs 3(3) (relating to municipal waste management plans of counties other than the host county) and 3(8) (relating to WMPI's legal ownership of the land) of the Florence appeal is hereby granted.

2. WMPI's motion to dismiss paragraphs 3(1), 3(2), 3(4), 3(5), 3(6) and 3(7) of the Florence Appeal is hereby denied.

3. WMPI's motion to dismiss paragraphs 3(1) through 3(5) of the CLAW and Mobley Appeal is hereby denied.

ENVIRONMENTAL HEARING BOARD

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Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
Member

Michelle A. Coleman

MICHELLE A. COLEMAN
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Issued: March 6, 1996

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MAX STARR and MARTHA STARR	:	
	:	
v.	:	**EHB Docket No. 95-143-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 13, 1996**

OPINION AND ORDER ON MOTION FOR PROTECTIVE ORDER and MOTION TO COMPEL

By Michelle A. Coleman, Member

Synopsis:

Before the Board is the motion of the Department of Environmental Protection for a protective order which would preclude the Appellants, Max and Martha Starr, from (1) inquiring into information acquired prior to the issuance of a May 1, 1987 order and (2) inquiring into facilities previously approved by the Department to which tires have been removed and the costs associated with removal to such facilities and (3) dangers posed by the tires on the property. We grant the Department's motion because events prior to 1987 are beyond the scope of the current appeal, and facts concerning the disposal costs of other facilities previously permitted by the Department would be overly burdensome for the Department to compile; such information is available to Appellants by other, less burdensome, means. We grant the Department's motion to compel because the information sought is relevant to this case.

OPINION

This matter concerns the appeal of the Appellants from a June 13, 1995 order of the Department which, among other things, requires the Appellants, over the next ten years, to remove 5.9 million tires which have accumulated on their property. The Appellants served a notice of deposition upon the Department, requiring it to designate individuals to testify relative to seven specific issues. The Department seeks a protective order to limit the scope of the deposition on three of these issues.

The first two issues involve "DEP involvement at the Starr site and knowledge of tire disposal from and including 1984 through the issuance of the cease and desist order on May 1, 1987, including site visits, meetings, and conversations with the Starrs" and dangers posed by the tires on the property. Notice of Deposition ¶¶3, 5. The Department objects to this inquiry on the grounds that Appellants are collaterally estopped from raising any argument relative to the May 1, 1987 order, since any issues already were litigated in proceedings before this Board and the Commonwealth Court.[1] Appellants argue that the inquiry is relevant to discover evidence which supports their argument that the Department is estopped from ordering the removal of tires because it knew and encouraged tire disposal at the Starr site, at a time when there were no regulations or departmental policies relating to waste tires, and that the Department's knowledge was not actually litigated in the prior proceedings.

After reviewing the record currently before us, we find that the Department's knowledge and

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[1]The Board dismissed the appeal of the 1987 order in Starr v. DER, 1991 EHB 494, which was affirmed by the Commonwealth Court in Starr v. DER, 607 A.2d 321 (Pa. Commw. Ct. 1992).

behavior which formed the basis of the May 1987 order is beyond the scope of the present appeal. The only question properly before us is whether or not the Department had the authority to issue the June 1995 order.

We will grant the Department's requested protective order because the matters into which Appellants wish to inquire are beyond the scope of this appeal. Two decision of the Commonwealth Court are instructive. In DER v. United States Steel Corp., 333 A.2d 489 (Pa. Commw. Ct. 1975)(en banc), the court reversed an order of the Board which ordered the Department to extinguish subsurface fires if certain actions were not taken by a corporation. The court held that the only issue before the Board was whether or not the Department's order requiring the corporation to abate these fires was valid; it was not proper for the Board to decide which of the two parties was responsible, even though the Department had discretionary authority to abate the fires itself. That issue was not before the Board for disposition, thus the action of the Board was beyond the scope of the appeal before it.

The court affirmed a Board decision to quash a subpoena of two witnesses whose testimony would be beyond the scope of an appeal in Fuller v. DER, 599 A.2d 248 (Pa. Commw. Ct. 1991). There the appellants were challenging the Department's issuance of a construction permit and a discharge permit for a sewage treatment facility. They sought to introduce testimony of two witnesses concerning the Department's failure to properly evaluate the siting of the facility. The Board had quashed the subpoena of the witnesses because the issue of siting was not a subject of the permits under appeal.[2] The court affirmed, holding that siting was beyond the scope of the appeal.

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[2]The appellants had not challenged earlier permits and planning proceedings wherein the siting issue arguably could have been litigated.

Cf. North Pocono Taxpayer's Association v. DER, 1994 EHB 449 (alleged permit violations which occurred during the pendency of an appeal of the issuance of the permit were not relevant to the question of whether or not the Department properly issued the permit).

Here, the Department's actions in issuing the 1987 order are simply not before us in the present appeal. The sole question properly before us is the propriety of the 1995 order. Issues arising before 1987 are not relevant. For the same reasons, we also grant the Department's motion as to the issue of dangers posed of fire and mosquitos posed by the presence of the tires on the property. Accordingly, the request for protective order is granted.

The Department next argues that it is unduly burdensome to require the Department to designate an individual to testify concerning the "facilities previously approved by the Department to which the tires can be removed and the costs associated with removal to such facilities." Notice of Deposition ¶2. We agree.

The Pennsylvania Rules of Civil Procedure require a governmental agency, upon notice, to designate an individual or individuals to testify "as to matters known or reasonably available to the organization." Pa. R.C.P. No. 4007.1(e)(emphasis added). Requiring the Department to bring six individuals from all over the state and to assemble voluminous public records, which are equally accessible to Appellants is not reasonable. It is not a purpose of discovery for a party to supply information which is readily available to the opposing party; such a request is no more than discovery gamesmanship. Boyle v. Steiman, 631 A.2d 1025, 1031 (Pa. Super. Ct. 1993). The Board will grant a protective order sought in response to a notice of deposition which is overly broad and unduly burdensome. Northeastern Equity Associates, Inc. v. DER, EHB Docket No. 94-328-MR (Opinion issued March 15, 1995).

The Department alleges that there is no central file and no single person who has knowledge concerning waste tire removal costs, but the information is contained in the files of each of the Department's six regional offices. In its answers to Appellants' interrogatories, the Department explained this situation, and provided the telephone numbers for each regional office, and a list of permitted facilities. This information is public record, and each regional office can be directly contacted by Appellants. See Pa. R.C.P. No. 4006(b)(where answers to interrogatories may be ascertained from a party's files, and the burden of providing such answers would be equal on both parties, such interrogatory may be answered by making such files reasonably available to the serving party). Appellants do not dispute these facts, nor do they explain what information can be obtain via deposition that can not be ascertained by other less burdensome means. Accordingly, we will grant the Department's request for protective order. Pa. R.C.P. No. 4011; see also 1958 Assessment of Glen Alden Corp., 17 D & C.2d 624 (Luzerne 1958)(government agency need not produce information in discovery which is a matter of public record).

The Board also has before it a motion to compel answers to interrogatories and production of documents filed by the Department. The Department seeks to compel Appellants to answer an interrogatory which requests information concerning "the facts to which each witness will testify" and also to compel Appellants to produce documents relative to their financial status.

Appellants argue that the Department's interrogatory is overly burdensome because it requires them to provide "an itemized listing of each fact each lay witness intends to offer at trial." Answer to Interrogatory No. 2(g). Appellants' concede, however, that they are willing to provide the a summary of each witnesses testimony, and provide the substance of each witness' knowledge.

We grant the Department's motion to compel. We do not read the interrogatories at issue

to be as broad as Appellants do, and note that the more proper response would have been to provide the summary of testimony which they were willing to provide, rather than not answering at all. Hilton v. Willought, 13 D & C3d 587 (Philadelphia 1980). If the Department then felt that Appellants' answer was inadequate, that issue could have been disposed of appropriately.

The Department's request for documents seeks documents concerning Appellants' financial condition. The Department argues that it is entitled to these documents because financial status was put in issue by Appellants in their notice of appeal. Appellants also strenuously argue that their financial status is relevant, but seek the Board's ruling on this relevancy before providing the requested material.

We grant the Department's motion to compel because the issue of Appellants financial status was raised in their notice of appeal. See City of Harrisburg v. DER, 1992 EHB 170. We fail to understand why Appellants have interposed an objection to discovery they admit is relevant. Many courts have noted that relevancy for the purposes of discovery is not the same as relevancy at trial. E.g., Upstill v. Jamesway, 31 Somerset 211 (1975); Ruddy v. Pennsylvania Gas & Water Co., 36 D & C2d 705 (Luzerne 1965). However, we caution the parties that our ruling on this motion in no way expresses an opinion as to the relevancy of this issue at trial. Ruddy.

ORDER

AND NOW, this 13th day of March, 1996, all three issues in the motion for protective order of the Department of Environmental Protection are hereby GRANTED.

The motion to compel of the Department of Environmental Protection is GRANTED. Max and Martha Starr shall answer the Department's interrogatories Nos. 2(g),(h) and (i), and produce the documents requested in document requests 1, 3, and 4, if the Starrs wish to adduce evidence of their financial condition in these proceedings.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 13, 1996

cc: **DEP Litigation**
Library: Attention: Brenda Houck

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TELECOPIER 717-783-4738

JAMES B. WHITE	:	
	:	
v.	:	**EHB Docket No. 95-068-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMBROSIA COAL & CONSTRUCTION COMPANY, Permittee	:	**Issued: March 25, 1996**

OPINION AND ORDER SUR DEPARTMENT'S MOTION FOR JUDGMENT ON THE PLEADINGS

By Thomas W. Renwand, Member

Synopsis

An appeal from the Department's Stage I release of mining bonds is dismissed. Neither §4(g)(1) of the Surface Mining Act nor 25 Pa. Code §86.174(a) requires the removal of mining equipment from a mine site prior to a grant of Stage I bond release.

OPINION

James B. White ("Mr. White" or "White") appealed the Department of Environmental Protection's ("Department") Stage I release of the mining bonds posted by Ambrosia Coal & Construction Company ("Ambrosia"). Mr. White resides in Enon Valley, Lawrence County, Pennsylvania. Ambrosia operated and reclaimed a surface coal mine in North Beaver Township, Lawrence County.

Mr. White appealed the Department's action because "a large unsightly drag line has been left on the property which ruins the view of the countryside. It also represents a safety hazard to children playing in the area." (Notice of Appeal) A Stage I release of the mining bonds is governed by the Surface Mining Conservation & Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S.§1396.1 et seq.. ("Surface Mining Act") and the rules and regulations promulgated by the Environmental Quality Board pursuant to this Act.

Presently before the Board is the Department's Motion for Judgment on the Pleadings. The Department contends that Mr. White has not raised any issue in his Notice of Appeal which would prevent a Stage I release of the mining bonds. Mr. White has not filed any reply or brief in opposition to the Department's motion.[1]

Standard for Judgment on the Pleadings

A motion for Judgment on the Pleadings is similar to a demurrer. It is used to determine whether a cause of action, as pled, exists at law. Joseph F. Cappella & Sons, Inc. v. Department of Environmental Resources, 1994 EHB 1835, 1837; Bensalem Twp. School District v. Commonwealth, 518 Pa. 581, ___, 544 A.2d 1318, 1321 (1988). In deciding such an issue, "the Board must accept as true all of the well-pleaded facts contained in the Notice of Appeal, and may not consider any facts not contained in the Notice of Appeal." Cappella at 1837. Judgment on the Pleadings will only be granted if there are no material facts in dispute and the law is clear in favor of the moving party.

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[1] In fact, Mr. White has not filed his prehearing memorandum despite a Rule to Show Cause Order issued by the Board on July 10, 1995. White's prehearing memorandum was due on July 3, 1995.

Discussion

Section 4(g) of the Surface Mining Act, 52 P.S. §1396.4(g), gives the Department the authority to release mining bonds in stages. Section 4(g)(1) authorizes the Department to release up to sixty percent of the bond (a Stage I release) when the operator "has completed the backfilling, regrading and drainage control of a bonded area in accordance with his approved reclamation plan...so long as provisions for treatment of pollutional discharges have been made...."Moreover, 25 Pa. Code §86.174 (a), relating to the standards for release of bonds, states:

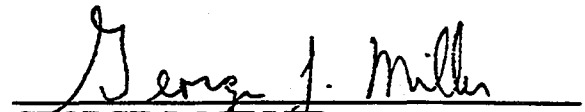
> When the entire permit area or a portion of a permit area has been backfilled and regraded to the approximate original contour or approved alternative, and when drainage controls have been installed in accordance with the approved reclamation plan, Stage I reclamation standards have been met.

Neither the statute nor the regulations require the removal of mining equipment from the mine site prior to the grant of Stage I bond release. In the present appeal, Mr.White has not alleged that Ambrosia failed to comply with the requirements for Stage I bond release. Therefore, the Department's Motion for Judgment on the pleadings is granted.

ORDER

AND NOW, this 25th day of March, 1996, it is ordered that the Department's Motion for Judgment on the Pleadings is **granted** and the appeal is **dismissed.**

ENVIRONMENTAL HEARING BOARD



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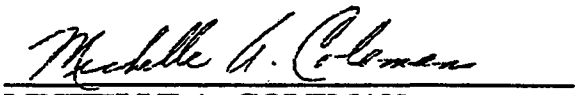
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 25, 1996

See next page for service list.

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M. DIANE SMITH
SECRETARY TO THE BO

KENCO OIL & GAS, INC.	:	
	:	
v.	:	EHB Docket No. 95-160-R
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	Issued: March 25, 1996

OPINION AND ORDER SUR DEPARTMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

By Thomas W. Renwand, Member

Synopsis

Gas wells not producing for at least twelve months are legally abandoned pursuant to the Pennsylvania Oil & Gas Act. Such abandonment, as a matter of law, constitutes a public nuisance and unlawful conduct.

OPINION

Presently before the Board is the Department of Environmental Protection's ("Department") Motion for Partial Summary Judgment. The Appellant, Kenco Oil & Gas, Incorporated ("Kenco"), filed an appeal to the Department's June 28, 1995 Order directing Kenco to plug 107 of its oil and gas wells because it allegedly abandoned the wells. Kenco argued in its Notice of Appeal that it neither abandoned the wells nor was its action "a public nuisance or

unlawful conduct." *See* paragraph 3, Notice of Appeal.

The Board may grant summary judgment where the pleadings, depositions, answers tc interrogatories, and admissions, together with any affidavits show there is no genuine issue as tc any material facts so as to entitle the moving party to judgment as a matter of law. Envyrobale v. DER, 1994 EHB 1714, 1715; Pa. R.C.P. 1035(b). Summary judgment may be entered only in cases "where the right is clear and free from doubt." Hayward v. Medical Center of Beaver County, 530 Pa. 320, 608 A.2d 1040, at 1042 (1992). Moreover, the Board must view the record in the light most favorable to the nonmoving party. Marks v. Tasman, 527 Pa. 132, 589 A.2d 205 (1991); New Castle Township Board of Supervisors v. DER and Reading Anthracite Company, 1993 EHB 1541. "A fact is material if it directly affects the disposition of a case." Fulmer v. White Oak Borough, 606 A.2d 589, 590 (Pa. Cmwlth. 1992).

The General Assembly by enacting the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, as amended, 58 P.S.§§601.101-601.605("Oil and Gas Act"), established a comprehensive framework for the regulation of oil and gas activities in Pennsylvania. The purposes of the Oil and Gas Act as set forth in Section 601.102 are as follows:

1) Permit the optimal development of the oil and gas resources of Pennsylvania consistent with the protection of the health, safety, environment and property of the citizens of the Commonwealth.
2) Protect the safety of personnel and facilities employed in the exploration, development, storage and production of natural gas or oil or the mining of coal.
3) Protect the safety and property rights of persons residing in areas where such exploration, development, storage or production occurs.
4) Protect the natural resources, environmental rights and values secured by the Pennsylvania Constitution.

Section 601.103 is the definitional section of the legislation. It defines an abandoned well as:

> Any well that has not been used to produce, extract or inject any gas, petroleum or other liquid within the preceding 12 months, or any well for which the equipment necessary for production, extraction or injection has been removed, or any well, considered dry, not equipped for production within 60 days after drilling, redrilling or deepening, except that it shall not include any well granted inactive status.

The Department alleges in its Motion for Partial Summary Judgment that Kenco is the owner\operator of 108 gas wells in Crawford and Erie counties. It further contends that Kenco has not produced gas from the wells for at least twelve months. Kenco admitted these facts in response to the Department's Requests for Admissions.[1] Section 601.210 requires that "upon abandoning any well, the owner or operator thereof shall plug the well in a manner prescribed by regulation of the Department...." Since the wells have not produced gas within the previous 12 months the Department contends they are abandoned pursuant to Section 601.210. Therefore, the Department argues that it is entitled to partial summary judgment as a matter of law.[2]

In response to the Department's Motion, Kenco claims that it never abandoned the wells but because of the bankruptcy of its buyer, Columbia Gas Transmission Corporation ("Columbia"), it was unable to sell its gas. It relates that in 1991 Columbia filed voluntary

---

[1]One of the wells has evidently been plugged.

[2]Kenco's Notice of Appeal states that it never abandoned the wells. It further argues that its "alleged failure does not constitute a public nuisance or unlawful conduct." If we find that Kenco legally abandoned the wells under the Pennsylvania Oil & Gas Act, we can also find pursuant to Sections 601.502 and 601.509, that such abandonment constitutes a public nuisance and/or unlawful conduct. *See* 58 P.S.§§ 601.502 and 601.509.

petitions for reorganization under Chapter 11 with the United States Bankruptcy Court for the District of Delaware. Kenco filed claims against Columbia which were resolved by settlement late in 1995. Kenco alleges it was without income during this period and never intended to abandon its wells.

While we empathize with Kenco's plight, it is irrelevant to the issue before the Board. Kenco provides this Board with no authority to excuse its failure to act. Moreover, there is absolutely nothing of record which shows any efforts by Kenco to obtain relief from its predicament - either with the Bankruptcy Court or the Department. For example, Kenco could have easily requested the Department to allow its wells to be listed as inactive pursuant to Section 601.204. This statute provides in part:

> § 601.204. Inactive status
>
> (a) Upon application, the department shall grant inactive status for a period of five years for any permitted or registered well provided the following requirements are met:
>
> 1) the condition of the well is sufficient to prevent damage to the producing zone or contamination of fresh water or other natural resources or surface leakage of any substance;
>
> 2) the condition of the well is sufficient to stop the vertical flow of fluids or gas within the well bore and is adequate to protect freshwater aquifers, unless the department determines the well poses a threat to the health and safety of persons or property or to the environment;
>
> 3) the operator anticipates future use of the well for primary or enhanced recovery, future gas storage, or the operator anticipates the construction of a pipeline, for approved disposal or other appropriate uses related to oil and gas well production; and
>
> 4) the applicant satisfies the bonding requirements of sections 203 and 215, except that the department may require additional financial security for any well on which an alternative fee is being paid in lieu of bonding under section 215(d).
>
> b) The owner or operator of any well granted inactive status shall be

responsible for monitoring the mechanical integrity of such well to insure that the requirements of subsection (a)(1) and (2) are met and shall report the same on an annual basis to the department in a manner and form as the department shall prescribe by regulation.

c) Deleted. 1992, July 2, P.L. 365, No. 78 § 4.

d) Any well granted inactive status pursuant to subsection (a) shall be plugged in accordance with section 210 or returned to active status within five years of the date inactive status was granted, unless the owner or operator applies for an extension of inactive status which may be granted on a year-to-year basis if the department determines that the owner or operator has demonstrated his ability to continue to meet the requirements of this section and the owner or operator certifies that the well will be of future use within a reasonable period of time.

By merely doing nothing Kenco abandoned its wells pursuant to the Oil and Gas Act. The Department was entirely justified, and indeed legally mandated, to order Kenco to plug its wells. Moreover, by not plugging its wells in contravention of Section 601.210 Kenco violated Sections 601.502 and 601.509 which, as a matter of law, constitutes a public nuisance and unlawful conduct. Although the Department only requested Partial Summary Judgment, based on our finding that Kenco abandoned its wells there are no remaining questions of fact. Accordingly, there are no issues left to resolve and the Department is entitled to Summary Judgment and the dismissal of Kenco's appeal.

ORDER

The Department's Motion for Summary Judgment is granted. Kenco's appeal is dismissed.

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ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 25, 1996

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M. DIANE SMITH
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NORTHEASTERN EQUITY ASSOCIATES, INC.	:	
v.	:	**EHB Docket No. 94-328-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** April 1, 1996

OPINION AND ORDER ON
DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

By: George J. Miller, Chairman

Synopsis

The Department's Motion for Summary Judgment under the Dam Safety and Encroachments Act is granted where appellant's response to the motion contends only that there is no obstruction to the stream flowing under and through appellant's property, but the testimony of appellant's president and environmental consultant clearly demonstrate that there is such an obstruction. The affidavit filed in support of appellant's response stating that these individuals did not intend to imply that there was such an obstruction fails to raise any "genuine" issue of material fact.

BACKGROUND

This appeal arises from a compliance order issued by the Department of Environmental Protection ("the Department") on October 17, 1994 pursuant to the provisions of the Dam Safety and Encroachments Act ("DSEA), Act of 1978, PL. 1375, as amended 32 P.S.

§693.1 et. seq. The order was issued to appellant, Northeastern Equity Associates, Inc. ("Northeastern"), the owner of real property located southwest of the East Bangor Dam near Bangor, Pennsylvania on which there is a "slate box" enclosure through which Brush Meadow Creek flows to the southwest to discharge below Capitol Boulevard to Martin's Creek. The property consists, in part, of a large slate refuse pile on which Northeastern's affiliate, Capitol Auto Parts, is located. The Conrail railroad tracks are located adjacent to and along the southeastern perimeter of this property.

The Department's inspection of the site in March, 1994 indicated that the stream enclosure was partially blocked at the eastern end of Northeastern's property with flood debris and was not being maintained to convey the flood flows from Brush Meadow Creek through Northeastern's property to Martin's Creek. The order required appellant to submit a Restoration Plan to convey the flow of the stream through the Site so that it would not imperil the safety of life and property upstream or downstream of the enclosure. Northeastern filed this appeal rather than submit the ordered Restoration Plan. The materials developed in discovery reveal a water flow to the southwest beginning with the East Bangor Dam to Brush Meadow Creek and through the slate enclosure or culvert underneath Northeastern's property which discharges through portions of concrete pipe which discharge below Capitol Boulevard to Martin's Creek. Northeastern's President, Nolan Perin, acknowledges that this stream flows through a slate pile located on Northeastern property (Motion Exhibit E, N.T. 11-13, 15-16). The flow through the property began at a forty-eight-inch diameter concrete pipe at the eastern end of the property and discharged through portions of a forty-eight-inch diameter concrete pipe to the southwest end of the property below Capitol Boulevard.

In January, 1993, Brush Creek flooded at the entrance point to this culvert at the eastern end of Northeastern's property which reportedly flooded the Conrail tracks which run parallel and adjacent to the creek. This flooding prevented trains from moving on the right of way. (Motion Exhibit E, N.T. 20-21- Exhibit 3). As a result, the Department issued an emergency permit to Northeastern's affiliate, Capitol Auto Parts, to clear the clogged pipe which appeared to be causing the flooding. The required work was done by Northeastern in the summer of 1994 as described by Mr. Perin in his deposition. The necessary work was performed by Northeastern through the use of an excavator, a bulldozer and a dump truck to remove sections of concrete pipe as well as mud, tree branches and railroad ties so that the pond formed at the eastern end of the property was fully cleared.

This work was not sufficient to create a free flow through the slate culvert because in March, 1994 Meadow Creek again flooded. As a result, on April 1, 1994, the Department issued a notice of violation to Northeastern and, when Northeastern denied any violation, it issued the compliance order appealed from in October, 1994.

DISCUSSION

Summary judgment may be granted a party only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Pa. R.C.P. No. 1035(b); Robert L. Snyder, et al. v. Dept. of Environmental Resources, 588 A.2d 1001 (Pa. Cmwlth. 1991), petition for allocatur dismissed as improvidently granted, 534 Pa. 276, 632 A.2d 308 (1993). In ruling on a motion for summary judgment, we grant it only in circumstances which are clear and free from doubt.

Hayward v. Medical Center of Beaver County, 530 Pa. 320, 608 A.2d 1040 (1992). Moreover, we must view the evidence in a light most favorable to the non-moving party. Michael Strongosky v. DER and Resource Conservation Corp., 1993 EHB 412. Finally, we point out that the burden rests on the moving party to demonstrate it is entitled to judgment as a matter of law. Estate of Charles Peters, et al. v. DER, et al., 1992 EHB 358; 370.

The Department's motion for summary judgment demonstrates through the material developed in discovery that Northeastern is the owner of the property involved within the meaning of the DSEA and that Brush Meadow Creek is a "water course" under the terms of the regulations promulgated by the Department under that act. The area of flow of this water course through Northeastern's property is a "stream enclosure" under the Department's regulations. 25 Pa. Code §105.1.[1] The motion also presents substantial evidence from the discovery materials that the slate culvert was an obstruction or encroachment within the meaning of the DSEA and, that under Section 13 of the DSEA, the owner of such an obstruction or encroachment has a legal duty to maintain the facility in a safe condition in accordance with the Department's regulations. The response of Northeastern to the motion for summary judgment admits nearly all of the basic background facts but denies that there is an obstruction on the property. To the contrary, the affidavit submitted by Northeastern's president, Nolan Perin, and its consultant, Jan Hutwelker, P.E., assert that there is no such reduction of the effective area of the stream's flow through the Northeastern property sufficient to cause flooding during normal

[1]A "stream enclosure" is defined as a [b]ridge, culvert or other structure in excess of 100 feet in length upstream to downstream which encloses a regulated water of this Commonwealth." The enclosure under Northeastern's property is approximately 1,300 feet. (Motion, Exhibit J)

weather conditions.

Under Section 13 of the DSEA, the owner of a water obstruction or encroachment has the legal duty to "monitor, operate and maintain the facility in a safe condition in accordance with the regulations. . .issued pursuant to this act." 32 P.S. §693.13. The Department's regulations require that the owner of the structure maintain its opening in good repair in order to assure the flood carrying capacity of the structure. It is assumed that the flow of water is obstructed when there has been a reduction of the effective area of the structure opening of greater than 10%. 25 Pa. Code §§105.211 and 105.171. In addition, section 105.172 of the regulations requires that whenever a culvert has collapsed or is in imminent danger of collapse, the owner shall remove the collapsed portions and repair the structure in accordance with plans submitted to and approved by the Department. 25 Pa. Code §105.172.

The Department's claim that there is an obstruction even after the remedial work done by Northeastern following the 1993 flooding is plainly supported by the fact that Brush Meadow Creek overflowed its banks again during March, 1994. (Motion, Exhibit D) In addition, in an August 5, 1994 letter from Nolan Perin to Conrail, Mr. Perin acknowledged that there was an ongoing flooding problem on Northeastern's property and that there has been a diminished water flow situation there since he became the owner of the property. (Motion, Exhibit E - Exhibit 6 to Perin Deposition)

Mr. Perin's deposition testimony left no question but that he knew there was an obstruction to water flow under the Northeastern property even after he had done the work of clearing the pond area and the entrance to the culvert in the summer of 1993. His explanation as to why he did not do any further work was that "it didn't look like going any further was going to

cure this problem." His explanation for that was as follows:

> "I did not see how without getting into a major excavation project I could go further down the stream bed which may have been the old stream bed or whatever that would open anything up to, you know, simulate something at least like a pipe where an opening that would allow the free flow water as you would ordinarily find a pipe for a culvert or what have you through that area and at that point in time having spent a bunch of money on it and time on it I didn't want to invest any more money and time in it because I was simply there to volunteer and took the equipment off the job." (Deposition, Motion Exhibit E, N.T. 32-33)

He also acknowledged that the work he had done was not an adequate solution to the problem that he was trying to address. He explained as follows:

> "Well, my experience tells me that there should be some type of a culvert or a pipe open to let the water flow through. Under normal circumstances, that's what someone who divert the stream or want to fill in on top of the stream would do." (Deposition, Motion, Exhibit E, Deposition N.T. 33)

The Department's evidence that there was an obstruction also includes the report of Jan C. Hutwelker, Northeastern's consultant, which states that he observed during an October 3, 1995 site visit that [the] entrance to the culvert was covered by waste slate material. (Motion, Exhibit J, p. 2)

We can grant summary judgment if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving parties entitled to judgment as a matter of law. Pa. R.C.P. 1035(b); Fiore v. DER, 655 A.2d 108, 1085 (Pa. Cmwlth. 1995).

In this case, the affidavits submitted by appellant in opposition to the motion for summary judgment failed to raise a genuine issue of material fact. While the question as to whether or not there is an "obstruction" is a central issue of the case, the facts set forth in the affidavits only pose the contention that the diminished water flow which caused the flooding of the premises resulted from extreme weather conditions and that the pipe entrance is sufficiently permeable to convey water at a rate sufficient to prevent flooding during normal weather conditions.

These affidavits do not and cannot refute the uncontested evidence that the lack of permeability in the slate culvert on the Northeastern property has caused flooding in two of the past three years. By contrast, the DSEA and the Department's regulations require Northeastern to keep the culvert in good repair so as to assure flood carrying capacity, not just stream carrying capacity under normal weather conditions. In addition, the Department's regulations require the prompt repair of any collapse of a culvert according to the plans submitted to and approved by the Department. The Department's regulations also state that it shall be assumed that the flow of water is obstructed when there has been a reduction of the effective area of the structure opening of greater than 10%. The inspection at the property in October, 1995 by Northeastern's engineering consultant, Jan C. Hutwelker, P.E. indicated that the "entrance to the culvert was covered by waste slate material." (Motion, Exhibit J, p. 2) While the affidavits of both Messrs. Perin and Hutwelker say that they did not intend to imply that an "obstruction" was present, the uncontradicted evidence provided by Mr. Perin's deposition and the report of Jan Hutwelker, P.E. present facts from which no conclusion can be reached under the DSEA and the Department's regulations other than that an "obstruction" exists which will result in flooding, a

plainly unsafe condition.

ORDER

AND NOW this 1st day of April, 1996, IT IS HEREBY ORDERED as follows:

1. Summary judgment is granted in favor of the Department.

2. Summary judgment is granted against appellant, Northeastern Equity Associates.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
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THOMAS W. RENWAND
Administrative Law Judge
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MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 1, 1996

See following page for service list.

EHB Docket No. 94-328
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M. DIANE SMITH
SECRETARY TO THE BOA

COMMONWEALTH ENVIRONMENTAL SYSTEMS, L.P.	:	
v.	:	**EHB Docket No. 94-355-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND PINE GROVE LANDFILL, INC., INTERVENOR	:	**Issued: April 1, 1996**

OPINION AND ORDER SUR MOTION FOR RECONSIDERATION

By: Robert D. Myers, Member

Synopsis:

An order withdrawing an appeal of conditions of a solid waste permit upon appellant's request will not be reconsidered without compelling and persuasive reasons. Intervenor failed to show reasons justifying reconsideration since the appeal had became moot by virtue of the Department of Environmental Protection's (DEP) issuance of a permit modification that superseded the permit conditions from which this appeal arose. Moreover, an intervenor is in no position to control the decisions of the DEP.

OPINION

Commonwealth Environmental Systems, L.P. (Appellant) initiated this appeal with the December 30, 1994 filing of a Notice of Appeal seeking review of a number of conditions of the Department of Environmental Resources' (now the Department of Environmental Protection) (DEP) December 21, 1994, issuance of a solid waste permit for Appellant's municipal waste processing and

disposal facility in Foster Township, Schuylkill County. Pine Grove Landfill, Inc. (Pine Grove) filed a Petition for Leave to Intervene as a party respondent on May 15, 1995, and was granted intervenor status on August 2, 1995.

On March 1, 1996, the Board entered an Order withdrawing the appeal pursuant to Appellant's Notice of Withdrawal of Appeal dated February 29, 1996. Pine Grove timely filed this Motion for Reconsideration and Reargument supported with Memorandum of Law on March 21, 1996.

The Board's Rules of Practice and Procedure provide that motions for reconsideration may be granted in limited circumstances and "only for compelling and persuasive reasons." 25 Pa. Code § 1021.122(a). In its motion, Pine Grove has set forth several reasons for reconsideration, none of which the Board finds compelling or persuasive.

Pine Grove first challenges the withdrawal of the above matter on the basis that as an intervenor to the action it retained the right to continue the appeal for purposes of defending the permit as originally issued by DEP to Appellant, and as a result, the Board's Order improperly terminated this right. However, the Board has repeatedly stated that where an event occurs during the pendency of an appeal before the Board which deprives it of the ability to provide effective relief, the matter becomes moot. *Empire Sanitary Landfill, Inc. v. Commonwealth of Pennsylvania Department of Environmental Resources*, 1991 EHB 66. As in the matter here, the appeal of a DEP action, specifically the issuance of a solid waste permit, is null and void when DEP issues a subsequent permit modification superseding the prior appealed action. *Id.* Since DEP issued permit modifications, dated February 26, 1996, superseding the conditions of the solid waste permit from which this matter arose, the matter is now moot. Since the matter has become moot, no appeal

remains upon which Pine Grove can rest its right to continue as an intervenor.[1]

Pine Grove next argues that its exclusion from participating in the negotiations between DEP and Appellant preceding the matter's withdrawal violated its due process rights. In making this argument, it asserts that "DEP did not have the right to settle the [Appellant's] litigation without Pine Grove's participation." While Pine Grove became a party to the appeal by intervention entitling it to all rights of a full party, it was not also conferred "a right to control whether or not [DEP] may elect to rescind its order." *Pequea Township, et al., v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 1994 EHB 755. DEP's unilateral action modifying the appealed permit conditions is within its domain of administrative discretion, and as such does not deprive Pine Grove of any due process rights to participate in the DEP's decision. *Id.* at 755-760.

Finally, Pine Grove asserts that Appellant and DEP violated the mechanism for terminating proceedings before the Board delineated in 25 Pa. Code § 1021.120(a) by negotiating an agreement without seeking the Board's approval pursuant thereto. While section 1021.122(a) does provide a mechanism for "cases where a proceeding is sought to be terminated by the parties as a result of a settlement agreement," no settlement agreement resulted from this appeal. No agreement sought the Board's approval pursuant to this section. Neither Appellant nor DEP is bound to terminate proceedings in the manner set forth at section 1021.122(a), but rather appellant is free to withdraw its appeal without Board approval.

Accordingly, because Pine Grove has not demonstrated that compelling and persuasive reasons exist for reconsideration of the Boards's Order of March 1, 1996, withdrawing

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[1] Pine Grove is not without recourse for it filed an appeal from those subsequent permit modifications with the Board on March 27, 1996, at EHB Docket No. 96-073-MR.

the above matter, the Board must deny Pine Grove's motion.

ORDER

AND NOW, this 1st day of April, 1996, it is ordered that Pine Grove's Motion for Reconsideration and Reargument is denied and the Board's Order will not be reconsidered.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 1, 1996

EHB Docket No. 94-355-MR
Service List

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M. DIANE SMITH
SECRETARY TO THE BO

EMPIRE SANITARY LANDFILL, INC.	:	
	:	
v.	:	**EHB Docket No. 90-467-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 3, 1996**

OPINION AND ORDER ON MOTION TO DISMISS

By: Michelle A. Coleman, Member

Synopsis:

Before the Board is the motion to dismiss of the Department of Environmental Protection. The Department contends that the appeal of Empire Sanitary Landfill from a permit modification has become moot. We deny the Department's motion.

Opinion

The relevant facts are not in dispute. On March 14, 1990, the Department issued a permit to Empire authorizing the disposal of solid waste on 25.74 acres in Ransom Township, Taylor Borough, Lackawanna County, Pennsylvania. On April, 6, 1990, the Department issued a permit modification[1] that, among other things, contained restrictions on daily waste volumes, imported waste, acreage, and traffic conditions. In addition, the April Modification contained a condition,

[1]Hereinafter April Modification.

known as Condition 14, prohibiting Empire's acceptance of municipal waste designated for another facility under the planning laws of the Pennsylvania municipality where the waste originated. On May 7, 1990, Empire filed a timely appeal to the Board.

