# Environmental Hearing Board

# Adjudications
## and
# Opinions

# 1995

## Volume I

COMMONWEALTH OF PENNSYLVANIA
George J. Miller, Chairman

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

1995

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## FOREWORD

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

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

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| **FRANK J. LATOSKY** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 92-268-W** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | |
| **DEPARTMENT OF ENVIRONMENTAL RESOURCES** | : | **Issued: January 5, 1995** |

## OPINION AND ORDER
## SUR MOTION TO DISMISS

**By Maxine Woelfling, Chairman**

**Synopsis:**

The Department of Environmental Resources' (Department's) motion to dismiss an appeal of a letter advising a landowner of its intent to enter upon his property in order to control pollution from mine drainage pursuant to the Land and Water Conservation and Reclamation Act, the Act of January 19, 1968, P.L. (1967) 996, as amended, 32 P.S. §5101 et seq. (LWCRA), is denied. Because the landowner challenges the Department's basis for asserting that entry is necessary to abate stream pollution, the Board cannot dismiss the appeal on the grounds that the entry does not constitute a taking.

## OPINION

This matter was initiated with the filing of a July 27, 1992, notice of appeal by Frank J. Latosky (Latosky) challenging the Department's June 26, 1992, letter notifying him that it was going to enter on his land pursuant to the LWCRA to install and maintain a drainage system for the purpose of abating pollution of Little Muddy Run and the Janesville Reservoir. The pollution was caused by acid mine drainage emanating from the operations of the former Westport

Mining Company in Gulich Township, Clearfield County, and the drainage system would replace one already installed on Latosky's property by Benjamin Coal Company (Benjamin) under the terms of a February 27, 1988, easement with Latosky. Latosky alleged that the Department's action was an abuse of discretion because it, inter alia, deprived him of his due process right to notice and an opportunity to be heard; violated §1921-A of the Administrative Code,[1] the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21 ("Administrative Code"); failed to follow the proper procedures for effecting a taking; and was outside the scope of the Department's authority.

A hearing on the merits was scheduled for February 24-25, 1994, but was continued as a result of an order granting the Department's motion for a continuance. The basis for the Department's request was that there was a dispute over the ownership of the easement which required resolution in another forum before the Board could adjudicate Latosky's appeal. Latosky contended that the easement reverted back to him because of Benjamin's alleged failure to complete construction of the pipeline within the time specified by the easement,[2] while the Department argued that it owned the easement by virtue of its purchase of the easement from the trustee in bankruptcy for Benjamin. The hearing was continued to allow the parties to resolve the ownership question. Concluding that neither party was making any attempt to resolve the alleged ownership dispute,[3] the Board, on June 15, 1994, ordered the Department to file a motion to dismiss

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[1]This portion of the Administrative Code was repealed by §8(a) of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530.

[2]The easement reverted to Latosky if construction of the pipeline was not completed within a year. Exhibit A to Latosky's Response to Motion to Continue Hearing.

[3]It was each party's position that the other party was responsible for initiating action in what it believed to be the appropriate forum for resolution.

relating to this issue.[4]

As near as the Board is able to determine, the Department asserts in its motion to dismiss that in order to determine whether there has been a taking, as Latosky contends, the ownership of the easement must first be conclusively established. The only forum which can make that determination, according to the Department, is the Board of Property, which has jurisdiction over disputes involving Commonwealth lands.[5] Alternatively, the Department requests the Board to dismiss the appeal with prejudice "in light of the clear direction given by the Land and Water Conservation and Reclamation Act."

On August 15, 1994, Latosky filed his response to the Department's motion to dismiss. Predictably, he disputes the assertion that the Department owns the easement. He contends that the Board has jurisdiction, as a Department action is the basis of the appeal, and thus, the Board can resolve the initial issue of ownership. He also contends that the Department exceeded its statutory authority under the LWCRA because its actions were a taking for which he was not compensated.

The Department accurately observes that ownership is relevant if the Board is to decide whether there has been a taking of property. The statute, however, spares the Board from that responsibility if it is established that:

* * * * *

> (i) a mine fire, refuse bank fire, stream pollution resulting from mine drainage or subsidence resulting from mining is at a stage where in the public interest immediate action should be taken; and (ii) the owners of the property upon which entry must be made to

---

[4]If an ownership dispute is indeed germane to the appeal, the Board could then transfer it to the proper forum pursuant to §5103 of the Judicial Code, 42 Pa. C.S. §5103.

[5]Pursuant to §1207 of the Administrative Code, 71 P.S. §337.

> combat...stream pollution resulting from mine drainage...will not give permission for the Secretary of Environmental Resources...to enter upon such premises.
>
> * * * * *

In such case, §16 of LWCRA declares that entry upon property for the purpose of abating pollution does not constitute "an act of condemnation of property...."

Nonetheless, the Board cannot grant the Department's motion to dismiss. Then Department Secretary Davis did, on May 27, 1992, authorize entry on the Latosky property on the basis of these findings: abandoned mine drainage was polluting Little Muddy Run and the Janesville Dam; it was in the public interest that action be taken to control the problem; and the owners of the property on which entry was necessary would not give permission (Attachment to Notice of Appeal). But, Latosky has asserted in his notice of appeal that these findings of Secretary Davis are "without stated basis or sufficient evidence." If they are without sufficient evidence, then the Department cannot proceed under §16 of the LWCRA and, therefore, claim that its action did not constitute a taking. The Board cannot decide these issues on the basis of the Department's motion and Latosky's response. Accordingly, the following order is entered.

## ORDER

AND NOW, this 5th day of January, 1995, it is ordered that the Department of Environmental Resources' motion to dismiss is denied. A hearing on the merits shall be rescheduled.

**ENVIRONMENTAL HEARING BOARD**

Maxine Woelfling

**MAXINE WOELFLING**
**Administrative Law Judge**
**Chairman**

**DATED:** January 5, 1995

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| | | |
|---|---|---|
| **FRED McCUTCHEON and RUSMAR INCORPORATED** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 94-096-W** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | |
| **DEPARTMENT OF ENVIRONMENTAL RESOURCES** | : | **Issued:** January 5, 1995 |
| **and JOSEPH J. BRUNNER, INC., Permittee** | : | |

**OPINION AND ORDER SUR MOTION TO DISMISS**

**By Maxine Woelfling**

**Synopsis:**

A motion to dismiss for lack of standing is granted. Appellants failed to demonstrate that they have been aggrieved by the granting of a permit modification allowing the use of a geomembrane tarpaulin as alternative daily cover for a landfill under 25 Pa. Code §273.232 because they do not have direct and immediate interests which have been adversely affected by the decision.

**OPINION**

This matter was initiated with the May 3, 1994, filing of a notice of appeal by Fred McCutcheon (McCutcheon) and Rusmar Incorporated (Rusmar) (collectively, Appellants) challenging the Department of Environmental Resources' (Department) issuance of a permit modification. The permit modification approved the use of geomembrane tarpaulin as an alternative daily cover for Joseph J. Brunner, Inc.'s (Brunner) municipal waste landfill in New Sewickley Township, Beaver County. McCutcheon and Rusmar contend that the Department's approval of the alternative did not comport with the combustibility requirements for daily

cover and were a violation of 25 Pa. Code §§271.232 and 273.232.[1] McCutcheon is a volunteer firefighter who resides in the vicinity of the landfill, while Rusmar is the manufacturer of a foam material which has been approved as an alternative daily cover material by the Department.

Both the Department and Brunner have moved to dismiss this appeal for lack of standing, contending that McCutcheon's interest is not a substantial interest and Rusmar's is neither immediate and direct nor of the type to be protected. Predictably, Appellants dispute these contentions.

In order to have standing to challenge a Department action, the appellant must be "aggrieved" by that action, that is, a party must have a direct, immediate and substantial interest in the litigation challenging that action. Empire Sanitary Landfill, Inc. v. DER *et al.*, EHB Docket No. 94-114-W (Opinion issued September 30, 1994); *see also*, William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, ___, 346 A.2d 269, 280 (1975). 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." South Whitehall Twsp. Police Service v. South Whitehall Twsp., 521 Pa. 82, ___, 655 A.2d 793, 795 (1989); Press-Enterprise, Inc. v. Benton Area School District, 146 Pa.Cmwlth. 203, ___, 604 A.2d 1221, 1223 (1992). For an interest to be "direct," it must have been adversely affected by the matter complained of. South Whitehall Twsp. Police Service, *supra*. 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

[1]Under 25 Pa. Code §271.231 the Department may approve an alternative to a design requirement if the regulation incorporating the design requirement authorizes an alternative and the alternative is equivalent or superior to the design requirement. Alternatives to daily cover are permissible under 25 Pa. Code §273.232(b)(4) if they are noncombustible.

Landfill, Inc. v. DER *et al.*, *supra*. Applying the tests for standing to this appeal, we conclude that neither McCutcheon nor Rusmar has standing to challenge Brunner's permit modification.

McCutcheon alleges he has standing because he has resided near the landfill for the past eight years; he has been a volunteer firefighter since 1940; he is an active member of many state and local firefighters' associations; he has a long-term interest in fire prevention; and he would likely be called upon to extinguish a fire at the landfill resulting from a combustible tarp (Notice of Appeal, Paragraph 12; Appellants' Objections and Response to Motion to Dismiss filed by the Department, Paragraph 6; and Appellants' Objections and Response to Motion to Dismiss filed by Brunner, Paragraph 10). Even if McCutcheon's avocation as a volunteer firefighter is regarded as conferring upon him an interest in fire prevention surpassing that of every citizen--and, therefore, a substantial interest--it cannot be concluded that such an interest is also direct and immediate.

In order for an interest to be "direct," the aggrieved party must show causation of the harm to his interest by the matter about which he complains. Ferri Contracting Co., Inc. v. DER, 1985 EHB 339; William Penn, *supra*. The prospective litigant should demonstrate that there is a "substantial probability" that the result he seeks would materialize. Ferri Contracting Co., Inc., *supra*; Warth v. Seldin, 422 U.S. 490, 504 (1975). McCutcheon, as the Department points out in its memorandum of law in support of its motion, lives eight miles from the landfill and there is only a likelihood that he would be called on to extinguish any fire at the landfill. Moreover, McCutcheon has not alleged a substantial probability that the Department's approval of the geomembrane tarpaulin will lead to a fire at the landfill, much less to a fire that McCutcheon will respond to

as a volunteer firefighter. Consequently, he does not have standing to challenge the Department's approval.