On October 26, 1990, the Department issued another modification to the permit.[2] The October Modification superseded the April Modification by altering certain conditions of the permit, and repeated verbatim Condition 14. On October 13, 1990, Empire filed a timely appeal to the Board.

The Board initially considered the appeal from the April Modification, and by order dated January 24, 1991, held that the April Modification was null and void and was completely superseded by the October Modification. Accordingly, Empire's appeal from the April Modification was dismissed as moot. Empire Sanitary Landfill, Inc. v. Department of Environmental Resources, 1991 EHB 66.

Empire filed a motion for summary judgment regarding the October Modification, which was granted in part by the Board, by order dated July 10, 1992. Subsequently, after consultation with Empire, the Department issued a new permit modification, setting new maximum and average daily waste volume limits, new traffic restrictions and revised Empire's acreage limitation. The Department filed the present motion on July 11, 1995, on the ground that the appeal to the October Modification has been rendered moot by the new modifications. Empire, on the other hand, contends that the validity of Condition 14 has never been addressed, and therefore its appeal of the October Modification cannot be dismissed.

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[2]Hereinafter October Modification.

The Department argues (1) that Empire is precluded from challenging Condition 14 by the doctrine of administrative finality, because it failed to appeal Condition 14 in the April Modification, and (2) even if Empire could challenge Condition 14, it failed to properly raise this issue in its notice of appeal of the October Modification.

The Department argues that the doctrine of administrative finality precludes Empire from challenging Condition 14. We disagree.

It is beyond peradventure that where a party fails to challenge an action by the Department within the prescribed time limit, that party is precluded from thereafter raising that challenge. Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corp., 375 A.2d 320 (Pa. 1977). Specifically, where a permit condition is in continuous effect, and the condition is unappealed when originally issued, it can not be challenged in later modifications. Kelly Run Sanitation, Inc. v. Department of Environmental Resources, EHB Docket No. 94-270 (decided March 22, 1995).

We find that the doctrine of administrative finality does not apply to the challenge of Condition 14 in the October modification. In reviewing Empire's appeal of the April Modification, this Board specifically held that:

> Where Departmental action supersedes a prior appealed action, the prior action is null and void; the Board can grant no relief and must dismiss the appeal as moot, Glenworth Coal Company v. DER, 1986 EHB 1348, citing Silver Springs Township v. DER, 28 Pa.Cmwlth 302, 368 A.2d 866 (1977). As for Empire's arguments that exceptions to the mootness doctrine apply, the issues raised by Empire in its appeal of the April permit are the same as the issues raised in its appeal of the October permit, so these issues will not escape review.

1991 EHB 66,70. Therefore, there is no Departmental action from which Empire could appeal and

no relief which could be granted by the Board, since the April Modification was rendered a nullity by the October Modification.

Moreover, the Department itself intended the April modification to be a nullity. The cover letter which accompanied the October modification stated that "[t]his modification superseded the permit modification for your facility of April 6, 1990 . . . ." (Motion to Dismiss Exhibit C.) The Department argued in its motion to dismiss the appeal of the April modification that the modification was null and void. Empire Sanitary Landfill, Inc. v. DER, 1991 EHB 66,67. Since the Department's action was null and void, the conditions of the April modification no longer exist as an action from which Empire could have appealed. There was no Departmental action to which the doctrine of administrative finality could apply. In sum, Empire is not precluded from challenging Condition 14 in its appeal to the October Modification.

Next, the Department argues that Empire failed to properly preserve its challenge to Condition 14 in its notice of appeal. We disagree.

Board regulations provide that notices of appeal from an action of the Department:

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

25 Pa. Code § 1021.51(e).[3]

Although Empire's notice of appeal does not specifically mention Condition 14, we find that

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[3] This regulation is a recodification of 25 Pa. Code § 21.51(e).

the allegations in the notice are specific enough to preserve the issue. The Commonwealth Court's decision in Croner, Inc. v. Department of Environment Resources, 589 A.2d 1183 (Pa. Cmwlth Ct. 1991), is instructive. In that case, the appellant challenged a permit by a notice of appeal which alleged simply that conditions of the permit were contrary to the law, and in violation of the appellant's rights. At hearings before the Board, the appellant made a specific argument that a specific provision violated a specific statute. The Department argued that the appellant was precluded from making this argument because it had failed to raise a violation of the statute in the notice of appeal. On review, the Court held that alleging that the permit was issued in violation of the law in general terms in the notice of appeal was specific enough to preserve the argument.

Empire's notice of appeal contains several paragraphs which are specific enough to preserve its challenge to Condition 14. For example Paragraph 44 states that prohibiting Empire from accepting imported waste except for limited circumstances is beyond the Department's legal authority which could include waste imported from other municipalities; Paragraphs 49 and 50 challenge the permit as a violation of Empire's constitutional due process rights; Paragraph 51 alleges violation of the Commerce Clause of the United States Constitution.[4] As relief, in the notice of appeal Empire asks this Board to overrule the entire modification, not just specific portions of it. Based on these general allegations, it can be reasoned that Empire asks the Board to overrule the October Modification. We find that these allegations are sufficient to preserve a specific challenge

[4] Contrary to the argument of the Department, it is not possible from the record presently before the Board to conclude that restrictions on the acceptance of waste from other municipalities within the Commonwealth can have no possible effect on interstate commerce. Cf Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 34 ERC 1729 (U.S. 1992).

to Condition 14 as part of the October Modification.

ORDER

AND NOW, this 3rd day of April, 1996, the motion to dismiss of the Department of Environment Protection in the above-captioned matter is hereby denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 3, 1996

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M. DIANE SMITH
SECRETARY TO THE BO

COUNTY COMMISSIONERS, SOMERSET COUNTY	:	
v.	:	**EHB Docket No. 95-031-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MOSTOLLER LANDFILL, INC., Permittee	:	**Issued: April 4, 1996**

ADJUDICATION

By George J. Miller, Chairman

Syllabus:

In a third party appeal of the Department's issuance of a permit to operate a municipal waste landfill in Somerset and Brothersvalley Townships, Somerset County, the Somerset County Commissioners have failed to meet their burden of proving that the Department's issuance of the permit was an abuse of discretion. First, the Commissioners failed to prove that the predicted leachate from the facility was incompatible with the proposed liner system. Second, the Commissioners failed to show that the evaluation of fugitive emissions from the facility was inadequate. Third, the Commissioners' appeal raises arguments concerning the needs assessment, consideration of public comment, and the calculation of the closure bond. Although we believe that the last of these three contentions were waived by the Commissioners by failing to press them in their post-hearing brief, they are of significant public importance under the

circumstances presented here. Accordingly we have reviewed these contentions and we have determined that the Department did not abuse its discretion.

BACKGROUND

This appeal by the County Commissioners of Somerset County ("Commissioners") arises from the issuance of a Solid Waste Disposal and Processing Facility Permit ("Permit") to Mostoller Landfill, Inc. ("Mostoller") by the Pennsylvania Department of Environmental Protection ("Department") on December 30, 1994. The permit was issued pursuant to the Solid Waste Management Act, the Act of July 7, 1980, PL. 380, as amended, 35 P.S. §6018.101 et seq. ("SWMA"); the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, PL. 556, 53 P.S. §4001.101 et seq. ("Municipal Waste Planning Act" or "Act 101"); the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 et seq. ("APCA") and the Clean Streams Law, the Act of June 25, 1937, PL. 1987, as amended, 35 P.S. §691.1 et seq. ("CSL"). This permit authorizes Mostoller to construct and operate the Mostoller Municipal Waste Landfill ("Facility") in Somerset and Brothersvalley Townships in Somerset County.

The Commissioners asserted in their 43 paragraph Notice of Appeal that the issuance of the permit was arbitrary, capricious and an abuse of discretion because the Permit Application did not comply with the statutes and regulations relevant to the disposal of solid waste as well as a failure to comply with Article I, Section 27 of the Pennsylvania Constitution. More specifically, the Notice of Appeal attacked the adequacy of the liner for the proposed facility and the Department's claimed failure to adequately determine the nature of fugitive emissions. In addition, the appeal claimed that there is no longer a need for this facility in

Somerset County. Finally, the appeal claimed that the bond required by the Department was insufficient to prevent adverse effects upon the public health, safety, welfare and the environment during the operation of the facility and after closure.

Following extensive discovery and an order from the Board imposing sanctions on the Commissioners for their failure to comply with a discovery order, the parties entered into a Joint Stipulation which narrowed the issues for decision.[1]

A hearing was held before Administrative Law Judge Richard S. Ehmann, a Member of the Environmental Hearing Board, on October 23 and 24, 1995.[2] The testimony and exhibits introduced at that hearing focused principally around the issues of the adequacy of the approved liner for the facility in relation to the expected leachate from waste disposed in the facility, the adequacy of the Department's analysis of fugitive dust emissions, the need for the facility within Somerset County and the adequacy of the bond required by the Department.

The record consists of the pleadings, a partial stipulation of facts, a transcript of the hearing and 41 exhibits. After a full and complete review of the record, we make the following:

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[1]Mostoller contends in the motion to strike portions of the Commissioners' briefs that certain of the evidence relied upon by the Commissioners and their briefs are in contravention of the Board's order imposing sanctions. A formal opinion by this Board in response to that motion will not be issued; to the extent those issues are relevant to the disposition of this appeal, they will be dealt with in the course of this Adjudication.

[2]Judge Ehmann having left the Board prior to the issuance of an adjudication in this matter, this adjudication has been prepared from a cold record. Lucky Strike Coal Co. v. DER, 546 A.2d 447 (Pa. Commw. Ct. 1988).

FINDINGS OF FACT

1. Appellants are County Commissioners, Somerset County.

2. Appellee is the Department of Environmental Protection, the agency of the Commonwealth with the duty and responsibility to enforce SWMA, the Municipal Waste Planning Act, the APCA, the CSL and the rules and regulations promulgated pursuant to those statutes.

3. Permittee is Mostoller Landfill, Inc. a corporation.

4. On December 30, 1994, Department issued a solid waste permit (Permit No. 101571) authorizing Mostoller to construct and operate a municipal waste landfill in Somerset and Brothersvalley Townships in Somerset County. (Stipulations of Fact No. 2)[3]

5. The permit authorized the disposal of municipal, residual and special handling waste and prohibits the acceptance of hazardous waste. (Stipulations of Fact No. 8)

Leachate and Liner Compatibility

6. The Landfill is authorized to receive an average daily volume of 2000 tons of solid waste, but may not receive any more than 2400 tons of solid waste for disposal on any given operating day. (Ex. 2, Conditions 16 and 17)

7. Condition 27 of the permit authorizes Mostoller to accept and dispose of both municipal waste, and residual and special handling wastes, including sewage sludges, combustion residues,

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[3] All exhibits were stipulated in the Parties' Joint Stipulation filed on October 6, 1995. Although the Stipulation was admitted as Board Exhibit No. 16, references to stipulated facts will be referenced as "Stipulation of Fact No. ___", which are found in Section F of the Stipulation. All references to exhibits are denoted by "Ex. ___". References to the transcript of the hearing are denoted as "N.T. ____".

metallurgical process residues, sludges scales, chemical wastes, generic wastes, special handling residues, industrial equipment, scrap, non-coal mining waste, auto shredder fluff, site cleanup material, stabilized waste, municipal waste-like residual waste, asbestos-containing waste, virgin petroleum contaminated soil and PCB-containing waste. (Stipulation of Fact No. 23)

8. Michael G. Forbeck, Facilities Supervisor for Bureau of Waste Management in the Department's Southwest Regional Office, testified that all thirteen municipal landfills in the region are authorized to accept both municipal and residual wastes, and that the permit is not unique in the number and types of residual wastes that Mostoller is allowed to accept. (N.T. 300, 302)

9. The liner system to be used by Mostoller consists of a subbase, two 60 mil Gundle or equivalent high-density polyethylene (HDPE) synthetic liners, a clay layer, leachate detection zone and protective cover. (Stipulation of Fact No. 28)

10. Form 24 of the application as incorporated in the permit addresses the requirement for liner systems as required by 25 Pa. Code §§ 273.161, 273.251 and 273.260. (Stipulation of Fact No. 27)

11. It is Department policy that permit applicants can demonstrate liner compatibility with leachate by comparing leachate from an existing, Department approved, facility which accepts similar wastes in a similar site. (Forbeck, N.T. 324)

12. This policy is based in part on leachate data which the Department has collected over the last twenty years, which was gathered from over 1,000 landfills.

a. This data included data from municipal waste landfills which accept residual waste.

b. In reviewing the leachate quality data from municipal waste landfills, the Department has determined that leachate quality does not vary significantly from municipal waste landfill to municipal waste landfill.

c. The Department has also concluded that the fact that a municipal waste landfill accepts residual waste does not significantly alter the composition of the leachate which it generates.

(Forbeck, N.T. 314-15)

13. Jeffrey P. Evers, Project Manager of CE Consultants, Inc. prepared Form 24 which includes the liner compatibility study for the permit application. (Evers, N.T. 436)

14. Mr. Evers is a registered geologist with a degree in geosciences. He has ten years of experience in the field of environmental and geological consulting which include permitting of solid and hazardous waste landfills, and environmental site assessments. Through this experience he is familiar with Pennsylvania law and regulations relative to solid waste landfills. (Ex. 3). Mr. Evers has been personally involved in twelve solid waste sites, ten of which were municipal landfills, and two of which were residual waste landfills. He has been involved in preparing the permit applications and has consulted in various aspects of landfill operations. (N.T. 397, 399)

15. Leachate quality data from the Southern Alleghenies Landfill was used to determine compatibility of the proposed liner system, because

a. Southern Alleghenies is a municipal landfill which accepts residual waste for disposal;

b. is similar in design to the proposed landfill;

c. is located in a similar climatic setting.

(Evers, N.T. 437, 442)

16. Southern Alleghenies Landfill is at least as comparable to the proposed landfill because it is permitted to accept more categories of residual and special handling wastes than the proposed landfill, in addition to accepting municipal waste. (Forbeck, N.T. 320; 354-57; 391-92;Ex. 1(e))

17. The analysis of the liner compatibility with the leachate which is likely to be generated by the proposed landfill also included data from other municipal landfills, municipal landfills which accepted residual waste, and a residual waste impoundment. (Evers, N.T. 439)

18. Mr. Evers testified that the mix of residual waste and municipal waste which is accepted by a municipal landfill is not determinative of the chemical composition of the leachate. This is because a leachate, whether it is from municipal or residual waste, is a mixture of different chemicals and elements that are soluble. Since water can only hold a certain concentration of each of these components, once this limit is reached, more waste will not result in a higher concentration of components in the leachate. (N.T. 440-41)

19. The other reason that the percentage of residual waste does not affect the chemical composition of leachate is due to the way landfills are operated pursuant to the regulations. Landfills must minimize the amount of open area which is exposed to rainfall. Since rainfall exposure is minimized, production of leachate is minimized. (Evers, N.T. 441)

20. The testing of leachate generated by the Southern Alleghenies Landfill as supplemented with the data which was submitted from other landfills, provided an adequate analysis of the leachate which is likely to be generated by Mostoller. (Evers, N.T. 442-43)

21. Mr. Forbeck was responsible for the compatibility review of the liner system. The

purpose of leachate characterization is to ensure liner compatibility and treatability of the leachate that will be generated by the proposed landfill. (N.T. 313)

22. He determined that this liner system met requirements imposed under the municipal waste regulations based on a comparison of the leachate produced by existing landfills which accept wastes similar to those proposed for Mostoller, using the EPA method 9090 testing methodology. (Stipulation of Fact No. 22; Forbeck, N.T. at 314)

23. This testing methodology is widely accepted in the scientific community, and has been used by the Department for determining the compatibility of liner systems with leachate. (Forbeck, N.T. 325)

24. Dr. Melvyn Kopstein testified as an expert witness on behalf of Appellants. Dr. Kopstein is a forensic chemical engineer who holds a Ph.D in Chemical Engineering from the University of Pennsylvania. He currently provides counsel to attorneys and private industry in environmental sciences. (Ex. 5)

25. Dr. Kopstein testified that since the Southern Alleghenies landfill accepts only twenty percent residual waste and eighty percent municipal waste, and the proposed landfill can accept eighty percent residual waste, the leachate of the Southern Alleghenies landfill was not representative of the leachate which would be generated by Mostoller. (N.T. 68)

26. Dr. Kopstein determined that Mostoller would be accepting eighty percent residual waste by dividing 400 tons per day of waste which is reserved for Somerset County per the agreement by 2000 tons per day which is the total which the facility is permitted to accept. (N.T. 139)

27. Mr. Evers specifically disagreed with the analysis of Dr. Kopstein based on empirical data from the landfills he has personally been involved with which demonstrates that leachate

characteristics do not vary much from landfill to landfill. (Evers, N.T. 442-43)

28. The Board finds the testimony of Mr. Forbeck and Mr. Evers to be more competent and credible than the testimony of Dr. Kopstein. Dr Kopstein was not familiar with Method 9090, was not familiar with the conditions of the Southern Alleghenies landfill permit and was not familiar with leachate data from other municipal waste landfills in Pennsylvania. (N.T. 41;121)

Air Quality Issues

29. Dr. Kopstein also testified about fugitive emissions. He testified that the application only set forth some estimates of fugitive dust emissions from road surfaces, but these estimates did not set an upper or lower bound and did not address where the dust could carry outside of the site. He also testified that there was no information concerning emissions from the operational area of the landfill. (N.T. 108-109)

30. He concluded with a reasonable degree of scientific certainty that the permit application failed to demonstrate the nature and likelihood of fugitive emissions. (N.T. 109)

31. Joseph Pezze, the Regional Air Pollution Control Engineer for the Department's Southwest Regional Office testified as an expert witness on behalf of the Department. Mr. Pezze has managed the Department's air quality program in the Southwest Regional office for more than seven (7) years. He has been employed as an air quality engineer with the Department since 1975. He holds a joint Masters Degree in metallurgical materials engineering and public health from the University of Pittsburgh. He assisted in the development of the Department's policies and printed application forms with regard to fugitive emissions from landfills. (Ex. 4; N.T. 254)

32. Form 15 of the solid waste disposal permit application addresses fugitive dust emissions from disposal facilities. Its purpose is to provide the Department with the necessary information

to evaluate the potential impact of fugitive dust emissions on the public. It requires the permit applicant to submit estimates of fugitive dust emissions and to describe the measures which will be used to minimize fugitive dust emissions in the construction and operation of the solid waste disposal facility. (Pezze, N.T. 260-61;273-74)

33. Mr. Pezze was responsible for the engineering review, which verified the data submitted by Mostoller. (N.T. 265)

34. Emission factors from the U.S. Environmental Protection Agency publication AP-42, "Compilation of Air Pollutant Emission Factors" were used to determine the estimated fugitive dust emissions which would be generated by the facility. (Pezze, N.T. 266)

35. AP-42 is generally recognized and accepted within the scientific community. (Pezze, N.T. 263,266)

36. Based on the data provided on Form 15, using AP-42 and other fugitive dust emission data compiled by the Department, Mr. Pezze testified that the facility will not cause ambient air quality standards to be exceeded. (N.T. 267-70)

37. The conclusion that the ambient air quality standard will not be exceeded is not required by a dispersion modeling.

a. Dispersion air modeling is only required if the facility is a major source. Since the proposed facility only has the potential to emit 30 tons per year, it is not a major source which required dispersion modeling.

b. Major facilities under the APCA are those which emit 250 tons per year of particulate matter. Such facilities must perform dispersion modeling to predict the off site impacts of such emissions.

c. Since the proposed facility has the potential to emit 30 tons per year, it does not qualify as a major source.

(Pezze, N.T. 276)

38. Mostoller will employ certain measures to control fugitive dust emissions. For example

a. flush paved roadways with a pressurized water truck;

b. water unpaved roadways;

c. install a truck wash to minimize any track-out of dust or dirt; and

d. restrict speed of vehicular traffic to 15 m.p.h. on paved roadways, and 10 m.p.h. on unpaved roadways.

(Pezze N.T. 268; Ex 1(d); Ex. 2, Permit Condition 81)

39. Mr. Pezze testified that the amount of fugitive dust emitted from a landfill depends primarily on the amount of traffic coming into and going out of the landfill and the earthmoving activity at the landfill, not on the type of waste being disposed of at the landfill. (N.T. 264)

40. The application provided information as to how Mostoller intended to control gaseous emissions from the proposed landfill and the Department's imposition of Permit Conditions 76-80 are designed to ensure compliance with the requirements of the APCA.

41. The opinions of Mr. Pezze concerning the fugitive dust emissions from the proposed facility were given with a reasonable degree of scientific certainty. (N.T. 270)

42. The Board finds the testimony of Mr. Pezze to be more competent and credible than that of Dr. Kopstein. Dr. Kopstein acquired his only familiarity with the APCA and its accompanying regulations though a review of the documents associated with this appeal. (N.T. 41). He has never estimated fugitive dust emissions from a landfill, nor is he familiar with AP-

42. (N.T. 47-49)

Need Assessment

43. County Commissioner David L. Mankamyer testified that the county objected to the issuance of the permit because its waste disposal needs were met by two existing facilities and because the county was not generating as much waste as predicted in its county plan. (N.T. 150)

44. The Department made its determination on this contention based on a needs assessment. The purpose of a needs assessment is to determine whether an application for a municipal waste facility meets the criteria of Section 507 and Section 1111 of the Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. §§ 4000.507 and 4000.1111, and regulations adopted at 25 Pa. Code §§ 271.127,273.138 and 273.139.

45. David Eberle, Facilities Supervisor in the Department's Section of Waste Management, testified that the information necessary to conduct a needs assessment was included in the permit application in Forms 45, 46, and Form D which are Exhibits 1(h),(i), and (b) respectively. (Eberle, N.T. 210-12)

46. The purpose of Form 45 is to ensure that there will be sufficient disposal capacity for Pennsylvania communities for at least ten years, implementing 25 Pa. Code §273.138. Form 46 is designed to obtain information sufficient to determine whether or not a site meets the criteria of county plans, implementing 25 Pa. Code §273.139. Form D implements the environmental assessment requirements found in 25 Pa. Code §271.127. (Eberle, N.T. 210-11, 213-14).

47. Mostoller and the Commissioners entered into an agreement regarding the processing and disposal of 400 tons per day of municipal waste generated in the County, wherein Mostoller agreed to reserve capacity for the disposal of waste for a ten (10) year period, ending August 31,

2000. (Stipulation of Fact No. 12; Ex. 8)

48. Pursuant to this agreement, Mostoller was included on the county's Municipal Waste Plan, which was approved by the Department on April 1, 1991; the Plan incorporates the agreement between Mostoller and the County. (Stipulation of Fact No. 13; Ex. 6)

49. The County Plan has not been revised since its approval by the Department. (Stipulation of Fact No. 18)

50. Eberle was responsible for, among other things, reviewing the forms germane to the needs assessment to determine whether or not the information provided demonstrated compliance with the Municipal Waste Act and the accompanying regulations. (Eberle, N.T. 206-209).

51. Form 45 requires the permit applicant to submit evidence of a contractual commitment between the landfill operator and the host municipality/county which reserves capacity for municipal waste disposal. Form 45 of Mostoller's permit application included the letter of intent in which Mostoller agreed to accept municipal waste from the County. (Eberle, N.T. 210-11; Ex. 1(h); Ex. 7)

52. Form 46 is used by the Department to determine whether or not a site meets or does not violate any county plans, pursuant to 25 Pa. Code §273.139. It requires the applicant, among other things, to identify any county plans that have designated the facility to receive waste from that particular county. (Eberle, N.T. 211; Ex. 1(i))

53. Form 46 of Mostoller's application did not contain an environmental siting analysis because the proposed facility is expressly provided for in the county Plan and the siting analysis was not required. (Eberle, N.T. 212)

54. Form D is used by the Department to determine where a landfill can be located, and if it will have any adverse effects on the surrounding area, implementing 25 Pa. Code §271.127 (Eberle, N.T. 213; Ex. 1(b))

55. Eberle concluded, after verifying the information provided in the forms, that the proposed landfill met the requirements of the Municipal Waste Planning Act and the accompanying regulations, because the proposed facility is explicitly provided for in the County's waste plan. His determination was accepted by Anthony D. Orlando, Solid Waste Manager of the Department's Southwest Regional Office, who was responsible for the ultimate approval to issue a permit. (Eberle N.T. 212-13).

56. The Commissioners have made no attempt to revise the County Plan. (Eberle, N.T. 216)

Public Comment

57. Rita Coleman, Facilities Supervisor in the Southwest Regional Office of the Bureau of Waste Management, testified that public hearings are not held for every landfill permit application. A hearing was held in this case because it was requested by members of the public. (N.T. 179)

58. The Department held a public hearing concerning the permit application on April 21, 1993. Presentations were made by county officials, township officials and concerned citizens, most of whom were in opposition to issuance of the permit. (Coleman, N.T. 179-81)

59. As part of Ms. Coleman's duties as supervisor for the technical review team, she summarized the comments made during the public hearing. She included them along with findings of fact and recommendations in an official document which was provided to each staff member who was reviewing the permit application. (Coleman, N.T. 182-83)

60. Ms. Coleman testified that the regulations for obtaining public input on applications for residual waste facilities are the same as for municipal waste facilities. (N.T. 190)

61. The County Commissioners met several times with the Department and corresponded with the Department concerning the permit. (Mankamyer, N.T. 157; Ex. 11)

62. The procedure used by the Department for reviewing public comment in this case was consistent with procedures used for reviewing other, similar permits. (Coleman, N.T. 176)

63. The Department concluded that the permit application satisfied the needs criteria and bonding requirements. Because the county as the host municipality objected to the permit, the Department also included an override justification when it issued the permit to Mostoller.

a. The purpose of the override justification is to weigh the merits of the objections of the municipality based on the regulatory and design requirements of a proposed facility and determine whether the objections can be addressed with a design change or permit condition.

b. In this particular case, the override justification also addressed concerns raised by citizens, even though the Department is not required to do so in the regulations.

c. The Department issued the override justification because it concluded that the proposed facility satisfied the needs assessment criteria and bonding requirements. The override justification is attached to the permit.

(Coleman, N.T. 184-86)

Sufficiency of the Bond

64. Mr. Eberle was responsible for evaluating the amount of the closure bond. He testified that the purpose of the bond is to assure that in the event a solid waste disposal facility must be

closed by the Department before its anticipated closure date, there are sufficient funds to close the facility in a manner that will not harm or pose a risk to the environment. (N.T. 216-17)

65. The estimated costs for the various steps in closure are calculated through the use of construction manuals and manufacturers' data, and the bond amount is adjusted to account for inflation and include contingencies for unanticipated events. However, the calculation of the bond amount does not, and need not, account for catastrophic events such as a gross breach of the liner. (Eberle, N.T. 223-24,226,230-31)

66. The total bond for the proposed facility in the amount of $4.2 million, is 20% more than the estimated costs for closing the facility. (Ex. 1(f), Bond Determination Worksheet at 8.1) Closure costs will be updated within 90 days of the closure, and in the event of increased costs, a new bond will be submitted to the Department (Ex. 1(f), Narrative at 12)

67. The Department has mechanisms and authority, other than the amount of the bond itself, which take into account unanticipated, catastrophic events. For example the Department:

a. has the authority to request an additional bond from a permittee in the event of a situation which was not anticipated when the original bond was calculated (Eberle, N.T. 226);

b. will not release the bond for 10 years after final closure, during which on-going monitoring occurs (N.T. 225); and

c. may institute enforcement action, which may include suspension or revocation of the permit, to assure the facility is operated in accordance with SWMA and its regulations (N.T. 224-27; 248-49; Ex. 2, Condition 97).

DISCUSSION

The Commissioners bear the burden of proof. 25 Pa. Code §1021.101(c)(2). To satisfy this burden, the Commissioners must show by a preponderance of the evidence that the Department's issuance of the permit was unlawful or an abuse of discretion. 25 Pa. Code §1021.101(a); Heasley v. DER, 1994 EHB 624. While the review conducted by the Board is a *de novo* review, the Board ordinarily will affirm the Department's actions if the record made by the Commissioners fails to establish that the Department abused its discretion in issuing the permit. Western Hickory Coal v. DER, 485 A.2d 877 (Pa. Commw. Ct. 1984).

The two principal issues presented to us for review by the Commissioners are whether the leachate data considered by the Department was properly used as a basis for concluding that the facility's liner will be compatible with the waste streams to be generated at the facility. The second principal issue is whether the Department failed to use its discretion in issuing the permit because of its failure to determine the nature and likelihood of fugitive emissions from the facility.

The Commissioners have also raised several issues in their appeal which are technically waived because they failed to adequately preserve them in their post-hearing brief. This Board has long held that issues not raised in a party's post-hearing brief are deemed waived. See, e.g., Lucky Strike Coal Co. v. DER, 547 A.2d 447 (Pa. Commw. Ct. 1988). Merely proposing findings of fact without developing any argument is ordinarily not sufficient to preserve issues for our review. Heasley v. DER, 1994 EHB 624. Nevertheless, because of the importance of the public interest in the particular circumstances of this case, we have addressed the Commissioners' concerns regarding the adequacy of the Department's assessment of need for the

proposed facility, the adequacy of the Department's review of public comment, and the adequacy of the closure bond.

Leachate and Liner Compatibility

The Commissioners first argue that the Department abused its discretion in issuing the permit because the leachate data used in the application was not adequate to determine the compatibility of the proposed liner system. Specifically, the Commissioners contend that it was erroneous to predict the character of the leachate for the proposed facility by using data from leachate produced by the Southern Alleghenies Landfill. This argument is based upon Dr. Melvyn Kopstein's[4] contention that the leachate from the Southern Alleghenies Landfill did not provide an accurate comparison, because Southern Alleghenies accepts only 20% residual waste, and Mostoller will accept 80% residual waste. (Finding of Fact Nos. 25-26) This calculation was based on the fact that Mostoller has reserved a certain capacity for municipal waste, therefore Dr. Kopstein concluded that the remainder would be composed of residual waste.

Section 273.161 of the SWMA regulations requires an application to contain information concerning the liner system which demonstrates, among other things, that

> leachate will not adversely affect the physical or chemical characteristics of the proposed liner system, or inhibit the liner's ability to restrict the flow of solid waste, solid waste constituents or leachate, based on the most recent edition of *EPA Method 9090* (Compatibility Test for Wastes and Membrane Liners), or other documented data.

25 Pa. Code §273.161(c)(emphasis in original). The Department allows proposed facilities to

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[4]Dr. Kopstein's testimony was accepted over the objections of Mostoller and the Department (N.T. 55-57). Dr. Kopstein was permitted by the presiding board member to testify as an expert in chemical engineering analysis relating to fugitive emissions and leachate characteristics. (N.T. 56).

present evidence of the liner's adequacy by testing leachate produced by existing facilities which have similar characteristics to the proposed facility. (Finding of Fact No.11) This policy is based on twenty years of leachate data collected by the Department which shows that the chemical characteristics of leachate do not vary significantly from landfill to landfill. (Finding of Fact No. 12)

Using this methodology, Mr. Evers prepared the portion of the application which included the liner compatibility study, using leachate collected from Southern Alleghenies, as well as data from other landfills. (Finding of Fact Nos.13, 15) Based on the studies submitted in the application, the Department determined that the proposed facility conformed to the requirements of 25 Pa. Code §273.161.

There are several flaws with the Commissioners' argument that the Department erred in approving Mostoller's liner compatibility analysis. Dr. Kopstein's opinion relied in great part on the proportion of residual waste and municipal waste that he determined the proposed landfill would be accepting. First, the terms "residual waste" and "municipal waste" refer to the source of solid waste, not its chemical composition. Section 103 of SWMA, 35 P.S. §6018.103.[5]

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[5]Section 103 of SWMA defines municipal and residual waste. "Municipal waste" is defined as:

> Any garbage, refuse, industrial lunchroom or office waste and other material including solid, liquid, semisolid or contained gaseous material resulting from operation of residential, municipal, commercial or institutional establishments and from community activities and any sludge not meeting the definition or residual or hazardous waste hereunder from a municipal, commercial or institutional water supply treatment plant, waste water treatment plant, or air pollution control facility.

"Residual waste" is

Accordingly, in the last twenty years the Department has gathered extensive data concerning leachates generated by waste facilities and determined that, in fact, the ratio of residual to municipal waste does not significantly alter the chemical composition of the leachate. (Finding of Fact No.12) Jeffrey Evers, in his ten years of experience, also found this to be true. (Finding of Fact Nos. 18, 27).

Second, the liner compatibility study was not based solely on the leachate comparison with Southern Alleghenies Landfill. Mr. Evers testified that the Southern Alleghenies data was augmented with data from other facilities, including a residual waste impoundment. (Finding of Fact No. 20)

Third, Dr. Kopstein did not offer any opinion concerning the adequacy of the proposed liner system. He was not familiar with the EPA Method 9090 used to determine compatibility of liners with leachate. Even if we accept his analysis, the Commissioners failed in their burden of proving that the liner would not restrict the flow of leachate as required by Section 273.161(c). We find no error or impropriety in the conclusion by the Department that the liner system for the proposed facility will not be adversely affected by the leachate produced by the proposed landfill.

Based on the comparative quality of experience and familiarity with the pertinent laws and regulations, we find the testimony of Mr. Evers to be more credible and competent than the

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> Any garbage, refuse, other discarded material or other waste including solid, liquid, semisolid, or contained gaseous materials resulting from industrial, mining and agricultural operations and any sludge from an industrial, mining or agricultural water supply treatment facility, waste water treatment facility or air pollution control facility, provided that it is not hazardous. . . .

35 P.S. §6018.103.

testimony of Dr. Kopstein.

Air Quality Issues

The Commissioners assert that the Department abused its discretion in issuing the permit because the application did not characterize the fugitive emissions from the facility with respect to rate of generation, content of the emissions, the upper or lower limits of the expected rate of emissions or the nature and likelihood of fugitive emissions from the facility. These contentions are based on the testimony of Dr. Melvyn Kopstein who testified that the application failed to contain adequate information demonstrating the nature and likelihood of fugitive emissions from the facility. He said that there was no information regarding sources of fugitive dust over the facility's roads and that there was no information contained in the application relating to upper and lower bounds of emissions or of the content of those emissions. (Finding of Fact No.29)

Dr. Kopstein's testimony is not sufficient to show that the Department abused its discretion in issuing the solid waste permit. To begin with, Dr. Kopstein's testimony made no distinction between fugitive dust emissions generated by earth moving activities and traffic at the landfill and fugitive gaseous emissions from waste decomposition and the landfill gas management system. This distinction is critical because Section 502(d) of the SWMA, 35 P.S. § 6018.502, requires only that the application for the permit set forth the manner in which the operator plans to comply with the requirements of the APCA. With respect to gaseous emissions, the permit application describes the landfill gas management system which Mostoller proposes to use to control gaseous emissions and Conditions 76-80 of the permit were designed to require Mostoller to implement control measures which would meet the requirements of

APCA. The Department properly conditioned the solid waste permit on Mostoller's securing appropriate air quality permits before waste is deposited at the facility and by proper operations of the landfill gas management system. (Ex. 2, Conditions 76-80) The type and quantity of gaseous emissions then become relevant during the course of the air quality plan approval and review process which Mostoller must comply with before any waste material can be placed in the landfill. Accordingly, the Department's approach to the fugitive gaseous emissions is not an abuse of discretion because it assures that the gaseous emissions from the facility will be regulated in accordance with appropriate air quality plan approvals and operating permits before the commencement of waste disposition. We have specifically approved this approach to waste and air permitting. Lower Windsor Township v. DER, 1993 EHB 1305.

With respect to fugitive dust emissions from landfill facilities, the testimony of Joseph Pezze conclusively demonstrated that the application and the Department's analysis fully complied with the requirements relating to fugitive dust emissions. Municipal waste regulations provide that a municipal waste landfill operator must prevent and control air pollution in accordance with the Air Pollution and may not cause or contribute to exceeding ambient air quality standards. 25 Pa. Code §273.217.

The data submitted to the Department using the AP-42 and other data collected by the Department over the years, indicated that the proposed facility will only generate 30 tons per year of fugitive dust emissions. Mr. Pezze testified that the proposed facility will not cause ambient air quality standards for particulate matter to be exceeded. (Finding of Fact No.36) Moreover, he testified that the application was not required to submit dispersion modeling to demonstrate emissions of fugitive dust will not cause a violation of air quality standards because

the facility will not qualify as a major source of dust emissions. (Finding of Fact No. 37)

Mr. Pezze also described the regulatory requirements with respect to Mostoller's obligation to control fugitive dust emissions. The regulations require access roads to be constructed in a certain way to control dust and erosion, by, for example, paving access roads, and preventing the tracking of mud on and off the site. 25 Pa. Code § 273.213. Also Mostoller is required to put into place other measures to control fugitive dust such as applying water on an as-needed basis to the shoulder of the public highway for a distance of 500 feet in both directions from the proposed facility and restricting the speed of vehicular traffic within the facility to 15 miles per hour on paved roadways and 10 miles per hour on unpaved roadways. Condition 81 of the permit implements these regulatory requirements. (Finding of Fact No. 38) We hold that the Department did not err in concluding that the proposed facility satisfied the regulatory requirements of fugitive dust emissions from the facility.

We find the testimony of Mr. Pezze to be more competent and credible than the testimony of Dr. Kopstein, taking into consideration the quality of their professional experience, and familiarity with the relevant laws and regulations.

Needs Assessment and Public Comment

The Commissioners argue that the proposed landfill is not actually needed, because the county is generating less waste than was originally estimated in their county plan, and that the county's current needs are satisfied by existing landfills.

The purpose of a needs assessment is to assure that the proposed facility complies with Sections 507 and 1111 of the Municipal Waste Planning Act, 53 P.S. §4000.507 and §4000.1111. Generally speaking, a facility complies with these statutes where it is provided for

in a county plan pursuant to Section 507, and has reserved capacity for the host municipality's and county's waste disposal needs pursuant to Section 1111. The Commissioners do not dispute that Mostoller is included in their county plan nor that they have entered into an agreement with Mostoller to reserve capacity for waste generated by the county. There is simply no requirement in the regulations that a proposed facility must demonstrate "actual" need when it is provided for in the appropriate county plans.

The Commissioners only contend that the Department failed to consider the need for the proposed facility because the facility will not be used to implement the County Plan as provided in 25 Pa. Code § 271.127(g). That section provides:

> The Department may consider a proposed municipal waste landfill . . . to be needed for municipal waste disposal or processing if the following are met:
>
> (1) The proposed facility . . . is provided for in an approved county plan.
>
> (2) The proposed facility will actually be used to implement an approved county plan based on implementing documents submitted under § 272.245 (relating to submission of implementing documents) or other clear and convincing evidence acceptable to the Department.

Implementing documents include "ordinances, contracts or other requirements to implement an approved plan." 25 Pa. Code §272.245; see also 25 Pa. Code §272.231.

Mostoller presented ample evidence demonstrating that its facility was expressly provided for in the Somerset County plan and had an agreement in place with the county to reserve 400 tons of capacity for the county's disposal needs. (Finding of Fact Nos. 47,48;Ex. 8,15,16) The Commissioners do not dispute that Mostoller is included on the approved county plan for Somerset County, which satisfies the first prong of 25 Pa. Code §272.127.

Reviewing the evidence, it is also clear that the second prong is satisfied as well. The

implementing documents for Somerset County include the municipal disposal agreement between the County and Mostoller (Ex. 8) and a flow control ordinance which specifically designates Mostoller as an "exclusive designated [disposal] site." (Ex. 6) The Department was well within its authority to rely on these documents in order to conclude that the proposed facility "will actually be used to implement" the county plan as provided by the plain language of the regulation. There is simply no requirement that would require the Department to look beyond this documentation and determine that the facility is no longer needed; instead the Department's review must be "based on implementing documents" relating to the county plan. 25 Pa. Code §271.127(g)(2); see also Milk Control Commission v. Penn Fruit Co., 410 Pa. 242, 188 A.2d 705(1963)(in interpreting a statute, plain words should not be ignored). If the Mostoller facility was no longer needed to implement the county's waste disposal plan, the appropriate remedy would have been for the Commissioners to revise the county plan. See Section 501 of Municipal Waste Planning Act, 53 P.S. § 4000.501. Therefore the Department did not abuse its discretion in concluding that Mostoller had satisfied the requirements of the needs assessment for the permit application.

We further find that the Department adequately took into consideration the comments of the public. The Commissioners argue that the Department violated the provisions of 25 Pa. Code § 287.153, by failing to consider public comment. They do not specify in what manner the Department failed to consider public comment.

The regulations do not mandate the Department to hold a hearing.[6] Rita Coleman

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[6]Section 287.153, cited by the Commissioners, relates to public comments for residual waste landfills. An identical provision is found in the regulations for municipal waste landfills at

testified that the Department does not hold a hearing in every case. (Finding of Fact No. 57) In this case a hearing was held because it was requested by members of the public. The Department then prepared a report of the comments made at that hearing pursuant to Section 271.143(c). The Department also held informal meetings with the Commissioners which was permitted pursuant to the provisions of Section 271.143(d). After reviewing these comments, the Department decided that there were compelling reasons to grant the permit and prepared an override justification explaining why. (Finding of Fact No. 63) The Department did not fail to consider public comments simply because it came to a different conclusion than that advocated by the Commissioners. See New Hanover Township v. DER, 1991 EHB 1234 (holding that the Department acted within its authority in issuing a permit "in the face of strenuous local government objections.") The Department did not abuse its discretion.

Sufficiency of the Bond

The Commissioners contend that the bond amount required by the Department is insufficient to prevent adverse effect on the public health and safety and the environment, but again fail to specify in what respect it is insufficient. The Commissioners presented no testimony on this issue at the hearing.

The purpose of the bond is to ensure that there are sufficient funds to close the facility in a manner that will not harm or pose a risk to the environment[7]. Section 505(a) of SWMA

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25 Pa. Code § 271.143. That regulation provides that the Department may conduct public hearings and prescribes certain protocols if a public hearing is held.

[7] The Commissioners cite 25 Pa. Code §287.331 which relates to the bond determination for residual waste landfills. A virtually identical provision appears in the regulations pertaining

provides that

> The amount of the bond required shall be in an amount determined by the secretary based upon the total estimated cost to the Commonwealth of completing the final closure according to the permit granted to such facility and such measures as are necessary to prevent adverse effects upon the environment; such measures include but are not limited to satisfactory monitoring, post-closure care, and remedial measures.

35 P.S. §6018.505(a). The bond is not meant to cover unexpected catastrophic events. Concerned Residents of the Yough, Inc. v. DER, 1993 EHB 973. The Department has other mechanisms in place to protect the environment from catastrophic events, such as a breach of the liner system. (Finding of Fact No.67) For example, the Department can demand an additional bond in the event of an unanticipated situation. (Id.) The Department can ensure compliance with the terms of the permit and the relevant regulations through its enforcement authority. Id.

David Eberle testified at length concerning the bond calculation. He explained that the cost for various remedial actions that are required for the closure of a solid waste facility are estimated based on construction manuals and manufacturing data. These costs are then adjusted for inflation and certain unanticipated events. (Finding of Fact No. 65) These calculations resulted in a bond amount of $4.2 million. We can ascertain no error in the Department's methodology, or abuse of discretion. There is simply no support for the Commissioners' claim that the Department improperly calculated the amount of the bond it required Mostoller to post.

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to municipal waste landfills at 25 Pa. Code §271.331. Both of these regulations implement Section 505 of SWMA. Mr. Eberle testified that the method for calculating the bond for a municipal waste landfill is not different than that used for residual waste landfills. (N.T. 221)

CONCLUSIONS OF LAW

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

2. A third party appealing the Department's approval of a permit application bears the burden of proving that the Department abused its discretion or committed an error of law in approving the permit. 25 Pa. Code §1021.101(c)(3).

3. All contentions which are not preserved by a party in its post-hearing brief are deemed to be waived. Lucky Strike Coal Co. v. DER, 547 A.2d 447 (Pa. Commw. Ct. 1988).

4. The Board finds the testimony of Joseph Pezze and Jeffrey Evers to be more competent and credible than the testimony of Dr. Melvyn Kopstein.

5. The Department properly concluded that Mostoller's proposed liner would be compatible with the leachate to be generated on the basis of Method 9090 testing performed on the proposed liner with leachate from similar facilities.

6. The proposed facility conformed to the requirements of 25 Pa. Code §273.161 because the permit application adequately demonstrated the compatibility of the liner system with leachate which is likely to be produced by the proposed facility.

7. The Department adequately analyzed the nature and likelihood of fugitive dust emissions which will be emitted by the proposed facility.

8. Condition 81 of the permit regarding the control of fugitive dust emissions was imposed in accordance with APCA and 25 Pa. Code §273.217 (regarding air resources protection).

9. The permit application adequately assessed the need for the proposed facility pursuant to 25 Pa. Code § 271.127 because the facility was designated in the approved plan of Somerset

County.

10. The Department's approval of the permit application was in accordance with Sections 507 and 1111 of the Municipal Waste Planning Act and 25 Pa. Code §§273.138 and 273.139.

11. Pursuant to 25 Pa. Code §271.143 the Department may consider public comments; it is not required to accept or adopt those comments. New Hanover Township v. DER, 1991 EHB 1234.

12. The Department considered and addressed all relevant public comments on the permit application in accordance with its duty under 25 Pa. Code §271.143.

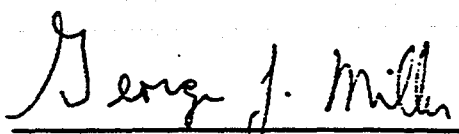
13. The bond amount approved by the Department complies with the requirements of Section 505(a) of SWMA and regulations promulgated pursuant thereto.

14. The Department's issuance of the permit was not arbitrary, capricious, or otherwise an abuse of discretion.

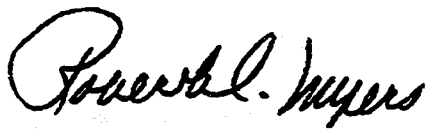
ORDER

AND NOW, this 4th day of April, 1996, it is ordered that the appeal of the County Commissioners, Somerset County is dismissed in accordance with the foregoing adjudication.

ENVIRONMENTAL HEARING BOARD

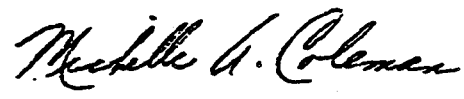


GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 4, 1996

See following page for service list.

EHB Docket No. 95-031-MG
Service List

c: **DEP Bureau of Litigation**
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For Permittee:
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M. DIANE SMITH
SECRETARY TO THE B

LINDE ENTERPRISES, INC.	:	
	:	
v.	:	**EHB Docket No. 93-269-MR**
	:	**(consolidated with 94-064-MR)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	
	:	**Issued: April 5, 1996**

ADJUDICATION

By: Robert D. Myers, Member

Syllabus:

A contractor excavated soil on site A and removed it to site B, where it was used as fill on a construction project, without obtaining a permit from the Department of Environmental Protection (DEP) under the Noncoal Act. DEP issued compliance orders directing the contractor to cease (which the contractor ignored), followed by an assessment of civil penalties. The Board holds that the soil constituted "earth" or "fill" under the definition of "minerals" in the Noncoal Act and that the excavation of the soil, therefore, constituted "surface mining" under the Noncoal Act. The Board holds further that the contractor is not entitled to the Building Construction Exemption because, since the construction of a building on site A was only speculative at the time the excavation occurred, the excavation was not conducted "concurrently with construction." Finally, the Board holds that the civil penalties assessed were required by the Noncoal Act and "reasonably fit" the violations.

PROCEDURAL HISTORY

On September 23, 1993, Linde Enterprises, Inc. (Linde) filed a Notice of Appeal at Board Docket No. 93-269, seeking Board review of Compliance Order (C.O.) No. 93-5-140-N, issued on August 23, 1993 by the Department of Environmental Resources (now the Department of Environmental Protection) (DEP), and C.O. No. 93-5-143-N, issued by DEP on August 30, 1993. The C.O.s, issued pursuant to provisions of the Noncoal Surface Mining Conservation and Reclamation Act (Noncoal Act), Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3301 *et seq.*, and the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, charged Linde with conducting noncoal surface mining without a permit on a site in Texas Township, Wayne County, and ordered Linde to cease operations and apply for a permit.

Linde filed another Notice of Appeal on March 25, 1994 at Board Docket No. 94-064, seeking Board review of DEP's February 25, 1994 Assessment of Civil Penalty in the total amount of $27,500 for Linde's violations alleged in the C.O.s. On July 14, 1994 the two appeals were consolidated at Board Docket No. 93-269.

Hearings on the consolidated appeals were held in Harrisburg before Administrative Law Judge Robert D. Myers, a Member of the Board, on October 18, 19, and 20, 1994 and January 24, 25, and 26, 1995. Both parties were represented by legal counsel and presented evidence in support of their respective legal positions. DEP filed its post-hearing brief on March 27, 1995; Linde filed its on May 11, 1995. DEP filed a reply brief on May 30, 1995. On June 12, 1995 Linde filed a Motion to Dismiss portions of the reply brief to which DEP filed a

Response on the same date. By a Board Order of June 15, 1995, action on the Motion to Dismiss was deferred to be resolved as part of the Adjudication.

The record consists of the pleadings, a partial stipulation of facts (Stip.) contained in the parties' Joint Response to Pre-Hearing Order No. 2, a transcript of 1161 pages and 57 exhibits.

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

FINDINGS OF FACT

1. Linde is a corporation with a mailing address of P.O. Box A, Honesdale (Wayne County), Pennsylvania 18431, and a principal place of business at R.D. #1, Box 1755, Honesdale (Wayne County), Pennsylvania 18431 (Stip.).

2. DEP is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Noncoal Act; the CSL; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the rules and regulations adopted pursuant to these statutes (Stip.).

3. BGM Fastener Company (BGM), a wholesale distributor of fastener products, is located on a two-acre site in Texas Township, Wayne County, along township road 405. BGM also owns a nearby 135-acre tract at the intersection of Route 652 and Route 6 (BGM Site), the tract which is the subject of the litigation (Stip.; N.T. 19-24).

4. The BGM Site occupies a hill (N.T. 24-25).

5. BGM acquired the BGM Site at or about 1985 because it adjoined other BGM land and would be a likely prospect for future commercial development (N.T. 25-27).

6. During the spring of 1993, BGM decided to proceed with development of the BGM Site. Since BGM's own business facilities were not of sufficient size, the initial thinking was to put a new BGM building on the BGM Site (N.T. 22-23, 26-27).

7. Linde is a utility, heavy and road construction contractor (no building construction), is in the sand and gravel business, and previously was a surface miner of anthracite coal. Linde has a coal surface mining license, a noncoal surface mining license and a noncoal surface mining permit (pertaining to Brown's sand and gravel pit - a site not involved in this litigation) (N.T. 1009-1017).

8. In 1993 Linde was hired as site construction subcontractor by Hoar Construction Co. of Birmingham, Alabama, in connection with a K-Mart project on a tract across Route 6 from the BGM Site. To perform the site construction work, Linde had to bring onto the K-Mart site 50,000 cubic yards of suitable fill material[1] (N.T. 1022-1027).

9. At the time of preparing its bid, Linde considered three sites (not including the BGM Site) from which to obtain the 50,000 cubic yards of fill. None of the owners would have charged for the fill (N.T. 1027-1040; Exhibit L-34).

10. After being contacted in June 1993 by representatives of Wal-Mart Stores, Inc. about the BGM Site, BGM decided the Site was much too valuable to use for its own facilities. It decided to pursue Wal-Mart Stores, Inc. because the presence of that store would increase the value of BGM's remaining land (N.T. 27-32).

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[1]Fill material brought onto a construction project from an off-site location is commonly known as "borrow." The place where the material is excavated is called a "borrow pit" even though it might not resemble a pit: *McGraw-Hill Encyclopedia of Scientific and Technical Terms, Fourth Edition*, McGraw-Hill, Inc., New York, 1989.

11. To make the BGM Site more attractive to Wal-Mart Stores, Inc. and other prospective developers, BGM decided to explore ways to reduce the hill by having earth removed from the Site (Stip.; N.T. 32-33).

12. Aware of Linde's need for fill in connection with the K-Mart project, BGM's Philip Goyette contacted Linde in June 1993 to discuss an arrangement whereby Linde would remove the fill it needed from the BGM Site and leave a level area in its place (N.T. 33-36, 1065-1068).

13. Linde and BGM entered into a Site Improvement Agreement, dated July 31, 1993, providing, *inter alia*, for Linde to remove from the BGM Site approximately 50,000 cubic yards of "fill necessary for the construction" of the K-Mart project, grading the land to a "pre-approved contour" so that BGM would be left with a "viable commercial building site" and an "earth road" for access. Linde was to be responsible for obtaining all permits and approvals from governmental agencies (Exhibits C-13 and C-14).

14. Linde came up with the 50,000 cubic yard figure; BGM was interested in having as much removed as possible (N.T. 47-48).

15. On July 15, 1993, Linde prepared a Site Plan for that portion of the BGM Site where fill was to be removed. The Site Plan showed, *inter alia*, a "proposed building", "parking" and "loading-storage area" (Exhibit C-5).

16. On July 29, 1993, Linde prepared an Erosion and Sedimentation Control Plan for the BGM Site showing the area to be disturbed by the removal of fill but showing no proposed improvements or structures (Exhibit C-31).

17. On or after July 29, 1993 Linde filed the Erosion and Sedimentation Control Plan along with a narrative with the Wayne County Conservation District seeking approval of the erosion and sedimentation (E&S) control facilities and practices (N.T. 402; Exhibit C-31).

18. The Erosion and Sedimentation Control Plan and narrative were found not to be adequate by the Wayne County Conservation District for the reasons set forth in an August 10, 1993 letter to Linde (Exhibit C-35).

19. The Erosion and Sedimentation Control Plan and narrative were revised by Linde and resubmitted on August 18, 1993 on which date they were approved by the Wayne County Conservation District (Stip.; Exhibits C-4, C-15 and C-31).

20. Nothing in the Erosion and Sedimentation Control Plan and narrative indicated the intention to construct a building or other improvements on the BGM Site. These documents indicated, and the Wayne County Conservation District approved them on the assumption that, the 4.09-acre area to be disturbed by excavation would revert to open, grass-covered area (N.T. 406-410; Exhibits C-4 and C-31).

21. Upon receiving a complaint during July 1993 that Linde was planning to obtain fill for the K-Mart project from an unpermitted site, DEP's Inspector Supervisor Colleen Stutzman contacted Linde's Robert Opalka by telephone and admonished the company to obtain a permit unless it came within the Building Construction Exemption. A copy of DEP's Program Guidance Manual explaining the Building Construction Exemption was forwarded to Linde on July 19, 1993 with an accompanying memorandum informing Linde that violations would result in a cease order and civil penalties. Linde received these documents and was aware of their

contents prior to entering into the Site Improvement Agreement with BGM (N.T. 325-327, 364-367, 1087-1092; Exhibit L-35).

22. Linde did not apply for or obtain, and does not have, a Noncoal Surface Mining Permit to conduct mining activities at the BGM Site (Stip.).

23. Linde began working on the BGM Site on or about August 23, 1993, initially removing vegetation and topsoil (unsuitable as fill) and installing E & S controls. When that had been accomplished, Linde began excavating suitable fill material, using a track backhoe, and hauling it in three or four dump trucks across Route 6 to the K-Mart project where it was dumped, leveled by bulldozers and compacted by rollers. Rocks too big for fill purposes were stockpiled on the BGM Site (Stip.; N.T. 245-248, 267-274).

24. On the morning of August 23, 1993, DEP Surface Mine Conservation Inspector Michael Soloski (having been informed by his supervisor (Stutzman) of reports of illegal mining activities) arrived at the BGM Site. Soloski

(a) observed the activity and photographed it;

(b) spoke with Linde's Job Superintendent, Robert McGraw, informed him he was mining without a permit and directed him to cease (action which McGraw declined to take without something in writing); and

(c) repeated these statements to Eric Linde, Linde's CEO, when he arrived on the scene

(Stip.; N.T. 115-121, 248, 286-291, 1095-1096; Exhibits C-2, C-3A and C-3B).

25. Eric Linde

(a) contended that no permit was needed because of the Building Construction Exemption;

(b) refused to cease operations;

(c) took Soloski to Linde's field office on the K-Mart project where he showed him the approved Erosion and Sedimentation Control Plan and narrative and some drawings depicting the proposed BGM building;

(d) stated that no building permit was required in Texas Township for site preparation work; and

(e) told Soloski to contact BGM for more details on the proposed development of the BGM Site

(N.T. 121-124, 292-294, 1096-1101; Exhibits C-2, C-4, and C-30).

26. Soloski told Eric Linde he would have to investigate the matter further. If he concluded that the Building Construction Exemption applied, no order would be issued. Otherwise, a compliance order would be forthcoming (N.T. 125, 294, Exhibit C-2).

27. After returning to his office, Soloski

(a) examined the drawings and found them incomplete and lacking an engineer's seal;

(b) called BGM and was told that there were no blueprints for a building and there were no starting and completion dates because the project was only proposed at this point;

(c) called one of the Texas Township Supervisors and learned that no building permit had been issued for the BGM Site;

(d) discussed his findings with Stutzman;

(e) called Linde's field office, informed McGraw that the Building Construction Exemption did not apply, directed him to cease mining activities and told him a compliance order was being issued that day;

(f) left a message to the same effect for Eric Linde; and

(g) issued C.O. No. 93-5-140-N, citing Linde for mining without a permit and directing operations to cease immediately

(Stip.; N.T. 125-127, 203-205, 295-296, 332, 1101-1102; Exhibits C-2 and C-6).

28. Eric Linde informed Soloski by telephone on August 24, 1993 that it was Linde's legal position that no permit was needed and that operations would continue (N.T. 127-128, 1103-1104).

29. As of August 23, 1993, BGM had abandoned its own construction plans in favor of pursuing Wal-Mart. There was no construction scheduled for the BGM Site, no final building plans and no building permit (N.T. 51-52).

30. As of August 23, 1993 there were no zoning regulations in Texas Township and a building permit was not required until construction of footers (N.T. 83,205).

31. Stutzman inspected the BGM Site on August 30, 1993, found the same activities and equipment observed by Soloski on August 23, 1993 and issued C.O. No. 93-5-143-N, citing Linde for failure to comply with C.O. No. 93-5-140-N, directing Linde to cease mining immediately and informing Linde that the C.O. carries a civil penalty of $750 per day (Stip.; N.T. 325, 327-332; Exhibits C-9 and C-11).

32. While on the BGM Site on August 30, 1993, Stutzman saw no stakes, flags or markers, no foundation nor any other indication that a building was going to be constructed (N.T. 329; Exhibit C-9).

33. C.O. No. 93-5-140-N was amended on September 2, 1993 by C.O. No. 93-5-147-N which changed the corrective action required and the required abatement date and time but left all other requirements in place (Stip.; N.T. 129-131; Exhibit C-12).

34. On September 23, 1993, Linde appealed the C.O.s to this Board (Stip.).

35. Linde continued to remove fill from the BGM Site for use on the K-Mart project until November 1993, moving about 50,000 cubic yards and expending about 1200 manhours (of which 500 related to excavation) (N.T. 250-257; Exhibit C-8).

36. Linde removed additional fill from the BGM Site for use in the K-Mart project during September 1994. Linde expended additional manhours earlier in 1994 installing and maintaining E&S facilities (N.T. 259, 296-317; Exhibits C-55, L-15, L-21 through L-33).

37. Soloski inspected the BGM Site on December 17, 1993, taking photographs and making observations. Soloski

(a) documented the area that had been excavated and partially graded;

(b) documented the E&S control facilities on the Site; and

(c) saw no indications that a building was being constructed on the Site

(N.T. 131-135; Exhibits C-3C through C-3K).

38. On January 5, 1994, Wal-Mart Stores, Inc. (Wal-Mart) entered into a Purchase Agreement with BGM for a portion of the BGM Site (including the area excavated by Linde) and a portion of the Holbert Parcel, for a total purchase price of $850,000 payable as follows: $10,000

with the signing of the Purchase Agreement; $20,000 at the end of the Feasibility Period (the entire $30,000 to be held in escrow); and the balance at the closing. Wal-Mart's obligation to carry out the Purchase Agreement was conditioned, *inter alia*, on the following:

(a) the determination by Wal-Mart after the conclusion of a 150-day Feasibility Period that development of the land as contemplated by Wal-Mart is economical and viable;

(b) the approval of Wal-Mart's Real Estate Committee;

(c) acquisition by BGM of the Holbert Parcel in order to provide access to the BGM Site directly from Route 6;

(d) receipt of subdivision approval and site development approval for construction of at least 195,000 square feet of commercial retail development; and

(e) receipt of bids for complete grading of the land at a cost not to exceed $860,000

(N.T. 52-57; Exhibit C-17).

39. Soloski inspected the BGM Site on February 7, 1994 but it was snow-covered (N.T. 135).

40. Soloski, accompanied by Surface Mine Conservation Inspector James McKenna, inspected the BGM Site on April 6, 1994 during which they determined (by tape measurement) the area of excavation to be about 250 feet wide by 450 feet long and a depth ranging from 2 feet to 8 feet. While additional grading had been done, there was no indication that a building was going to be constructed (N.T. 135-137; Exhibit C-46).

41. Soloski made a joint inspection of the BGM Site on August 23, 1994 with Wayne County Conservation District Resource Conservationist Steven S. Werner. They noted that sedimentation ponds had been enlarged and that additional grading and temporary seeding had been done. There was no indication that a building was going to be constructed (N.T. 139-141; Exhibit C-25).

42. Soloski and DEP Hydrogeologist Thomas L. Whitcomb inspected the BGM Site on September 30, 1994. They

(a) observed renewed excavation activity;

(b) photographed ditches and other E&S control facilities, equipment and the area affected by Linde's activities;

(c) took 9 soil samples at various locations throughout the excavated area, following DEP's standard procedures for collecting, storing and transporting; and

(d) saw no indication that a building was going to be constructed

(N.T. 141-154, 595-596; Exhibits C-26, C-42A through C-42K and C-48).

43. These same Site conditions were present on October 11, 1994 when McGraw photographed them (N.T. 301-310; Exhibits L-15, L-21 through L-33).

44. DEP's Geologic Resources Division, Bureau of Topographic and Geologic Survey, under the supervision of Samuel W. Berkheiser, Jr., Chief of the Division, performed a sample analysis of the 9 soil samples obtained from the BGM Site on September 30, 1994 by Soloski and Whitcomb. The Division

(a) received the samples from Whitcomb and observed that they were packed and sealed in accordance with DEP standard procedures;

(b) performed a visual analysis to determine the organic content, finding it to be less than 1% in all samples;

(c) performed a gradation (size) analysis and found that 6 of the 9 samples were composed of 50% or more sand and gravel;

(d) performed a gross compositional identification on the sand fraction and found that quartz made up 50% to 90% of the sand in 7 of the 9 samples;

(e) found minor rock fragments in 7 of the 9 samples and predominant rock fragments in the other 2;

(f) determined that the rock fragments were shale or siltstone and appeared to be the indigenous sandstones and bedrock material in the area; and

(g) concluded that the sampled material represents an aggregate of various types of minerals - a surficial deposit made through the action of glaciers (N.T. 435-492; Exhibits C-49 and C-52).

45. In a geological context, the only nonmineral material is organic (N.T. 462).

46. While they were not analyzed, the soil samples obtained by McGraw on Linde's behalf on or about October 11, 1994 appeared to Berkheiser to be similar to the material in the 9 soil samples analyzed for DEP. These samples were believed by McGraw to be representative of the material removed by Linde from the BGM Site (N.T. 275-278, 476).

47. DEP's Roger Hornberger, an expert in geology with emphasis on the development of soils from geologic features, conducted an evaluation of the material removed by Linde from the BGM Site. Hornberger

(a) explained that "earth" or "soil" is the product of weathering of bedrock material and the deposition of organic matter, producing an aggregate or mass of material that is mostly mineral in makeup;

(b) characterized Wellsboro Channery Loam (the soil classification of the material on the BGM Site, according to the Erosion and Sedimentation Control Plan and narrative filed by Linde with the Wayne County Conservation District) as a transported soil - that is, a soil that developed on glacial materials, transported by glaciers into the area, and left there;

(c) explained that in glacial till biological activity necessary for soil formation is usually confined to the uppermost horizons, topped by a small organic layer;

(d) stated that the organic layer (topsoil) rarely has less than 95% mineral matter; and

(e) concluded that the material excavated by Linde on the BGM Site was a mineral soil

(N.T. 493-543, 565-567; Exhibits C-44 and C-53).

48. DEP's interpretation of the definition of "minerals" in the Noncoal Act (which includes the terms "earth" and "fill") encompasses all noncoal material extracted by surface mining whether or not the material is considered to be a mineral in the technical, scientific sense (N.T. 603-606).

49. Based on this interpretation, DEP has issued noncoal surface mining permits for materials such as topsoil and cinders (N.T. 333-338, 606-607; Exhibits C-21 and C-22).

50. Based on DEP's interpretation, the material removed by Linde from the BGM Site fell within the definition of "minerals" in the Noncoal Act because it was earth and fill - an aggregate of mineral matter (N.T. 608-609).

51. Based on DEP's interpretation, Linde's removal of the material from the BGM Site constituted "extraction" and "surface mining" under the Noncoal Act (N.T. 609-618).

52. Because the definition of "surface mining" under the Noncoal Act excludes, *inter alia*, "the extraction, handling, processing or storing of minerals from any building construction excavation on the site of the construction where the minerals removed are incidental to the building construction excavation, regardless of the commercial value of the minerals", the regulations at 25 Pa. Code §77.1 provide that the minerals removed are considered incidental if the excavator demonstrates that (A) the extraction, handling, processing or storing are conducted concurrently with construction, (B) the area mined is limited to the area necessary to construction, and (C) the construction is reasonably related to the use proposed for the site (25 Pa. Code §77.1, definition of "Noncoal Surface Mining Activities").

53. In order to assist DEP personnel in administering this so-called "Building Construction Exemption," DEP's Bureau of Mining and Reclamation issued a Program Guidance Manual (PGM) on June 15, 1991. The PGM, *inter alia*,

(a) points out that only a small percentage of building construction sites will involve the removal of excavated noncoal minerals to another site, it being far less expensive to regrade them on the site of the excavation;

(b) states that DEP's chief concern are those sites where noncoal minerals are excavated and removed for sale or barter, and are not incidental to construction;

(c) suggests that zoning or planning approval, the issuance of a building permit, the existence of construction plans and the availability of financing are factors to be considered in determining whether an excavation is intended for building construction;

(d) advises that the building construction activity should take place soon after the excavation in order to be concurrent but that on some sites extensive grading may have to be done first;

(e) advises that the excavation and marketing of materials from areas not necessary to accommodate the construction of buildings and related facilities is not incidental; and

(f) sets forth six situations as examples and indicates whether they qualify for the Building Construction Exemption

(N.T. 209-210, 326-327, 620-626; Exhibit C-10).

54. The PGM was one of the documents sent to Linde's Robert Opalka by DEP's Colleen Stutzman on July 19, 1993 (see Finding of Fact No. 21).

55. Linde's mining and geological experts, Frederick C. Spott and Lawrence D. Malizzi, interpret the Noncoal Act to exclude the excavation and removal of materials with no commercial value (such as overburden or subsoil) for use as fill (N.T. 826-831, 835-840, 918-923, 926-937).

56. Spott and Malizzi agree, therefore, that a Noncoal permit is needed for the excavation and sale of topsoil, since that material has commercial value (N.T. 860, 942).

57. Spott concedes that even overburden and subsoil have value to a contractor who can use them to provide fill on a construction project (N.T. 868).

58. DEP's application form for a Noncoal permit contains items that would not apply to the excavation of "earth" or "fill" (N.T. 333-338, 841, 876, 894, 897, 928, 931, 960-961).

59. Eric Linde's interpretation of the Noncoal Act excludes construction excavation from surface mining and allows the incidental removal of noncoal minerals encountered during such excavation (N.T. 1075, 1077-1078).

60. Eric Linde also maintains that DEP's administration of the Building Construction Exemption is outmoded because construction projects currently proceed to site preparation before building plans are finalized, building permits obtained, and financing secured. As a result, there frequently are long delays between site preparation and pouring of footers (N.T. 1105-1106, 1115-1116).

61. As of the date of the last day of hearings on January 26, 1995, the status of the sale of the BGM Site to Wal-Mart was as follows:

(a) sanitary sewer service had been applied for and approved in July 1994;

(b) an additional $20,000 had been placed in escrow by Wal-Mart in October 1994;

(c) Wal-Mart had switched engineers in December 1994 after spending between $100,000 and $200,000 without receiving an acceptable site development plan;

(d) an overall conception plan prepared by the new engineer in January 1995 had been approved by Wal-Mart's Real Estate Committee;

(e) Wal-Mart had not yet purchased the BGM Site;

(f) No closing date had been set; and

(g) No building permit had yet been issued

(N.T. 985-1003; Exhibit L-34).

62. All of the various site development plans prepared by Wal-Mart's engineers required the removal of from 100,000 to 350,000 additional cubic yards of material from the BGM Site (N.T. 48, 1109-1111).

63. The overall conception plan prepared in January 1995 shows the area excavated by Linde to be used only for access to the part of the BGM Site where the building actually is to be constructed (N.T. 59-60, 1005).

64. There are vendors in the Honesdale area who sell fill either by the ton or the cubic yard at prices varying with the quantity purchased. 50,000 cubic yards of fill could be obtained for $2.00 per cubic yard (N.T. 768-771).

65. Removing fill in exchange for grading a site is viewed as a bartering transaction and would have to be included in gross income for tax and accounting purposes (N.T. 772, 778).

66. Requiring Noncoal permits for borrow sites protects the public interest by focusing on environmental concerns (such as the impact on surface and groundwater), safety concerns (such as the hazards inherent in an open pit) reclamation concerns (such as blending the site into the surrounding land), compliance history and landowner consent (N.T. 599-602).

67. Walter Dieterle is a Monitoring and Compliance manager with DEP, responsible for calculating civil penalties. On September 1, 1993 he forwarded to Linde a Notice

of Proposed Civil Penalty Assessment in the amount of $5,000 for the violations contained in C.O. No. 93-5-140-N (N.T. 720-721; Exhibit C-33).

68. As set forth on the civil penalty worksheet enclosed with the Notice of Proposed Civil Penalty Assessment and as explained in his testimony, Dieterle

(a) used DEP's Program Guidance Manual for Noncoal Civil Penalty Assessments which instructs that penalty calculations must be reviwed for seriousness, culpability, speed of compliance, cost to the Commonwealth, savings to the violator and compliance history;

(b) considered the levels of seriousness to be at the high end of the medium range and calculated it at $2,500;

(c) considered the level of culpability to be at the midpoint of the recklessness range and calculated it at $2,500; and

(d) combined these two amounts for a total proposed assessment of $5,000, the maximum amount that can be assessed for 1 day's violations under the Noncoal Act (N.T. 715-725; Exhibits C-33 and C-51).

69. Dieterle forwarded to Linde on September 7, 1993 a Notice of Proposed Civil Penalty Assessment in the amount of $2,250 for the ongoing violations contained in C.O. No. 93-5-143-N (N.T. 725-726; Exhibit C-34).