As for Rusmar, it asserts that it has standing because it will be financially harmed by the Department's approval of a competing alternative daily cover (Notice of Appeal, Paragraphs 15 and 16; Appellants' Objections and Response to Motion to Dismiss filed by the Department, Paragraph 6) and that it has already suffered economic injury by expending time and expense in developing an alternative cover material that meets the standards (Appellants' August 2, 1994, Objections and Response to Motion to Dismiss, Paragraph 12). Rusmar's interest is not within the scope of interests protected by the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* The statute's purposes are enumerated in §102 and do not contain any statement regarding the protection of one private enterprise's interest over that of another. As a result, Rusmar does not have standing to challenge Brunner's permit modification. Sequa Corporation v. DER and Dublin Borough, 1993 EHB 1589, 1594-1599.

Moreover, we also cannot conclude that Rusmar's interest is direct or immediate. Here, we can only speculate whether the Department's action will cause the harm of which Rusmar complains. We cannot predict whether a landfill operator will seek to employ alternative daily cover, much less how it will choose between competing acceptable, alternative technologies. As a result, we cannot find a direct interest on the part of Rusmar. Roger Wirth v. DER, 1990 EHB 1643.

## O R D E R

AND NOW, this 5th day of January, 1995, it is ordered that the Department's and Joseph J. Brunner, Inc.'s motions to dismiss are granted and the appeal of Fred McCutcheon and Rusmar Incorporated is dismissed.

**ENVIRONMENTAL HEARING BOARD**

Maxine Woelfling

**MAXINE WOELFLING**
**Administrative Law Judge**
**Chairman**

Robert D. Myers

**ROBERT D. MYERS**
**Administrative Law Judge**
**Member**

Richard S. Ehmann

**RICHARD S. EHMANN**
**Administrative Law Judge**
**Member**

**DATED:** January 5, 1995

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| AMBLER BOROUGH WATER DEPARTMENT | : | |
| v. | : | EHB Docket No. 93-284-MJ |
| COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES | : | Issued: January 6, 1995 |

**OPINION AND ORDER**
**SUR MOTION FOR NON-SUIT**

**By: The Board**

**Synopsis**

The Board grants the Department of Environmental Resources' (DER) motion for non-suit against the appellant and dismisses this appeal where the appellant water supplier has failed to make out a *prima facie* case that DER's denial of its application for a permit to construct and operate a public water supply system was an abuse of DER's discretion. Appellant has not shown *prima facie* evidence that it exercised reasonable efforts to obtain the highest quality sources available, as it is required to do pursuant to 25 Pa. Code §109.603(a). Moreover, appellant has failed to make out the elements of an equitable estoppel against DER.

**OPINION**

**Procedural Background**

Appellant Ambler Borough Water Department (Ambler) commenced this appeal on October 12, 1993, seeking our review of DER's September 16, 1993 denial of its application for a permit to construct and operate a public water supply system. DER's reason for denying Ambler's permit application was that the application and

its supporting documentation were insufficient to allow DER to determine Ambler's compliance with the Pennsylvania Safe Drinking Water Act (Safe Drinking Water Act), Act of May 1, 1984, P.L. 206, 35 P.S. §721.1 *et seq.*, and Chapter 109 of 25 Pa. Code.

A hearing on the merits of the appeal was held on June 1, 1994 before former Board Member Joseph N. Mack. At the conclusion of Ambler's presentation of its case-in-chief but before DER presented any testimony or evidence, DER orally raised a motion for a non-suit. (N.T. 92)[1] Former Board Member Mack explained that under the Board's rules, DER's motion would have to be decided by the Board *en banc* but DER could present its case-in-chief. (N.T. 95) See 25 Pa. Code §21.86. DER chose not to put on its case-in-chief, and the hearing was adjourned.

After the Board received the transcript of the merits hearing, the parties were ordered to file their respective post-hearing briefs. Ambler filed its response to DER's motion for non-suit, along with its post-hearing brief, on July 6, 1994. DER filed its reply to Ambler's response to DER's motion for non-suit, along with its post-hearing brief, on July 25, 1994. Ambler subsequently filed its reply post-hearing brief on August 8, 1994. Any arguments not raised by the parties' post-hearing briefs are deemed waived. Lucky Strike Coal Co. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).[2]

Before we adjudicate this matter, we must consider DER's motion for non-suit, examining the facts to which the parties have stipulated, the exhibits

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[1] "N.T." represents a reference to the June 1, 1994 merits hearing transcript.

[2] Former Board Member Mack resigned from the Board on August 1, 1994 without preparing an adjudication in this matter. We have prepared this opinion from a "cold record", as we are permitted to do. See Lucky Strike, supra.

which they have stipulated for admission as Board exhibits, the transcript of testimony offered in Ambler's case-in-chief, and the exhibits offered in Ambler's case-in-chief. See Solomon Run Community Action Committee v. DER, 1992 EHB 39. Upon this review, we have found that one of the reasons offered by DER for its denial of Ambler's application, that Ambler has not shown reasonable efforts to obtain the highest quality sources of water supply available, was proper. Thus, we need not consider DER's other reasons for its denial and Ambler's objections to those reasons. Willowbrook Mining Company v. DER, 1992 EHB 303.

At the merits hearing, four witnesses testified on behalf of Ambler. Additionally, the parties have stipulated to a number of facts. This evidence establishes the following.

**The Whitemarsh Pumping Station**

Ambler owns and operates the Whitemarsh Pumping Station, which is located in the northeast portion of Whitemarsh Township, Montgomery County. (Jt. Stip.[3]; N.T. 15) Ambler purchased what now constitutes its water department, including the Whitemarsh Pumping Station, during the 1930s. (Jt. Stip.; N.T. 15)

The Whitemarsh Pumping Station is comprised of the north spring and the spring well. (Jt. Stip.) The north spring is a spring fed source with a shallow basin which collects and diverts water to the spring well by an underground pipeline. (Jt. Stip.) The north spring and the spring well were operational wells as of the time of the merits hearing. (Jt. Stip.; N.T. 16)

The Sun Oil Company installed and operates a petroleum pipeline in close proximity to the Whitemarsh Pumping Station. (Jt. Stip.) This petroleum pipeline leaked in 1971. (Jt. Stip.; N.T. 17) Sun undertook remedial action and attempted to remove as much of the gasoline that had leaked from the pipeline as

[3] The parties' joint stipulation was admitted as Board Exhibit (B Ex.) 1.

was possible. (N.T. 17) Sun's remedial action was terminated in 1976 upon Sun's belief that its remedial action had been successful. (Jt. Stip.)

Well No. 3 was a production well, drilled in 1947, which was operated in conjunction with the north spring and the spring well. (Jt. Stip.; N.T. 15) Well No. 3, the spring well and the north spring are located on a 3.6 acre plot which also contains an abandoned dolomite quarry. (Jt. Stip.; N.T. 15) The north spring and the spring well were production wells from the floor of the quarry, while Well No. 3 was drilled above the grade. (Jt. Stip.; N.T. 16, 20) Because of turbidity problems, Well No. 3 was used only until 1980, and was thereafter converted to an observation well. (Jt. Stip.; N.T. 22)

William T. Weir, who has been a consulting engineer for Ambler since 1980, testified on behalf of Ambler at the merits hearing. (N.T. 14, 17) In 1985, Weir retained consultants to design an air stripper and groundwater activated granulated carbon filter as a water treatment system for Ambler. (N.T. 17) This system is currently installed and functioning. (Jt. Stip.) The function of the air stripper equipment and the charcoal filter is to remove the volatile organic chemicals (VOCs) and sediments from the water. (Jt. Stip.; N.T. 20)

In July of 1986, Ambler received a permit authorizing it to run 350 gpm of water through the air stripper and activated carbon filter system. (N.T. 19) The primary source of the water was to be the spring well. (N.T. 19) The air stripper and activated carbon filter were rated for 350 gpm. (Jt. Stip.) Ambler has used this treatment system since July of 1986. (N.T. 19)

When Ambler pumps between 250 and 350 gpm to the air stripper, there is still more water coming in the floor of the quarry. (N.T. 23) In order to keep the quarry dewatered, a sump pump pumps this waste water over the rim of the quarry to a stream which flows to the Wissahickon Creek. (Jt. Stip.; N.T. 23)

In January of 1989, Ambler applied for and received a permit authorizing: an increase in output at the site to 550 gpm through the existing air stripper and activated carbon filter plant (as modified); an increase in the amount of backwash water allowed to be discharged to the stream under the National Pollutant Discharge Elimination System (NPDES) permit; and an increase in the volume of air discharges.[4] (Jt. Stip.)

**Ambler's Efforts to Obtain a Water Source**

G. Sidney Fox, Executive Vice-President of Leggette, Brashears, & Graham, Inc. (LBG), which is a consulting firm based in Wilton, Connecticut, testified on behalf of Ambler at the merits hearing. (N.T. 22, 28) Fox was contacted by Weir to conduct a study on how Ambler could reinstate significant water resources at the Whitemarsh Pumping Station site. (N.T. 22, 28) Fox investigated the site and determined there were two alternative courses of action: (1) to attempt to rehabilitate Well No. 3; or (2) to drill a replacement well on the site. (N.T. 30) Fox first decided to pursue rehabilitating Well No. 3 because that well previously had been permitted as a source of public water supply. (N.T. 33) A subcontractor hired by Ambler videotaped Well No. 3, and this videotape revealed there was a blockage in that well in the form of pump equipment, and the well had been badly damaged. (N.T. 30, 40, 42-44) Fox sent inquiries to well drilling contractors, seeking estimates for rehabilitating Well No. 3 versus drilling a new well and informing the contractors about the blockage problem at Well No. 3. (N.T. 34, 45) The estimates Fox received showed it would be less costly and the outcome more predictable for Ambler to drill a new well, as opposed to rehabilitating Well No. 3, because the contractors did not want to be responsible

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[4] "Backwashing" is "the process of cleaning a rapid sand or mechanical filter by reversing the flow of water." C.C. Lee, Ph.D., Environmental Engineering Dictionary.

for problems caused by other contractors' work at Well No. 3. (N.T. 36, 45) Ambler decided to pursue constructing a replacement well. (N.T. 30)

Testifying as an expert witness on behalf of Ambler, Fox explained that the geology of the aquifer at the Whitemarsh Station site is dolomite limestone, a carbonate rock which is soluble and which is much more prolific than the water-bearing units which underlie most of the borough. (N.T. 30-32, 37) Vertical sets of fractures in this rock at the site have been enlarged through solution caused by precipitation percolating through these rocks for many millenia. (N.T. 32) Fox knew that at least 650 gpm could be obtained from Well No. 3. (N.T. 33) Fox recommended that the replacement well, Well No. 3A, be drilled as near as possible to Well No. 3 and along the strike of the geological features, where it would accept water from the enlarged fractures, so that the water from the replacement well would be from the same source as Well No. 3. (N.T. 30-34) Fox assumed that obtaining a permit from DER for a new well in this location would not be difficult. (N.T. 30, 33-34) Since the Whitemarsh Pumping Station site is small, Fox believed there was no other possible well site on it, but he was not asked by Ambler to investigate any other potential off-site locations. (N.T. 33, 38)

Craig S. Horne was employed by LBG during the time when Well No. 3A was drilled but was no longer employed by LBG at the time of the merits hearing. (N.T. 41) Drilling of Well No. 3A was done under Horne's supervision, and he was present when drilling began on November 25, 1991. (N.T. 34, 41, 46) Well No. 3A was drilled approximately 55 feet east of Well No. 3 on the 3.6 acre site. (Jt. Stip.)