70. As set forth in the civil penalty worksheet enclosed with the Notice of Propsed Civil Penalty Assessment and as explained in his testimony, Dieterle based the penalty on the mandatory $750 per day for each of the three days of violations that had accrued up to September 1, 1993, informing Linde that the amount would continue to accrue (N.T. 725-726; Exhibit C-34).

71. Linde requested a meeting to discuss the Proposed Civil Penalty Assessments and the meeting was held (N.T. 731-732).

72. On February 25, 1994, DEP issued an Assessment of Civil Penalty inposing a total penalty of $27,500 made up of the following:

(a) the $5,000 proposed on September 1, 1993; and

(b) $22,500 representing 30 days (August 30, 1993 to September 30, 1993) of violations at $750 per day. DEP capped this penalty at 30 days despite the fact that Linde still was not in compliance

(Stip.; N.T. 719-720, 725-726; Exhibit C-19).

73. The $27,500 Assessment of Civil Penalty was consistent with other DEP assessments for similar violations of the Noncoal Act (N.T. 726).

74. On March 25, 1994, Linde filed a Notice of Appeal at Board Docket No. 94-064 from the Assessment of Civil Penalty. This appeal, as noted at the outset, was consolidated with the earlier appeal from the C.O.s at Board Docket No. 93-269 (Stip.).

DISCUSSION

DEP has the burden of proof: 25 Pa. Code §1021.101(b)(3). To carry the burden, DEP must show by a preponderance of the evidence that the issuance of the C.O.s and the assessment of civil penalty were lawful and appropriate exercises of its discretion: 25 Pa. Code §1021.101(a). Since the Building Construction Exemption is a statutory exception, Linde's entitlement to it is in the nature of an affirmative defense with respect to which Linde has the burden of proof: *Commonwealth, Pennsylvania Liquor Control Board v. T.J.J.R., Inc..*, 548 A.2d 396 (Pa. Cmwlth. 1988). The presiding judge made a preliminary ruling to this effect at the

outset of the hearings (N.T. 12). Neither party has objected to the ruling in the post-hearing briefs and, as a result, the issue is waived: *Lucky Strike Coal Co. and Louis J. Beltrami v. Commonwealth, Dept. of Environmental Resources*, 547 A.2d 447 (Pa. Cmwlth. 1988).

Because the burden of proving its entitlement to the Building Construction Exemption was placed on Linde, DEP was given the right to file a reply post-hearing brief on that point without seeking Board approval (N.T. 1159-1160). After DEP filed its reply brief, Linde (on June 12, 1995) filed a Motion to Dismiss Arguments I, II, and IV on the grounds that they went beyond the Building Construction Exemption. DEP's letter response on that same date asserted that its reply brief went beyond the Building Construction Exemption to answer two other affirmative defenses not previously raised by Linde. In addition, the letter contained a belated request for Board approval for filing the reply brief. Under the circumstances and in view of the General Rules of Practice and Procedure at 1 Pa. Code §35.191 (affirming the right of the party bearing the burden of proof to file a reply brief), we deny Linde's Motion to Dismiss Arguments I, II and IV of DEP's reply brief and accept the brief for consideration.

Linde points out on pages 49-50 of its post-hearing brief that adjudicating these appeals will not depend so much on the resolution of factual issues (most of which are undisputed) but upon the resolution of the principal legal issue: whether the bulk excavation of dirt on one site for use as fill on another site is a construction activity (unregulated by the Noncoal Act in Linde's opinion) or noncoal surface mining (regulated by the Noncoal Act and requiring a permit from DEP).

We begin with the provisions of the Noncoal Act, specifically two definitions in Section 3, 52 P.S. §3303.

"Minerals." Any aggregate or mass of mineral matter, whether or not coherent, that is extracted by surface mining. The term includes, but is not limited to, limestone and dolomite, sand and gravel, rock and stone, earth, fill, slag, iron ore, zinc ore, vermiculite and clay; but it does not include anthracite or bituminous coal or coal refuse, except as provided in section 4, or peat.

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"Surface mining." The extraction of minerals from the earth, from waste or stockpiles or from pits or from banks by removing the strata or material that overlies or is above or between them or otherwise exposing and retrieving them from the surface, including, but not limited to, strip mining, auger mining, dredging, quarrying and leaching and all surface activity connected with surface or underground mining, including, but not limited to, exploration, site preparation, entry, tunnel, drift, slope, shaft and borehole drilling and construction and activities related thereto; but it does not include those mining operations carried out beneath the surface by means of shafts, tunnels or other underground mine openings. The term does not include any of the following:

(1) The extraction of minerals by a landowner for his own noncommercial use from land owned or leased by him.

(2) The extraction of sand, gravel, rock, stone, earth or fill from borrow pits for highway construction purposes of the Pennsylvania Department of Transportation or the extraction of minerals pursuant to construction contracts with the department if the work is performed under a bond, contract and specifications that substantially provide for and require reclamation of the area affected in the manner provided by this act.

(3) The handling, processing or storage of slag on the premises of a manufacturer as a part of the manufacturing process.

(4) Those dredging operations that are carried out in the rivers and streams of the Commonwealth and in Lake Erie.

(5) The extraction, handling, processing or storing of minerals from any building construction excavation on the site of the construction where the minerals removed are incidental to the

> building construction excavation, regardless of the commercial value of the minerals.

There is no consensus about what is meant by the term "minerals." In its most technical sense, "minerals" are solid homogeneous crystalline chemical elements or compounds that result from the inorganic processes of nature: *Websters' Third New International Dictionary Unabridged,* Merriam-Webster, Inc., Springfield, Massachusetts, 1986. The geologist, like Samuel W. Berkheiser, Jr. who testified in this case, abbreviates the definition to any naturally-occurring substance that is not organic. This excludes coal (not a "true" mineral because it is inhomogeneous, noncrystalline and organic) and materials such as slag (synthetic rather than natural). The gemologist is more restrictive, in one sense, limiting the term to precious stones. The broadest meaning includes everything in nature that is not animal or vegetable: *Websters', supra.* The mining engineer's viewpoint is somewhere between these two extremes, considering any natural material that is useful enough to mine. Within this ambit fall a host of metallic and nonmetallic items. According to the Encyclopedia Americana's discussion of "mining," "sand, gravel, stone and clays for the construction industry" are useful nonmetallic materials (*The Encyclopedia Americana, International Edition*, Grolier Incorporated, 1993; Vol. 19, pages 167-168).

Regulation of the surface mining of noncoal minerals (now accomplished by the Noncoal Act) began on January 1, 1972, the effective date of the Act of November 30, 1971, P.L. 554. This act amended the Bituminous Coal Open Pit Mining Conservation Act, Act of May 31, 1945, P.L. 1998, changing its name to the Surface Mining Conservation and Reclamation Act (SMCRA) and broadening its scope to cover bituminous and anthracite coal and metallic and

nonmetallic minerals. This original version of SMCRA (referred to popularly as the "All Surface Mining Act" because of its scope) defined "minerals" in section 3 with the same words incorporated later into the Noncoal Act with the exception that it specifically included anthracite and bituminous coal whereas the Noncoal Act specifically excludes these materials along with coal refuse and peat.

"Surface mining" is defined in both the Act of 1971 and the Noncoal Act in similar terms but the exclusions are somewhat different. The 1971 Act contained four exclusions of which three closely parallel (1), (2) and (3) in the Noncoal Act, quoted above. Exclusion (2) of the Noncoal Act, which is restricted to contracts with PennDOT or DEP, originally applied to all highway construction projects. Exclusions (4) dredging operations and (5) the Building Construction Exemption were not in the 1971 Act. They were added when the Noncoal Act was passed in 1984. Section 6 of the Noncoal Act, 52 P.S. §3306, was section 3.2 of the 1971 Act. It reads as follows:

> It shall be the duty of the architects, engineers or other persons preparing specifications for construction projects, which specifications include the requirement that the construction contractor supply fill for the project, to include, within the specifications, a specific reference to this act and the regulations pertaining to this act adopted by [DEP]. If such a reference is omitted from the specifications and reclamation and planting of the land from which the fill was removed by the construction contractor is required under this act, any contract based on the specifications may be amended, at the option of the construction contractor, to allow a reasonable price for the reclamation and planting of the land affected in accordance with a plan acceptable to the secretary [of DEP].

Despite the groundbreaking nature of its provisions, the Act of 1971 was enacted without any discussions or debates that shed light on what was intended by section 3.2 and the above-mentioned definitions in section 3.

SMCRA was substantially revised by the Act of October 10, 1980, P.L. 835, in order to gain primacy in the regulation of surface mining. The definition of "surface mining" was modified somewhat, especially with respect to the exclusions. The four exclusions in the Act of 1971 were reduced to three by eliminating one not relevant to our discussion. The others remained unchanged. Section 3.2 also remained unchanged. Once again, legislative history is silent on the intendment of these provisions. When the Noncoal Act was enacted in 1984, the definitions of "minerals" and "surface mining" basically were copied from SMCRA with the changes already mentioned. Legislative history offers no insight into these areas.

The legislative definition of "minerals" has remained basically the same since the Act of 1971. It is not confined to ore deposits in a vein or seam but encompasses any "aggregate" of "mineral matter," whether or not "coherent." It is not limited to gem stones but includes a wide variety of common substances. It is not confined to naturally-occurring items but includes slag, a synthetic product. The definition is broad but not especially technical. Yet, all of the materials specifically mentioned (except slag) are naturally-occurring "mineral matter." This includes "earth" and "fill" (since it consists of earth or sand and gravel). "Earth" or "soil", as testified to by Roger J. Hornberger in this case, is the product of the weathering of bedrock material and the deposition of organic matter, producing an aggregate or mass of material that is mostly mineral in makeup. Even topsoil, which contains the highest concentration of organic

matter, is 95% or more mineral matter. The Wellsboro Channery Loam excavated by Linde on the BGM Site was 99% mineral matter.

Why would the Legislature specifically mention such mundane items as "earth" and "fill" when defining "minerals"? Certainly, these substances do not have great value. The other specifically-mentioned materials can be valuable and mined at a profit,[2] but "earth" and "fill" have only limited utility - embankment or subgrade material for highways or structures. This use is nonetheless important. The science of soil mechanics deals with the stability of soils as foundation material, and soils are used almost exclusively for this purpose.

Soil studies are important aspects of highway engineering.

> In planning the grading operations the design engineer considers the type of material to be encountered in excavating or in cutting away the high points along the project and how the material removed can best be utilized for fill or for constructing embankments across low areas elsewhere on the project. For this the engineer must analyze the gradation and physical properties of the soil, determine how the embankments can best be compacted and calculate the volume of earthwork to be done.
> *(McGraw-Hill Encyclopedia of Science and Technology, 7th Edition,* McGraw Hill, Inc., New York 1992, vol. 8, page 465)

Earthwork in the PennDOT Specifications, Publication 408, 1994, includes embankments and backfill in Section 206. Suitable materials include soil meeting certain gradation, density, liquid and plasticity requirements. When soil meeting those tests is not available in adequate quantities on the project site, borrow material is to be used under Section 205. This is earth material meeting the requirements of the Specifications obtained off the project

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[2]Some sand, rock, stone and clay, depending on their particular characteristics, can be highly prized in manufacturing or building.

site. If a borrow area is left unreclaimed, it can be just as much an eyesore as an unreclaimed quarry or coal mine. "Earth" is readily available and finding earth to satisfy the requirements of soil mechanics is relatively easy. As a result, the material does not have a great value (although it is sold as a commodity on a regular basis, even in the Honesdale area as testified to in this case) and there is little economic incentive for the contractor to reclaim the borrow area.

Obviously, this was in the mind of the Legislature as far back as 1971 when the regulation of Noncoal minerals first began. The purposes of that regulation, as set forth in section 1 of the Act of 1971 and as continued in section 2 of the Noncoal Act, 52 P.S. §§3302, were (1) the conservation and improvement of land affected by surface mining, (2) the protection of birds and wildlife, (3) the enhancement of land values for taxation, (4) the decrease of soil erosion, (5) the prevention of pollution of rivers and streams, (6) the protection and maintenance of water supplies, and (7) the elimination of hazards to health and safety. The Legislature was more concerned with correcting abuses than it was with the technical meaning of "minerals". "Earth" and "fill" were specifically mentioned, in our opinion, because unreclaimed borrow areas can be a nuisance.

That's why section 6, quoted earlier, was included from the outset in 1971. The section applies only to construction contracts where the contractor is to bring in borrow from an area off the project site. The specifications for such contracts are required to refer to the Noncoal Act and the regulations. If they do not, the contractor may recover the cost of reclaiming the borrow site. There is no need for section 6 if the excavation of borrow areas was not regulated by the Noncoal Act. The same can be said of exclusion (2) from the definition of "surface mining", also quoted earlier. The exclusion deals only with borrow sites and is limited to those

under contracts with PennDOT or DEP that require reclamation and the posting of a bond. Section 105.14 of the PennDOT Specifications, *supra*, requires the contractor to reclaim borrow sites. Topsoil is to be stripped off and stockpiled. After borrow operations are completed, the sites are to be left in a well-drained and smoothly graded condition, blending into the existing topography, and permanently seeded.[3]

The reclamation mandated by these Specifications is the result expected to be achieved on all other contruction projects by section 6. The difference is that PennDOT and DEP contracts are universally covered by surety bonds guaranteeing the reclamation work (see, for example, section 103.5 of the PennDOT Specifications, *supra*). For this reason, we conclude, they were excluded from regulation under the Noncoal Act. But, again, this exclusion would be unnecessary if excavation of borrow sites was not regulated by the Noncoal Act in the first instance.

While Board precedents have not dealt specifically with "earth," they have dealth with the excavation of materials used in construction. The operation of a gravel pit was involved in *Franklin Township v. DER*, 1990 EHB 344, where the facts established that the Township operated a gravel pit for its own use and also for sale to PennDOT on a tonnage basis. The Board held that the Township would be exempt from regulation under exclusion (1) if it used the gravel solely for its own purposes. However, when it sold the gravel to PennDOT, it went beyond the scope of exclusion (1). And, since the basis upon which it sold the gravel to PennDOT did not

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[3]While permanent seeding may be accomplished under the Erosion Control regulations at 25 Pa. Code Chapter 102, there is no requirement for blending the site into the surrounding land and no requirement for a bond to guarantee performance.

satisfy the requirements of exclusion (2), the township had to get a license and permit under the Noncoal Act. The Board's decision was affirmed by Commonwealth Court at 583 A.2d 68 (Pa. Cmwlth. 1990).

The excavation and sale of sand and gravel were held to be subject to the Noncoal Act in *F.A.W. Associates v. DER*, 1990 EHB 1791, when the landowner failed to qualify for the Building Construction Exemption. The excavation in a bluestone quarry of overburden in the form of sandstone, which was used off-site as a base material in the construction of parking lots, was held to be subject to the permitting requirements of the Noncoal Act in *Edmund Wikoski v. DER*, 1994 EHB 1461. The Board noted in footnote 3 that exclusion (2) made it clear that other borrow operations "such as the one involved here," require a permit: 1994 EHB 1461 at 1467.

Further support is found in the regulations on residual waste landfills at 25 Pa. Code §288.235, which state that the "extraction and removal of cover and related material from offsite borrow areas shall be subject to a permit from [DEP] under the [Noncoal Act]...."

We conclude that Linde's activities on the BGM Site - excavating earth for use as fill on another site (K-Mart project) - was a borrow operation, pure and simple. We conclude further that, as such, it was the "surface mining" of "minerals" regulated by the Noncoal Act. In reaching these conclusions, we reject Linde's contentions that, to be covered by the Noncoal Act, the excavated material must have commercial value. As we have noted, "earth" and "fill" are not highly valuable. Yet, they are specifically mentioned in the definition of "minerals"; and, while they can often be obtained for little consideration, they nonetheless have some commercial value.

Linde's use of the Wellsboro Channery Loam was of economic benefit to it because the material met the quality and compaction specifications of the K-Mart project. Linde needed 50,000 cubic yards of borrow for that project and intended to obtain it from any one of several nearby sites. While Linde would not have had to pay for the material itself, it would have had to bear the cost of digging it, trucking it, spreading it and compacting it. Its bid on the K-Mart project reflected the costs of performing these activities. The material had economic value to Linde, therefore, wherever it was obtained, because it fulfilled a requirement of its contract. Certainly if proper fill had not been available free of charge, Linde would have had to purchase it.

We held in *Edmund Wikoski v. DER*, *supra*, that the marketability of minerals under the Noncoal Act is relevant only in determining whether a small license or large license is required. It has no bearing on the need for a permit. Moreover, we held that the sandstone which Wikoski viewed as useless overburden had value to those who removed it and used it in the construction of parking lots. The same principles apply here.[4]

We also reject Linde's contention that requiring contractors to obtain Noncoal permits before excavating would, in effect, shut down the industry. The contention is based on the testimony of Linde's experts that the permit application is too involved for this activity and on the presumption that DEP would not act diligently in approving such applications. Admittedly, there are portions of the application form that are designed to elicit information relevant to the

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[4]It is curious that Linde's experts agree that the excavation of topsoil requires a permit because the product has commercial value. Yet, it is a type of soil with the least mineral content and most organic matter. Topsoil is not normally used as fill because it cannot meet the compaction requirements.

more common types of noncoal mining and quarrying where a specific mineral is sought to be separated and secured. But, even then, not all portions are applicable to every site and the applicant must concentrate only on those that are relevant to his proposed operation. The same is true where "earth" or "fill" is the subject of the application. Indeed, Linde's experts conceded that the application form was adaptable to a topsoil operation which, they agreed, needed a permit.

We conclude that the application form is not so daunting as to be a barrier to excavation contractors. As far as the amount of time involved in getting a permit from DEP, there is simply no evidence to show how long it would take or whether that amount of time would pose problems in the industry. Absent evidence to support Linde's argument, we reject it.

Satisfied that Linde's activities on the BGM Site involved the "surface mining" of "minerals" under the Noncoal Act, we now consider whether Linde was exempt from the requirements of the Act by reason of the Building Construction Exemption. As quoted earlier, the Exemption is exclusion (5) from the definition of "surface mining," and covers, *inter alia*, the "extraction" of "minerals" from any "building construction excavation" on the "site of the construction" where the minerals removed are "incidental to the building construction excavation," regardless of the "commercial value of the minerals." The regulations at 25 Pa. Code §77.1, defining "Noncoal surface mining activities,"add to the statutory exclusion the following language:

> For purposes of this section, the minerals removed are incidental if the excavator demonstrates that:
>
> (A) Extraction, handling, processing or storing are conducted concurrently with construction.

(B) The area mined is limited to the area necessary to construction.

(C) The construction is reasonably related to the use proposed for the site.

It seems clear that the legislative intent was to exclude from Noncoal Act regulation mineral extraction carried on as part of a building construction excavation so long as it was done on the construction site and was incidental to the excavation. The intent of the regulatory addition, apparently, was to formulate a three-prong test for determining whether the activity was incidental to the building construction excavation. Linde does not challenge the statutory language or the regulatory addition and is, therefore, bound by them. Linde's attack instead is directed toward the June 15, 1991 PGM (Finding of Fact No. 53), claiming correctly that it has no legally binding effect. Nonetheless, we find its guidance to be worthwhile and useful in administering the Building Construction Exemption.

The PGM observes at the outset that only a small percentage of building construction sites will involve the removal of excavated material from the sites. Cost considerations usually require the excavated material to be regraded on the construction site. DEP's concern lies solely with those sites where the excavated material is removed and either sold or bartered. If DEP concludes, with respect to one of these sites, that the excavation is not incidental to a valid construction purpose or is being used as a subterfuge to avoid getting a permit, it will refuse to recognize the Exemption.

After making these preliminary observations, the PGM points out that some proof of intended construction should be available. This often will be in the form of a building permit or planning/zoning approval, but these items are not always required (especially in rural areas).

In such cases, other evidence of construction could be building and construction plans, E & S approval by the local County Conservation District, and financing commitments.

The PGM then discusses in detail the three prongs of the "incidental" test added by the regulations. With respect to (A), "concurrently with construction" is to be determined on a site-by-site basis since some sites require extensive excavation and regrading before construction can begin. The time period between excavation and construction should be reasonably related to the proposed construction plan. With respect to (B) and (C), the area of excavation must bear a close relationship to both the size and intended use of the building to be constructed on the site.

Finally, the PGM sets forth a series of examples demonstrating the applicability of the Building Construction Exemption and suggests procedures to be followed.

We find nothing in this PGM that, in our opinion, runs counter to the intent and purpose of the Noncoal Act or the regulations. The guidance strikes us as eminently reasonable and appropriate.

It is clear that for Linde's activities to fall within the scope of the Building Construction Exemption, its excavation on the BGM Site had to be incidental to the excavation for the construction of a building on the BGM Site; that is, it had to be concurrent with that construction, limited to the area necessary to that construction, and reasonably related to the use proposed for the BGM Site. We must view the activities in their historical context, August 1993, when Linde began excavation on the BGM Site and DEP issued the C.O.s.

BGM decided to begin development of the BGM Site in the spring of 1993, planning initially to construct a building for its own use. After being contacted by Wal-Mart during June of that year, BGM concluded that the BGM Site was much too valuable to use for its

own purposes and decided instead to pursue Wal-Mart. BGM realized that the topography of the BGM Site was a potential barrier to commercial development and explored ways to reduce the hill. Goyette was aware that Linde had the contract for site preparation work on the K-Mart project directly across Route 6 from the BGM Site and needed 50,000 cubic yards of fill to fulfill that contract. Goyette contacted Linde in July 1993 to discuss a mutually beneficial arrangement whereby Linde would get the fill it needed and BGM would get a portion of the hill removed.

Apparently, Goyette represented that BGM's proposed use of the BGM Site was a new location for its business. At BGM's request, Linde prepared one or more conceptual drawings showing how a building and related facilities could be placed on the portion of the BGM Site where the 50,000 cubic yards would be excavated and removed. Since Goyette was sworn to secrecy by Wal-Mart, it is doubtful that he mentioned that type of proposed use.

The parties entered into a Site Improvement Agreement on July 31, 1993. This Agreement makes clear that the 50,000 cubic yards of material to be excavated from the BGM Site was to be the "fill necessary for the construction" of the K-Mart project. As Goyette testified, Linde came up with the 50,000 cubic yard quantity; BGM wanted as much removed as possible. The Agreement provided further that Linde would regrade the area of excavation so as to leave BGM with a "viable commercial building site" and an "earth road."

While this was the private arrangement between the parties, it was not made public. The Erosion and Sedimentation Control Plan and narrative which Linde prepared and filed with the Wayne County Conservation District at the end of July 1993 (revised August 18, 1993) gave no indication that a building was intended to be constructed on the excavated portion of the BGM

Site. All indications were that the land would revert to open, grass-covered area. The Plan was approved on this basis.

This then was the scenario on the morning of August 23, 1993 when Linde began excavating and removing fill from the BGM Site. When DEP's Soloski arrived on the scene and spoke with Eric Linde, he was told that a permit was not necessary because of the Building Construction Exemption, was shown plans depicting a proposed building for BGM, and was told to contact BGM for more information. When Soloski examined the plans later that day, he found them to be incomplete. On talking with Goyette, he learned that the building was only proposed at that point. Consequently, there were no blueprints and no starting or completion dates. Soloski relayed this information to Linde on August 23 or 24.

Linde claims to have been misled by BGM,[5] relying on BGM's representations that it planned to construct a building for its own use on the BGM site when, in fact, BGM had already abandoned that idea (unknown to Linde) in favor or pursuing Wal-Mart. But it was not the illusory nature of the Wal-Mart project that prompted DEP to act. DEP was as ignorant of that possibility when it issued the C.O.s as Linde was. DEP issued the C.O.s because of Goyette's statements concerning the tentative nature of the BGM building project. Linde does not claim to have been misled about that. Indeed, the fact that Linde prepared and filed the Erosion and Sedimentation Control Plan and narrative with no indication that a building was to be constructed would seem to fly in the face of any such claims.

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[5]This contention is made for the first time in Linde's post-hearing brief. No evidence is cited to support it and we have found none in our review of the record. Our consideration of the argument is not to be deemed a retreat from precedents such as *C&K Coal Company v. DER*, 1992 EHB 1261 at 1292-1293.

Besides, if Linde truly was misled about BGM's plans for the BGM Site, why did it continue with the excavation after learning on August 23 or 24, 1993 that BGM had no definitive plans or intentions to proceed with construction? Since it had only begun work on the BGM Site and since it had at least three other nearby sites available to it for borrow purposes, Linde could have halted its activities on the BGM Site with little interruption of its work on the K-Mart project. Instead, Linde continued to excavate the BGM Site, in the face of C.O.s and civil penalties,[6] until November 1993 when the full 50,000 cubic yards had been removed. Linde even came back and removed some additional fill in 1994. These are not the actions of a contractor duped into potential violations of the Noncoal Act by allegedly false representations of the landowner. They portray instead a contractor determined to defy the edicts of DEP because it was convinced that its activities were not within the scope of the Noncoal Act.

We have no hesitancy in concluding that, as of August 23, 1993, Linde's excavation on the BGM Site was not conducted "concurrently with construction" of a building for BGM. Was it conducted "concurrently with construction" of a building for Wal-mart? Certainly, BGM and Wal-mart were engaged in serious discussions during the latter half of 1993 when the bulk of the excavation took place. It was January 1994, however, before any agreement was executed - and that Purchase Agreement had a host of contingencies, so much so that a year later, on the final day of hearings, Wal-Mart still had not purchased the BGM Site and no closing date had yet been set. While an overall construction plan had finally been approved that same month (January 1995) by Wal-Mart's Real Estate Committee, there were no definitive construction

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[6]and after having been warned by DEP about this very activity on this very Site before Linde and BGM entered into the Site Improvement Agreement.

drawings yet in existence. Given these facts, we can only conclude that Linde's 1993 activities were not conducted "concurrently with construction" of a building for Wal-Mart.

Prior consideration of this issue took place in *F.A.W. Associates v. DER*, *supra*, where it was held that excavation of a site and removal of excavated material while the landowner's intentions to erect a building were still nebulous was a violation of the Noncoal Act because the excavation was not conducted "concurrently with construction."[7] The same considerations that led to the holding in *F.A.W.* apply here. In order for excavation to be conducted "concurrently with construction" there must be more than an intent to build something on the land.

Linde argues that such a requirement ignores current building practices where site preparation frequently occurs long before building plans are finalized and building and zoning permits are obtained. It cites the K-Mart project as an example. But the conditions described by Erie Linde - a change in land ownership, changes in plans, absence of a building permit, lack of financing - all are potential problems that can arise during any building project. When Linde bid on the K-Mart job in June or July 1993, and began its work in August 1993, building plans had to be fixed to the point where fill quantities and compaction requirements could be set. In fact, the major changes in the building plans, according to Eric Linde's testimony, occurred before Linde began its work.

Nothing concerning the BGM Site came even close to this penultimate state. The building plans for a BGM building were embyonic - not presented to the Wayne County

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[7]Because this opinion, issued by a hearing examiner on a petition for supersedeas, could be viewed as having no precedential value, we specifically approve its rationale.

Conservation District and never to progress toward maturity. Plans for a Wal-Mart building were virtually nonexistent. BGM was determined to pursue Wal-Mart or some other major commercial establishment and was determined to make the BGM Site as attractive as possible. Removal of fill was one aspect of BGM's determination, coinciding fortuitously with Linde's work on the K-Mart project. But Linde's 50,000 cubic yards was only a fraction of the total amount of material (100,000 to 350,000 cubic yards) that will have to be removed in order to develop the BGM Site. It was apparently an important step in getting developers to consider the BGM Site but was unrelated to any specific construction project.

The proof of that statement is the fact that, as of January 26, 1995, the last day of hearings, Wal-Mart still had not acquired the BGM Site and had only recently approved an overall conception plan for the BGM Site. Conditions still remained to be fulfilled before Wal-Mart would make a final, irrevocable decision to proceed to closing. While the prospects were favorable that a Wal-Mart would be constructed eventually on the BGM Site, they were far from certain nearly 1-1/2 years after Linde began its work on the BGM Site. At that time (August 23, 1993), the chances that any building would be constructed on the BGM Site were speculative at best.

Real estate owners and developers are known to speculate. The Noncoal Act and its regulations do not seek to interfere with that behavior but wisely limit the Building Construction Exemption to those projects that are far past the speculative stage and into actuality. Only then can the excavation be done "concurrently with construction." If a landowner like BGM desires to have a contractor like Linde do site preparation work at the speculative stage, the Noncoal Act requires that "the general welfare of the people of this Commownealth" be protected

by the issuance of a Noncoal permit with an approved reclamation plan backed up by a bond (52 P.S. §3302, §3307, §3309). That protection is necessary to assure that real estate speculation does not become a financial burden on the public.[8]

Having determined that Linde's activites violated the Noncoal Act, we now consider the civil penalty assessment totalling $27,500. Since the violations resulted both in the issuance of a cessation order (C.O. No. 93-5-140-N) and involved a failure to correct (C.O. No. 93-5-143-N), DEP was required to assess civil penalties of at least $750 per day and at the most $5,000 per day (52 P.S. §3321(a)).

DEP's Dieterle did, in fact, calculate a $5,000 assessment for the first C.O. which was based on the violations for the single day August 23, 1993. Dieterle then calculated a penalty of $22,500 for the second C.O. using the $750 per day minimum for the 30-day period August 30, 1993 to September 30, 1993. Dieterle capped the penalty at 30 days even though Linde's violations continued beyond that point.

Dieterle arrived at the $5,000 portion of the assessment using DEP's Program Guidance Manual for Noncoal Civil Penalty Assessments. This document does not have binding force such as a regulation but serves to focus the attention of the assessing official on the various elements required by the Noncoal Act to be considered. Each element is divided into levels with suggested amounts given for each. Dieterle considered the seriousness of the violations to be in the medium range ($1,000 to $2,500) but toward the higher end, warranting a $2,500 penalty.

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[8]DEP also contends that Linde's activities were not within the Building Construction Exemption because they did not satisfy items (B) and (C) added to the statutory exclusion at 25 Pa. Code §77.1. Since we have held that the activities did not satisfy item (A), we will not discuss the other two items.

This was based on Linde's failure to get a Noncoal permit, on the size of the area disturbed, on the amount of material removed and on the extent of reclamation required.

Dieterle then considered culpability and determined that Linde's actions were reckless rather than negligent because Linde deliberately violated the Noncoal Act despite prior warning from DEP and refused to stop working when ordered to do so on August 23, 1993. He considered the actions to fall in the middle of the reckless range, calling for a penalty of $2,500. Since the amount calculated for seriousness and culpability totalled the $5,000 maximum, Dieterle did not consider any other elements.

Linde contends that its actions were not within the scope of the Noncoal Act and, thus, were not serious or culpable so as to warrant a civil penalty. We have already rejected this argument, *supra*, and see no basis to reconsider it here. We agree with Dieterle on the seriousness and culpability of Linde's actions and conclude that the $5,000 civil penalty "reasonably fit" the violations in C.O. No. 93-5-140-N. See *Wilbar Realty, Inc. et al. v. Department of Environmental Resources*, 663 A.2d 857 (Pa. Cmwlth. 1995).

Dieterle's calculation of the civil penalty for C.O. No. 93-5-143-N involved little exercise of judgment, since he merely applied the mandatory statutory daily minimum of $750 to the 30-day period covered by the assessment. The resulting civil penalty ($22,500) is appropriate because Linde's violations continued during that period. Whether the penalty should have been capped on September 30, 1993 when the violations continued well after that date is not before us. Neither party has raised it and the record contains no evidence concerning Dieterle's reasons for capping the violations at the end of 30 days. We will not speculate on the reasons and feel no compulsion to interject an issue the parties saw fit to ignore.

Linde's main argument against the civil penalties is that BGM was the responsible entity that should have been penalized; that Linde was acting solely as an independent contractor; and that Linde, therefore, was not an "operator" as defined in the Noncoal Act. Unfortunately for Linde, these contentions were never raised in its Notices of Appeal or pre-hearing memoranda. Nor is it included among the legal issues listed in the parties' Joint Response To Pre-Hearing Order No. 2 which required a "statement of the legal issues on which this matter turns." The parties listed the 10 issues they agreed were involved and Linde listed 2 additional issues it contended were involved. None of the 12 deal even remotely with the above arguments. We have consistently held that issues raised for the first time in a post-hearing brief will not be considered: *David S. Murdoch v. DER et al*, 1994 EHB 1817; *C&K Coal Company v. DER*, 1992 EHB 1261 at 1292-1293; *Midway Sewerage Authority v. DER*, 1990 EHB 1554. We see no reason to depart from that precedent here.[9]

CONCLUSIONS OF LAW

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

2. DEP has the burden of showing by a preponderance of the evidence that the issuance of the C.O.s and the assessment of civil penalties were lawful and an appropriate exercise of its discretion.

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[9]We note in passing that under the Site Improvement Agreement between Linde and BGM, Linde specifically took on the responsibility of "dealing with the various local, state and federal agencies" and of obtaining any "permits, licenses, or local, state or federal approvals." See Finding of Fact No. 13.

3. Since entitlement to the Building Construction Exemption is an affirmative defense, Linde has the burden of proof (preponderance of evidence) with respect to it.

4. Linde's activities on the BGM Site constituted the "surface mining" of "minerals" within the scope of the Noncoal Act because they involved the excavation and removal from the BGM Site of "earth" and "fill".

5. Linde's activities on the BGM Site were not entitled to the Building Construction Exemption because they were not "conducted concurrently with construction."

6. Linde was required to have a permit under the Noncoal Act to perform the activities on the BGM Site.

7. The $5,000 civil penalty assessed for Linde's violations in C.O. No. 93-5-140-N "reasonably fit" the violations.

8. The $22,500 civil penalty assessed for the violations in C.O. No. 93-5-143-N, being the $750 mandatory minimum for the 30 days included in the assessment, is appropriate because Linde's violations continued during that period.

9. Linde's arguments against the civil penalty assessments, raised for the first time in its post-hearing brief, will not be considered.

ORDER

AND NOW, this 5th day of April, 1996, it is ordered that the consolidated appeals are dismissed.

ENVIRONMENTAL HEARING BOARD

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Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 5, 1996

cc: **Bureau of Litigation:**
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Dunmore, PA

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M. DIANE SMITH
SECRETARY TO THE BO

MAX AND MARTHA STARR	:	
	:	
v.	:	
	:	**EHB Docket No. 95-143-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	**Issued: April 9, 1996**

OPINION AND ORDER SUR MOTION FOR RECONSIDERATION *EN BANC*

By Michelle A. Coleman, Member

Synopsis

A motion for reconsideration of a protective order is denied. The Board will reconsider an interlocutory order only where "exceptional circumstances" are present. Since the burden is on the moving party to prove that it is entitled to the relief requested, the Board will not grant a motion for reconsideration which fails even to allege such exceptional circumstances exist.

OPINION

This matter was initiated with the filing of a notice of appeal by Max and Martha Starr (Starrs) seeking review of a June 13, 1995, Department of Environmental Protection (Department) order. The order, among other things, directed Starrs to remove 5.9 million tires they had accumulated on their property. Starrs assert that the Department is estopped from

issuing the order because there were no Department policies or regulations discouraging the collection of tires at the time Starrs did so, and because the Department knew of and encouraged Starrs's activities.

On April 2, 1996, Starrs filed a motion requesting that the Board reconsider a March 13, 1996, opinion and order[1] granting a motion for a protective order submitted by the Department. Starrs had served a notice of deposition upon the Department requiring it to designate individuals to testify relative to seven issues. The Department sought a protective order with respect to three of those issues: (1) the extent of the Department's knowledge and encouragement of Starr's activities involving the tires; (2) the effect of the tires on the threat posed by fire and mosquitoes; and (3) the feasibility and cost of removing the tires from the site.

The Department objected to the first two issues on the basis of collateral estoppel. Noting that the Starrs had unsuccessfully appealed a May 1, 1987, order directing them to stop receiving tires, the Department argued that the Starrs had raised those issues in the appeal of that order and were collaterally estopped from raising them here, at least to the extent they pertained to facts prior to May 1, 1987. The Department objected to the third issue--the feasibility and cost of removing the tires from the site--on the basis that it was unduly burdensome.

The Board granted the Department's request with respect to all three issues. With respect to the first two issues--the extent of the Department's knowledge of the Starrs's activities, and the potential fire and mosquito hazard posed by the tires--we held that, to the

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[1] Max Starr and Martha Starr v. Commonwealth, DEP, EHB Docket No. 95-143-C (Opinion issued March 13, 1996).

extent they pertained to facts prior to May 1, 1987, the issues were beyond the scope of the current appeal. With respect to the issue of the cost and feasibility of removing the tires, we agreed with the Department that the discovery sought was unduly burdensome.

Starrs move for reconsideration *en banc* with respect to only part of our holding: our conclusion that the extent of the Department's knowledge of Starrs's activities prior to May 1, 1987, is beyond the scope of the current appeal. In support of their position, Starrs argue that the parties did not address whether that issue was beyond the scope of the current appeal in their legal memoranda, and that §1021.122 of the Board's rules of practice and procedure provides that the Board will grant reconsideration where it issues a decision which rests on a legal ground not considered by the parties and which the parties should have an opportunity to brief.

Section 1021.122 of the Board's rules provides that the Board will grant reconsideration only for "compelling and persuasive reasons," and will generally be limited to instances where:

> (1) The decision rests on a legal ground not considered by any party to the proceeding and the parties in good faith should have had an opportunity to brief such question.
>
> (2) The crucial facts set forth in the application are not as stated in the decision and are such as would justify a reversal of the decision. In such a case reconsideration would only be granted if the evidence sought to be offered by the party requesting reconsideration could not with due diligence have offered the evidence at the time of the hearing.

25 Pa. Code §1021.122(a).

Section 1021.122 of our rules is inapplicable here, however. The order Starrs request that we reconsider is an interlocutory order, and the Board has previously held that the language in §1021.122 refers only to *final* Board actions, not to interlocutory orders. *See, e.g.,* Adams

Sanitation Company, Inc. v. DER, 1994 EHB 1482, and Joseph Krivonak, Jr. v. DEP, EHB Docket No. 94-247-E (Opinion issued August 30, 1995).[2] With regard to interlocutory orders, the standard for granting reconsideration is higher: "exceptional circumstances" must also be present. Cambria Coal Co. v. DER, 1991 EHB 361, 363; City of Harrisburg v. DER, 1993 EHB 220, 222.

The burden is on a moving party to show that it is entitled to the relief requested. Green Thornbury Committee, *et al.* v. DER, EHB Docket No. 93-271-W (Opinion issued February 17, 1995). Since Starrs fail even to allege that exceptional circumstances exist here, they have not established that reconsideration is appropriate.

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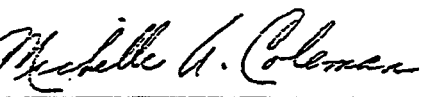
[2] Our decisions in Adams and Krivonak both involved the interpretation of what was then §21.122 of the Board's rules of practice and procedure. Since then, the Board's rules have been amended and renumbered. *See* 25 Pa. Bull. 3823. While the designation of §*21*.122 changed to §*1021*.122 as part of this process, the actual language of the section has remained unchanged.

ORDER

AND NOW, this 9th day of April, 1996, it is hereby ordered that the Motion for Reconsideration filed by Max and Martha Starr at EHB Docket 95-143-C is denied.

ENVIRONMENTAL HEARING BOARD



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 9, 1996

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REED, SMITH, SHAW & McCLAY
Harrisburg, PA

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M. DIANE SMITH
SECRETARY TO THE BOA

BENJAMIN A. STEVENS and JUDITH E. STEVENS	:	
v.	:	**EHB Docket No. 96-036-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASHINGTON TOWNSHIP MUNICIPAL AUTHORITY, Permittee	:	**Issued: April 10, 1996**

OPINION AND ORDER ON MOTION TO QUASH

By Michelle A. Coleman, Member

Synopsis:

Before the Board is the motion of the Department of Environmental Protection to quash the appeal by Benjamin A. and Judith E. Stevens (collectively, the Stevens) from a water obstruction and encroachment permit because it was filed more than 30 days after public notice of the issuance of the permit was published in the *Pennsylvania Bulletin*. The Stevens request the Board to allow the appeal nunc pro tunc. We grant the Department's motion to quash and find that the Stevens have failed to provide circumstances sufficient to warrant an appeal nunc pro tunc.

OPINION

The relevant facts are as follows. On October 19, 1995 the Department issued a Water Obstruction and Encroachment Permit No. E28-219 to the Washington Township Municipal Authority. This permit allows the construction and maintenance of two sequencing batch reactor

tanks, a blower building, and chlorination and dechlorination building along the East Branch of Antietam Creek, Washington Township, Franklin County, Pennsylvania. On November 4, 1995, the issuance of the permit was advertised in the *Pennsylvania Bulletin*. 25 Pa. Bull. 4733. On January 18, 1996, the Department received a notice of appeal and request for appeal nunc pro tunc from the Stevens. On February 9, 1996, these documents were received by this Board.

The Department argues that the Stevens' appeal should be dismissed because it was filed well beyond 30 days after notice in the *Pennsylvania Bulletin*, citing 25 Pa. Code § 1021.52(a). The Stevens, on the other hand, contend that they were entitled to personal notice of the issuance of the permit which they did not receive until January 19, 1995, when they received a copy of the permit itself. In the alternative, the Stevens argue that they are entitled to relief nunc pro tunc because the circumstances demonstrate a non-negligent failure to file a timely appeal.

The timeliness of filing the notice of appeal goes to the Board's jurisdiction. See Pennsylvania Game Commission v. Department of Environmental Resources, 509 A.2d 877 (Pa. Commw. Ct. 1986), *rev'd on other grounds*, 521 Pa. 121, 555 A.2d 812 (1989). Section 1021.52 of the Board's regulations provides that

> [T]he jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of the action or within 30 days after notice of the action has been published in the *Pennsylvania Bulletin* unless a different time is provided by statute . . . .

25 Pa. Code 1021.52(a).

The Stevens argue that they did not receive proper notice of the issuance of the permit until January 19, 1996, when they received a copy of the permit. Numerous opinions of the Commonwealth Court and this Board have held that publication of the issuance of a permit in the

Pennsylvania Bulletin is adequate to afford due process notice from which the 30 day time to appeal begins to run. E.g., Grimaud v. Department of Environmental Resources, 638 A.2d 299 (Pa. Commw. Ct. 1994); Krivonak v. DER, (94-247-E, Opinion and Order issued June 1, 1995). The rules of the Board provide that challenges to permitting decisions of the Department, by those other than the recipients of the permit must be filed within 30 days of publication in the *Pennsylvania Bulletin.* 25 Pa. Code 1021.52. There is no requirement that such interested persons, known as third parties, receive personal notice rather than constructive notice. Grimaud v. Department of Environmental Resources, 638 A.2d 299 (Pa. Commw. Ct. 1994).

The Stevens argue that Section 503 of the Flood Plain Management Act (Act), Act of October 4, 1978, P.L. 851, *as amended*, 32 P.S. § 679.503, controls.[1] That section provides that "[a]ny person aggrieved by any action of the Department . . . shall have the right within 30 days of receipt of notice of such action to appeal such action the the Environmental Hearing Board." The Stevens contend that they did not receive notice until they received a copy of the actual permit. We disagree. Section 503 of the Act does not require personal notice. Constructive notice by publication in the *Bulletin* is adequate notice under the Act; this section is not in conflict with the regulations of the Board.

The Stevens' also argue that we should allow their appeal nunc pro tunc because, despite correspondence with the Department, they were unable to secure a copy of the permit until January 1996, well after the appeal period had expired. The Stevens' participated in the public hearings concerning the issuance of the permit, and their notice of appeal attaches several letters written to

---

[1] The Board provides no opinion as to the applicability of the Flood Plain Management Act to the permit itself.

the Department requesting information regarding the status of the permit, and copies of the permit, beginning in October 1995. The Stevens allege that they were not told of the issuance of the permit until December 27, 1995, when, in response to a letter from the Stevens dated November 22, 1995, Raymond Zomok, Chief of the Department's Southcentral Regional Soils and Water Section enclosed a copy of the *Pennsylvania Bulletin* notice. Moreover, the Stevens contend that they were not sent an actual copy of the permit until after their appeal to the Board was filed, despite their repeated inquiries.

The Board will grant a petition to appeal nunc pro tunc "only where there is a showing of fraud, breakdown in the administrative process, or unique and compelling factual circumstances establishing a non-negligent failure to file a timely appeal." Falcon Oil v. Department of Environmental Resources, 609 A.2d 876, 878 (Pa. Commw. Ct. 1992). While it would have imposed no burden on the Department to have informed the Stevens that notice of the issuance of the permit would be published in the *Pennsylvania Bulletin*, we are constrained to hold that the inefficiency of the Department in responding to the Stevens' inquiries is insufficient to constitute fraud or a breakdown in the administrative system.[2] The Department had no duty to ensure that the

---

[2] Mr. Stevens alleges in his notice of appeal that he contacted the Department on October 18, 1995, and was told that the permit had been issued. The following morning, he faxed a letter requesting a copy of the permit. Later that day, he alleges, he was told that the permit had not in fact been issued. Mr. Stevens renewed his request for the permit in a letter dated November 22, 1995, which was not responded to until after expiration of the appeal period on December 29, 1995. (Notice of Appeal ¶¶ 6-10 and Ex. C-E).

To perform more effectively in situations such as the one presented here, where members of the public correspond so closely with the Department concerning the issuance of a permit, it would behoove the Department to institute a policy to provide such individuals with personal notification of the issuance of the permit.

Stevens received timely notice of the issuance of the permit, other than to publish notification in the *Pennsylvania Bulletin*. See Falcon Oil (DER had no obligation to ascertain whether the appellant's notice of appeal was properly filed with the Board). Accordingly, we enter the following order.

ORDER

AND NOW, this 10th day of April, 1996, the appeal of Benjamin A. and Judith E. Stevens in the above captioned matter is hereby quashed and the request to appeal *nunc pro tunc* is denied.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 10, 1996
See following page for service list

EHB Docket No. 96-036-C
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Central Region
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For Permittee:
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Jan G. Sulcove, Esq.
HETRICK ZALESKI & PIERCE
Harrisburg, PA

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M. DIANE SMITH
SECRETARY TO THE BOA

TOWNSHIP OF DOYLESTOWN	:	
	:	
v.	:	**EHB Docket No. 95-198-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: April 17, 1996**
PROTECTION, Appellee and	:	
HAROLD ROTHSTEIN, Intervenor	:	

OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Chairman

Synopsis

The Department of Environmental Protection has authority under the Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 *et seq.* to consider a private request for, and issue, an order requiring a municipality to amend its Act 537 Plan where the municipality has granted a conditional approval of the developer's subdivision plan. The provisions under 25 Pa. Code §71.14(c) which were effective at the time the Department's order was issued did not bar the issuance of the order because the regulation did not require that the municipality approval of the subdivision plan be final.

OPINION

This matter was initiated by the filing of a notice of appeal by the Township of Doylestown ("Doylestown") on September 14, 1995. Doylestown appealed from an August 24,

1995, order issued by the Department which directed Doylestown to revise its official sewage facilities plan ("Plan") to provide for a proposed development of a 5-lot subdivision on approximately 18 acres owned by Harold Rothstein ("Rothstein") and located on the south side of Pebble Hill Road, Doylestown Township, Bucks County. Rothstein had requested Doylestown to revise its official plan, which designated the area for on-site sewage systems. Doylestown decided not to amend the Plan as requested by Rothstein. Subsequently, Rothstein requested the Department to order Doylestown to revise the Plan. On March 11, 1994, the Department denied the request. Subsequently, on March 27, 1995, Doylestown granted conditional approval to Rothstein's Preliminary Major Subdivision/Land Development Plan. On August 24, 1995 the Department issued an order requiring Doylestown to revise the Plan to provide for adequate sewage facilities for Rothstein's property.

Doylestown's notice of appeal asserts the Department abused its discretion because the August 24, 1995 order violates §5 of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 *et seq.* (Sewage Facilities Act), and the requirements of the Department's implementing regulations governing private requests at 25 Pa. Code §71.1 *et seq.* The notice of appeal also contends that the Department's order contained factually incorrect aversions regarding the verbal approval of the sketch plan, the proposed discharge system, and whether Rothstein received approval on a final subdivision plan.

Rothstein was permitted to intervene as a party appellee by stipulation.

The Department's motion for summary judgment asserts that Rothstein's request comported with the Department's regulations governing private requests for revisions to official plans and that the municipality's grant of conditional approval permitted it to issue the order

under 25 Pa. Code §71.14(c). Rothstein joined in this motion and accompanying memorandum of law. Doylestown filed its response arguing that the Department acted prematurely when it withdrew its earlier denial of the private request solely on the basis of a conditioned approval of Rothstein's preliminary plan. Doylestown further contends that the Department has no authority to approve the private request until the plan received final approval.

When ruling upon a motion for summary judgment, the Board is authorized to render summary judgment if the pleadings, depositions, answers to interrogatories, and the admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035(b). The Board must read the motion for summary judgment in the light most favorable to the non-moving party. *AH & RS Coal Corporation v. DEP*, EHB Docket No. 94-320-MR (Opinion issued October 6, 1995).

The undisputed material facts are these. Rothstein submitted a proposed revision to the Plan for a 5 lot subdivision. (Department's motion for summary judgment, ¶3; Doylestown's answer, ¶3). Doylestown voted not to amend the Plan. (Department's motion for summary judgment, ¶4; Doylestown's answer ¶4). Rothstein requested the Department to order Doylestown to revise the Plan. (Department's motion for summary judgment, ¶5; Doylestown's answer, ¶5). On March 11, 1994, the Department denied this first private request. (Department's motion for summary judgment, ¶8; Doylestown's answer, ¶8). On March 27, 1995, Doylestown granted approval to Rothstein's Preliminary Major Subdivision/Land Development Plan conditioned upon satisfaction of several conditions. (Department's motion for summary judgment, ¶9; Doylestown Township's February 17, 1993 letter to the Department, Department's Exhibit B; Doylestown's answer, ¶9) On August 24, 1995, the Department withdrew its denial

of Rothstein's private request and ordered Doylestown to revise the Plan to provide adequate sewage facilities for the proposed subdivision. (Department's motion for summary judgment, ¶10; August 24, 1995 Order, Notice of Appeal attachment) The Plan provides for on-lot systems for this property. (Department's motion for summary judgment, ¶3; Doylestown's answer, ¶3) The soil on the property is unsuitable for on-site systems. (Department's motion for summary judgment, Exhibit B, ¶3 and Exhibit D)

We will first examine whether the municipality's conditional approval permitted DEP to consider Rothstein's approval. Doylestown alleges that the Department incorrectly stated that Rothstein received final subdivision approval when, in fact, he had received only preliminary plan approval subject to several conditions. (Notice of Appeal, ¶1.c).

The Department asserts conditional approval is sufficient to meet the requirements of the regulation. The Department also pointed out that the applicable regulation, 25 Pa. Code §71.14, was repealed by the December 14, 1994, amendments to §5 of the Sewage Facilities Act.[1] Doylestown asserts that Rothstein needs final approval of the subdivision plans in order to satisfy the regulations.

Subsection (c) reads:

> No private request to revise an official plan because of the subdivision of land will be considered by the Department unless the subdivision has

[1] We will not address this argument because the order, which is the basis of this appeal, was issued prior to the amendments' effective date of December 15, 1995.

> received prior approval under municipal or county planning codes being implemented through Article VI[2] of the Pennsylvania Municipalities Planning Code (53 P.S. §§10601-10609).

25 Pa. Code §71.14(c). Since the Department was required to evaluate whether Rothstein's request complied with the requirements of §71.14(c), the question now becomes whether Rothstein's proposed subdivision "received prior approval under municipal or county planning codes ...."

We must reject Doylestown's argument and will grant the Department's motion on this issue. The language of the regulation is clear that all that is required is "prior approval," it does not specify that it has to be final. In *Baker v. Board of Supervisors of Hilltown Township*, 668 A. 2d. 635 (Pa. Cmwlth. 1995), the Commonwealth Court stated that the Department will not consider a private request to revise a municipality's official plan unless the subdivision plan has received approval from the municipality. Here, Rothstein's subdivision did receive prior approval from Doylestown as stated in the March 27, 1995, letter from Doylestown to Rothstein in which the township granted approval conditioned upon fulfillment of seven conditions all of

---

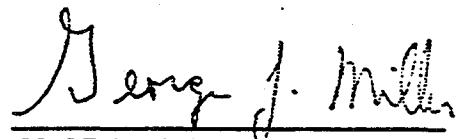
[2] Although §71.14(c) refers to approval under codes being implemented through Article VI of the Municipalities Planning Code, that article addresses the enactment, amendment, and repeal of zoning ordinances and contains no requirements that subdivisions be approved. It is Article V of the Municipalities Planning Code, and not Article VI, which empowers municipalities to regulate subdivision and land development. Thus, the reference in §71.14(c) to Article VI is a clerical error. The Pennsylvania Supreme Court held in *Lancaster County v. Frey*, 128 Pa. 593, 18 A. 478 (1889) that "the courts may correct an error even in an act of assembly when, as it is written, it involves a manifest absurdity and the error is plain and obvious." Such is the case here, and the Board will construe §71.14(c) as requiring prior subdivision approval under municipal or county planning codes adapted pursuant to Article V of the Municipalities Planning Code. *James Wunder v. DER*, 1993 EHB 30; *Franconia Township v. DER*, 1991 EHB 1290

which were approved by Rothstein and his attorney. Department's Motion for Summary Judgment, Exhibit C. The Department should have considered Rothstein's request to revise the official plan, and is entitled to judgment as a matter of law on this issue. The Board finds it unnecessary at this time to address the other grounds raised in the notice of appeal to render a decision on the current motion because the issues of incorrect facts and the technical concerns are immaterial at this stage of the process which deals exclusively with the request for revision.

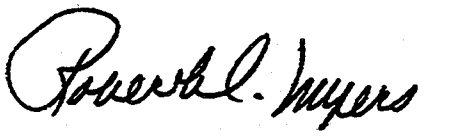
ORDER

AND NOW, this 17th day of April, 1996, it is ordered that the Department of Environmental Protection's motion for summary judgment is hereby granted and the appeal is dismissed.

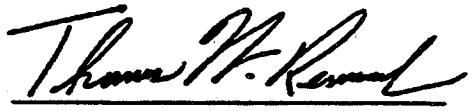
ENVIRONMENTAL HEARING BOARD



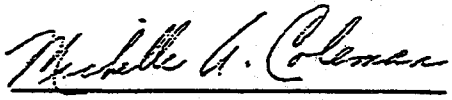
GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: **April 17, 1996**

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AL HAMILTON CONTRACTING COMPANY	:	
	:	
v.	:	**EHB Docket No. 95-124-R**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	**Issued: April 19, 1996**

OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Member

Synopsis

Section 3.1(d) of the Surface Mining Act, 52 P.S. §1396.3a(d), and 25 Pa. Code §86.37(a)(8) of the regulations authorize DEP to condition surface mining permits on the applicant's compliance with outstanding Departmental orders relating to other mining operations, even where an appeal of the order is pending before the Board. Therefore, summary judgment is granted to DEP on the issue of whether it had authority to issue to Al Hamilton seventeen permits which were conditioned on Al Hamilton's compliance with outstanding administrative orders related to its mining operation at three separate mine sites. DEP is also granted summary judgment on the issue of whether it had authority to condition the permits on Al Hamilton's fulfillment of the terms of a settlement agreement reached in an unrelated appeal. However, DEP acted contrary to law when it conditioned three of the permits on the compliance with a Consent Order and Agreement to which Al Hamilton was not a party. Although DEP asserts that Al

Hamilton is a "related party" to the mining company involved in the Consent Order and Agreement by virtue of its status as a subcontractor, the evidence does not demonstrate that Al Hamilton was a "related party" at the time of the issuance of the permits in question. Moreover, since Al Hamilton was not a party to the Agreement, it exercises no control over its enforcement.

OPINION

This matter involves seventeen appeals filed by Al Hamilton Contracting Company ("Al Hamilton") on July 13, 1995, consolidated at EHB Docket No. 95-124-R. The appeals challenge the inclusion of certain special conditions in seventeen surface mining permits reissued to Al Hamilton by the Department of Environmental Protection ("DEP") in June 1995. The permits were issued conditionally based on some or all of the following conditions: (1) Al Hamilton's compliance with certain administrative orders issued by DEP in connection with other mining operations of Al Hamilton; (2) Al Hamilton's compliance with a Consent Order and Agreement issued in connection with a mine site permitted by Thompson Brothers Coal Company, Inc., which Al Hamilton mined as a subcontractor; and (3) pending the outcome of Al Hamilton's appeal of a civil penalty assessment issued by DEP in connection with a separate mining operation. Each of the special conditions deals with mining operations other than those covered by the permits involved in this appeal. In its appeals, Al Hamilton challenges the inclusion of these special conditions as being outside the scope of DEP's authority.

On November 21, 1995, DEP filed a Motion for Summary Judgment and supporting memorandum of law. Also included with the Motion are three supporting affidavits. In its Motion, DEP asserts that it has the authority pursuant to §3.1(d) of the Surface Mining

Conservation and Reclamation Act ("Surface Mining Act"), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.*, at 52 P.S. §1396.3a(d), and 25 Pa. Code §86.37(a)(8) of the regulations to condition a surface mining permit on the applicant's satisfactory progress toward compliance with outstanding Departmental orders or consent orders and agreements.

Al Hamilton filed a Response on December 15, 1995, in which it asserts that, by including the conditions in the permits, DEP has required Al Hamilton to take affirmative action (as to the alleged violations covered by the administrative orders, consent order and agreement, and civil penalty assessment) without any final determination having been made as to Al Hamilton's liability. By way of further response, Al Hamilton asserts that it is in compliance with the administrative orders referenced in the permit conditions. As to the Consent Order and Agreement with Thompson Brothers Coal Company, Al Hamilton argues that because it was not a party to the Agreement, DEP cannot condition permits issued to Al Hamilton upon the satisfactory performance of the Agreement. Finally, Al Hamilton asserts that the appeal from the civil penalty assessment was withdrawn in May 1995 and, therefore, any special condition concerning this appeal is unnecessary.

DEP filed a Reply to Al Hamilton's Response on January 4, 1996. In its Reply, DEP asserts that the only issue raised by Al Hamilton in its Notice of Appeal was whether DEP had the authority to condition the permits on Al Hamilton's compliance with outstanding Departmental orders and/or agreements. DEP argues that the Notice of Appeal did not aver that Al Hamilton was in compliance with the orders in question or challenge the company's relationship to Thompson Brothers Coal Company, and, therefore, these two issues cannot be raised at this time. DEP also challenges Al Hamilton's failure to support its claims with any

affidavits. Finally, as to Al Hamilton's claim that the permit condition regarding the appeal of the civil penalty assessment is unnecessary because the appeal was withdrawn, DEP contends that this condition was properly included because the settlement of that appeal included Al Hamilton's performance of a hydrogeologic study which was still ongoing at the time of the permit issuances. We shall examine each of the parties' arguments below.

DEP's Authority to Condition Permits on Compliance with Departmental Orders

All of the seventeen permits in question were issued conditionally based on Al Hamilton's compliance with the following administrative orders:

Order No.	Permit No.	Date of Order
924104	17723164	9/29/92
944092	17793169	10/25/94
924096	4770BSM9	9/17/92

Some of the permits contain the provision that a failure to comply with the orders will result in a suspension of the permits.

Order No. 924104 directed Al Hamilton to conduct a study to address the geologic and hydrogeologic relationship between its Little Beth operation and the property of a nearby landowner (the "Cowder site"). This order was upheld by the Environmental Hearing Board and the Commonwealth Court. Al Hamilton Contracting Company v. DER, 1994 EHB 1027, aff'd, 659 A.2d 31 (Pa. Cmwlth. 1995). Order No. 924096 directed Al Hamilton to treat an area of iron staining at the Brenda Gayle No. 1 operation. Al Hamilton appealed this order to the Environmental Hearing Board at EHB Docket No. 92-467-R; the outcome of this appeal is still pending. Finally, Order No. 944092 directed Al Hamilton to treat or abate a discharge of

acid mine drainage at the Caledonia Pike No. 3 site. The mine sites covered by the orders are unrelated to the sites covered by the permits which are the subjects of this appeal. (Carrello Affidavit)

Al Hamilton argues that DEP has exceeded the scope of its authority by conditioning the permits in question on Al Hamilton's compliance with orders pertaining to other mine sites, particularly where, as in the case of Order No. 924096, a final determination has not yet been made as to Al Hamilton's liability for the violation cited in the order.

Contrary to Al Hamilton's position, however, there is authority in both the Surface Mining Act and the regulations for DEP to condition a permit on the applicant's compliance or "satisfactory progress toward compliance" with an order of DEP, whether related to the permit site in question or not. Section 3.1(d) of the Surface Mining Act states in relevant part as follows:

> The department shall not issue any surface mining permit or renew or amend any permit if it finds, after investigation and an opportunity for an informal hearing, that (1) the applicant has failed and continues to fail to comply with any provisions of this act or any of the acts repealed or amended hereby or (2) the applicant has shown a lack of ability or intention to comply with any provision of this act or of any of the acts repealed or amended hereby as indicated by past or continuing violations. Any person, partnership, association or corporation which has engaged in unlawful conduct as defined in [this act], which has a partner, associate, officer, parent corporation, subsidiary corporation, contractor or subcontractor which has engaged in such unlawful conduct or which controls or has controlled mining operations with a demonstrated pattern of wilful violations of any provisions of this act or the Surface Mining Control and Reclamation Act of 1977 [citations omitted] shall be denied any permit required by this act unless the permit application demonstrates that the unlawful conduct is being corrected to the satisfaction of the department...

52 P.S. § 1396.3a(d).

Further support is found at 25 Pa. Code §86.37(a), which deals with the criteria which DEP must review in determining whether a mining permit should be issued. This provision states that "[a] permit or revised permit application will not be approved unless the application affirmatively demonstrates and the Department finds" that certain criteria have been met. Among these are the following:

> The applicant has submitted proof that a violation related to the mining of coal by the applicant, a person owned or controlled by the applicant or a person who owns or controls the applicant under the definition of "owned or controlled" or "owns or controls" in § 86.1 (relating to definitions) or by a related party of the acts, a rule, regulation, permit or license of the Department has been corrected or is in the process of being corrected to the satisfaction of the Department, whether or not the violation relates to an adjudicated proceeding, agreement, consent order or decree, or which resulted in a cease order or civil penalty assessment. A permit issued under this paragraph on the basis that a violation is in the process of being corrected or pending the outcome of an appeal, and the appropriate regulatory authority program having jurisdiction over the violation provides for a stay of execution of the abatement procedure or a court of competent jurisdiction has issued a supersedeas providing that relief, will be issued conditionally.

25 Pa. Code §86.37(a)(8). According to the language of §86.37(a)(8), DEP may expressly condition a permit on the applicant's demonstration that an outstanding violation is in the process of being corrected to the satisfaction of DEP. This is true even though the violation may be the subject of a pending appeal.

Therefore, based on §3.1(d) of the Surface Mining Act, 52 P.S. §1396.3a(d), read in conjunction with Pa. Code §86.37(a)(8), we find that DEP has the authority to condition

permits on an applicant's compliance with outstanding Departmental orders, even where the orders pertain to sites other than that which is the subject of the pending permit application.

We now turn to Al Hamilton's contention that it is in compliance with the aforesaid administrative orders. DEP has asserted in its Reply that Al Hamilton may not raise this issue at this time since it did not raise it in its Notice of Appeal. We agree with DEP that the issue of Al Hamilton's compliance with the orders in question was not raised in the Notice of Appeal and, therefore, it is untimely. Pennsylvania Game Commission v. DER, 509 A.2d 877 (Pa. Cmwlth. 1986), aff'd, 521 Pa. 121, 555 A.2d 812 (1989).

However, even if Al Hamilton had raised this argument in a timely fashion, it has provided no evidence to support its claim that it was in complete compliance with the orders at the time DEP issued the permits in question. The only documentation which Al Hamilton has included with its Response are copies of inspection reports for the Caledonia Pike No. 3 site which show that in June 1995, when the permits in question were issued, Al Hamilton was "in satisfactory progress under [Compliance Order No.] 944092." Al Hamilton was placed in full compliance with this order on July 17, 1995, after issuance of the permits. There is no documentation included with Al Hamilton's Response as to the status of its compliance with Compliance Orders No. 924104 or 924096 at the time of the permit issuances. However, according to the affidavit of DEP Mining Permit & Compliance Specialist, Mario Carello, Al Hamilton was not placed in compliance with Order No. 924104 (Cowder Study Order) until September 1, 1995, and was still progressing toward compliance with Order No. 924096 as of the date of DEP's Motion.

Therefore, even if Al Hamilton had raised the issue of compliance in a timely manner, there appears to be no dispute that Al Hamilton was not in full compliance with the orders at the time the permits in question were issued.

DEP's Authority to Condition Permits on Pending Appeal of Penalty Assessment

A second special condition placed in each of the permits states, "This permit is issued conditionally based upon the outcome of the appeal of the formal assessment issued November 14, 1994." Al Hamilton asserts that because this appeal has been settled and withdrawn, it should not be made a condition of the permits in question. DEP counters that, although the appeal had been settled and withdrawn at the time of the permit issuances, one of the terms of the settlement involved a study by Al Hamilton which was still ongoing at the time the permits were issued.

The civil penalty assessment in question relates to Compliance Order No. 924104 and the Cowder site, referenced above. As noted earlier, Compliance Order No. 924104 directed Al Hamilton to perform a geologic and hydrogeologic study at the Cowder site.

On September 21, 1994, DEP issued to Al Hamilton a Failure to Abate Cessation Order for failing to comply with Compliance Order No. 924104. On November 14, 1994, a $30,000 civil penalty was assessed against Al Hamilton for failing to comply with the same compliance order. (Carrello Affidavit)

Al Hamilton appealed both the Failure to Abate Cessation Order and the civil penalty assessment. On May 7, 1995, the parties reached a settlement in which Al Hamilton agreed to a reduced penalty of $750 and an extended schedule for complying with the Cowder study order. (Carrello Affidavit) According to Mr. Carrello's affidavit, DEP considered Al

Hamilton to be in "satisfactory progress" toward compliance with the Cowder study order at the time of the issuance of the permits which are the subject of this appeal, but it "had neither completed the study nor otherwise been placed in compliance." (Carrello Affidavit, paragraph 14) Based on Al Hamilton's ongoing progress with the Cowder study order at the time of the permit issuances in question, DEP asserts that this special condition was properly placed in the permits.

We must agree with DEP. According to Mr. Carrello's affidavit, which has not been disputed by Al Hamilton, Al Hamilton was in the "process of correcting the violation", that is, the ongoing Cowder study, at the time of the permit issuances in June 1995. Since we have determined that 25 Pa. Code §86.37(a)(8) authorizes DEP to condition a permit upon the applicant's compliance or progress toward compliance with an agreement or order of DEP, we find that DEP had the proper authority to condition the permits in this manner.

We would add, however, that once a permittee has completed the requisite corrective action and has achieved full compliance, as in the case of the Cowder study order, DEP must have some provision for removing the condition in question from the permit or designating that the condition has been fulfilled.

DEP's Authority to Condition Permits on Consent Order with Thompson Brothers

Three of the permits contain the following special condition: "This permit is issued conditionally based on Al Hamilton Contracting Company's compliance with the Consent Order and Agreement of August 4, 1994...(Thompson Bros. Coal Co., Inc.)" The Consent Order and Agreement pertains to the reclamation of a mine site permitted by Thompson Brothers Coal Company ("Thompson Brothers"), known as the Morris-Emigh operation. Al

Hamilton was a contract operator for Thompson Brothers at the site (Carrello Affidavit), but is not a party to the Agreement. A copy of Al Hamilton's Contract Operator Approval Certificate is attached to Mr. Carrello's Affidavit as Exhibit G. A copy of the Consent Order and Agreement is attached to Mr. Carrello's Affidavit as Exhibit H. As of the dates of issuance of the permits which are the subjects of this appeal, DEP considered Thompson Brothers to be in "satisfactory progress" toward compliance with the Consent Order and Agreement but not in full compliance. (Carrello Affidavit, paragraph 30)

Al Hamilton argues that because it is not a party to the Consent Order and Agreement, its permits cannot be conditioned on satisfactory performance of the Agreement. In its Reply, DEP argues, first, that Al Hamilton is precluded from raising this argument since it did not include it in its Notice of Appeal. Second, DEP argues that even if Al Hamilton is allowed to make this argument it has no merit since, as a contract operator, Al Hamilton is a "related entity" to Thompson Brothers.

We first examine whether Al Hamilton has raised this argument in its Notice of Appeal. Mindful of the Commonwealth Court's holding in Croner, Inc. v. Department of Environmental Resources, 589 A.2d 1183 (Pa. Cmwlth. 1991), that we must broadly construe an appellant's grounds for appeal, we find that Al Hamilton has sufficiently raised this issue in its Notice of Appeal. Specifically, in paragraph 3.h of the Notice of Appeal[1], Al Hamilton asserts that DEP's inclusion of the special conditions in the permits imposes conditions and criteria on Al Hamilton which are other than those contained at 25 Pa. Code §86.37. For the

[1]We shall refer to the seventeen Notices of Appeal filed in this matter as one "Notice of Appeal" since they contain identical objections.

reasons set forth below, we find that the condition in question goes beyond the scope of DEP's authority under §86.37.

Section 86.37(a)(8) states that it applies not only to violations by a permit applicant, but also to violations by a "related party" or by one who "owns or controls" or is "owned or controlled by" the applicant. Section 86.1 includes within the definition of "related party" a contractor or subcontractor. Likewise, an "operator or contractor of a coal mining activity" is presumed to fall within the definition of "ownership or control". 25 Pa. Code §86.1. DEP argues that, by virtue of its contractual relationship with Thompson Brothers, Al Hamilton falls within these categories.

DEP also points to the following language in §3.1(d) of the Surface Mining Act:

> Any person, partnership, association or corporation which has engaged in unlawful conduct as defined in section 18.6,[footnote omitted] which has a partner, associate, officer, parent corporation, subsidiary corporation, contractor or subcontractor which has engaged in such unlawful conduct or which controls or has controlled mining operations with a demonstrated pattern of wilful violations of any provisions of this act or the Surface Mining Control and Reclamation Act of 1977 [citations omitted] shall be denied any permit required by this act unless the permit application demonstrates that the unlawful conduct is being corrected to the satisfaction of the department. Persons other than the applicant, including independent subcontractors, who are proposed to operate under the permit shall be listed in the application and those persons shall be subject to approval by the department prior to their engaging in surface mining operations, and such persons shall be jointly and severally liable with the permittee for such violations of this subsection as the permittee is charged and in which such persons participate.

52 P.S. §1396.3a(d). Based on this language and the aforesaid language in §86.37(a)(8), DEP asserts that it may condition Al Hamilton's permits on the satisfactory performance of Thompson Brothers' Consent Order and Agreement.

Al Hamilton raises several arguments in response to DEP's assertions. First, Al Hamilton points out that the Contract Operator Approval Certificate attached to Carrello's affidavit as Exhibit G was issued on August 18, 1995, after the issuance of the permits involved in this appeal. Second, Al Hamilton states that, although at one time it had contracted with Thompson Brothers to extract coal, this relationship was discontinued and, therefore, it denies that it exercises any control over Thompson Brothers. Finally, it points out that it is not a party to the Consent Order and Agreement with Thompson Brothers.