During drilling of Well No. 3A, Horne notified DER's John Fabian, who is Chief of DER's Technical Services Section, about the Whitemarsh Pumping Station's

site history, and he informed Fabian that hydrocarbon odors had been encountered during drilling. (N.T. 47-48; A Ex. 8) Horne suggested that Ambler would continue to drill deeper and would plan on casing off the contaminated fractures encountered. (N.T. 48) Horne also told Fabian that Ambler would take a sample of the water before drilling deeper, and Ambler would notify DER of the results. (N.T. 48) Fabian indicated that this course of action was acceptable to DER. (N.T. 48) Horne's conversation with Fabian was summarized in a letter dated December 3, 1991 from Horne to Fabian. (N.T. 49; A Ex. 6(a))[5] Fabian sent Horne a letter dated December 17, 1991 which indicated that DER concurred with Horne's December 3, 1991 letter. (N.T. 49; A Ex. 8) Fabian's letter further stated that Ambler would need to conduct a 48 hour pump test on the new well, and Fabian asked that DER be informed at least two weeks prior to that test so DER could conduct its water sampling. (A Ex. 8)

Ambler continued to drill deeper at Well No. 3A, and a hydrocarbon odor was detected at a depth of 195 feet, but the odor was more faint than at 125 feet. (N.T. 61) Ambler then notified DER's Joseph Feola, who is DER's Regional Water Quality Manager, of the sample analyses results on drilling discharge water at Well No. 3A. (N.T. 63, 77; A Ex. 6) Ambler also applied for and received from DER a temporary discharge permit on December 20, 1991, authorizing Ambler's discharge of water containing benzene, toluene, ethylbenzene, and xylene (BTEX) from Well No. 3A to the Wissahickon Creek. (N.T. 62-64, 77-78) Effluent sampling was conducted daily by Ambler upon its receipt of the temporary discharge permit, and the results were sent to DER. (N.T. 68)

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[5] "A Ex." is a reference to one of Ambler's exhibits admitted into the record at the merits hearing.

Ambler then installed a temporary casing on Well No. 3A at a depth of 250 feet and proceeded to drill to a depth of 600 feet, where it then removed this temporary casing. (N.T. 65-66, 70, 75) Results of packer testing[6] conducted on January 2-3, 1992 at a depth from 180 to 450 feet below grade at Well No. 3A showed low levels of benzene (3 ppb), toluene (5 ppb), ethylbenzene (4 ppb), total xylenes (40 ppb), and TPH (1650 ppb). (N.T. 66; A Ex. 5 at Table 3) There were insufficient water bearing fractures at a depth of 140 to 180 feet below grade to enable sampling in that zone. (N.T. 67) The results of sampling conducted in the zone between 0 and 180 feet below grade showed that the levels for all parameters were higher than those at 180 to 450 feet, except for TPH, which was approximately double the level found at 180 to 450 feet. (N.T. 67; A Ex. 5 at Table 3)

Horne recommended to his client that a permanent 14-inch casing be installed from grade to a depth of 150 feet, between the water-bearing fractures at 195 feet and 120 feet (where the hydrocarbon odors were detected) and that the casing be pressure grouted to seal the fracture at 120 foot depth. (N.T. 67)

On February 5, 1992, LBG sent a letter to DER by fax to arrange a pump test for Well No. 3A. (Jt. Stip.) The sample analyses from the pump testing conducted on February 18, 1992 on Well No. 3A showed that total coliform bacteria exceeded Pennsylvania drinking water standards, while the February 20, 1992 pump test sample analyses showed that benzene exceeded the Pennsylvania safe drinking water standards. (N.T. 71; A Ex. 5 at Tables 4 and 6 of the LBG report) The results of long duration pump testing on Well No. 3A in May of 1992 showed that

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[6] A packer is a rubber gasket employed with nitrogen gas which is expanded to seal off the borehole and prevent the vertical migration of water, primarily through the borehole, from entering the pump, so that the pump is sampling a discrete vertical profile of the aquifer. Packer testing enables testing to be done in stages. (N.T. 66)

benzene was not within the Pennsylvania safe drinking water standards. (N.T. 74)

DER was apprised of what was occurring at the Whitemarsh Station site throughout the well drilling process, at least through June 4, 1992, through correspondence, telephone conversations, and DER site visits. (Jt. Stip.)

**Ambler's Permit Application**

Ambler filed its application for a permit to complete construction of Well No. 3A and to operate Well No. 3A (as a replacement source of supply to Well No. 3, the spring well, and the north spring) on July 14, 1993. (Jt. Stip.; N.T. 53; A Ex. 5) This permit application included special specifications for drilling of Well No. 3A and LBG's groundwater supply evaluation. (N.T. 56; A Ex. 5) Ambler stated in its application that it intended to use the existing treatment facilities for the spring well to treat the water from Well No. 3A. (Jt. Stip.) On September 16, 1993, Ambler was informed by DER that its application was denied because the application and its supporting documents were insufficient to allow the DER to determine compliance with the Safe Drinking Water Act and Chapter 109 of 25 Pa. Code. (Jt. Stip.) This appeal followed.

Ambler offered no evidence to show it undertook an evaluation of the highest quality sources available. Nor did Ambler offer evidence that it ever had a discussion with DER concerning Ambler's compliance with 25 Pa. Code §109.603(a) at any time during Ambler's exploration of its options at the site and its construction of Well No. 3A.

**Motion for Non-Suit**

The burden is on Ambler to prove by a preponderance of the evidence that DER's denial of Ambler's application for a permit to construct and operate a water supply was arbitrary, capricious, contrary to law, or an abuse of

discretion. 25 Pa. Code §21.101(c)(1); Al Hamilton Contracting Co. v. DER, 1992 EHB 1458, 1486.[7]

As the Board's rules of practice and procedure at 25 Pa. Code §21.86 require a majority of the Board Members to enter a final order, we have previously ruled that where a single Board Member presides over a merits hearing, the Board may consider an appropriately timed motion for non-suit after the close of the hearing. Solomon Run Community Action Committee v. DER, 1992 EHB 39. We recently explained in Delaware Environmental Action Coalition, et al. v. DER, EHB Docket No. 91-430-MR (Adjudication issued October 18, 1994):

> A motion for a non-suit provides a defendant with the opportunity to test the sufficiency of a plaintiff's evidence. Atlantic Richfield Co. v. Razumic, 480 Pa. 366, 390 A.2d 736 (1978). The Board has held that it may enter a nonsuit if a plaintiff fails 'to prove a *prima facie* case.' Welteroth v. DER and Clinton Township Board of Supervisors, 1989 EHB 1017, 1022. The entering of a nonsuit is limited to clear cases of insufficiency of appellant's case, *Id.*, and allowed only after a plaintiff presents its case and before a defendant has introduced evidence into the record. City of Harrisburg v. DER and Pennsylvania Fish and Boat Commission, 1993 EHB 90. Consequently, only the plaintiff's evidence is examined. See, Highland Tank and Manufacturing Co. v. Duerr, 423 Pa. 487, 489, 225 A.2d 83, 84 (1966). Commonwealth Court has applied this standard to the rule of civil procedure governing the motion for nonsuit, Pa. R.C.P. 230.1. See, Robinson v. City of Philadelphia, 149 Pa. Cmwlth. 163, 612 A.2d 630, 633 (1992). Under Pa. R.C.P. 230.1, a nonsuit may be entered only if the party moving for nonsuit has not yet introduced any evidence into the record.

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[7] In our *de novo* review, we may decide whether, based on the record before us, DER abused its discretion in denying the permit application here. If we find DER has abused its discretion, we are authorized to substitute our discretion for that of DER. Warren Sand & Gravel Co. v. Commonwealth, DER, 20 Pa. Cmwlth. 186, ___, 341 A.2d 556, 565 (1975). The Board will not substitute our discretion for that of DER and approve Ambler's submission unless Ambler shows it is clearly entitled to that approval. Al Hamilton, *supra* at 1487; Pagnotti Enterprises, Inc., d/b/a Tri-County Sanitation Co. v. DER, 1993 EHB 884 (affirmed on appeal).

Delaware Environmental Action Coalition, *supra* at 4-5 (footnote omitted). We further explained the applicability of nonsuit motions to proceedings before the Board is as follows.

> Generally, proceedings before the Board are governed by the Administrative Agency Law. 2 Pa. C.S. Ch. 5, Subch. A, the General Rules of Administrative Practice and Procedure, 1 Pa. Code Part II, and the Board's own rules of practice and procedure, 25 Pa. Code Ch. 21. However, when these rules do not cover a certain procedural issue, such as compulsory nonsuits, the Board looks to the Pennsylvania Rules of Civil Procedure for guidance. See, Welteroth, *supra* (employing the standards of the Pennsylvania Rules of Civil Procedure to determine whether an order of nonsuit is appropriate).

Delaware Environmental Action Coalition, at 5.

In order to defeat the motion for non-suit, Ambler must have made out a *prima facie* case that DER abused its discretion or acted contrary to law when it denied Ambler's permit application. See Delaware Environmental Action Coalition, *supra*. The motion must be viewed in the light most favorable to Ambler, the non-moving party, and should be granted only if Ambler's case is clearly insufficient. Solomon Run, supra.

**Did Ambler Establish Its Prima Facie Case?**

The Safe Drinking Water Act provides, at section 721.5(b)(5), that DER shall develop and implement procedures as may be necessary and appropriate in order to obtain compliance with that act or the rules and regulations promulgated, or permits issued under that act. These procedures include:

> (5) The establishment and maintenance of a permit program concerning plans and specifications for the design and construction of new or substantially modified public water systems, which program:
>
> > (i) Requires all such plans and specifications, or either, to be first approved by [DER] before any work thereunder shall be commenced.
> >
> > (ii) Requires that all such projects are designed to comply with any rules and regulations of [DER] concerning their construction and operation; and once

> completed will be capable of compliance with the drinking water standards; and will deliver water with sufficient volume and pressure to the users of such systems.

35 P.S. §721.5(b)(5).

As cited in Ambler's post-hearing brief, DER's regulations[8] at 25 Pa. Code §503(a), require, *inter alia*, that applications for public water system construction permits be accompanied by plans, specifications, engineer's report, water quality analyses and other data, information or documentation reasonably necessary to enable DER to determine compliance with the Safe Drinking Water Act and Chapter 109 of 25 Pa. Code.

The section of DER's regulations which is at issue here is section 109.603(a) of 25 Pa. Code, which provides:

> (a) Prior to the development of a new source or modification of an existing source, the water supplier shall make reasonable efforts to obtain the highest quality sources available. The supplier shall take reasonable measures to protect the source from existing or foreseeable sources of contamination and causes of diminution.

Ambler and DER take differing approaches as to interpreting what section 109.603(a) requires. Ambler argues that section 109.603(a) does not require a premium site or the exhaustion of every other possible avenue in order for the water supplier to show reasonable efforts to obtain the highest quality sources available. It argues that if the site were required by section 109.603(a) to be "utterly pristine", the second sentence of section 109.603(a) would be superfluous, as it calls for protection from foreseeable contamination. Ambler

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[8] The parties agree in their respective post-hearing briefs, that Ambler's argument that sections 109.503, 109.603(b), and 109.604(b) of 25 Pa. Code cannot be retroactively applied, is moot because DER is not relying on these sections for its denial.

then contends that the treatment system currently in place for the water from the spring well could adequately treat the water from Well No. 3A, and that Well No. 3A's casing would minimize the potential for contamination of that supply. DER, on the other hand, contends that Ambler has not shown that it took reasonable efforts to find potable water at the site in question or at any other site, and, thus, that Ambler has failed to establish its *prima facie* case.

We disagree with Ambler's interpretation of section 109.603(a). Ambler's interpretation amounts to reading the section as providing that "reasonable efforts to obtain the highest quality sources available" equates from the beginning with whether "reasonable measures have been taken to protect the source from existing or foreseeable sources of contamination and causes of diminution." Such an interpretation does not give effect to the "highest quality sources available" portion of the regulation. The rules of statutory construction, which are applicable in interpreting regulations, require that every statute be construed to give effect to all of its provisions. 1 Pa. C.S. §1921; Fraternal Order of Police Lodge No. 5 v. City of Philadelphia, 139 Pa. Cmwlth. 256, 590 A.2d 384 (1991). It is presumed that every word, sentence, or provision of a statute is intended for some purpose and accordingly must be given effect. Commonwealth v. Lobiondo, 501 Pa. 599, 462 A.2d 662 (1983). The requirement of this section of DER's regulations that there be a showing of reasonable efforts to obtain the highest quality source available cannot be met where a water supplier has only considered one source.[9] It is only after there has been some

[9]In reaching this conclusion, we do not suggest a water supplier who investigates a single source of water, which in its untreated state meets or exceeds all standards for potability, is obligated to try to find a still cleaner raw water source. This regulation cannot be read to require the unreasonable. However, this is not the circumstance in this appeal.

comparison of sources and the water supplier has decided on the highest source available to it that the water supplier then must undertake reasonable measures to protect that source from existing and potential causes of contamination. We thus see no reason to disregard DER's construction of this regulation, as DER's interpretation is not clearly erroneous or inconsistent with the authorizing statutes behind the regulation, which include the Safe Drinking Water Act. See Ferri Contracting v. Commonwealth, DER, 96 Pa. Cmwlth. 30, 506 A.2d 981 (1986).

Fox's testimony was that Ambler's decision to locate its well on the Whitemarsh Station site was based on the presence of wells on that site which already were permitted. Fox found the carbonate rock units underlying Whitemarsh Station to be of a type which are more prolific water-bearing units than those underlying other parts of the borough. He never explored what sources were available to Ambler at any other site, however, nor did Ambler request him to do so. Ambler based its course of action on what source was already available to it, whether it was possible to bring that source within Pennsylvania safe drinking water standards, and the costs involved therein. This is not a *prima facie* showing by Ambler that it took reasonable efforts to obtain the highest quality sources available. Thus, we do not reach the question of whether Ambler took reasonable measures to protect its source from existing or potential contamination.[10]

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[10] We thus do not address the evidentiary rulings challenged by Ambler which bear on whether it made a *prima facie* showing of the measures it took to protect Well No. 3A from existing or potential causes of contamination and whether Well No. 3A is more treatable than DER believes. For the same reason, we do not address DER's motion to strike David Wilkes' testimony offered on behalf of Ambler to show that Ambler took efforts to prevent or minimize the impacts from potential or existing sources of contamination.

Ambler argues that on the basis of Perano v. DER, 1992 EHB 963, we should take into account the money it has spent in drilling its new well and whether that well is to be cased and find these considerations show Ambler exercised reasonable efforts to obtain the highest quality source available. Perano involved a petition for supersedeas, brought by the owner of a mobile home park, in his appeal of a DER denial of his public water supply application for a well in his mobile home park. In granting supersedeas of DER's refusal to extend the emergency permit in that matter, we took into account the problems of inadequacy of supply and the irreparable harm to the appellant in having to move his well to comply with the 100-foot rule in DER's Public Water Supply Manual, as well as the fact that there had been no contamination in the well water during the year in which it had been operating. Perano did not require us to consider whether the supplier had made reasonable efforts to obtain the highest quality source available, and we reject its applicability to this matter.

We thus conclude that DER's motion for non-suit should be granted on the basis that Ambler did not exercise reasonable efforts to obtain the highest quality sources available unless Ambler succeeds on its affirmative defense of estoppel.[11]

**Should DER Be Equitably Estopped?**

Ambler contends that DER should be equitably estopped from denying its permit application because DER knew of the contamination problem at the Whitemarsh Station site and was kept apprised of Ambler's activities in

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[11] Based upon this conclusion that one of DER's reasons for denying Ambler's permit application was appropriate, we need not consider DER's other reasons for denial or Ambler's objections thereto. Willowbrook, supra. We note that while the general nature of DER's denial letter and its lack of specificity is troubling, this is not sufficient reason for us to overlook the appellant's non-compliance with section 109.603(a); but, DER is advised that it could be much more specific in such letters.

connection with drilling Well No. 3A there but never voiced any objection to Ambler as it was spending money in exploring that proposed well. Ambler asserts it assumed, since its application was being submitted in connection with an already permitted site and related to the same aquifer which was already permitted, that its permit application "was more of a formality than usual" and that DER never negated that assumption.

The doctrine of equitable estoppel was recently explained by the Commonwealth Court as:

> a doctrine of fundamental fairness designed to preclude a party of depriving another of the fruits of a reasonable expectation when the party inducing the expectation knew, or should have known, that the other would rely. Equitable estoppel can be applied to a governmental agency. The doctrine of equitable estoppel prevents one from doing an act differently from the manner in which another one was induced by word or deed to expect.

Department of Commerce v. Casey, 154 Pa. Cmwlth. 505, 624 A.2d 247 (1993)(citations omitted). See also Altoona City Authority v. DER, 1993 EHB 1782. To apply the doctrine of equitable estoppel against a governmental agency, it must have intentionally or negligently misrepresented some material fact and induced a party to act to his or her detriment, knowing or having reason to know that the other party will justifiably rely on the misrepresentation. Bolduc v. Board of Supervisors of Lower Paxton Township, 152 Pa. Cmwlth. 248, 618 A.2d 1188 (1992). An estoppel is based on misrepresentation and cannot be claimed where both parties had equal knowledge of the facts. Culbertson v. Cook, 308 Pa. 557, 162 A. 803 (1932). Ambler bears the burden of proof on this issue. Davis Coal v. DER, 1991 EHB 1908; 25 Pa. Code §21.101(a). Ambler must make out these elements by clear, precise, and unequivocal evidence. Foster v. Westmoreland County Casualty Co., 145 Pa. Cmwlth. 638, 604 A.2d 1131 (1992).

There is no evidence of any misrepresentation made by DER of the material facts or any inducement by DER to Ambler upon which Ambler relied to its detriment. DER and Ambler had equal knowledge of the facts in this matter. Ambler admits that it assumed its permit application would be approved and that it relied on this assumption. Moreover, Ambler offered no evidence that DER was aware of Ambler's assumption. The mere fact that the parties communicated about the drilling of Well No. 3A does not show that DER had knowledge of the underlying assumptions Ambler had made with regard to its application, the permit process, and what was required for compliance with section 109.603(a). An estoppel also will not lie when there is no evidence to indicate that the party invoking the equitable estoppel doctrine acted any differently from how he otherwise would have acted. Blofsen v. Cutaiar, 460 Pa. 411, 333 A.2d 841 (1975). There is no evidence in this matter to show that Ambler would have explored other sites in order to determine whether Well No. 3A was the highest quality source available.

Citing Benco, Inc. of Pennsylvania v. DER, EHB Docket No. 91-554-W (Adjudication issued February 17, 1994), Ambler urges that DER should be estopped from making a decision or taking an action which works a fundamental injustice. In Benco, we found that it would be fundamentally unfair to Benco to deny its estoppel claim against DER where Benco had become too deeply indebted and too heavily obligated, as a result of DER's approval of Benco's plan revision, to allow DER to rescind that approval. Here, DER has not approved Well No. 3A as a public water supply source contrary to the relevant requirements and then waited nearly two years to rescind that approval. Thus, we find no basis to apply the doctrine of equitable estoppel against DER here on the basis of any fundamental injustice.

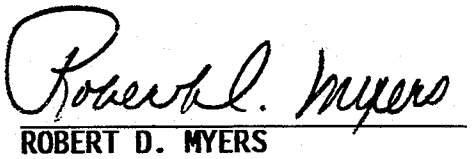
Having found that Ambler failed to make out its *prima facie* case, and having found no evidence from which an equitable estoppel should be invoked against DER, we accordingly grant DER's motion for non-suit and enter the following order dismissing Ambler's appeal.

**ORDER**

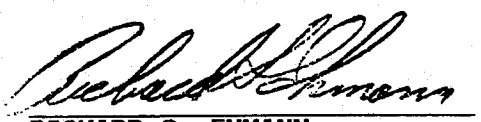
AND NOW, this 6th day of January, 1995, it is ordered that DER's motion for non-suit is granted, and Ambler's appeal is dismissed.