We agree with Al Hamilton that this condition is beyond the scope of §3.1(d) of the Surface Mining Act and 25 Pa. Code §86.37(a)(8). DEP has presented us with no evidence that Al Hamilton owned or controlled or was owned or controlled by Thompson Brothers at the time DEP issued the permits in question. As correctly noted by Al Hamilton, the Contract Operator Approval Certificate provided by DEP in support of its Motion was issued after the permits in question were issued and, therefore, cannot form the basis for DEP's contention that Al Hamilton exercised ownership or control over Thompson Brothers at the time of the permits' issuance. Moreover, as Al Hamilton has also pointed out, it is not a party to the very Consent Order and Agreement which DEP has, in effect, charged it with enforcing. Although the Consent Order and Agreement mentions Al Hamilton, it does not require Al Hamilton to take any action. Nor is there any indication that a separate compliance order was issued to Al Hamilton with respect to this site. Based on this, we cannot find that this condition was a

proper exercise of DEP's discretion.

Summary Judgment

The Board is empowered to grant summary judgment where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Pa.R.C.P. 1035(b); Robert L. Snyder, et al. v. Department of Environmental Resources, 588 A.2d 1001 (Pa. Cmwlth. 1991), appeal dismissed, __ Pa. __, 632 A.2d 308 (1993). With respect to the special conditions relating to Al Hamilton's compliance with Departmental Orders No. 924104, 944092, and 924096 and the special condition related to the settlement of the Cowder civil penalty appeal, we find that there are no genuine issues as to any material fact and that DEP is entitled to judgment as a matter of law. Therefore, summary judgment is granted to DEP with respect to the question of its authority to impose these conditions in the permits which are the subject of this appeal. However, DEP is not entitled to judgment as a matter of law with respect to the special condition requiring Thomas Brothers' compliance with the Consent Order and Agreement for the Morris-Emigh site, for the reasons set forth above, and, therefore, summary judgment is denied with respect to this condition.

ORDER

AND NOW, this 19th day of April, 1996, it is hereby ordered that DEP's Motion for Summary Judgment is **granted in part and denied in part**. The Motion is **granted** on the issue of DEP's authority to include those special conditions in the permits involved in this appeal which require Al Hamilton's compliance with Departmental Orders Nos. 924104,

944092, and 924096 and which require Al Hamilton's compliance with the settlement of the Cowder study civil penalty appeal. It is further ordered that, for the reasons set forth herein, the Motion is **denied** on the issue of DEP's authority to include a special condition in the permits requiring compliance with the Consent Order and Agreement between DEP and Thompson Brothers Coal Company.

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Administrative Law Judge
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MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 19, 1996

See next page for service list.

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M. DIANE SMITH
SECRETARY TO THE BOA

MORCRETTE, et al.	:	
	:	
v.	:	**EHB Docket No. 95-176-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PINE CREEK VALLEY WATERSHED ASSOCIATION, INC.	:	**Issued: April 19, 1996**

OPINION AND ORDER ON MOTION TO DISMISS APPEAL AS MOOT

By: George J. Miller

Synopsis:

The appeal of real estate developers from the Department's denial of a planning approval for new land development is dismissed as moot where the developers have sought approval of a second planning module and no longer intend to pursue the first planning module.

BACKGROUND

Two real estate developers, Kathy Morcrette and Mary Gresh ("Developers"), desire to construct seven large residences on a fifty-one acre parcel of land located in Rockland Township, Berks County. The proposed development is on Lobachsville Road, which is also known as State Route 1023.

To this end, the developers prepared and submitted a planning module for new land development to Rockland Township which approved it and submitted it to the Department of

Environmental Protection for its approval pursuant to the provisions of the Sewage Facilities Act, Act of January 24, 1966, PL. (1965) 1535, as amended, 35 P.S. §750.1, et seq. By letter dated July 21, 1995, the Department disapproved the module for a number of reasons including the fact that two of the seven proposed lots exceeded minimum slopes on which an elevated sand mound permissibly could be constructed and the likely impact of the septic systems on a tributary to Pine Creek, which is classified under the Department's regulations as an Exceptional Value water. This appeal followed from that denial.

After a meeting between the Developers and the Department's technical staff, the Developers prepared and submitted a second planning module in which many of the deficiencies which led to the Department's disapproval of the second module had been corrected. The Township approved this planning module and submitted it to the Department for review. The Department's motion for summary judgment,joined in by the intervenor, Pine Creek Valley Watershed Association, Inc. ("Pine Valley") states that the Developers no longer intend to pursue the first planning module with its many deficiencies (Motion, ¶10).

On or about February 13, 1996, the Developers received a notice of disapproval from the Department with respect to the second module. The Developers claim that this denial was the result of an objection made by the intervenor, Pine Valley.

The Department denied approval of the second planning module because of the predicted adverse impact of the on-lot sewage disposal systems on the unnamed tributary to Pine Creek. Pine Creek has been designated as an Exceptional Value stream under the Department's regulations. These regulations require that "Exceptional Value waters" shall be maintained and protected at a minimum at their existing quality. 25 Pa. Code §95.1(c).

The Department and Pine Valley moved to dismiss the appeal from the first planning module as moot in the belief there is no longer any meaningful relief which the Board could grant to the Developers as to the first planning module.

DISCUSSION

The appellants' response to the motion to dismiss does not in any way challenge the claim of Paragraph 10 of the Department's Motion that the Developers no longer intend to pursue the first planning module. Under Rule 70(e) of the Board's Rules, 25 Pa. Code §1021.70(e), a response to a motion is required to set forth in correspondingly-numbered paragraphs all factual disputes as well as the reason the opposing party objects to the motion. Appellants' response to the motion fairly clearly confirms that they have abandoned the first planning module in favor of the second. Their response to the motion requests that the Department be ordered to approve the second module which the Developers prepared at great expense in accordance with what they believe were the requirements of the Department.

As the Department points out, the Developers are free to appeal from the denial of the second planning module if they choose to do so. However, this Board could not give appellants the relief which they request with respect to the second planning module in this appeal. The Board has no power to compel the Department to approve the second planning module at least until after a hearing in an appeal on the second module at which time the contentions of the Department and the intervenor, if there is an intervenor in any second appeal, could be heard. In addition, the Board is not statutorily authorized to exercise judicial powers in equity. Marinari v. DER, 566 A.2d 385 (Pa. Cmwlth. 1989).

Since the Board cannot give the appellants the relief which they seek with respect

to the second planning module in this appeal, and the appellants have abandoned the planning module which was the subject of this appeal, the dispute with respect to the first planning module is moot. The Courts and this Board have consistently held that a matter before the Board becomes moot when an event occurs that deprives the Board of the ability to provide effective relief. Pennsylvania Electric Company v. DER, 1994 EHB 810; Empire Sanitary Landfill, Inc. v. DER, 1994 EHB 30, 46-47. See also Newtown Limited Partnership v. DER and Newtown Township, 1994 EHB 856.

ORDER

AND NOW this 19th day of April, 1996, this appeal from the first planning module is hereby dismissed as moot.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Member

DATED: **April 19, 1996**

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M. DIANE SMITH
SECRETARY TO THE BOA

AL HAMILTON CONTRACTING COMPANY :
:
v. : EHB Docket No. 92-467-R
:
COMMONWEALTH OF PENNSYLVANIA, : Issued: April 29, 1996
DEPARTMENT OF ENVIRONMENTAL PROTECTION[1] :

ADJUDICATION

By: Thomas W. Renwand, Member

Synopsis

The Board sustains an appeal from the Department of Environmental Resources' (Department) issuance of a Compliance Order concerning an alleged discharge of acid mine drainage.

In challenging the Department's issuance of the Compliance Order, the appellant is collaterally estopped from challenging issues resolved against it in earlier litigation involving the same mine site. Furthermore, the Board once again admits the Department's water sample analyses pursuant to the Business Records Act.

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[1]Pursuant to §501 of the Conservation and Natural Resources Act, the Act of June 28, 1995, the Department of Environmental Resources was renamed the Department of Environmental Protection. For the sake of consistency, however, in the body of this adjudication the Board will continue to refer to the Department of Environmental Resources since the Compliance Order under appeal was issued by that entity.

Although the Department successfully demonstrated that the discharge violated the effluent limits of 25 Pa.Code §87.102, the Department failed to show that the discharge was hydrogeologically connected to the appellant's mine site.

INTRODUCTION

Once again, the Board is called upon to resolve a dispute between the Department and Al Hamilton Contracting Company (Hamilton) over an acid mine drainage discharge that the Department alleges is hydrogeologically connected to Hamilton's Brenda Gayle #1 mine site (Mine Site) in Rush Township, Centre County. This matter has its origins in the October 13, 1992 Notice of Appeal filed by Hamilton from the Department's September 17, 1992 Compliance Order. It concerns a discharge of acid mine drainage into the Mountain Branch, a tributary of Moshannon Creek, from the "1050 seepage area." This discharge is so named because of its location approximately 1,050 feet upstream of the water intake for the Houtzdale Municipal Authority.

In the Compliance Order, the Department contends that the 1050 seepage area is hydrogeologically connected to the Mine Site and that Hamilton mined through the recharge area for the groundwater emanating from the 1050 seepage area. The Department further contends the discharge from the 1050 seepage area has the chemical characteristics of acid mine drainage, as evidenced by the concentrations of iron (Fe), manganese (Mn), sulfate (SO_4), and acidity, and does not meet the effluent limits set forth in the Department's regulations, 25 Pa.Code §87.102. And finally, the Department contends the waters of the

Mountain Branch regularly exceed the instream limits for iron, as set forth in 25 Pa.Code Ch. 93, at the point where the discharge from the 1050 seepage area enters the stream, but do not exceed the instream limits for iron upstream of that point. Based on these findings, the Department ordered Hamilton to submit a treatment or abatement plan that provides for the collection and treatment of groundwater emanating from the 1050 seepage area. The Department further ordered Hamilton to implement the plan within 15 days of the Department's approval.

Along with its Notice of Appeal, Hamilton also filed a petition for supersedeas pursuant to the Board's rules at 25 Pa.Code §21.76. After former Board Chairman Maxine Woelfling conducted a supersedeas hearing, she issued an opinion and order denying Hamilton's petition for supersedeas. *See*, Al Hamilton Contracting Company v. DER, 1993 EHB 329.

A hearing on the merits was held on September 28-30, 1993, May 17-19, 1994, and July 18 and 19, 1994, before Judge Woelfling. The parties completed the filing of post-hearing and reply briefs on December 13, 1994. Any issues not raised in the post-hearing briefs have been waived. Lucky Strike Coal Co., *et al.* v. Cmwlth., Dept. of Environmental Resources, 547 A.2d 447, 449 (Pa.Cmwlth 1988).[2]

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[2]Due to Judge Woelfling's resignation from the Board on February 17, 1995, this matter was eventually reassigned to Judge Thomas W. Renwand. The Board is empowered to adjudicate the merits of this appeal from a cold record. *See*, Lucky Strike Coal Co., 547 A.2d at 449.

The record in this matter consists of a transcript of 1,819 pages and 35 exhibits.[3] After a full and complete review of this record, the Board makes the following findings of fact.

FINDINGS OF FACT

1. Appellant is Hamilton, a Pennsylvania business corporation with its principal place of business in Woodland, Pennsylvania (Notice of Appeal).

2. Appellee is the Department, the agency of the Commonwealth with the authority to administer and enforce the Surface Mine Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §1396.1 *et seq.* (SMCRA); the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.* (Clean Streams Law); Section 1917-A of the Administrative Code of 1929, the Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §510-17; and the rules and regulations adopted thereunder.

3. At all times relevant hereto, Hamilton was the permittee and operator of a bituminous surface coal mine at the Mine Site (J.Stip.).[4]

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[3]Pursuant to the parties' September 21, 1993, joint stipulation, the record compiled at the supersedeas hearing was incorporated into the final record in this appeal.

[4]References to the record are as follows: "J.Stip" refers to the parties September 21, 1993, Joint Stipulation; "N.T." refers to the Notes of Testimony from the merits hearing; "Super. N.T." refers to the Notes of Testimony from the supersedeas hearing; "Ex. A-_" refers to Hamilton's exhibits; and "Ex. C-_" refers to the Department's exhibits.

4. Hamilton was authorized to conduct surface mining activities on the Mine Site pursuant to, *inter alia*, Mine Drainage Permit 447708SM9 (J.Stip.).

5. In January 1989, James McDonald, a Surface Mine Conservation Inspector, noticed iron staining in the stream bed of Mountain Branch at a point 1,050 feet upstream from the water intake for the Houtzdale Municipal Authority (hereafter referred to as the 1050 discharge) (N.T. 227, 230-231).

6. Mountain Branch is a tributary to Moshannon Creek in the southwestern corner of Centre County (J.Stip.).

7. Prior to January 1989, Mr. McDonald had never seen iron staining in Mountain Branch (N.T. 231).

8. Mr. McDonald observed iron staining in Mountain Branch again in February 1989 and throughout the following summer (N.T. 235).

9. In August 1989, iron staining in the stream bed of Mountain Branch extended to more than 10 feet upstream of the 1050 discharge (N.T. 329).

10. The iron staining was washed away in April 1993, but has since reappeared and is visible all the way to the Houtzdale intake (N.T. 238).

11. On September 17, 1992, the Department issued Hamilton the Compliance Order which required Hamilton to treat the 1050 discharge (J.Stip.).

12. The Mine Site is located on top of a hill to the south-southwest of Mountain Branch (Ex. C-2).

13. In the area closest to the Mine Site, Mountain Branch flows from southeast to northwest (Ex. C-2).

14. The topography of the area between the Mine Site and Mountain Branch gently slopes from the northeastern edge of the Mine Site to a steep bank approximately eight to ten feet above the floodplain of the stream (N.T. Super. 71).

15. The area immediately adjacent to Mountain Branch is composed of wet or saturated alluvial material (N.T. 1209).

16. Two major faults run through the area between the Mine Site and Mountain Branch (N.T. Super. 114-116; N.T. 633-640; Ex. C-2).

17. The fault zone is located on the bench above the floodplain of Mountain Branch (N.T. 1210).

18. These faults between the Mine Site and Mountain Branch are near-vertical thrust faults, meaning that one block of material has moved upward relative to another block of material (N.T. 885).

19. The geologic map for this area from the Pennsylvania Geologic Survey indicates several hundred feet of vertical displacement along these faults (N.T. 634, 809, 887).

20. The Mine Site is located on the block of material containing the Kittanning and Clarion series of strata (N.T. 1222).

21. The Glen Ritchie Formation, which is on the other side of the fault zone from the Mine Site, contains the Freeport strata and was displaced downward in the vicinity of Mountain Branch (N.T. 1222).

22. The 1050 discharge is located on the Glen Ritchie side of the fault zone (N.T. 1225).

23. Samples were collected in accordance with Department procedures and reports were prepared (N.T. 102).

Terrain Conductivity Study

24. Joseph Schueck is a Hydrogeologist with the Division of Monitoring and Compliance in the Department's Bureau of Mining and Reclamation, as well as a registered Professional Engineer (N.T. Super. 5-7, 203-204).

25. Mr. Schueck is an expert in hydrogeology and geophysics, with an emphasis on terrain conductivity and resistivity studies (Super. N.T. 203).

26. Mr. Schueck conducted a terrain conductivity study of the area between the Mine Site and Mountain Branch in December 1990 (N.T. Super. 16, 20).

27. Mr. Schueck did not study the area across Mountain Branch from the Mine Site (N.T. Super. 267).

28. Mr. Schueck presented papers in 1988 and 1991 at two coal symposiums, one of which compared the use of terrain conductivity and magnetics to find "very tipple refuse," and the other of which concerned the use of terrain conductivity and magnetics to investigate mine fires and burning refuse banks, and to locate the source of AMD (N.T. Super. 96, 129).

29. Mr. Schueck's papers and presentations were published or submitted to knowledgeable experts for their review (N.T. Super. 129; N.T. 561-562).

30. Mr. Schueck also wrote a paper concerning an EPA-sponsored research project in Clinton County that involved the use of geophysical mapping techniques, including resistivity, terrain conductivity, and magnetics, to determine where to inject fluidized bed fly ash in order to abate AMD (N.T. Super. 96; N.T. 559).

31. The purpose of the Clinton County project was to locate the source of AMD and to isolate the pyritic material from rainwater and oxygen (N.T. 559).

32. Mr. Schueck was invited to present his most recent paper to the annual meeting of the Association of Abandoned Minelands, to a conference concerning the utilization of fly ash, to the Pennsylvania Coal Association, and to a panel concerning waste disposal as an alternative to reclamation (N.T. 559-560).

33. Within the past 12 years, no articles have been published that evaluated the use of terrain conductivity for mine-related applications (N.T. 1434).

34. Michael Smith is the District Mining Manager at the Department's Hawk Run District Office (N.T. 405).

35. If Mr. Smith has a case that requires a geophysical investigation, he sends a request to the Department's central office for Mr. Schueck to conduct the appropriate study (N.T. 509).

36. Mr. Smith made no requests for geophysical investigations in 1991, 1992, or 1993 (N.T. 509).

37. Wilson Fisher is the President and Chief Engineer of Hess & Fisher Engineers, Inc., in State College (Ex. A-1).

38. Mr. Fisher has completed undergraduate and graduate studies in geophysics and geochemistry, and was qualified by the Board as an expert in terrain conductivity and resistivity (N.T. 1151-1152, 1178; Ex. A-1).

39. Mr. Fisher has extensive professional experience in the fields of terrain conductivity and resistivity (N.T. 1150-1178; Ex. A-1).

40. In the early 1970s, Mr. Fisher was a staff engineer involved in the development of terrain conductivity and, as such, collected data and performed some of the mathematical analyses underlying the concept (N.T. 1170).

41. Mr. Fisher did not replicate Mr. Schueck's terrain conductivity study between the Mine Site and Mountain Branch (N.T. 1174).

42. Terrain conductivity measures the apparent conductivity of the earth between a receiver and a transmitter (N.T. Super. 17; N.T. 1155).

43. Terrain conductivity readings over a plume of AMD will be much higher than readings taken over uncontaminated ground (N.T. Super. 17).

44. Mr. Schueck used an instrument known as the Geonics EM-34 to conduct his terrain conductivity study (N.T. Super. 17).

45. The EM-34 utilizes two hoops separated by a distance of 10 meters to measure terrain conductivity (N.T. Super. 17).

46. When the hoops are situated vertically, i.e. perpendicular to the ground surface, the EM-34 measures the conductivity of the ground to a depth of approximately 24 feet, and when the hoops are situated horizontally, it measures conductivity to a depth of approximately 45 feet (N.T. Super. 18).

47. When conducting a terrain conductivity study, the hoops must be as close to horizontal as possible, even if the ground is on a slope (N.T. 382).

48. The hoops on the EM-34 do not have a level to indicate when they are perfectly horizontal (N.T. 382).

49. Mr. Schueck used a computer program known as SURFER to generate two contour maps depicting the shallow and deep conductivity in the study area between the Mine Site and Mountain Branch (N.T. Super. 19; Exs. C-4a, C-4b).

50. The SURFER program is widely used and generally accepted by hydrogeologists (N.T. Super. 233-234).

51. The SURFER program determines the value for a particular grid point by considering the actual value of that point along with the values of the 10 nearest data points (N.T. 1070).

52. The orientation of the terrain conductivity contour maps, i.e. north, south, east, and west, does not match the orientation of the permit map (N.T. 234; Exs. C-2, C-4a, C-4b).

53. Mr. Schueck took terrain conductivity readings every 25 feet along a grid laid-out between the Mine Site and Mountain Branch (N.T. Super. 21).

54. The coil spacing on the EM-34 is 10 meters or 32.8 feet, resulting in an overlap of 7.8 feet for every reading (N.T. Super. 17; N.T. 926-927).[5]

55. The 7.8 feet overlap between readings did not adversely affect the results of the conductivity surveys (N.T. 927, 1060, 1067-1068).

56. A shallow groundwater level and a greater saturated thickness will result in a greater conductivity reading (N.T. Super. 73).

57. Based on his experience in the Appalachian Plateau region, Mr. Schueck believes a conductivity reading of 7 millimhos per meter (mmhos/m) is indicative of AMD (N.T. Super. 93; N.T. 566, 569).[6]

58. Conversely, Mr. Schueck also believes a conductivity reading of less than 7 mmhos/m is indicative of areas underlain by dry soils, nonconductive groundwater, or with poor degrees of saturation (N.T. 566-567).

59. The purpose of the terrain conductivity was to ascertain the limits of the AMD plume, not its movement (N.T. Super 137).

60. Mr. Schueck did not attempt to determine the background or baseline conductivity in the area of the study (N.T. 937).

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[5]Although Mr. Schueck and counsel for Hamilton discussed a conversion ratio of 31 feet for 10 meters, this value is incorrect and the Board takes judicial notice of the proper conversion factor: 39.37 inches/meter or 3.28 feet/meter. *See*, Fulkroad v. DER, 1993 EHB 1630, 1632 (Board can take judicial notice of, among other things, weights, measures, and values).

[6]A "mho" is "the practical unit of conductance equal to the reciprocal of the ohm." *Webster's Ninth New Collegiate Dictionary* (1989).

61. The results of Mr. Schueck's terrain conductivity study were qualitative and required additional data to understand what they represent (N.T. Super. 274; N.T. 571).

62. In areas with conductivity values greater than 7 mmhos/m, sulfate levels exceed 250 mg/l (N.T. 1024; Exs. C-4a, C-4b).

63. In the study area, the highest levels of sulfate were found next to the Mine Site, while the lowest levels were found next to Mountain Branch (N.T. 575; Exs. C-4a, C-4b).

64. Conductivity levels and sulfate values in the northwestern and southeastern ends of the study area are relatively low, but are relatively high in the center and southwestern portions of the study area (N.T. 584; Exs. C-4a, C-4b).

65. Mr. Schueck did not perform a quantitative analysis of the relationship between sulfate levels and conductivity (N.T. 745).

66. In addition to water quality, other factors that could influence terrain conductivity include degree of saturation, depth of groundwater, and type of bedrock (N.T. 573, 786).

67. Although there was light precipitation during the study, Mr. Schueck did not mathematically correct the data to account for the precipitation (N.T. 938).

68. In order to ensure the accuracy of his multi-day survey, Mr. Schueck measured the conductivity along a certain line in the study area each day

of the survey and found a daily variability in conductivity no greater than 0.5 mmhos/m (N.T. 929-930, 938).

69. There is a 0.91 correlation between the conductivity values measured in the shallow and deep studies (N.T. 1268).

70. A 0.91 correlation means there is no statistical difference between the results of the shallow and deep surveys (N.T. 1269).

71. There is a high correlation between the results of the shallow and deep terrain conductivity surveys because the electromagnetic field generated by the EM-34 will follow a highly conductive zone regardless of whether it is in the horizontal or vertical dipole mode (N.T. 1270).

72. In the study area, the shallow soil and weathered zone profile had a significant ionic and moisture content, causing the deep electromagnetic field to stay near the surface (N.T. 1270).

73. At the 1050 and 1100 wells, groundwater levels were very close to the surface (N.T. Super. 73).

74. Mr. Schueck did not attempt to correlate the other variables that affect conductivity, i.e. depth to groundwater, degree of saturation, and other cations and anions, to the results of the terrain conductivity study (N.T. 764).

75. In order to determine whether the increases in terrain conductivity were the result of saturated soil conditions or the presence of highly ionic groundwater, it is necessary to sample the groundwater and measure its chemical constituents (N.T. 572, 1300).

76. A terrain conductivity study should yield higher values along fault lines (N.T. 838. 1299).

77. The deep terrain conductivity study indicates slightly increased conductivity values near the faults between the Mine Site and Mountain Branch (N.T. 839; Ex. C-4b).

78. The deep terrain conductivity readings compiled by Mr. Schueck in the northeastern end of the study area, i.e. the top of Ex. C-4b, were affected by electromagnetic interference from the Houtzdale Municipal Authority's waterline adjacent to Mountain Branch (N.T. 841. 844. 1070; Ex. C-4b).

79. Mr. Schueck did not know why there was no such interference recorded during the shallow terrain conductivity study (N.T. 850).

80. Because the Houtzdale Municipal Authority's water pipeline is composed of metal and is highly conductive, the terrain conductivity studies should have, but did not, indicate its location (N.T. 1299).

81. Mr. Schueck did not plot the location of a known water pipeline onto his terrain conductivity contour maps (N.T. 841; Exs. C-4a, C-4b).

82. Mr. Schueck did not know whether the relatively high conductivity values for location P-9, which is a swale or drainage way to the north-northwest of the known waterline interference, were the result of electromagnetic interference or of the supersaturated ground there (N.T. 852-853; Ex. C-4b).

83. Both terrain conductivity and resistivity studies can be affected by rapid frequency interruption interference, which is the result of domestic or commercial AC electrical current (N.T. 1242-1243).

84. The effects of rapid frequency interruption interference must be corrected, or the accuracy of the data will be compromised (N.T. 1244).

85. The results of terrain conductivity and resistivity studies can also be affected by changes in soil moisture content, temperature, the viscosity of liquid in soils and rocks, the earth's own magnetic field, and the sun's electromagnetic field (N.T. 1245-1246, 1419).

86. In order to correct for these variables, a baseline must be established at an area whose underlying hydrogeology is completely understood (N.T. 1247-1250, 1424, 1426-1429).

87. Multiple readings taken at a baseline on any given day can vary between 5% and 40% (N.T. 1250).

88. There is no relationship between the qualitative geophysical data from the terrain conductivity and resistivity studies and the water quality data from the wells between the Mine Site and Mountain Branch (N.T. 1265-1267).

89. Because terrain conductivity only yields qualitative values, it is not an acceptable predictive tool for locating plumes of AMD (N.T. 1302-1304, 1322).

Resistivity Study

90. Mr. Schueck also conducted a resistivity study in the area between the Mine Site and Mountain Branch (N.T. Super. 40).

91. Mr. Schueck received one week of formal training on the Barnes resistivity analysis from the United States Geological Survey in 1983 or 1984 and has read extensively on the subject since (N.T. Super. 48-49).

92. Mr. Schueck's resistivity study was conducted along the "trench" line, which was located between the Hamilton I discharges and Mountain Branch (Exs. C-4a, C-4b).

93. Resistivity measures the resistance of material to the transmission of an electromagnetic field or current, and is the inverse of conductivity (N.T. Super. 40. 425: N.T. 1237).

94. The ground is normally a poor conductor with a high resistivity (N.T. 667).

95. Mr. Schueck used the resistivity study as a predictive tool to determine whether AMD would be encountered in certain areas (N.T. 668).

96. Mr. Schueck has never tested the resistivity meter to determine whether it is properly calibrated (N.T. 805).

97. Mr. Schueck's resistivity was performed over the course of several days, during which there was no appreciable rainfall (N.T. Super. 43-44).

98. The resistivity study performed by Mr. Schueck utilized the Wenner method with a Lee modification (N.T. 660).

99. The Wenner method utilizes two inner electrodes, which are connected to an ohmmeter, to measure the resistance between two outer electrodes, through which an electric current passes into the ground (N.T. 661, 905).

100. The Lee modification involves another electrode midway between the two inner electrodes that allows measurements of the resistance between the left and right inner electrodes and the central electrode (N.T. 661).

101. The "A Spacing" is the distance between the inner electrodes (N.T. 661, 905).

102. Mr. Schueck started with an A Spacing of 5 feet and increased that distance in five foot increments to a maximum of between 60 and 80 feet (N.T. 662-663, 905-906).

103. A "sounding" is comprised of all of the measurements taken while increasing the A Spacing from its minimum to its maximum distance (N.T. 603).

104. Mr. Schueck took a sounding every 25 feet along the trench line (N.T. 663).

105. Resistivity is measured in terms of ohm-feet, and is calculated through mathematical manipulation of the raw data acquired during the field study (N.T. Super. 247).

106. Mr. Schueck used a spreadsheet program with formulas already entered to calculate the Barnes-Layer value for each point (N.T. 807).

107. Mr. Schueck's resistivity study resulted in a Barnes-Layer Diagram, which is a cross-sectional view of the distribution of electrical resistivity along the trench line (N.T. Super. 41, 245).

108. The Barnes-Layer Diagram provides a means to look at all of the soundings taken along the trench line (N.T. 666).

109. The Barnes-Layer Diagram can be used to determine the changes in resistivity at different depths (N.T. 902).

110. The formulas used to calculate Barnes-Layer values assume horizontal layering of the geologic strata beneath the test line (N.T. 667, 1234).

111. The lack of homogenous layers beneath the profile line rendered the theoretical basis of the Barnes-Layer Diagram moot (N.T. 1233).

112. The results of a resistivity survey are meaningless unless they are calibrated by comparison with detailed geological data (N.T. 1235-1236).

113. Calibrating the results of a resistivity survey involves drilling into the profile to: identify the strata; affirm the existence of a multi layer scenario; and verify the borehole's resistivity (N.T. 1240-1241).

Hamilton's Current Treatment Operations

114. Hamilton currently collects and treats AMD discharges emanating from Springs One and Two and the Fugitive Discharge (Hamilton I discharges) (N.T. Super. 211-212).

115. The Hamilton I discharges are located between the Mine Site and Mountain Branch to the south-southwest of the Houtzdale intake (N.T. Super. 211-212; Ex. C-2).[7]

Comparison of Water Quality Data

116. On November 6, 1991, the water quality of the 1050 discharge was as follows:

Chemical Constituent	Concentration
pH	6.3
Alkalinity	28.0 mg/l
Suspended Solids	21.0 mg/l
Na	< 10.0 mg/l
SO_4	1764.0 mg/l
Fe	244.0 mg/l
Mn	20.4 mg/l
Al	< 0.5 mg/l
Acidity	440.0 mg/l

(Ex. C-7).[8]

117. The 1050 discharge does not have the same water quality as Springs One and Two and the Fugitive Discharge (the Hamilton I discharges), which Hamilton is currently treating (N.T. Super.132, 183).

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[7]The exact nature and location of these three discharges was discussed at length in the Board's adjudication in Hamilton I, 1993 EHB at 1658-1659, and will not be repeated here.

[8]The Board notes that the abbreviation in the sample reports "RES TOT NONF," meaning residual total nonfilterables, refers to suspended solids (*See*, N.T. 1029).

118. Four wells, A2 shallow and deep (A2S and A2D) and K13 shallow and deep (K13S and K13D) were drilled along the trench line at points allegedly contaminated by AMD to verify the results of the resisitivity study (N.T. Super. 249). 119. On September 5, 1991, the water quality of wells A2S, A2D, K13S, and K13D was as follows:

Well	Fe	Acid	Al	Mn	SO_4	Mg	Ca	Suspen Solids
A2S	13.4	3.0	<0.5	2.6	37.0	9.7	13.4	700.0
A2D	>300.0	1066.0	0.6	51.3	2816.0	196.0	267.0	216.0
K13S	>300.0	1508.0	0.8	61.6	3675.0	247.0	292.0	58.0
K13D	>300.0	1876.0	2.1	117.0	4830.0	371.0	391.0	282.0

(N.T. Super. 251; N.T. 671; Ex. C-6a).

120. On November 7, 1991, the water quality of wells A2S, A2D, K13S, and K13D was as follows:

Well	Fe	Acid	Al	Mn	SO_4	Mg	Ca	Suspen Solids
A2S	75.9	0.0	3.8	2.0	52.0	N/A	N/A	125.0
A2D	>300.0	980.0	1.4	57.4	2499.0	N/A	N/A	107.0
K13S	>300.0	1460.0	<0.5	65.6	3318.0	N/A	N/A	5.0
K13D	>300.0	1780.0	0.6	135.0	4539.0	N/A	N/A	34.0

(N.T. Super. 251; N.T. 671; Ex. C-6b).

121. The calcium and magnesium concentrations at well A2D are caused by limestone used as bedding, amelioration, or abatement material in the vicinity (N.T. 1358).

122. The water quality from the "K" wells is not the same as from the Hamilton I discharges (N.T. Super. 270).

123. Other wells within the study area exhibited the following chemical characteristics:

Well	Fe	Acid	Al	Mn	SO_4	Mg	Ca	Dissol Solids
TH61	257.0	848.0	30.6	168.0	4311.0	555.0	264.0	8002.0
TH56	44.7	848.0	77.9	170.0	4731.0	690.0	223.0	9058.0
THDW1	26.2	558.0	43.8	133.0	3694.0	537.0	206.0	6964.0
TH57	1.2	44.0	1.4	1.1	67.0	5.0	10.3	1164.0
TH62	355.0	1068.0	41.6	218.0	5620.0	624.0	345.0	9160.0
TH55	0.1	22.0	0.6	1.8	42.0	5.0	3.9	1643.9
MW1	10.1	14.2	0.1	5.8	86.0	9.3	12.2	252.0
MW5	0.2	12.2	0.3	0.4	28.0	3.0	3.4	56.0
MW6	3.0	8.0	0.1	0.4	21.0	1.0	1.2	36.0
MW8	0.1	13.6	0.4	0.3	30.0	1.8	3.3	54.0
MW2	122.0	336.0	1.5	64.6	1748.0	210.0	121.0	2810.0
TH174	157.0	366.0	1.3	71.0	1667.0	253.0	119.0	3060.0
TH33	110.0	330.0	1.6	21.1	859.0	67.5	48.7	1688.0
TH173	0.4	52.0	3.3	6.0	221.0	20.5	23.5	418.0
PS2	303.0	1408.0	83.5	251.0	7211.0	1060.0	327.0	11764
PS3	330.0	1212.0	52.9	23.8	6380.0	1020.0	349.0	10100
PS4	15.2	406.0	39.2	55.2	1631.0	188.0	137.0	3356.0
PS5	2.1	714.0	86.9	72.9	2439.0	254.0	201.0	4258.0
MW3	81.1	390.0	23.5	84.1	2197.0	299.0	138.0	4092.0
TH58	0.5	248.0	23.7	48.4	1426.0	196.0	91.0	3042.0
MW4	1.2	164.0	21.0	56.2	1531.0	226.0	123.0	2216.0
J20	0.1	28.0	3.1	7.9	268.0	34.8	30.8	540.0
G15	5.2	598.0	58.8	121.0	3211.0	519.0	223.0	4992.0
06	3.3	114.0	11.0	19.9	559.0	75.2	39.4	852.0
J10	4.7	676.0	75.9	118.0	3073.0	487.0	191.0	4824.0
P9	0.4	590.0	54.6	81.2	2035.0	376.0	151.0	3588.0
TH53	76.0	426.0	24.5	18.2	643.0	31.6	25.5	1496.0
W1050	195.0	406.0	0.4	16.1	1636.0	68.5	273.0	235.0
W1100	33.7	64.0	0.2	4.71	178.0	9.1	25.8	321.0

(Ex. C-3).[9]

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[9]All values are expressed in mg/l except pH, which is expressed in standard units (Ex. C-3).

124. Wells TH61, TH56, and THDW1 are located adjacent to the Mine Site on the southwestern edge of the study area (N.T. 582; Exs. C-4a, C-4b).

125. Wells TH55 and MW1 are located on the northwestern edge of the study area (N.T. 579-580; Exs. C-4a, C-4b).

126. Well TH57 is located adjacent to the mine site near the southwestern corner of the study area (N.T. 582; Exs. C-4a, C-4b).

127. Well TH62 is located in the western end of the study area near wells TH56 and TH61 (N.T. 583; Exs. C-4a, C-4b).

128. Wells MW5, MW6, and MW8 are located in the southeastern portion of the study area (N.T. 596-597; Exs. C-4a, C-4b).

129. Well MW2 is located along the trench resistivity line in the north/northeast corner of the study area (N.T. 648; Exs. C-4a, C-4b).

130. Data point J10 represents the fugitive discharge (from the Hamilton I discharges) (N.T. 717, 720).

131. Mr. Berry hand dug the two monitoring wells along Mountain Branch, one at the 1050 discharge (1050 well) and a second 50 feet upstream (1100 well) (N.T Super. 216).