**ENVIRONMENTAL HEARING BOARD**

**MAXINE WOELFLING**
**Administrative Law Judge**
**Chairman**



**ROBERT D. MYERS**
**Administrative Law Judge**
**Member**



**RICHARD S. EHMANN**
**Administrative Law Judge**
**Member**

**DATED:** January 6, 1995

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M. DIANE SMITH
SECRETARY TO THE BOARD

| | | |
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| **M. W. FARMER COMPANY** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 94-190-W** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | |
| **DEPARTMENT OF ENVIRONMENTAL RESOURCES** | : | **Issued:** January 11, 1995 |

**OPINION AND ORDER SUR**
**MOTION TO DISMISS**

**By Maxine Woelfling, Chairman**

**Synopsis:**

The Department of Environmental Resources' (Department) motion to dismiss for lack of jurisdiction is granted. A notice of violation which informs appellant of violations and the need to promptly correct them but does not compel any action is not an appealable action.

**OPINION**

Currently before the Board for disposition is the Department's motion to dismiss for lack of jurisdiction a July 12, 1994, appeal filed by M. W. Farmer Company (Farmer). Farmer's appeal sought review of a June 27, 1994, notice of violation (NOV) which pertained to Farmer's alleged violations of a June 22, 1993, compliance order (CO) concerning its facility at 13 Fleming Street, South Williamsport, Lycoming County. The Department contends the NOV is not appealable since the language concerning compliance is voluntary rather than mandatory, while Farmer argues that the NOV is appealable because the language of the letter directs it to take action.

Whether an NOV is a Department action which is appealable to the Board depends not on its title, but its language. An NOV containing a listing of violations, the mention of the possibility of future enforcement action, or the procedures necessary to achieve compliance is not an appealable action. The Oxford Corporation v. DER, 1993 EHB 332. But, an NOV which orders action to be taken is an appealable Department action. *Id.*; S.H. Bell Company v. DER, 1991 EHB 587; Robert H. Glessner, Jr. v. DER, 1988 EHB 773.

The pertinent language of the NOV is as follows:

> You are hereby notified of both the existence of these violations as well as the need to provide for their prompt correction. Toward this end, you are requested to abide by the June 22, 1993, Compliance Order and to submit to the Department within fourteen (14) days a proposed program and schedule for the abatement of these violations.
>
> (emphasis added)

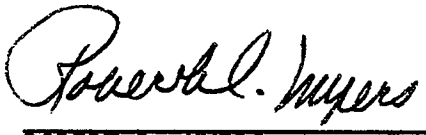
The NOV issued to Farmer is not appealable. It notifies Farmer of the violations and "the need to provide for their prompt correction." It goes on to request that Farmer abide by the CO as well as submit a proposed program and schedule for abatement of the violations. The nature of the language is advisory rather than imperative, as it does not compel the taking of action. Thus, the appeal must be dismissed for lack of jurisdiction.

## O R D E R

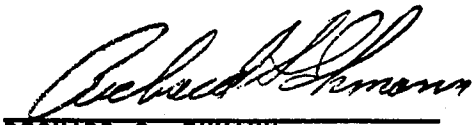
AND NOW, this 11th day of January, 1995, it is ordered that the Department's motion to dismiss is granted.

**ENVIRONMENTAL HEARING BOARD**

**MAXINE WOELFLING**
**Administrative Law Judge**
**Chairman**



**ROBERT D. MYERS**
**Administrative Law Judge**
**Member**



**RICHARD S. EHMANN**
**Administrative Law Judge**
**Member**

**DATED:** January 11, 1995

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

| | | |
|---|---|---|
| MCDONALD LAND & MINING, INC. and SKY HAVEN COAL, INC. | : | |
| v. | : | EHB Docket No. 89-096-MJ |
| | : | Consolidated with 89-556-MJ |
| COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES | : | 89-596-MJ and 89-597-MJ |
| | : | Issued: January 12, 1995 |

**OPINION AND ORDER SUR APPLICATION OF SKY HAVEN, INC. FOR AWARD OF FEES, EXPENSES AND COSTS UNDER §4(b) OF SMCRA**

**By: The Board**

**Synopsis**

The Board denies Sky Haven's application for award of attorney fees and costs filed under §4(b) of SMCRA in connection with Sky Haven's successful challenge to the Department's issuance of two compliance orders. By its plain language, §4(b) does not apply to all actions under SMCRA but only to proceedings which arise under §4 of the act, which deals exclusively with permitting and bonds.

**Opinion**

This matter was initiated with the filing of a notice of appeal by Sky Haven Coal, Inc. ("Sky Haven") at EHB Docket No. 89-547-MJ, challenging Compliance Order No. 894154 issued by the Department of Environmental Resources ("Department") on November 13, 1989. The compliance order required Sky Haven and another mining operator, McDonald Land and Mining, Inc. ("McDonald"), jointly to treat two off-site seeps which the Department alleged were hydrogeologically

connected to the companies' adjoining mine sites.[1] The Department also issued Compliance Order No. 894153 to Sky Haven, requiring it to treat an off-site spring which the Department alleged was hydrogeologically connected to Sky Haven's mine site. Sky Haven appealed the order at EHB Docket No. 89-596-MJ. The appeals were consolidated with an appeal filed by McDonald at EHB Docket No. 89-096-MJ.

On May 16, 1994, the Environmental Hearing Board ("Board") issued an Adjudication which sustained both of Sky Haven' appeals. The matter now before the Board is an Application for Award of Fees, Expenses and Costs ("Application"), filed by Sky Haven on July 14, 1994, pursuant to §4(b) of the Surface Mining Conservation and Reclamation Act ("SMCRA"), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.*, at §1396.4(b).[2] The Department filed an answer to the application on August 8, 1994.[3]

In response to an Order from the Board requesting additional information, Sky Haven filed a supplemental application on September 9, 1994, to which the Department responded by letter filed on October 21, 1994.

Initially, we must determine whether §4(b) authorizes the recovery of attorney fees and expenses incurred by an appellant in a successful challenge to the Department's issuance of a compliance order. Because this issue was not raised by either Sky Haven in its application or the Department in its answer,

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[1]McDonald also appealed the compliance order at EHB Docket No. 89-556-MJ.

[2]McDonald filed a separate application for attorney fees and costs on June 15, 1994. That matter is pending before the Board and will be addressed in a separate opinion.

[3]By letter dated July 14, 1994, the Board advised the Department that any objections it had to Sky Haven's application and a brief in support thereof should be filed with the Board. The Department filed merely an answer and an affidavit.

the Board ordered the parties to submit briefs addressing this matter. The parties filed briefs on November 10, 1994; however, only the Department's brief responds to the issue of whether §4(b) allows the recovery of fees and expenses in an action involving the issuance of a compliance order.

Section 4(b) provides in relevant part as follows:

> The Environmental Hearing Board, upon the request of any party, may in its discretion order the payment of costs and attorneys fees it determines to have been reasonably incurred by such party <u>in proceedings pursuant to this section.</u>

52 P.S. §1396.4(b) (Emphasis added).

The Board has interpreted "proceedings pursuant to this section" as referring to proceedings arising under §4 of SMCRA. <u>Big B Mining Co. v. DER</u>, 1990 EHB 248, 250, <u>rev'd on other grounds</u>, 142 Pa. Cmwlth. 215, 597 A.2d 202 (1991) <u>allocatur denied</u>, 529 Pa. 652, 602 A.2d 862 (1992); <u>James E. Martin v. DER</u>, 1986 EHB 101, 105, n.2. In its answer, the Department argues that "section" refers only to §4(b) and not to the whole of §4. However, as noted in <u>Big B Mining</u>, "By referring to proceedings pursuant to this '<u>section</u>' rather than '<u>subsection</u>,' the Legislature apparently intended the Board's discretionary power to encompass all proceedings arising under section 4." 1990 EHB at 259 (Emphasis in original). Thus, by its very language, §4(b) limits the recovery of attorney fees and expenses to only those actions arising under §4 of SMCRA and does not apply generally to all actions arising under the act.

Section 4 of SMCRA deals specifically with matters relating to permitting and bonds. Enforcement actions are not covered under §4, but are addressed elsewhere in the statute.[4] Thus, it appears that §4(b) was not intended to

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[4]The compliance orders which are the subject of this appeal were issued pursuant to, *inter alia*, §§4.2 and 4.3 of SMCRA, 52 P.S. §§1396.4b and 1396.4c.

provide for the recovery of costs and attorney fees in enforcement proceedings under SMCRA, but only proceedings involving permitting and bond related matters.

In reaching our conclusion, we recognize that the Commonwealth Court in Big B Mining, *supra*, said in dicta that the Board may award attorney fees and costs under §4(b) in an enforcement proceeding. However, Big B Mining did not involve an appeal of an enforcement action. The issue raised in that appeal was whether an applicant for a mining permit could recover costs and attorney fees under §4(b) of SMCRA in a successful appeal of the Department's denial of its permit application. A two member panel of the Board denied the appellant's request for fees and costs, concluding that §4(b) was not intended to apply to appeals of permit denials.[5] In reaching this conclusion, the majority looked to the costs provision of the Federal Surface Mining Control and Reclamation Act of 1977 ("Federal SMCRA") (Public Law 95-87), 30 U.S.C.A. §1201 *et seq.*, at §1275(e), and the regulations promulgated thereunder. The Federal SMCRA and regulations allow recovery of attorney fees and costs by a permittee only in an enforcement proceeding. The majority reasoned that, although the language of §4(b) did not expressly include enforcement actions, in order to construe §4(b) consistently with the Federal SMCRA, it must be interpreted as allowing recovery of attorney fees and costs by a permittee only in an enforcement proceeding and not in the case of a permitting action.

On appeal, the Commonwealth Court reversed, holding that the Board had erred in looking to federal law and its underlying congressional intent to interpret §4(b) when the language of the statutory provision was clear and

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[5]Two Members of the Board were recused and did not participate in the decision. A third Board Member filed a separate concurring opinion which agreed with the result but disagreed with the majority's reasoning that §4(b) did not allow recovery of attorney fees and costs in a permit denial action.

unambiguous. The Court instructed the Board to follow the plain language of §4(b) which expressly authorizes the Board to award costs and attorney fees in actions arising under §4, which the Court noted, contains "rules and procedures which relate to mining permit applications and bond release ... " 142 Pa. Cmwlth. at ___, 597 A.2d at 203. The Court concluded, however, by stating that fees and costs may be awarded under §4(b)" in permit proceedings as well as in enforcement proceedings." *Id.* (emphasis added).

As noted earlier, the issue in Big B Mining was not whether fees and costs could be awarded under §4(b) in an enforcement proceeding but whether they were recoverable in the case of a permit denial. Therefore, the question of §4(b)'s application to enforcement proceedings was not before the Court. More important, the Court specifically instructed the Board not to look to federal law in interpreting §4(b) but to look to its plain language in determining the scope of its coverage.[6] According to its plain language, §4(b) applies only to actions arising under §4 of SMCRA, which does not include enforcement actions. This was recognized by the Court in Big B Mining when it noted that §4 deals with "mining permit applications and bond release." The only basis for finding that §4(b) applies to enforcement proceedings comes from the Federal SMCRA, which the Court has held is not to be followed in interpreting §4(b). Based upon this reasoning, we conclude that §4(b) does not provide for the award of attorney fees and costs in an enforcement action arising under SMCRA.

That §4(b) was not intended to cover enforcement actions is further evidenced by the Legislature's inclusion of another cost recovery provision,

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[6]In a subsequent decision in the same matter, the Commonwealth Court reiterated its holding that the Board should not look to Federal SMCRA to interpret §4(b). Big B Mining Co. v. Commonwealth, DER, 155 Pa. Cmwlth. 16, 624 A.2d 713 (1993), *allocatur denied*, ___Pa. ____, 633 A.2d 153 (1993).

§4.2(f)(5), in the 1992 amendments to SMCRA. Section 4.2(f)(5) provides for the recovery of costs by a mining operator or owner in actions arising under §4.2(f) of the statute, which deals with the replacement of water supplies affected by surface mining. 52 P.S. §1396.4b(f). Section 4.2(f)(2) creates a rebuttable presumption of liability on the part of a surface mine operator or owner whose mining operation is located within 1,000 linear feet of any public or private water supply which becomes contaminated or diminishes after the start of mining; in such case, the mining owner or operator may be ordered to replace the affected water supply. 52 P.S. §1396.4b(f)(1) and (2). To rebut the presumption of liability, the owner or operator must establish that one of five conditions listed in §4.2(f)(2) exists. An owner or operator who provides a successful defense to the presumption of liability is entitled to recover attorney fees and expert witness fees under §4.2(f)(5). 52 P.S. §1396.4b(f)(5). Thus, §4.2(f)(5) authorizes the recovery of attorney fees and costs in the limited circumstance of enforcement actions arising under §4.2(f) of SMCRA.

Section 4.2(f)(5) was added in 1992, subsequent to the adoption of §4(b) in 1980. Act of December 18, 1992, P.L. 1384. As the Department correctly notes, if the Legislature had intended §4(b) to allow the recovery of fees and costs in all actions arising under SMCRA, including enforcement actions, it would not have deemed it necessary to add a separate provision for the recovery of fees and costs in enforcement actions arising under §4.2(f).

Thus, we conclude that, because Sky Haven's appeal involves an enforcement action, it is not eligible for an award of attorney fees and costs under §4(b). Because we have determined that the scope of §4(b) does not extend to enforcement actions and Sky Haven has not sought an award of attorney fees and costs under any other statutory provision, its application must be denied.

## ORDER

AND NOW, this 12th day of January, 1995, it is ordered that Sky Haven's Application for Award of Fees, Expenses and Costs Under §4(b) of SMCRA is denied.

**MAXINE WOELFLING**
**Administrative Law Judge**
**Chairman**

**RICHARD S. EHMANN**
**Administrative Law Judge**
**Member**

* Board Member, Robert D. Myers dissents. His Dissenting Opinion is attached.

**DATED:** January 12, 1995

cc: **DER Bureau of Litigation:**
**(Library: Brenda Houck)**
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M. DIANE SMITH
SECRETARY TO THE BOARD

| | | |
|---|---|---|
| **MCDONALD LAND & MINING, INC. and SKY HAVEN COAL, INC.** | : | |
| **v.** | : | **EHB Docket No. 89-096-MJ Consolidated with 89-556-MJ, 89-596-MJ and 89-597-MJ Issued: January 12, 1995** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES** | : | |

**DISSENTING OPINION BY**
**ROBERT D. MYERS, MEMBER**

Section 4 of SMCRA, in my judgment, can be construed to cover enforcement. Section 4(a)H requires the application for a surface mining permit to set forth how the operator plans to comply with five other environmental laws, including the Clean Streams Law and the Air Pollution Control Act. The provision goes on to state:

> No approval shall be granted unless the plan provides for compliance with the statutes hereinabove enumerated, and failure to comply with the statutes hereinabove enumerated during mining or thereafter shall render the operator liable to the sanctions and penalties provided in this act for violations of this act and to the sanctions and penalties provided in the statutes hereinabove enumerated for violations of such statutes. Such failure to comply shall be cause for revocation of any approval or permit issued by [DER] to the operator ....
>
> (Emphasis added)

While the beginning of §4(a)H deals with the application for a permit, the emphasized language deals with an operator's liability after the permit is issued "during mining and thereafter." The emphasized language has nothing to do with requirements for a permit; it sets forth statutory

penalties for post-permit issuance violations. "Proceedings pursuant to this section," as used with respect to fee awards in §4(b), can include proceedings involving post-permit issuance violations of the enumerated statutes. Doing so gives effect to the plain language of the statute.

The Compliance Orders which were involved in the underlying appeals were issued, in part, pursuant to the Clean Streams Law and cited regulatory provisions adopted, in part, under authority of the Clean Streams Law. The underlying appeals, thus, were proceedings dealing with alleged post-permit issuance violations of the Clean Streams Law - proceedings included within the scope of §4 of SMCRA.

**ENVIRONMENTAL HEARING BOARD**

**ROBERT D. MYERS**
**Administrative Law Judge**
**Member**

**DATED:** January 12, 1995

jm

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M. DIANE SMITH
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| | | |
|---|---|---|
| CONCERNED RESIDENTS OF THE YOUGH, INC. | : | |
| v. | : | EHB Docket No. 92-106-MJ |
| COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and MILL SERVICE, INC., Permittee | : | Issued: January 12, 1995 |

**OPINION AND ORDER SUR APPELLANT'S MOTION FOR SUMMARY JUDGMENT AND PERMITTEE'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

**By the Board**

**Synopsis**

The appellant's Motion for Summary Judgment, challenging the Department's reinstatement of a permit for the operation of a residual waste landfill, is denied where it fails to provide factual support or legal authority for many of its allegations and where material questions of fact remain in dispute. The permittee's Cross-Motion for Partial Summary Judgment is granted with respect to certain issues and denied with respect to those where questions of material fact exist.

Pursuant to the mixture rule of 25 Pa. Code §261.3(c)(iii), whenever a solid waste is mixed with a listed hazardous waste, the resulting mixture is a hazardous waste. Contrary to the permittee's assertion, this rule was properly promulgated pursuant to §402 of the Solid Waste Management Act without notice or comment. However, the appellant failed to present any evidence to support its allegation that a listed hazardous waste was disposed in the permittee's residual waste impoundment. Without such evidence, we cannot consider the appellant's contention that the entire contents of the

impoundment were rendered hazardous by their mixture with hazardous waste. Because this factual dispute exists, summary judgment may not be entered on behalf of either the appellant or the permittee.

The appellant's contention that the permit illegally authorizes the disposal of hazardous waste in the impoundment is precluded by the doctrine of administrative finality since this issue could have and should have been raised in an appeal of the permit's issuance, not its reinstatement. Therefore, the permittee is granted summary judgment on this issue.

Section 503(d) of the Solid Waste Management Act, the so-called "permit bar" provision, is applicable only to the issuance of a new permit and not to the reinstatement of a suspended permit. However, we may not grant summary judgment to the permittee on the issue of whether the Department failed to comply with §503(d) in reinstating the permit, since the permittee did not move for summary judgment on this issue.

Questions of material fact remain with respect to the appellant's allegations that the Department failed to properly consider the permittee's compliance history under §503(c) of the Solid Waste Management Act, which authorizes the Department to revoke a permit where the permittee has shown a lack of ability or intention to comply with the environmental statutes and regulations, permit conditions, or orders of the Department. Summary judgment on this issue, therefore, cannot be granted to the appellant.

Finally, the permittee is denied summary judgment with respect to paragraph 46 of the notice of appeal which alleged that the Department failed to take steps to ensure that the permittee's use of a dredge procedure to mix lime slurry with waste in the impoundment did not affect the integrity of the impoundment's liner or operation. The affidavit relied upon by the permittee

fails to address this particular issue. Because a factual dispute exists with respect to this allegation, summary judgment may not be granted.

**OPINION**

This matter was initiated with the filing of a notice of appeal by Concerned Residents of the Yough, Inc. ("CRY") on March 16, 1992, challenging the Department of Environmental Resources' ("Department's") reinstatement of Residual Waste Permit No. 301071 ("permit") to Mill Service, Inc. ("Mill Service"). The permit authorizes the operation of a residual waste impoundment, known as "Impoundment No. 6", at a site located in South Huntingdon Township, Westmoreland County, referred to as the "Yukon site".

The permit had been suspended on November 15, 1991 by order of the Department, which alleged that on November 2, 1991, Mill Service had disposed of hazardous waste, in the form of spent pickle liquor sludge, in Impoundment No. 6 in violation of Condition No. 2 of its permit. The order required Mill Service, *inter alia*, to submit a proposed sampling and analysis procedure to test for the presence of characteristic hazardous wastes and a procedure for the removal of any such wastes identified in Impoundment No. 6.[1] Following subsequent testing, the permit was reinstated on March 3, 1992.

Presently before the Board for disposition are a motion for summary judgment filed by CRY and a cross-motion for partial summary judgment filed by Mill Service. The Department filed a memorandum of law in response to Mill Service's cross-motion. Because the arguments of the parties are extensive, we will not attempt to summarize them here.

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[1]Mill Service appealed the Department's cessation order at EHB Docket No. 91-543-MJ. The appeal was dismissed on March 4, 1993 following a settlement entered into by the parties.

The Board is empowered to grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035(b); Summerhill Borough v. Commonwealth, DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320 (1978). The evidence presented must be viewed in a light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131. Where triable issues of fact exist, summary judgment may not be granted. Brodheads Protective Association v. DER, 1992 EHB 628, 630.

We will now address each of the grounds on which the parties seek summary judgment.

**Classification of Waste Authorized for Disposal in Impoundment No. 6**

Impoundment No. 6 is permitted for the disposal of residual waste. The disposal of hazardous waste is prohibited by Condition No. 2 of the permit. (Ex. MS-1)[2] Conditions No. 2 and 3 of the permit outline the types of waste which the impoundment may accept. One type of waste which the permit authorizes for disposal is lime stabilized waste pickle liquor sludge derived from the lime treatment of waste pickle liquor generated by steel-finishing operations in the iron and steel industry, provided that it exhibits no characteristics of hazardous waste. (Ex. MS-1, p. 5)

In paragraphs 14-17, 19, 23, and 45 of its notice of appeal, CRY asserts that waste pickle liquor, and the sludge generated therefrom, is classified as a hazardous waste under both state and federal regulation. CRY contends that the disposal of such waste by Mill Service violates Condition No. 2 of the

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[2]"Ex. MS-___" refers to an exhibit submitted by Mill Service with its cross-motion for partial summary judgment.

permit, which prohibits the disposal of hazardous waste in Impoundment No. 6. CRY further asserts that the Department has improperly authorized the disposal of this waste under the guise of "residual waste".