132. The 1050 well is approximately 15 feet from the point in Mountain Branch where the iron staining began (N.T. Super. 38; N.T. 334).

133. The 1100 well is approximately four or five feet from Mountain Branch (N.T. 334).

134. Iron easily undergoes a cation/anion exchange (N.T. 729).

135. Good tracer constituents for comparing water qualities between different data points include aluminum, manganese, sulfate, magnesium, calcium, and dissolved solids (N.T. 729-732).

136. The total concentration of ions within a water sample should be within ten percent of the concentration of dissolved solids (N.T. 861)

137. Mr. Schueck did not compare total ion concentration to dissolved solids or determine whether the water samples indicated a balance between cations and anions (N.T. 859-860, 917-918).

138. One way that geochemists determine whether they have identified all of the elemental constituents in the water is to perform an electrostatic balance or valence balance (N.T. 1305).

139. The electrode chemical equivalency basis of an element is calculated by dividing the concentration of the element in solution by its electrostatic valence state (N.T. 1305).[10]

140. The electrode chemical equivalency basis of all cations and anions must balance in an aqueous solution (N.T. 1307).

141. If the positive equivalencies and the negative equivalencies do not balance, one or more of the elemental constituents is missing from the analysis (N.T. 1306).

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[10]For example, because the valence state of iron in solution is +2, the electrode chemical equivalency basis of the iron in a solution is calculated by dividing its concentration by +2 (N.T. 1305).

142. In the Department's water analyses, the cations are comprised of iron, aluminum, manganese, magnesium, and calcium, while the lone anion is sulfate (N.T. 1306).

143. The Department failed to analyze the water samples for all of the anions present in solution (N.T. 1307).

144. On a milli-equivalence basis, the ratios of calcium, magnesium, iron, aluminum, and manganese differ between the groundwater sampled from the 1050 discharge area, including the 1050 and 1100 wells, and the groundwater sampled from the area upgradient of the fault zone (N.T. 1225).

145. At the 1050 and 1100 wells, calcium comprises approximately one-half of all of the cations in solution and the other dominant cations are iron and magnesium (N.T. 1308, 1312, 1317, 1324).

146. None of the other water samples exhibited such a high proportion of calcium to the other cations (N.T. 1308).

147. Water in an open pit on the Mine Site exhibited the following characteristics:

Chemical Constituent	March 11, 1988	May 5, 1988
pH	3.3	2.9
Alkalinity	0.0 mg/l	0.0 mg/l
Suspended Solids	14.0 mg/l	14.0 mg/l
Na	17.1 mg/l	15.1 mg/l
SO_4	4389.0 mg/l	5250.0 mg/l
Fe	61.5 mg/l	142.0 mg/l
Mn	200.0 mg/l	> 300.0 mg/l
Al	38.2 mg/l	135.0 mg/l
Acidity	532.0 mg/l	1428.0 mg/l

(Exs. C-18. C-20).

148. In the pit water collected from the Mine Site. the dominant cation is manganese. which comprises approximately one-half of the cations (N.T. 1316-1317; Ex. C-20).

149. In order for the manganese to almost completely disappear from the groundwater between the Hamilton I discharges and the 1050 discharge area. it must precipitate out of solution (N.T. 1313).

150. In order for manganese to precipitate out of solution. the oxidation reduction potential of the aqueous environment must change (N.T. 1313).

151. If the oxidation reduction potential of the groundwater changes enough to cause manganese to precipitate out of solution. iron will also precipitate out of solution (N.T. 1313).

152. If iron precipitated out of solution between the Hamilton I discharges and the 1050 discharge area. it would not be a dominant cation in the groundwater collected from the 1050 and 1100 wells (N.T. 1313-1314).

153. AMD is essentially dissolved iron and dissolved sulfate which reacts with other metals and brings them into solution (N.T. 706).

154. What metals come into solution depends entirely upon the material with which the AMD comes into contact (N.T. 706).

155. The Freeport strata. on which the 1050 discharge is located. possesses a different mineralogical composition than the Kittanning and Clarion strata. on which the Mine Site is located (N.T. 1222-1223).

156. The Glen Ritchie Formation was deposited in a freshwater marine environment and contains deposits of limestone (N.T. 1222-1223).

157. Limestone contains calcium and magnesium (N.T. 1324).

158. Because the ionic contents are so dissimilar, the source of the groundwater emanating from the 1050 discharge cannot be the same as the source of the groundwater being collected at the Hamilton I discharges (N.T. 1311).

159. The different milli-equivalence ratios exhibited by water from the 1050 discharge area, in comparison with groundwater from the area closer to the Mine Site, reflects the different mineralogical characteristics through which the groundwater has flowed (N.T. 1311).

160. The water chemistries of the 1050 discharge and samples from the 1050 and 1100 wells are different than the chemistries exhibited by samples taken from wells closer to the Mine Site (N.T. 1225).

Transmissivity of Faults

161. The large amount of vertical displacement at the two faults in the fault zone between the Mine Site and Mountain Branch should be accompanied by a tremendous amount of fracturing both along and around the fault zone (N.T. 634, 637).

162. The soil in the fault zone is rich in clay, which is not conducive to the transmission of groundwater (N.T. 1211, 1215, 1218-1219).

163. Based on information in the Pennsylvania Geologic Survey, Mr. Schueck drew a third fault that traversed the southwestern side of the study area, near the Mine Site (N.T. 825-826; Exs. C-4a, C-4b).

164. Mr. Smith, the District Mining Manager of the Department's Hawk Run District Office, has a bachelor's degree in science/geology and a master's degree in geology/hydrogeology, and was qualified as an expert in hydrogeology (N.T. 1458).

165. Although Mr. Smith is familiar with the Mine Site, he did not conduct any study or investigation in this matter (N.T. 1459).

166. If the faults were not transmissive, they should act as a groundwater dam, causing groundwater to mound up and discharge to the surface (N.T. 1462).

167. There is no definitive delineation of springs along the fault zone (N.T. 1210, 1406).

168. At certain times of the year, springs emanate from the ground above the fault zone and flow across it (N.T. 1210, 1475).

169. Some springs emanate from the ground above the fault zone and infiltrate back into the ground as they cross the fault zone (N.T. 1465).

170. The fault zone is permeable close to the surface (N.T. 813).

171. The groundwater elevation at well MW2, which is located on the faults to the north/northwest of the 1050 discharge, is approximately 1603 feet.

while the groundwater elevation at the 1050 well is approximately 1599 feet (N.T. 965).

172. There is no consistent downgrade between MW2 and the 1050 discharge (N.T. 967).

Recharge for the 1050 Discharge

173. Normally, the recharge area for the 1050 discharge would be the area directly upgradient from it, i.e. perpendicular to the topographic contours, which would be the easternmost portion of the hill on which the Mine Site is located (N.T. Super. 212; N.T. 1194-1195).

174. The normal recharge area for the 1050 discharge is on the periphery of the area investigated by Mr. Schueck (N.T. 1196).

175. A number of wells upgradient of the 1050 discharge possess good water quality (N.T. 772-773).

176. The groundwater into which the wells upgradient of the 1050 discharge are drilled is flowing in the general direction of the 1050 discharge (N.T. 773).

DISCUSSION

Burden of Proof

The burden of proof in this matter rests with the Department. 25 Pa.Code §21.101(b)(3): Pete Claim v. DER, EHB Docket No. 94-125-E (Adjudication issued April 10, 1995). In order to satisfy its burden of proof, the Department must show by a preponderance of the evidence that the Compliance Order was not an abuse of discretion, arbitrary, capricious, or contrary to law. 25 Pa.Code §21.101(a): Al Hamilton Contracting Co. v. DER, 1994 EHB 1074.

Standard of Liability

Liability for a pollutional discharge from a surface mine site is founded in §315(a) of the Clean Streams Law, which states, in relevant part:

> No person or municipality shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department.

35 P.S. §691.315(a). Based on this provision, it has long been established that a mine operator is liable for an off-site discharge (i.e., a discharge that occurs outside of the perimeter of the mine operator's permitted mine site) if the discharge violates applicable effluent limits and is hydrogeologically connected to the operator's mine site. *See*, Harbison-Walker Refractories v. DEP, EHB Docket No. 91-268-MJ (Adjudication issued February 23,1996), p.54-55: Al Hamilton Contracting Co. v. DER, 1993 EHB 1651, 1705 (Hamilton I).

In its post-hearing brief, the Department argues it has satisfied both prongs of this standard. The Department contends a sample taken directly from the 1050 discharge, as well as samples taken from Mountain Branch near the 1050 discharge, prove that the 1050 discharge violates applicable effluent limits. The Department also contends it has offered sufficient evidence to show that the 1050 discharge is hydrogeologically connected to the Mine Site: the similarity in water quality between the sample taken from the 1050 discharge and samples taken from various other locations between the Mine Site and Mountain Branch; the substantial faulting and fracturing between the Mine Site and Mountain Branch that provides a mechanism for the transmission of AMD; the results of a terrain conductivity study; the results of a resistivity study; and the Board's adjudication in Hamilton I, 1993 EHB 1651, which, the Department argues, bars Hamilton, through either *res judicata* or collateral estoppel from challenging whether the Mine Site is producing AMD and whether the discharges being collected and treated pursuant to Compliance Order HRO 84-44 are hydrogeologically connected to the Mine Site.

In its post-hearing brief, Hamilton first responds that none of the Department's water sample analyses (Exs. C-6A, -6B, -7, -8A, -8B, -18, -20, and -21) are admissible in evidence. With respect to these exhibits, Hamilton argues the Department did not establish a sufficient chain of custody to show that the samples, when analyzed, were unimpaired and in essentially the same condition as when they were collected. Hamilton further argues the Department did not

successfully establish that these analyses were business records pursuant to the Uniform Business Records as Evidence Act, 42 Pa.C.S. §6108 (Business Records Act). Hamilton last argues the Department did not prove that the methods and procedures utilized by its laboratory were accepted in the scientific field pursuant to the Frye standard for the admissibility of scientifically adduced substantive evidence. Because Judge Woelfling reserved ruling on the admissibility of the Department's water quality exhibits until these issues could be fully briefed, the first matter for the Board to resolve in this adjudication is whether the Department's water sample analyses are admissible into evidence.

The Board's Decision in *Hamilton I*

The Board begins its discussion with the Department's claim that the doctrines of *res judicata* and collateral estoppel bar Hamilton from raising certain issues related to the Mine Site. Specifically, the Department argues Hamilton may not challenge the Board's findings in Hamilton I, 1993 EHB 1651, that the Mine Site was producing AMD or that certain discharges being collected and treated were hydrogeologically connected to the Mine Site.

In Hamilton I, the issue before the Board was, among other things, Hamilton's liability for three discharges (Springs One and Two, and the Fugitive Discharge, which are hereafter referred to as the Hamilton I discharges) emanating from the hillside between the Mine Site and Mountain Branch. 1993 EHB at 1704. There, the Board found that the chemical characteristics of water emanating from the Hamilton I discharges violated the effluent limits of 25

Pa.Code §87.102 and that the Hamilton I discharges were hydrogeologically connected to the Mine Site. 1993 EHB at 1707, 1712. Accordingly, the Board held that the Department had not abused its discretion in issuing Hamilton a compliance order concerning these discharges. *Id.* at 1716.[11]

Given the Board's decision in Hamilton I, the Department argues Hamilton may not relitigate the fact that the Mine Site is producing AMD and that the Hamilton I discharges are hydrogeologically connected to the Mine Site. According to the Department's view of the hydrogeology underlying the area between the Mine Site and Mountain Branch, the Hamilton I discharges are merely an intermediate location in the flow of AMD from the Mine Site towards the 1050 discharge. Since the Board has already found the Hamilton I discharges to be hydrogeologically connected to the Mine Site, the Department argues that in order for it to prevail here, the Board need only conclude that the 1050 discharge is hydrogeologically connected to the Hamilton I discharges.

Although the Department bases its argument on both *res judicata* and collateral estoppel, the Board finds *res judicata* to be inapplicable to the current proceeding. The nature and purpose of the doctrine of *res judicata* were

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[11]In *dicta*, the Board also found that Hamilton had caused the discharges emanating from Spring One and the Fugitive Discharge and had degraded the discharge emanating from Spring Two. *Id.* at 1712. The Board further found that the Mine Site had the potential to create, and was in fact creating, the AMD which was emanating from the three discharges. *Id.* at 1713.

explained by the Superior Court in Day v. Volkswagenwerk Aktiengesellschaft, 318 Pa.Super. 225, 464 A.2d 1313 (1983). There, the court stated:

> The doctrine of res judicata has been judicially created. It reflects the refusal of the law to tolerate a multiplicity of litigation. It holds that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal or concurrent jurisdiction. (citation omitted).

318 Pa.Super. at ____, 464 A.2d at 1316. In order for the doctrine of *res judicata* to apply, the following four elements must be present: 1) identity of the issues; 2) identity of the causes of action; 3) identity of the persons or parties to the action; and 4) identity of the quality or capacity of the parties suing or being sued. William Fiore, d/b/a Municipal and Industrial Disposal Co. v. DER, 1994 EHB 90. *See also*, Schubach v. Silver, 461 Pa. 366, ___, 336 A.2d 328, 333 (1975). As the Board explained in Mr. & Mrs. John Korgeski v. DER, the doctrine of *res judicata* relates to causes of action. 1991 EHB 935, 946. With respect to the current matter, because the Compliance Order at issue here relates to the 1050 discharge and the Compliance Order at issue in Hamilton I related to three different off-site discharges, there is no identity of causes of action and the doctrine of *res judicata*, therefore, is inapplicable. *See*, William Fiore, *supra*.

While the doctrine of *res judicata* applies to causes of action, the doctrine of collateral estoppel applies to specific issues of fact and law. "The doctrine of collateral estoppel or issue preclusion prevents a question of law or an issue of fact that has once been litigated and fully adjudicated in a court of competent jurisdiction from being relitigated in a subsequent suit." Meridian Oil and Gas Enterprises, Inc. v. Penn Central Corp., 418 Pa.Super. 231, ___, 614 A.2d 246, 250 (1992), *appeal denied*, 534 Pa. 649, 617 A.2d 180. In order for the doctrine of collateral estoppel to apply, the following five factors must be present: 1) the issue decided in the prior case was identical to the issue presented in the later case; 2) there was a final judgment on the merits in the earlier case; 3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; 4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and 5) the determination concerning the issue in the prior proceeding was essential to the judgment. *Id.*, 418 Pa.Super. at _, 614 A.2d at 251. *See also*, City of Pittsburgh v. Zoning Board of Adjustment of City of Pittsburgh, 522 Pa. 44, 55, 559 A.2d 896, 901 (1989).

After carefully reviewing the Board's decision in Hamilton I, 1993 EHB 1651, the Board finds the doctrine of collateral estoppel to be applicable to the present matter. The issues of whether the Mine Site is producing AMD and whether the Hamilton I discharges are hydrogeologically connected to the Mine Site are identical in both instances. Furthermore, the Board's decision in

Hamilton I was a final judgment on the merits. Hamilton was a party to that proceeding, and Hamilton had a full and fair opportunity to litigate these issues. And finally, the issue of whether the Hamilton I discharges were hydrogeologically connected to the Mine Site was essential to the Board's decision.[12] Accordingly, pursuant to the doctrine of collateral estoppel, Hamilton is barred in this proceeding from challenging whether the Hamilton I discharges are hydrogeologically connected to the Mine Site.

This application of the doctrine of collateral estoppel includes testimony elicited by Hamilton that the dip of the Clarion bed at the northeastern end of the Mine Site is to the west or southwest. *See, e.g.*, testimony of Terry Rightenour, N.T. 1111-1130. Implicit in this evidence is an attempt to have the Board reconsider its finding in Hamilton I that the Hamilton I discharges, which lie to the northeast of the Mine Site, are not hydrogeologically connected to the Mine Site. Even though this evidence could possibly show that the Hamilton I discharges are not hydrogeologically connected to the Mine Site, Hamilton has had a full and fair opportunity to present this evidence in Hamilton I, and failed. "The doctrine of collateral estoppel only requires that a party be given a full and fair chance to litigate the issue. The

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[12]*See*, note 4, *supra*, in which the Board explains that the discussion concerning the Mine Site's production of AMD was merely *dicta* because the Department had conclusively established the elements of liability for an off-site discharge, namely violations of the effluent limits of 25 Pa.Code §87.102 and hydrogeologic connection with the Mine Site.

fact that more conclusive evidence might be presented at a subsequent hearing is neither sufficient nor relevant grounds for disallowing the application of the doctrine in the Commonwealth." Cmwlth., Dept. of Transportation v. Martinelli, 563 A.2d 973, 976-977 (Pa.Cmwlth. 1989). *See also,* Meridian Oil and Gas Enterprises, Inc. v. Penn Central Corp., 418 Pa.Super. 231, 614 A.2d 246 (1992), *appeal denied,* 534 Pa. 649, 627 A.2d 180. Accordingly, the Board will not consider the evidence concerning the dip of the Clarion bed at the northeastern edge of the Mine Site or any other evidence related to the hydrogeologic connection between the Hamilton I discharges and the Mine Site.

Admissibility of Sample Analyses

Before turning to the merits of this matter, the Board must also address Hamilton's arguments concerning the admissibility of several of the Department's water quality sample analyses. In support of its position that the 1050 discharge violated applicable effluent limits, the Department relies almost exclusively on the result of a single water sample allegedly taken directly from the seepage area. *See,* Ex. C-7. The Department also relies, although to a lesser extent, on water samples taken from Mountain Branch above and below the seepage area. *See,* Exs. C-8A and -8B. According to the Department, the sample from the 1050 seepage area exceeded applicable limits contained in 25 Pa.Code §87.102 for iron, manganese, sulfate, and acidity, and the instream samples taken at seepage area 1050 exceeded applicable limits under 25 Pa.Code Ch. 93 for iron.

In addition to using water sample analyses to show that the discharge from the 1050 seepage area violated applicable effluent limits, the Department also used sample analyses to support its position that there is a hydrogeologic connection between that discharge and the Mine Site. Specifically, the Department sought to have introduced into evidence samples taken from an open pit in the Clarion coal seam (Exs. C-18 and -20) and from a number of monitoring wells (Exs. C-6A and -6B, and C-21). Because the Department made it very clear that it was seeking admission of these analyses under the Business Records as Evidence Act, 42 Pa.C.S. §6108 (Business Records Act), Judge Woelfling reserved ruling on their admissibility until the issue could be fully briefed and researched.

- Chain of Custody

Hamilton first challenges the admissibility of these sample analyses on the basis that the Department failed to establish a proper chain of custody. In support of this position, Hamilton claims the Department failed to elicit testimony from the chemist who supervised the testing at the Department's laboratory and, with respect to the sample from the 1050 seepage area, from John Berry, the Department employee who collected the sample. Surprisingly, the Department failed to address the chain of custody issue, and relied solely on the argument that the analyses were admissible under the Business Records Act. Nevertheless, the Board finds that Hamilton's chain of custody argument is without merit. As the Board explained in Hamilton I, "[e]vidence may be admitted

despite gaps in the testimony regarding its custody." 1993 EHB at 1692. *See also,* Lackawanna Refuse Removal, Inc. v. Cmwlth., Dept. of Environmental Resources, 442 A.2d 423 (Pa.Cmwlth. 1982). "[I]t is sufficient that the evidence, direct or circumstantial, establishes a *reasonable* inference that the identity and condition of the exhibit remained unimpaired until it was surrendered to the trial court." Commonwealth v. Hudson, 489 Pa. 620, 414 A.2d 1381 (1980). Furthermore, gaps in the chain of custody go to the weight to be accorded evidence rather than its admissibility. Brunson v. Cmwlth., Unemployment Compensation Bd. of Review, 570 A.2d 1096, 1098 (Pa.Cmwlth. 1990), *alloc. dn.*, 527 Pa. 603, 589 A.2d 693 (1990).

With respect to all of the Department's water quality sample analyses except for the sample taken from the 1050 discharge, the Board finds a sufficient chain of custody. For each sample, the Department elicited the testimony of the Department employee who collected the sample. Furthermore, the Department elicited the testimony of Dennis Neuin, Chief of the Section within the Department's Bureau of Laboratories that is responsible for analyzing samples of acid mine drainage. Mr. Neuin's responsibilities include supervising the chemists and chemistry technicians in the Section and directing the flow of work (N.T. 7, 39). Mr. Neuin testified about the standard procedures used to send a sample to the laboratory for analysis (N.T. 29-30), the procedures followed by the laboratory when it receives a sample (N.T. 8-10, 31, 48, 73-74, 92, 104, 107), the procedures used to identify a sample in the laboratory (N.T. 17-18),

and the procedures used to notify the collector of the results (N.T. 17-20). Mr. Neiun also testified that he had no reason to believe that these standard procedures were not followed (N.T. 102). The Department also elicited the testimony of John Varner, Chief of the Permit and Technical Services Section in the Bureau of Mining and Reclamation's Hawk Run Office, whose responsibilities include supervising the daily work of mine inspectors and mining specialists (N.T. 114, 117). Mr. Varner testified about the Department's protocol for collecting a sample of acid mine drainage and sending it to the laboratory for analysis (N.T. 156-158).

This evidence is similar to the evidence found acceptable in Hamilton I and, therefore, "establishes a reasonable inference that the samples remained unimpaired and in essentially the same condition from the time they were collected until the time the results were reported." Hamilton I, 1993 EHB at 1693-1694. *See also,* Wise v. Cmwlth., State Horse Racing Comm., 514 A.2d 308 (Pa.Cmwlth. 1986).

Hamilton also argues against admission of the sample from the 1050 discharge because the Department failed to elicit testimony from the individual who allegedly collected the sample.[13] This error, however, is not fatal. In

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[13]The Department made several attempts to recall Mr. Berry for the purpose of eliciting testimony that he had taken the sample from the 1050 discharge. *See, e.g.,* N.T. 416. The presiding Judge, however, refused to allow the Department to recall Mr. Berry. Given the Board's conclusion concerning the admissibility of Ex. C-7 under the Business Records Act, *infra.*, the Department's request to recall Mr. Berry is now moot and need not

Wise. Commonwealth Court found a sufficient chain of custody for the results of blood and urine samples taken from the appellant's horse despite the lack of testimony by the individual who collected the samples. 100 Pa.Cmwlth. at 211, 514 A.2d at 311. There, the court relied on the testimony of the Director of Enforcement, who explained the procedures to be followed by anyone under his supervision, and the chemist who performed the tests on the samples. The court further relied on two documents admitted pursuant to the Business Records Act: the detention barn report, which identified the horses from which samples were taken, the time the samples were taken, and the collector; and the identification tag attached to the samples. *Id.* From this evidence, the court could infer that the sample was taken from the appellant's horse. *Id.* *But see*, Paoli v. Cmwlth., State Horse Racing Comm., 473 A.2d 243 (Pa.Cmwlth. 1984).[14]

After carefully reviewing the evidence in the record, the Board concludes the Department has established a satisfactory chain of custody for the sample taken from the 1050 discharge. Although the Department failed to elicit

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be considered any further.

[14]In Paoli, the only evidence concerning the horse from which the sample was taken was that the appellant's horse was sampled and that urine sample #06314 tested positive for an illegal drug. *Id.*, 473 A.2d at 243. Because there was absolutely no evidence connecting the sample to appellant's horse, Commonwealth Court could not even infer that the sample was procured from the appellant's horse. 473 A.2d at 244. The Wise court, in contrast, was able to infer from the detention barn report and the identification tag that the sample at issue was collected from the appellant's horse. Wise, 514 A.2d at 311.

testimony from anyone present when the sample was collected from the 1050 discharge, there is sufficient evidence for the Board to infer that the sample was, in fact, taken from the 1050 discharge. The Department's Ex. C-7 consists of two distinct documents: a handwritten "Sample Analysis Report;" and a computer-generated "Laboratory Report." From the Sample Analysis Report, which is admissible as a business record pursuant to the Business Records Act, the Board finds that sample #4455425 was taken from the "seep @ 1050'" on November 6 or 7, 1991.[15] In addition, the Laboratory Report, which is also admissible as a business record pursuant to the Business Records Act, contains the analysis of sample #4455425. Contrasting the situation here with that faced by Commonwealth Court in Paoli, *supra*., the Board has sufficient evidence to infer that a sample was taken from the 1050 discharge and that the results of the sample from the 1050 discharge are contained in the Laboratory Report. Accordingly, the Board concludes that a satisfactory chain of custody has been established for the sample taken from the 1050 discharge. *See*, Wise, 514 A.2d at 311.

[15]*See*, the Board's discussion of the Business Records Act, *infra*.

- The Frye Standard

Hamilton argues that the Department's water quality analyses are inadmissible because they fail to satisfy the Frye standard, which governs the admission of scientific evidence in the Commonwealth.[16] In response, the Department contends its water samples are admissible under the Board's decision in Hamilton I, 1993 EHB 1651. The Department further contends it is entitled to a presumption that its standard laboratory procedure was followed and its water samples are, therefore, admissible as business records.

Under the Frye standard, scientific evidence is admissible if the process by which the evidence was developed is accepted within the scientific field in which it belongs. *See*, Commonwealth v. Nazarovitch, 496 Pa. 97, 101, 436 A.2d 170, 172 (1981). In Hamilton I, the Board found that the equipment used and the procedures followed by the Department's Division of Inorganic Chemistry, as testified to by Vincent White, the Division Chief, were accepted within the scientific community and industry to analyze mine drainage samples. 1993 EHB at 1694. To the extent the Department is arguing that Hamilton is precluded, under the doctrine of collateral estoppel, from challenging whether the Department

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[16]Frye v. U.S., 293 F. 1013 (D.C.Cir. 1923). The U.S. Supreme Court overturned Frye in Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S.Ct. 2786 (1993), holding that the admissibility of scientific evidence in a federal trial is governed by Rules 402 and 702 of the Federal Rules of Evidence. Nevertheless, Frye remains the standard for the admissibility of scientific evidence in this Commonwealth. *See*, Commonwealth v. Crews, 536 Pa. 508, 640 A.2d 395 (1994).

water sample analyses satisfy the Frye standard for admissibility, the Board agrees. In both this proceeding and Hamilton I, the issue with respect to Frye is whether the equipment and procedures followed by the Department's laboratory is accepted within the scientific community. Because this issue is identical in both proceedings, the doctrine of collateral estoppel is applicable. Hamilton, therefore, is precluded from challenging whether the Department's water sample analyses are admissible under the Frye standard.

- The Business Records Act

Hamilton's last challenge to the admissibility of the Department's water sample analyses is that they do not qualify as business records under the Business Records Act. In particular, Hamilton claims the Department failed to establish: that it has a satisfactory quality assurance program; how these records were maintained; or that the samples were collected in the regular course of business. In response, the Department relies exclusively on the Board's adjudication in Hamilton I, 1993 EHB 1651, in which the Board found the Department's water sample analyses to be admissible pursuant to the Business Records Act.

The Business Records Act states, in relevant part:

> A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information,

> method and time of preparation were such as to justify its admission.

42 Pa.C.S. §6108(b). In Hamilton I, the Board explained that the purpose of the Business Records Act is "to overcome the difficulties inherent in attempting to introduce the records of most organizations," because there is often no one person responsible for their creation and it would be difficult, if not impossible, to elicit the testimony of every employee who played a part in their preparation. 1993 EHB at 1695. *See also*, Fauceglia v. Harry, 409 Pa. 155, 185 A.2d 598 (1962).

The Department offered the testimony of several individuals in order to satisfy the authentication requirements of the Business Records Act. Dennis Neuin, who, as the Board explained above, is Chief of the Trace Metals and Solids Section, testified about the laboratory's quality assurance program (N.T. 80, 83, 86, 98) and the procedures followed by the laboratory to generate a sample analysis report and notify the sample collector about the results (N.T. 9-10). John Varner, Chief of the Permit and Technical Services Section of the Bureau of Mining Reclamation's Hawk Run (Clearfield County) Office, testified about the Department's standard procedures for collecting AMD samples (N.T. 114, 156-159). And finally, Michael Smith, the District Mining Manager at the Hawk Run Office, verified Mr. Varner's testimony about standard Department procedure for collecting AMD samples and explained how the Department maintains the sample reports (N.T. 405, 409-411, 504, 516-517, 522).

In In re Estate of Indyk, the court discussed the qualifications necessary to be an authenticating witness:

> The purport of the [Business Records] Act is to merely require that the basic integrity of the record keeping is established. Where it can be shown that the entries were made with sufficient contemporaneousness to assure accuracy and that they were made pursuant to the business practices and not influenced by the litigation in which they are being introduced, a sufficient indicia of reliability is provided to overcome their hearsay nature.

488 Pa. 567, ___, 413 A.2d 371, 373 (1979). The Indyk court made it clear that the authenticating witness does not have to be the person who made the entries or the custodian of records at the time the entries were made. 488 Pa. at ___, 413 A.2d at 374. *See also,* R.A. Freudig Assoc. v. Cmwlth., Insurance Dept., 532 A.2d 509, 513 (Pa.Cmwlth. 1987). Instead, the authenticating witness must only have "adequate knowledge of the regularity of the record keeping process." Ganster v. Western Pennsylvania Water Co., 349 Pa.Super. 561, ___, 504 A.2d 186, 190 (1985). "As long as someone in the organization has personally observed the event recorded, the evidence should be admitted." Green Construction Co. v. Dept. of Transportation, 643 A.2d 1129 (Pa.Cmwlth. 1994).

Given the testimony of Neuin, Varner, and Smith, the Board finds that the Department has sufficiently authenticated its water sample analyses as business records pursuant to the Business Records Act. *See,* Hamilton I, 1993 EHB at 1698 (describing the testimony of the records custodian, Vincent White). The evidence in the record indicates how a collector takes a sample, the chain of

custody for each sample, the procedures and equipment used by the Department's laboratory to analyze the sample, the method by which a sample report is prepared, how the sample collector is informed about the results, and how the records are maintained. *See also,* Fauceglia, 409 Pa. at ___, 185 A.2d at 599 (authenticating testimony sufficient when witness testified that the records were made after an examination and were part of the organization's records).

Hamilton last contends the Department's water sample analyses are not admissible pursuant to the Business Records Act because the samples were collected and analyzed in contemplation of litigation. According to Hamilton, the regular business of the Department is enforcing SMCRA and samples are collected only to ascertain whether they violate applicable effluent limits. The Board disagreed with this argument in Hamilton I and finds no reason to alter its position here. *See,* 1993 EHB at 1699-1701.

In order for a document to be admissible as a business record, it must have been made in the regular course of an organization's business. Ganster, 349 Pa.Super. at ___, 504 A.2d at 190. Records or reports made in anticipation of litigation are not made in the regular course of business. Newman v. Pittsburgh Railways Co., 392 Pa. 640, ___, 141 A.2d 581, 582 (1958). Contrary to Hamilton's position, these water sample analyses are not made in anticipation of litigation, but rather in the regular course of the Department's business. As the Board explained in Hamilton I:

> Under the Federal Surface Mining Control and Reclamation Act, the Act of August 3, 1977, P.L. 95-87, 30 U.S.C. §1201 *et seq.* (Federal SMCRA), the Department was required to conduct quarterly inspections of the mine site. *See*, 30 U.S.C. §1267(c); 30 CFR §840.11(b). These quarterly inspections had to include water sampling to ensure Hamilton's compliance with the effluent limits in its permit and 25 Pa.Code §87.102. *See*, 30 CFR §840.11(b).
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> Even though the Department used its water samples against Hamilton, this alone does not mean that they were prepared for the purpose of litigation. Courts have long accepted the results of blood alcohol tests under the Business Records Act in drunk driving cases even though the blood tests were performed to determine whether defendant's blood alcohol level exceeded the limits established in 75 Pa.C.S. §1547(d). *See*, Commonwealth v. Sullivan, 399 Pa.Super. 124, 581 A.2d 956 (1990); Commonwealth v. Seville, 266 Pa.Super. 587, 405 A.2d 1262 (1979). Similarly here, the Department tested these samples merely to determine whether the water quality at the sampling points violated the effluent limits of 25 Pa.Code §87.102.

1993 EHB at 1700. Accordingly, the Board finds that the water sample analyses at issue here were made in the regular course of business and, therefore, are admissible pursuant to the Business Records Act. *See*, Exs. C-6A, -6B, -7, -8A, -8B, -18, -20, and -21.

Admissibility of Ex. A-23

In its post-hearing brief, Hamilton contends Judge Woelfling erred in denying the admission of Ex. A-23, which is a comparison of the Department's water quality data with the results of the Department's terrain conductivity study (*See*, N.T. 1281, 1285-1287). Judge Woelfling had ruled this exhibit

inadmissible because Hamilton failed to include it along with its response to the Board's Pre-Hearing Order Number 2 (PHO-2) (N.T. 1282).[17] Hamilton argues that this exhibit, which was developed by Hamilton's expert hydrogeologist, Wilson Fisher, in response to the testimony of Department Hydrogeologist Joe Schueck, is admissible because Hamilton could not have been aware of the contents of Mr. Schueck's testimony until after Hamilton completed its cross-examination of Mr. Schueck. This argument is without merit.

According to the Board's records, discovery in this proceeding lasted for 75 days, from October 22, 1992 to January 5, 1993. There is no indication in the docket that Hamilton requested an extension of time for discovery or was otherwise unable to complete discovery. Hamilton could have availed itself of this 75 day period and deposed Mr. Schueck to ascertain the scope and extent of his expected testimony at the merits hearing, or at a minimum, the bases for his expected testimony. Moreover, Hamilton has been aware, since the supersedeas hearing, that the Department would be relying on the results of Mr. Schueck's terrain conductivity study. There is, therefore, no merit to Hamilton's argument that it was caught unaware of the contents of Mr. Schueck's testimony prior to

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[17]The Board's PHO-2, which was issued on April 13, 1993, after the close of discovery, expressly stated: "On or before September 14, 1993, each party shall file copies of the exhibits which they intend to introduce at the hearing . . . Failure to file an exhibit may result in the imposition of sanctions, including precluding the exhibit from evidence." PHO-2, ¶¶2 & 4. The Board received Hamilton's response to PHO-2 on September 14, 1993. It did not contain a copy of Ex. A-23, nor did it indicate that Hamilton would request the opportunity to amend.

his cross-examination. Accordingly, the Board affirms Judge Woelfling's ruling denying the admission of Ex. A-23 on the basis of Hamilton's failure to provide it in response to PHO-2.

Characteristics of the 1050 Discharge

A review of the information in Exhibit C-7 shows the 1050 discharge contains concentrations of iron of 244 mg/l and manganese of 20.4 mg/l, and acidity exceeds alkalinity (Ex. C-7). Under 25 Pa.Code §87.102, the concentration of iron may never exceed 7.0 mg/l, the concentration of manganese may never exceed 4.0 mg/l, and acidity may never exceed alkalinity. *See*, 25 Pa.Code §87.102(a). Accordingly, the Board finds that the 1050 discharge violated the effluent limits of 25 Pa.Code §87.102. Appellant further produced no credible evidence to the contrary.

Hydrogeologic Connection

Although the Board has found that the 1050 discharge violates the effluent limits of 25 Pa.Code §87.102, Hamilton is not liable for this discharge unless the Department has also shown it is hydrogeologically connected to the Mine Site. *See, e.g.*, Harbison-Walker Refractories v. DEP (Adjudication issued February 23, 1996); Hamilton I, 1993 EHB 1651.

The Department contends the AMD emanating from the 1050 discharge comes from the same "plume" of contaminated groundwater as the AMD emanating from the Hamilton I discharges. In other words, the Department believes AMD originates at the Mine Site, flows in the direction of, and discharges from, the

Hamilton I discharges, then flows towards and emanates from the 1050 discharge. Given the Board's decision in Hamilton I, if the Department has shown a hydrogeologic connection between the 1050 discharge and the Hamilton I discharges, the Board will be compelled to find that the 1050 discharge is hydrogeologically connected to the Mine Site.