In paragraphs 38-51 of its motion, CRY has moved for summary judgment on this issue.

Mill Service has also moved for summary judgment on paragraphs 14-17, 19, 23 and 45 of the appeal. Mill Service makes two arguments in support of its motion. First, in paragraph 2 of its motion, Mill Service asserts that CRY's objection amounts to an attack on the underlying permit and, therefore, should have been raised in an appeal of the permit issuance. Second, in paragraph 3 of its motion, Mill Service argues that lime stabilized waste pickle liquor sludge derived from the lime treatment of waste pickle liquor from the iron and steel industry is exempted from consideration as a hazardous waste under state and federal regulation and, therefore, Mill Service's disposal of the pickle liquor sludge in question does not constitute hazardous waste disposal.

We need not address the issue of whether lime stabilized waste pickle liquor, or the sludge generated therefrom, constitute hazardous waste, since we find that this issue is barred by the doctrine of administrative finality. Under this doctrine, one is precluded from raising an issue which could have and should have been raised in an earlier proceeding. Commonwealth, DER v. Wheeling-Pittsburgh Steel Corp., 22 Pa. Cmwlth. 280, 348 A.2d 765 (1975), aff'd, 473 Pa. 432, 375 A.2d 320 (1977); E. P. Bender Coal Co. v. DER, 1991 EHB 790, 793. In Concerned Residents of the Yough, Inc. v. DER, EHB Docket No. 86-513-MJ (Consolidated) (Adjudication issued February 1, 1993) ("the Impoundment No. 6 permit appeal"), CRY appealed the Department's issuance of

the Impoundment No. 6 permit, raising a number of objections. CRY did not, however, raise as one of its objections the issue of whether the lime stabilized waste pickle liquor sludge which the permit authorized Mill Service to dispose in Impoundment No. 6 was hazardous waste. In fact, CRY attempted to raise this issue for the first time in its post-hearing brief. In the Board's Adjudication of that appeal, we ruled that CRY was precluded from raising the issue of whether the permit authorized the disposal of hazardous waste in the form of waste pickle liquor sludge by virtue of CRY's failure to include that issue in its notice of appeal. *Id.* at 28-29. Since CRY could and should have raised this issue in its earlier appeal and failed to do so, it is precluded from now raising this issue in its appeal of the permit reinstatement. Therefore, summary judgment is granted to Mill Service on paragraphs 14-17, 19, 23, and 45 of CRY's appeal, dealing with the issue of whether the permit improperly authorizes the disposal of hazardous waste in the form of waste pickle liquor sludge in Impoundment No. 6.

**Mixture Rule - 25 Pa. Code §261.3**

In paragraph 18 of its notice of appeal, CRY references the Department's November 15, 1991 order, which found that on November 2, 1991 Mill Service had disposed of hazardous waste in Impoundment No. 6 in violation of its permit. In paragraph 22 of its appeal, CRY argues that the alleged disposal of hazardous waste into Impoundment No. 6 on November 2, 1991 rendered the entire contents of the impoundment hazardous by virtue of the "mixture rule" contained in 25 Pa. Code §261.3(a)(2)(iii). CRY further argues, in paragraphs 44 and 51 of its appeal, that the Department disregarded its own regulations, specifically §261.3(a)(2)(iii), and abused its discretion in reinstating the

permit without requiring the removal of the waste contained in Impoundment No. 6.

The definition of "hazardous waste" is found at 25 Pa. Code §261.3. A solid waste is a hazardous waste if it is not excluded under 25 Pa. Code §261.4 and meets one of the following criteria:

> (i) It exhibits one or more of the characteristics of hazardous waste identified in Subchapter C [of 25 Pa. Code Chapter 261] (relating to characteristics of hazardous waste).
>
> (ii) It is listed in Subchapter D [of 25 Pa. Code Chapter 261] (relating to lists of hazardous wastes) and has not been excluded from regulation as a listed hazardous waste under §260.22 (relating to delisting procedures).
>
> (iii) It is a mixture of a solid waste and a hazardous waste listed in Subchapter D [of 25 Pa. Code Chapter 261] and has not been excluded from regulation as a listed hazardous waste under §260.22.
>
> 25 Pa. Code §261.3(a)(2).

Thus, a waste is deemed to be hazardous if it is specifically listed in Subchapter D of Chapter 261 ("a listed hazardous waste"), if it exhibits any of the hazardous waste characteristics set forth in Subchapter C of Chapter 261 ("a characteristic hazardous waste"), or if it is a solid waste which has been mixed with a waste listed in Subchapter D of Chapter 261 ("the mixture rule"), and has not been excluded from regulation under 25 Pa. Code §261.4 or delisted under 25 Pa. Code §260.22.

CRY argues that, pursuant to the mixture rule, introduction of hazardous waste into Impoundment No. 6 on November 2, 1991 rendered the entire contents of the impoundment hazardous. Because Mill Service's permit authorizes only the disposal of residual waste in Impoundment No. 6, CRY argues that it was an abuse of discretion for the Department to have reinstated the permit without

first requiring the removal of the contents of Impoundment No. 6. CRY has moved for summary judgment on this issue in paragraphs 7-37 of its motion.

Mill Service disputes CRY's argument on two grounds. First, it argues that the mixture rule of 25 Pa. §261.3(a)(2)(iii) is invalid because it was promulgated without proper notice of rulemaking. Secondly, it asserts that the mixture rule applies only where a "listed" hazardous waste is mixed with a solid waste and CRY has failed to demonstrate either that a listed hazardous waste was actually deposited into the impoundment or that a listed hazardous waste mixed with the contents of the impoundment. Mill Service moves for summary judgment on this issue in paragraphs 4 and 5 of its motion.

We first address the question of whether 25 Pa. Code §261.3(a)(2)(iii) was improperly promulgated, as Mill Service asserts. The procedures for the promulgation of regulations are set forth in the Act of July 31, 1968, P.L. 769, as amended, 45 P.S. §1101 *et seq.* ("Commonwealth Documents Law").[3] Section 201 of the Commonwealth Documents Law states, "Except as provided in section 204 [45 P.S. §1204] an agency shall give...public notice of its intention to promulgate, amend or repeal any administrative regulation." 45 P.S. §1201. Section 204 sets forth certain circumstances under which notice of proposed rulemaking may be omitted. One such circumstance is the following:

> (3) The agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the order adopting the administrative regulation or change therein) that the procedures specified in sections 201 and 202 are in

[3]Although the title of "Commonwealth Documents Law" was repealed by the Act of July 9, 1976, P.L. 877, at 45 P.S. §1101, we shall refer to the act in this manner solely for purposes of identification.

> the circumstances impracticable, unnecessary, or contrary to the public interest.
>
> 45 P.S. §1204(3).

None of the parties dispute that the "mixture rule", along with certain other regulations now codified at 25 Pa. Code Chapter 261, were adopted by the Environmental Quality Board ("EQB") without the notice procedure of 45 P.S. §1201 set forth above. The parties disagree, however, as to whether this regulation was excepted from the notice requirements. Both the Department and CRY argue that §402 of the Solid Waste Management Act ("SWMA"), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, at §6018.402, expressly authorized the adoption of this regulation without notice or comment.

Section 402 of the SWMA provides as follows:

> The Environmental Quality Board shall establish rules and regulations identifying the characteristics of hazardous wastes and listing particular hazardous wastes which shall be subject to the provisions of this act. The list promulgated shall in no event prevent the department from regulating other wastes, which, although not listed, the department has determined to be hazardous.... The board shall <u>identify the characteristics of hazardous wastes and list particular hazardous wastes within 30 days after the effective date of this section, which initial list shall</u>...<u>be promulgated in accordance with section 204(3) (relating to omission of notice of proposed rule making)</u> of the act of July 31, 1968 (P.L. 769, No. 240), referred to as the Commonwealth Documents Law.
>
> 35 P.S. §6018.402 (Emphasis added).

In adopting the regulations in question, including the mixture rule, the EQB stated that the regulations were "adopted pursuant to the mandate of Section 402 of the [SWMA]" and that "[a]ccordingly, [the regulations] ha[d] not been previously published as a notice of proposed rule making..." 10 <u>Pa. Bulletin</u> 3163 (Vol. II). The EQB further found that because "section 402 of

the [SWMA] mandates that the subject regulations shall be promulgated within 30 days after the effective date of the [SWMA] and in accordance with section 204(3) of the [Commonwealth Documents Law]...notice of proposed rule making is unnecessary and impracticable." *Id.*

Mill Service argues that the mixture rule is not a regulation which either identifies the characteristics of hazardous waste or lists particular wastes as being hazardous. We disagree. Mill Service would apparently concede that the list of hazardous wastes in Subchapter D of Chapter 261 was authorized by §402 to be promulgated without notice or comment. The mixture rule simply extends the hazardous waste classification to any mixture of a solid waste with a listed waste.

Mill Service also notes that the federal corollary of Pennsylvania's mixture rule was invalidated by the U.S. Court of Appeals for the District of Columbia in Shell Oil Co. v. Environmental Protection Agency, 950 F.2d 741 (D.C. Cir. 1991), for failure to publish the federal mixture rule as part of EPA's proposed rulemaking. However, the fact that the federal equivalent of the mixture rule was subsequently invalidated does not mean that Pennsylvania lacked the authority to adopt its regulation, in light of the mandate of §402 of the SWMA. As CRY points out in its memorandum in support of its motion, Shell Oil did not affect the validity of any state-authorized mixture rule. We find that the EQB acted in accordance with §402 in promulgating the mixture rule at 25 Pa. Code §261.3(a)(2)(iii), and, therefore, we dismiss Mill Service's argument that this rule is invalid.

We now examine whether the mixture rule is applicable in this instance. In order to prove its allegation that the contents of Impoundment No. 6 have been rendered hazardous by the introduction of the waste in question, CRY must

demonstrate that the waste in Impoundment No. 6 was mixed with a hazardous waste which is listed in Subchapter D of Chapter 261 and which has not been excluded from regulation as a listed hazardous waste under 25 Pa. Code §260.22 (dealing with delisting procedures). CRY and the Department assert that the waste pickle liquor sludge which was deposited into the impoundment on November 2, 1991 was hazardous waste. Mill Service counters by arguing, first, that CRY has not demonstrated that the waste deposited into the impoundment on November 2, 1991 was a hazardous waste and secondly, that even if it can be shown that it was a hazardous waste, it was not a listed hazardous waste as defined in the regulations. Mill Service also argues that CRY has not demonstrated that any mixing of a listed hazardous waste with the contents of Impoundment No. 6 occurred. Finally, Mill Service argues that even if a hazardous waste was introduced into the impoundment or mixing did occur, the contents of Impoundment No. 6 do not exhibit any characteristic of hazardous waste, as evidenced by further testing.