In its post-hearing brief, the Department offers several bases for its position that the 1050 discharge is hydrogeologically connected to the Hamilton I discharges. First, the Department contends the chemical characteristics of the water emanating from the 1050 discharge is similar to the characteristics of the water emanating from the Hamilton I discharges and the water taken from various wells located between the Mine Site and Mountain Branch. Second, the Department argues that two faults between the Mine Site and Mountain Branch provide a mechanism for the flow of AMD from the Hamilton I discharges to the 1050 discharge. And third, the Department contends the results of a terrain conductivity study and accompanying resistivity study, prove the presence of AMD in the groundwater beyond the Hamilton I discharges.

- Similarity of Water Chemistries

In support of its belief that the 1050 discharge is hydrogeologically connected to the Hamilton I discharges and, therefore, the Mine Site, the Department argues that the AMD emanating from the 1050 discharge, as well as the water collected from the 1050 well, exhibit the same or similar chemical characteristics as groundwater collected from the Hamilton I discharges and other

sampling points between the Mine Site and Mountain Branch. Given this similarity, the Department contends, the Board must infer that the AMD emanating from the 1050 discharge has the same origins as the AMD emanating from the Hamilton I discharges. After carefully reviewing the water quality evidence, the Board finds this argument to be without merit.

According to the Department's Joseph Schueck, the groundwater emanating from the 1050 discharge is similar to groundwater collected from numerous sampling points between the Mine Site and Mountain Branch. In particular, Mr. Schueck pointed to the elevated concentrations of sulfate, iron, calcium, and manganese at the 1050 discharge and the Fugitive Discharge, well PS2, and well PS3 (N.T. 630, 732-733). For several reasons, the Board finds that this testimony is far from conclusive.

The first problem with the Department's comparison of water qualities is that it was based solely on whether certain AMD constituents were "elevated." Mr. Schueck, in comparing water qualities, failed to determine whether the Department's laboratory had analyzed all of the ions in the sample or whether there was a balance between the anions and cations (N.T. 859-860, 917-918). Had Mr. Schueck checked, he would have found that the Department's water quality analyses only contained information concerning one anion, sulfate, but contained information concerning several cations, including iron, aluminum, manganese, magnesium, and calcium (N.T. 1306). Furthermore, in comparing the anions and cations on a milli-equivalence basis, it is clear that the Department's analyses

did not identify or analyze all of the anions in solution (N.T. 1307).[18] Without this information, it was not possible for Mr. Schueck to determine whether water quality was or was not similar at various sampling points (N.T. 861, 859-860, 917-918).

Moreover, the Department's comparison of water qualities failed to account for the relative differences in the concentrations of various AMD constituents at the sampling points. On a milli-equivalence basis, the ratios of calcium, magnesium, iron, aluminum, and manganese differed between the groundwater sampled from the 1050 discharge area, including the 1050 and 1100 wells, and the groundwater sampled from the area between the fault zone and the Mine Site (N.T. 1225). For example, the dominant cation in the water sampled from the 1050 and 1100 wells was Ca, which comprised approximately one-half of the cations in solution (N.T. 1308, 1312, 1317, 1324). None of the other sampling points above the fault zone exhibited such a high proportion of Ca to the other cations (N.T. 1308).

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[18]One way to determine whether all of the constituents in a solution have been identified is to perform an electrostatic or valence balance (N.T. 1305). This is accomplished by comparing the constituents on a milli-equivalence or electrode chemical equivalence basis.

Although it sounds intimidating, the milli-equivalence basis of an element is merely the concentration of that element divided by its electrostatic valence state. The electrostatic valence state of iron, for example, is +2. Because the positive and negative equivalencies must balance in an aqueous solution, this procedure provides a relatively simple mechanism to determine whether all of the ions in a solution have been identified.

When pressed about this apparent inconsistency in water qualities, Mr. Schueck explained that the differences in relative concentrations were simply the result of changes that occurred over time as the groundwater flowed towards Mountain Branch (N.T. Super. 132, 272; N.T. 643-644, 722-723, 1002). This testimony is unacceptable, however, because it assumes what it is meant to prove, namely that a hydrogeologic connection exists between the 1050 discharge and the Hamilton I discharges. Without this assumption, Mr. Schueck appears to have been unable to correlate the water quality from the 1050 discharge, as well as the 1050 well and 1100 wells, with the water quality from the other sampling points between the Mine Site and Mountain Branch.[19]

- Transmissivity of Faults

As the Board explained above, the Department's position in this matter is that the 1050 discharge is hydrogeologically connected to the Mine Site via the Hamilton I discharges. According to the Department, groundwater flowing from the Mine Site towards Mountain Branch is redirected towards the east and the 1050 discharge by two faults that run from the west/northwest to the

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[19]The relatively high proportion of calcium to the other cations in the groundwater collected from the 1050 and 1100 wells appears to be a function of the wells' location within the Glen Ritchie Formation. The Glen Ritchie Formation is comprised of, among other things, deposits of limestone, which contains calcium and magnesium (N.T. 1222-1223, 1324). Because the composition of AMD depends entirely upon the material with which it comes into contact (N.T. 706), the Board can reasonably infer that the calcium in the groundwater collected from the 1050 and 1100 wells is a result of their location within the Glen Ritchie Formation.

east/southeast between the Mine Site and Mountain Branch. After reviewing the record, the Board finds that there is insufficient evidence to determine whether these faults convey AMD in the direction of the 1050 discharge.

Central to the Department's position concerning the faults is the belief that they are transmissive, i.e. capable of transmitting groundwater. Hamilton's expert hydrogeologist, Wilson Fisher, testified that the soil in the fault zone is clay rich, which is not conducive to the transmission of groundwater (N.T. 1211, 1215, 1218-1219). The Department's Michael Smith, District Mining Manager in the Hawk Run Office and an expert hydrogeologist, countered that if the faults were not transmissive, they would act as a groundwater dam and cause groundwater flowing in the direction of Mountain Branch to mound up and discharge to the surface (N.T. 1462). The manifestations of such a groundwater dam, Mr. Smith testified, would be a delineation of springs along the uphill side of the fault zone (N.T. 1462).

Although there is no definitive delineation of springs along the fault zone (N.T. 1210, 1406), which would tend to indicate that the faults are transmissive, there is evidence in the record of seasonal springs emanating from the ground upgradient of the fault zone and flowing across it (N.T. 1210, 1475). Mr. Smith attempted to explain away these seasonal occurrences by stating that water may still flow over a relatively permeable fault zone because of surface or soil permeabilities, the transmissivity of the fault zone, or the amount of water flowing past (N.T. 1476). Mr. Smith made no attempt, however, to apply

this theoretical discussion to the current matter (N.T. 1476). There is, therefore, no way for the Board to determine whether the seasonal springs that emanate above and flow over the fault zone are the result of an impermeable fault zone or a combination of the factors Mr. Smith discussed.

The parties' experts also spent a considerable amount of time discussing the hydraulic gradient of the fault zone and the effect of the minimal change in elevation between the Hamilton I discharges and the 1050 discharge (*See*, N.T. 970, 981, 1212, 1466-1468). This issue, however, has lost its importance since the Board has already found that the Department failed to prove the transmissivity of the faults. The Board concludes that until the transmissivity of the faults is established it is not possible to determine whether groundwater flows through them, regardless of the hydraulic gradient.

- The Geophysical Studies

The Department last relies on the results of two geophysical analyses conducted by Mr. Schueck in the area between the Mine Site and Mountain Branch to support its position that the 1050 discharge is hydrogeologically connected to the Mine Site (via the Hamilton I discharges). These studies, the Department contends, indicate that a "plume" of AMD flows from the Mine Site, past the treatment facilities at the Hamilton I discharges, and towards the 1050 discharge. For the reasons that follow, the Board concludes that these studies are insufficient to show that the 1050 discharge is hydrogeologically connected to the Mine Site via the Hamilton I discharges.

- The Terrain Conductivity Study

The first geophysical study undertaken by Mr. Schueck was a terrain conductivity study of a large portion of the area between the Mine Site and Mountain Branch (N.T. Super 16, 20). Through the use of this study, Mr. Schueck hoped to delineate the extent of the plume of AMD between the Mine Site and Mountain Branch (N.T. Super. 137). In its post-hearing brief, Hamilton offers several reasons why the Board should discard the results of Mr. Schueck's terrain conductivity study. Hamilton first argues the results of Mr. Schueck's study are invalid because he took the conductivity measurements incorrectly. Hamilton next argues the Board should disregard the results of the terrain conductivity because Mr. Schueck arbitrarily chose a value of 7 mmhos/m as indicative of AMD. And finally, Hamilton argues the terrain conductivity study is inadmissible because this method is not accepted as a tool for predicting the location of AMD plumes. Because Hamilton's final argument concerns the admissibility of the terrain conductivity study, while the other two arguments go to the weight to be accorded the study's results, the Board begins by examining whether terrain conductivity is an accepted tool for predicting the location of AMD plumes.

As the Board discussed above, the relevant standard for the admission of scientific evidence is the Frye standard, which requires the tribunal to determine whether the scientific methodology at issue has gained the acceptance of the scientific field in which it belongs. *See*, Nazarovitch, 496 Pa. at 101, 436 A.2d at 172; McKees Rocks Forging, Inc. v. DER, 1994 EHB 220, 289. In

support of his belief that terrain conductivity has been generally accepted by the hydrogeologic community. Mr. Schueck testified that he authored and presented several papers concerning the use of geophysical mapping techniques, including terrain conductivity (N.T. Super. 95, 129; N.T. 559-560). In particular, Mr. Schueck authored and presented a peer-reviewed paper concerning an EPA-sponsored research project in Clinton County that utilized various geophysical mapping techniques, including terrain conductivity, to locate the source of AMD (N.T. 559-561). Because Mr. Schueck's paper was accepted following peer review, the Department contends the use of terrain conductivity is generally accepted by the hydrogeologic community. The Board disagrees.

Mr. Schueck's Clinton County project is unacceptable as support for his current use of terrain conductivity because the goals of the two studies were different. The goal of Mr. Schueck's study in this proceeding was to use terrain conductivity alone to determine the location of a suspected plume of AMD emanating from the Mine Site.[20] The issue currently before the Board, therefore, is whether a terrain conductivity study, alone, is an accepted tool for determining the location of a plume of AMD. In the Clinton County project,

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[20]While the Department will undoubtedly argue that Mr. Schueck supported the results of his terrain conductivity study with a number of well samples and the results of the electrical resistivity study conducted along the trench line, there is no doubt that the purpose of the terrain conductivity study, as demonstrated by Exhibits C-4a and C-4b, was to show the location of a plume of AMD extending from the Mine Site to Mountain Branch. Given this purpose, the Board's role under Frye is to determine whether a terrain conductivity study was an acceptable tool for Mr. Schueck to use.

however, the goal of the study was to use a number of geophysical mapping techniques, including terrain conductivity, electrical resistivity, and magnetics, to determine the source of AMD pollution. If the Board were called upon to apply the Frye standard to that application, the issue would be whether geophysical mapping is an accepted tool for locating the source of AMD. The differences between these two applications preclude the Board from finding that the peer-reviewed Clinton County project is proof that terrain conductivity is an accepted tool for locating a plume of AMD.

The Board's position is further supported by Mr. Fisher, who explained that terrain conductivity is not yet an acceptable predictive tool for determining the location of AMD plumes (N.T. 1302). The problem with terrain conductivity measurements, Mr. Fisher testified, is that they only yield qualitative data, i.e. the apparent conductivity between two points (N.T. 1155-1156). In order to determine what the conductivity levels mean, Mr. Fisher stated, it is necessary to conduct a detailed investigation of the materials present (N.T. 1156). While Mr. Schueck acknowledged these limits to terrain conductivity (N.T. Super. 274; N.T. 571), he failed to perform anything more than a "gross quantification" (N.T. 572-573). Because even Mr. Schueck admitted the limits of the information that could be discerned from terrain conductivity values alone, the Board cannot find that a terrain conductivity study is an acceptable method for determining the limits of a plume of AMD.

The Board's current application of the Frye standard is not similar to other instances in which the Board found that scientifically adduced evidence was admissible under Frye. For example, in McKees Rocks Forging, 1994 EHB 220, the Board found that the Department's method for analyzing water samples for VOCs satisfied the Frye standard because it was contained in the "Approved EPA Analytical Methods and Detection Limits: Organics" found in the Department's regulations. 1994 EHB at 289-290. The Board also noted in McKees Rocks Forging, 1994 EHB 220, that the appellant had failed to challenge the Department's other method for analyzing VOCs. *Id.* at 290. Having carefully reviewed the record in this case, the Board was unable to find any analogous evidence supporting Mr. Schueck's use of terrain conductivity. Accordingly, the Department's terrain conductivity study, as expressed in Exhibits C-4a and C-4b, is inadmissible under Frye and will not be considered in resolving this adjudication.[21]

- The Resistivity Study

The second geophysical study relied on by Mr. Schueck was an electrical resistivity study undertaken along the trench line downgradient of the Hamilton I discharges. The purpose of this study was to determine whether AMD would be encountered in certain areas, and if so, at what depth (N.T. 668). Mr.

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[21]In reaching this decision, the Board is not rejecting the concept of terrain conductivity. The record overwhelmingly supports the proposition that the apparent conductivity of the earth between two points can be measured. What the Board does not accept, however, is that these measurements, alone, can be used to determine whether a plume of AMD exists beneath the study area.

Schueck exhibited the results of the resistivity study in a Barnes-Layer Diagram, which is a cross-sectional view of the distribution of electrical resistivity along the trench line to a depth of 55 feet (N.T. Super. 41, 245; Ex. C-5). After the resistivity study was completed, four monitoring wells (the "A" and "K" wells) were drilled into the trench line to verify the results (N.T. Super 249). Given the results of the resistivity study, as depicted in the Barnes Layer Diagram, the Department contends it has established the presence of AMD downgradient of the Hamilton I discharges, and, therefore, that the AMD emanating from the 1050 discharge comes from the same source as the AMD emanating from the Hamilton I discharges. Hamilton, in response, contends the resistivity study should be given zero weight because the area underlying the trench does not satisfy certain assumptions integral to the mathematical calculations used in interpreting the raw data. For the following reasons, the Board agrees with Hamilton and will accord no weight to the Department's resistivity study.

The electrical resistivity displayed in the Barnes-Layer Diagram is measured in terms of ohm-feet, which is calculated through a mathematical manipulation of the raw data acquired in the field (N.T. Super. 247). Mr. Schueck, surprisingly, was unable to recite the calculations used to convert the raw data into ohm-feet. Nevertheless, the Board accepts, and Hamilton did not dispute, that these calculations were correctly entered into the spreadsheet program Mr. Schueck used for this purpose (N.T. 807-808).

This does not mean, however, that the Board will also overlook what it finds to be a fundamental flaw in Mr. Schueck's research. As Mr. Fisher explained, and Mr. Schueck agreed, the equations used to convert the raw data into ohm-feet assume that the study area is underlain by homogenous horizontal layers (N.T. 666, 1234). Such a condition clearly does not exist here. Beyond the fact that Mr. Schueck admitted the area underlying the trench line does not satisfy the assumptions built into the Barnes-Layer equations (N.T.904), Mr. Fisher described how he determined that the geological strata underlying the trench line are not composed on homogenous horizontal layers (N.T. 1231-1233). Given the condition of the geologic strata underlying the trench line, the Board agrees with Mr. Fisher that the theoretical basis of the Barnes-Layer Diagram is moot (N.T. 1233).

The Board is also not persuaded by Mr. Schueck's attempts to explain why his resistivity study was valid despite the lack of homogenous horizontal strata. Mr. Schueck testified that the particular method he used in measuring the raw data, the Wenner method with a Lee partition, enabled him to use the Barnes-Layer Diagram to look for vertical discontinuities (N.T. 905). The Board, however, is unable to accept this testimony at face value because it directly contradicts Mr. Schueck's earlier statements that the equations used to calculate ohm-feet assume homogenous horizontal layering. The Board finds, therefore, that the ohm-feet values Mr. Schueck is using to look for vertical discontinuities are

themselves untrustworthy. Accordingly, Mr. Schueck could not rely on them for any purpose.

Mr. Schueck also testified that his use of the Barnes-Layer Diagram in this situation was appropriate because the information would not be used in isolation, but rather in concert with other evidence, including monitoring wells drilled into the trench line to verify the results (N.T. 902). The Board does not dispute that three of the four wells drilled into the trench line revealed groundwater quality indicative of AMD (N.T. Super. 251; N.T. 671; Exs. C-6a, C-6b). However, because the resistivity study failed to satisfy necessary theoretical underpinnings, there is no way for the Board to determine whether the water quality in these wells verified the results of the resistivity study or was simply coincidental.

And finally, even if the Board were to accept the results of the resistivity study and accord them some weight, they would not satisfy the Department's burden of proving a hydrogeologic connection between the 1050 discharge and the Hamilton I discharges. Although the resistivity study would indicate AMD in the groundwater downgradient of the Hamilton I discharges, the Department has failed to present any credible evidence of a mechanism for AMD to flow from that point to the 1050 discharge.

Conclusion

This adjudication resolves a dispute concerning the Department's issuance of a Compliance Order for an AMD discharge into Mountain Branch at a

point 1.050 feet upstream of the Houtzdale Municipal Authority's water intake. The Department successfully demonstrated at the hearing that the water emanating from the 1050 discharge violated the effluent limits of 25 Pa.Code §87.102. The Department, however, failed to demonstrate that the 1050 discharge is hydrogeologically connected to the Mine Site. Accordingly, the Board must find that the Department's Compliance Order concerning the 1050 discharge was contrary to law and affirm Hamilton's appeal.

CONCLUSIONS OF LAW

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

2. The burden of proof in this matter rests with the Department.

3. The 1050 discharge violates the effluent limits of 25 Pa.Code §87.102.

4. Hamilton is not liable for the 1050 discharge unless it is hydrogeologically connected to the Mine Site. Harbison-Walker Refractories v. DEP (Adjudication issued February 23, 1996), p.54-55.

5. Hamilton is collaterally estopped from challenging the Board's decision in Hamilton I so far as it concerns: Hamilton's liability for the off-site discharges at issue there; whether the Department's methods for analyzing water quality samples are generally accepted in the scientific field.

6. The Department presented a satisfactory chain of custody concerning the water quality samples taken in the area of the Mine Site and analyzed in its Harrisburg laboratory.

7. The Department's water sample analyses are admissible in evidence under the Business Records Act.

8. Judge Woelfling properly denied admission of Ex. A-23.

9. The Department failed to prove by a preponderance of the evidence that the 1050 discharge is hydrogeologically connected to the Mine Site.

10. The Department's issuance of the Compliance Order to Hamilton was contrary to law.

11. The Board affirms Hamilton's appeal from the Department's issuance of the Compliance Order.

ORDER

AND NOW, this 29th day of April, 1996, it is ordered that Al Hamilton Contracting Company's appeal from the Department's September 17, 1992 Compliance Order concerning the 1050 discharge is sustained and the order is vacated.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 29, 1996

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HAROLD WEISS, et. al.	:	
	:	
v.	:	**EHB Docket No. 94-283-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARTIN STONE QUARRIES, Permittee	:	**Issued:** April 30, 1996

OPINION AND ORDER ON MOTION TO COMPEL

By George J. Miller, Chairman

Synopsis:

Before the Board is a motion to compel compliance with a pre-hearing order filed by the appellants, Concerned Citizens of Washington Township. Because the pre-hearing order which it seeks to enforce does not apply to this case, we deny Concerned Citizens' motion.

Opinion

Concerned Citizens seeks to enforce a prehearing order issued on November 8, 1994, which set deadlines for the filing of prehearing memoranda in Washington Township v. DER, Docket No. 94-316, a case related to this matter. Washington Township was consolidated with the Concerned Citizens' appeal after the issuance of this November 8 order, but was later unconsolidated when Washington Township withdrew its appeal.[1] Because we ruled that that order does not apply to this

[1] For a more detailed discussion of the complicated procedural history of this matter, see Weiss v. DER, Docket No. 94-283-MG (Opinion filed March 6, 1996).

matter, we must deny the Citizens' motion.

On March 6, 1996, we issued an order dealing with various motions of the parties in this case. One of the motions dealt with was Martin Stone Quarry's (MSQ) motion to dismiss the appeal of Concerned Citizens because it had not filed a prehearing memorandum by the deadline set by the extended prehearing order issued at Docket No. 94-316. We explained that the November 8, 1994 prehearing order which set a deadline for the filing of prehearing memoranda did not apply to Concerned Citizens because it was issued at a different docket number for a different appellant before the two cases were consolidated. Weiss v. DER, Docket No. 94-283-MG (opinion issued March 6, 1996), slip op. at 4.

We also explained in our March 6 order that the Board's procedural rules governing prehearing procedure had changed during the pendency of this matter, and are now found at 25 Pa. Code §1021.81-.84.[2] Specifically, Section 1021.81(d) provides that prehearing memoranda must be filed at least 20 days before the scheduled hearing date. As a hearing date has not yet been scheduled for this matter, there currently are no official deadlines for the filing of memoranda.

A prehearing order No. 1 was issued for the appeal of Concerned Citizens on March 6, 1996. We note that Concerned Citizens filed its prehearing memoranda on March 7, 1996, no doubt believing itself to be bound by the 1994 prehearing order. MSQ has had benefit of that document in completing discovery pursuant to the prehearing order No. 1 which set a deadline for discovery of June 14, 1996. As a matter of fairness, any new information which is discovered by Concerned Citizens during that period can be added to their prehearing memorandum by amendment. Any

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[2] Concerned Citizens filed its appeal on October 24, 1994. The Board's new rules became effective on September 9, 1995.

amendments which Concerned Citizens wish to file. The schedule for the filing of any amendments to the Citizens' prehearing memorandum and of MSQ's prehearing memorandum will be set after discovery is closed and dispositive motions, if any, area dealt with.

Accordingly, we enter the following

ORDER

AND NOW, this 30th day of April, 1996, the motion to compel of Concerned Citizens of Washington Township in the above-captioned matter is hereby denied.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: April 30, 1996

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M. DIANE SMITH
SECRETARY TO THE BC

HARBISON-WALKER REFRACTORIES	:	
	:	
v.	:	**EHB Docket No. 91-268-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
	:	**Issued: May 2, 1996**

OPINION AND ORDER SUR APPLICATION FOR RECONSIDERATION

By the Board

Synopsis

The Board finds that the Department of Environmental Protection has not demonstrated that the Board erred in its Adjudication of this matter. Therefore, the Department's Application for Reconsideration, seeking the Board to reverse its ruling with respect to Harbison-Walker Refractories' liability for two off-site acid mine discharges, is denied.

OPINION

On February 23, 1996, the Board issued an Adjudication in this matter, which sustained in part and dismissed in part an appeal filed by Harbison-Walker Refractories ("Harbison-Walker") from an order by the Department of Environmental Protection ("Department").[1] The order directed Harbison-Walker to treat certain seeps in the vicinity of Harbison-Walker's Smith

[1]The Department of Environmental Protection is a successor to the Department of Environmental Resources, which issued the order involved in this appeal.

Mine site, implement a plan to improve the water quality of two streams in the vicinity of the mine site, and complete reclamation of the site. The Board upheld all of the Department's order except for that portion which directed Harbison-Walker to treat two off-site discharges known as the "B" and "C" seeps. The Board found that the Department had failed to prove a hydrogeologic connection between the seeps and Harbison-Walker's mine site under §315 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.*, at §691.315. The Board also found that Harbison-Walker could not be found liable under §316 of the Clean Streams Law, 35 P.S. §691.316, because it was not an "occupier" of the area where the seeps are located. See Harbison-Walker Refractories v. DER, EHB Docket No. 91-268-MJ (Adjudication issued February 23, 1996).

On March 14, 1996, the Department filed an Application for Reconsideration, seeking reconsideration of the Board's ruling with respect to treatment of the B and C seeps. By Order dated March 21, 1996, the Board granted reconsideration. Harbison-Walker filed a Response to the Application on April 19, 1996. The Department then requested and was granted leave to file a reply on April 26, 1996.

Standard for Reconsideration

The Board's rule on reconsideration is set forth at 25 Pa. Code §1021.122. Under this rule, the Board may grant reargument or reconsideration of one of its rulings for "compelling or persuasive" reasons, generally limited to the following instances:

> (1) The decision rests on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief the question.

> (2) The crucial facts set forth in the application are not as stated in the decision and would justify a reversal of the decision. In such a case, reconsideration would only be granted if the evidence sought to be offered by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing.

25 Pa. Code §1021.122(a).

The Department seeks reconsideration on the following grounds: (1) The Board erred in its finding that Harbison-Walker was not an occupier of the area where the B and C seeps are located, pursuant to §316 of the Clean Streams Law; (2) The Board erred by requiring the Department to prove a "causal connection" between the seeps and the mine site; (3) The Board erred in applying an incorrect standard of proof; and (4) The Board erred in finding that the circumstantial evidence presented by the Department at the hearing was insufficient to demonstrate a hydrogeologic connection between Harbison-Walker's mine site and the B and C seeps.

Section 316 of the Clean Streams Law - "Occupier"

Section 316 of the Clean Streams Law reads in relevant part as follows:

> Whenever the department finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the department may order the landowner or occupier to correct the condition in a manner satisfactory to the department...
>
> 35 P.S. §691.316

In its Adjudication, the Board found that Harbison-Walker qualified as both a landowner and occupier of the permit site as of the time of the Department's order, by virtue of the fact that

it continued to store and remove clay from stockpiles at the site. The Board further found as follows:

> However, while Harbison-Walker may be held liable under Section 316 for the treatment of any seeps located on its permit site, the B and C seeps are located off the permit area and thus, are not on land owned or occupied by Harbison-Walker.
>
> Harbison-Walker, slip op. at 82.

In its Application for Reconsideration, the Department asserts that the Board applied an incorrect definition of "occupier", and that Harbison-Walker is an occupier of any areas which it affected, not just the area within its permit boundaries.

We agree with the Department that a mining operator is an "occupier" not only of its permit area but also any areas outside the permit boundaries which it may have affected during mining. However, the record does not show that Harbison-Walker affected the area outside its permit boundaries where the B and C seeps are located.

Some confusion may have surrounded the fact that the record did not contain a description or depiction of the entire area covered by Harbison-Walker's mine drainage permit. On page 61 of the Adjudication, the Board found as follows:

> [W]hile the record contains no exact depiction or description of the entire area covered by Harbison-Walker's Mine Drainage Permit, the record does clearly show the area of the site disturbed by Harbison-Walker's mining.
>
> Harbison-Walker, slip op. at 61.

The Department interprets this language as being a finding by the Board that the areas disturbed by Harbison-Walker's mining activities are located both within and outside the boundaries of its

permit. (Application for Reconsideration, p. 5) This is an incorrect reading of the Board's opinion. Rather, this statement is a recognition of the fact that the Department did not introduce into evidence any map which accurately depicted the entire permit area (see Harbison-Walker, slip op. at 58-61). The record does, however, contain a map which depicts the area disturbed by Harbison-Walker. (Commonwealth Ex. V) This map shows the B and C seeps outside the disturbed area.

Section 315 of the Clean Streams Law - "Causal Connection"

Because the B and C seeps are not located within the area affected by Harbison-Walker's mining or the boundaries of its permit, the Board held that the Department must demonstrate that the seeps are hydrogeologically connected to the area affected by Harbison-Walker in order to establish liability under §315(a) of the Clean Streams Law, 35 P.S. §691.315(a). Section 315(a) reads in relevant part as follows:

> No person or municipality shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department.
>
> 35 P.S. §691.315(a).

The Department argues that the Board erred in requiring a showing of a hydrogeologic connection. The primary flaw with the Department's argument is that it confuses "hydrogeologic connection" with "causation". Contrary to the Department's position, these are two separate principles. It is true, as the Department points out in its Application, that a showing of causation is not required for a finding of liability under §315(a) of the Clean Streams Law. It is well-

established in both appellate and Board decisions that a mining operator is liable under §315(a) of the Clean Streams Law for any polluting discharge which emanates from its affected area regardless of whether the operator caused the discharge. Commonwealth v. Harmar Coal Co., 452 Pa. 77, 306 A.2d 308 (1973); Commonwealth v. Barnes & Tucker Co., 472 Pa. 115, 371 A.2d 461 (1977); Thompson & Phillips Clay Co. v. DER, 582 A.2d 1162 (Pa. Cmwlth. 1990); Ingram Coal Co. v. DER, 1990 EHB 395. However, it is also well established that where a discharge is not within the area affected by mining, the Department must prove that a hydrogeologic connection exists between the affected area and the discharge before the operator can be found liable for the discharge. Al Hamilton Contracting Co. v. DER, EHB Docket No. 93-072-E (Adjudication issued November 29, 1995); C&K Coal Co. v. DER, 1992 EHB 1261; Al Hamilton Contracting Co. v. DER, 1993 EHB 1651. This is not the same as having to demonstrate that the mining operator caused the discharge, but only that the discharge emanates from the mining operator's site or activity. Under the Department's theory, a mining operator would be liable for any discharges in the vicinity of the mine site regardless of whether they emanate from the site. This is not what is intended by §315 of the Clean Streams Law.

Circumstantial Evidence

The Department contends that the Board applied an incorrect standard of proof by requiring both circumstantial evidence and expert testimony to establish a hydrogeologic connection between the mine site and the B and C seeps. The Department asserts that circumstantial evidence alone is sufficient to establish that such a connection exists.

Again, we agree with the Department that circumstantial evidence alone can form the basis for a finding of liability under §315 of the Clean Streams Law. Circumstantial evidence has been

relied on by both the courts and the Board in finding that a connection existed between an appellant's site and a polluting discharge. See A.H. Grove & Sons, Inc. v. DER, 452 A.2d 586 (Pa. Cmwlth. 1982); C&L Enterprises v. DER, 1991 EHB 514. In the present case, the problem was not that the Board refused to consider circumstantial evidence as being sufficient to prove liability under §315 of the Clean Streams Law, as the Department suggests, but that the circumstantial evidence presented by the Department was not sufficient to meet its burden of proof.

Moreover, as Harbison-Walker correctly notes in its memorandum of law, expert testimony may be required as part of the circumstantial evidence relied upon. As Harbison-Walker quite correctly points out, "Someone must explain how the circumstantial evidence offered establishes the hydrogeologic connection."

The Department cites the Board's decision in Martin L. Bearer v. DER, 1993 EHB 1028, in support of its argument that the Department is not required to provide expert testimony on the direction of groundwater flow in order to establish liability under §315. We note, first of all, that Bearer did not involve the question of liability under §315 of the Clean Streams Law, but, rather, §4.2 of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq., at §1396. 4b, which imposes liability on surface mine operators who contaminate residential water supplies. In Bearer, the Board did not rely on direct evidence of a hydrogeologic connection between the mine site in question and residential wells which had been polluted by acid mine drainage. In reaching this conclusion, the Board did not rule, as the Department suggests, that expert testimony regarding groundwater flow is not required in order to establish liability for off-site contamination, but only that the circumstantial

evidence presented by the Department in that case was sufficient to support a conclusion that the Appellant's mining had polluted the wells. In fact, expert testimony regarding the direction of groundwater flow has been relied on by both the Board and the Commonwealth Court in establishing whether liability may be found under §315 of the Clean Streams Law: See e.g, A.H. Grove, 452 A.2d 586; McDonald Land and Mining Co. v. DER, 1994 EHB 705.

In its reply brief, the Department also cites Hughes v. Emerald Mines Corp., 303 Pa. Super. 426, 450 A.2d 1 (1982) and Lawrence Coal Co. v. DER, 1988 EHB 561, as instances where both the Superior Court and the Board found a mine site to be the source of contamination based on circumstantial evidence. As noted above, the Board recognizes that circumstantial evidence may form the basis for finding that a hydrogeologic connection exists. The Board's ruling in the present case was not that circumstantial evidence may not support a finding of a hydrogeologic connection, but that the circumstantial evidence presented by the Department in this case was not sufficient to carry its burden of proof.

This is especially important in light of the Commonwealth Court's holding in Kerrigan v. DER, 641 A.2d 1265 (Pa. Cmwlth. 1994), that the Board's findings must be supported by "substantial evidence". Id. at 1268. In Kerrigan, the Court found that the Board's conclusion that lead contamination on a tract of land owned by the Appellants posed a danger of pollution to waters of the Commonwealth was not supported by substantial evidence in the record. Specifically, the Court pointed to gaps in the testimony of the Department's expert witnesses. In the present case, the Board found that the evidence presented by the Department, both circumstantial and direct, did not amount to "substantial evidence" necessary to meet the Department's burden of proof that a hydrogeologic connection exists between Harbison-Walker's

affected area and the B and C seeps. As in Kerrigan, there were substantial and significant gaps in the testimony of the Department's expert witness. Based on these gaps, the Board could not find that the Department had met its burden of proving a hydrogeologic connection between the mine site and the seeps.

Evidence in the Record

Finally, it is necessary to address certain statements in the Department's Application for Reconsideration which constitute material misrepresentations of the Board's findings or evidence in the record. In paragraph 27.b of the Application, the Department states, "The Board's findings and uncontroverted evidence in the Record establish that the 'C Seeps' and some of the 'B Seeps' emanate from Harbison-Walker's mine spoil." In support of this statement, the Department cites to Finding of Fact 107 in the Board's Adjudication. However, Finding of Fact 107 reads, "The C seeps are located in clusters along the southern edge of the mine site. [Citations to transcript and exhibits omitted] The C seeps are located off the permit area." This clearly does not state what the Department claims it does.

The Department also mischaracterizes the evidence in the record. On page five of its memorandum, the Department states that Commonwealth Exhibit V shows that Harbison-Walker conducted mining activities on an area much larger than the area covered by its mining permits. This is a misrepresentation of what is depicted on Exhibit V. Exhibit V is a map which depicts Harbison-Walker's "Bonded Permit" area and the "Disturbed Area". Because a mining company's bonded area is usually much smaller than its entire permit area, there is no indication that Exhibit V depicts the entire area covered by Harbison-Walker's mining permits. This is especially true since Harbison-Walker did not mine all of the area covered by its mining permits,

and, therefore, it is unlikely that Harbison-Walker would have bonded the entire area covered by its permits.

The Department also refers to various portions of the record which it claims establish a "causal connection" between the areas affected by Harbison-Walker and the B and C seeps. However, these portions of the record either do not state what the Department claims or simply do not establish a hydrogeologic connection. In fact, much of the testimony to which the Department cites consists of unsupported or unexplained conclusions by the Department's expert witnesses regarding groundwater flow direction. As noted in the Adjudication, most of these conclusions were rejected by the Board for this reason.

Laches and Estoppel

Before concluding, we must address the assertion by Harbison-Walker in its memorandum of law that the Board erred in not considering Harbison-Walker's arguments on laches and equitable estoppel in its Adjudication. In footnote 30 of the Adjudication, the Board stated that it need not address Harbison-Walker's arguments with respect to laches and equitable estoppel as they pertained to the B and C seeps since the Board had sustained Harbison-Walker's appeal with respect to the B and C seeps. The Board did, however, consider these issues with respect to Harbison-Walker's liability for reclamation of the site, when it addressed the failure of earlier inspection reports to denote the existence of reclamation violations at the site. See Harbison-Walker, slip op. at 96-97, 109. The Board rejected these arguments since the Department may not be estopped from enforcing the law, even if prior enforcement by one of its inspectors has been lax. Lackawanna Refuse Removal, Inc. v. DER, 442 A.2d 423, 426 (Pa. Cmwlth. 1982)

Conclusion

In conclusion, the Department has failed to establish grounds requiring reconsideration and reversal of the Board's holding with respect to Harbison-Walker's liability for the B and C seeps. Based on this conclusion, we enter the following order:

ORDER

AND NOW, this 2nd day of May, 1996, it is hereby ordered that the Department's Application for Reconsideration, seeking reversal of the Board's finding that the Department failed to meet its burden of proving that Harbison-Walker is liable for the B and C seeps, is **denied.**

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
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MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: May 2, 1996

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