As noted earlier, Mill Service's permit authorizes it to dispose of waste pickle liquor sludge, generated by lime stabilization of pickle liquor from the iron and steel industry with an SIC Code of 331 and 332, which exhibits no characteristics of hazardous waste.[4] Pursuant to §261.3(c) of the regulations, this type of sludge is not classified as a hazardous waste unless it exhibits one or more of the characteristics of hazardous waste identified in Subchapter C of Chapter 261. At the time of the Department's reinstatement of the permit, the regulation stated as follows:

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[4]"Pickle liquor" is a dilute acid solution used in the steel industry for the cleaning of steel. C. C. Lee, Environmental Engineering Dictionary, p. 316 (1989).

> Waste pickle liquor sludge generated by lime stabilization of pickle liquor from the iron and steel industry (SIC codes 331 and 332) is not a hazardous waste even though it is generated from the treatment of a hazardous waste, unless it exhibits one or more of the characteristics of a hazardous waste identified in Subchapter C.
>
> Former 25 Pa. Code §261.3(c)(2).[5]

In determining whether the Department properly reinstated Mill Service's permit, we shall review the Department's action under the language of the regulation which was in effect at the time of its action. Township of Harmar v. DER, EHB Docket No. 90-003-MJ (Adjudication issued December 30, 1993); Fiore v. DER, 1986 EHB 744, 752-753 (In the context of reviewing the propriety of a Departmental permitting action, the regulations which were in effect at the time the Department took its action are applicable.)

The Department's order of November 15, 1991 found that the waste pickle liquor sludge which had been deposited into Impoundment No. 6 on November 2, 1991 exhibited a characteristic of hazardous waste for chromium.[6] Mill Service argues that because the Department's order found that the pickle liquor sludge deposited into Impoundment No. 6 on November 2, 1991 only exhibited a characteristic of hazardous waste and was not a listed hazardous waste, the mixture rule is not applicable.

The Department argues that we need not reach the issue of whether the waste pickle liquor sludge deposited into Impoundment No. 6 on November 2,

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[5]Under the language of the current regulation, if the sludge does exhibit a hazardous characteristic, it remains a listed waste with an EPA code of K062. 25 Pa. Code §261.3(c). This latter provision, however, was not added until the regulation was amended in January, 1993. 23 Pa. Bulletin 363, as corrected, 23 Pa. Bulletin 462.

[6]Chromium is listed as a toxic contaminant in 25 Pa. Code §261.24. Toxicity is one of the characteristics of hazardous waste set forth in Subchapter C of 25 Pa. Code Chapter 261.

1991 was a listed or characteristic hazardous waste. Although the Department maintains that it was a listed hazardous waste, it argues that it is unnecessary to make this determination since subsequent testing of the contents of Impoundment No. 6, following the treatment ordered by the Department's November 1991 order, revealed no characteristic of hazardous waste.

We agree that we need not reach this question, but for a different reason than that asserted by the Department. Although much discussion in CRY's and the Department's memoranda centers on the disposal of hazardous waste in Impoundment No. 6 on November 2, 1991, no evidence is provided by either party to support the allegation that hazardous waste, whether characteristic or listed, was, in fact, placed in Impoundment No. 6 on the date in question. The Department's November 1991 order contains the following finding:

> H. On November 2, 1991, Mill Service disposed of a hazardous waste in Impoundment No. 6 -- specifically, lime stabilized waste pickle liquor sludge which exhibited a characteristic of a hazardous waste for chromium as defined in 25 Pa. Code §261.24.
>
> (Ex. MS-3, paragraph H)

However, a finding in the Department's order does not constitute evidence upon which we may base a grant of summary judgment. CRY also relies on the following deposition testimony of Carl Spadaro, an engineer in the Department's Waste Management Section:

> Q. [by Attorney Ging] With respect to the events that occurred in November of 1991 at the Mill Service Yukon No. 6 facility, would you agree that the Department found that Mill Service had disposed of hazardous waste in the No. 6 impoundment?
>
> A. [Mr. Spadaro] Yes.

Q. The hazardous waste that was disposed of was it K062?

A. We believe it was, yes.

Q. And is that a listed hazardous waste?

A. Yes.

(Spadaro Deposition, p. 99-100)

However, no factual foundation is provided for the opinion expressed by Mr. Spadaro. Mr. Spadaro cites no sampling or tests conducted by Mill Service or the Department which would support his statement that the sludge deposited into Impoundment No. 6 on November 2, 1991 tested positive for chromium or exhibited any other characteristic of hazardous waste. In response to the question of whether the waste deposited in Impoundment No. 6 was K062, Mr. Spadaro replied only that the Department believed it was, not that the results of sampling and testing showed it to be K062. Although the Department's memorandum alludes to sampling results provided by Mill Service which "indicated that some waste which was disposed on November 2, 1991 exhibited one or more of the characteristics (specifically, toxicity for chromium) of a hazardous waste", these sampling results were not submitted either with CRY's motion or the Department's memorandum.

We may grant summary judgment only where it is clear that no genuine issue of material fact exists. Since the record does not clearly demonstrate whether a listed hazardous waste was disposed in Impoundment No. 6, we are unable to grant summary judgment to either CRY or Mill Service on this issue.[7]

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[7]Because of this conclusion, we need not address at this time the Department's argument that subsequent testing showed the contents of Impoundment No. 6 to exhibit no characteristics of hazardous waste. We note, however, that the Department failed to provide the results of any post-treatment testing and sampling of the sludge which showed the sludge to exhibit no characteristic of hazardous waste.

Therefore, summary judgment is denied with respect to paragraphs 18, 22, 44, and 51 of the notice of appeal.

Compliance History

Finally, in paragraphs 52-121 of its motion, CRY argues that the Department was barred from reinstating the Impoundment No. 6 permit based on Mill Service's compliance history. CRY's argument contains numerous sub-issues which we will address separately below.

Section 503(d) of SWMA

In paragraphs 27-29 and 53 of its notice of appeal, CRY contends that the Department was barred by §503(d) of the SWMA, 35 P.S. §6018.503(d), from reinstating Mill Service's permit. CRY has moved for summary judgment on this issue in paragraphs 52 through 121 of its motion.

Mill Service did not move for summary judgment on this issue, but in its memorandum in response to CRY's motion, it argues that §503(d) is not applicable in the case of reinstating a suspended permit.

Section 503(d) of the SWMA states in relevant part:

> Any person or municipality which has engaged in unlawful conduct as defined in [the SWMA]...shall be denied any permit or license required by [the SWMA] unless the permit or license application demonstrates to the satisfaction of the department that the unlawful conduct has been corrected.
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> 35 P.S. §6018.503(d).

Mill Service argues that §503(d), by its terms, does not apply to the reinstatement of a permit which was previously granted, but only to the grant or denial of a new permit. Neither CRY nor the Department responds to this argument.

By its terms, §503(d) applies only where the Department is considering an application for the issuance of a new or modified permit. Whereas

subsection (c) of §503 discusses the denial, suspension, modification, or revocation of a permit or license, subsection (d) refers only to denial of a permit. Secondly, §503(d) refers to a permit or license application, indicating an application for a new or modified license or permit. In the case of a permit which has been suspended, the actual permit itself remains in existence; only the rights conferred thereunder have been temporarily stayed.

We must follow the plain language of a statute where its words are clear and unambiguous. Statutory Construction Act, Act of December 6, 1972, P.L. 1339, 1 Pa. C.S.A. §1501 *et seq.*, at §1921(b). Based on its plain language, we find that §503(d) was not applicable in the present case where the Department was not reviewing an application for the issuance of a permit but, rather, was reviewing Mill Service's request to reinstate its suspended permit. Therefore, CRY is denied summary judgment on the issue of §503(d)'s applicability to this action. Nor, however, may we award summary judgment to Mill Service on this issue since our Supreme Court has held that summary judgment may not be entered in favor of a non-moving party. Bensalem Township School District v. Commonwealth, 518 Pa. 581, 544 A.2d 1318 (1988).

Although we have determined that §503(d) is not applicable to this proceeding, as a practical matter, even in the case of a permit reinstatement the Department is still required to conduct a review procedure similar to that required by §503(d). Where a permit has been suspended because a permittee has engaged in unlawful conduct, such as is alleged in the present case, the Department's decision to lift the suspension and reinstate the permit is based on its determination that the permittee has complied with the order suspending the permit and has taken measures to correct the unlawful condition leading to the permit suspension. In other words, for Mill Service to seek reinstatement

of its permit, it would have been required to demonstrate to the Department that it had taken action to correct the condition causing suspension of the permit. According to the deposition testimony of Carl Spadaro, the Department had determined that Mill Service was in compliance with the November 1991 order (Spadaro Deposition, p. 159), and CRY provided nothing to contradict this testimony.

Section 503(c) of SWMA

In paragraphs 52(a) and 53 of its motion for summary judgment, CRY asserts that §503(c) of the SWMA also barred the Department from reinstating the permit based on Mill Service's compliance history.

Upon examining CRY's notice of appeal, we note that nowhere in the appeal is any citation made to §503(c). Where a party fails to raise an issue in its notice of appeal, it is precluded from later attempting to raise that issue except where good cause is shown. Commonwealth, Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd on other grounds, 521 Pa. 121, 555 A.2d 812 (1989); NGK Metals Corp. v. DER, 1990 EHB 376. The Commonwealth Court has ruled, however, that if an issue is raised even in general terms, that is sufficient to preserve the issue for review. Croner, Inc. v. Commonwealth, DER, 139 Pa. Cmwlth. 43, 589 A.2d 1183, 1187 (1991).

Although CRY's notice of appeal does not refer specifically to §503(c), paragraph 26 of the appeal refers generally to §503 and recites language nearly identical to that contained in §503(c). Based on Croner, we find that this is sufficient to preserve the issue of compliance with §503(c) in CRY's appeal.

Section 503(c) of the SWMA states in relevant part as follows:

> (c) In carrying out the provisions of this act, the department may deny, suspend, modify, or revoke any permit or license if it finds that the applicant, permittee or licensee has failed or continues to fail to comply with any provision of this act, the act of June 22, 1937 (P.L. 1987, No. 394), known as "The Clean Streams Law", the act of January 8, 1960 (1959 P.L. 2119, No. 787), known as the "Air Pollution Control Act", and the act of November 26, 1978 (P.L. 1375, No. 325), known as the "Dam Safety and Encroachments Act", or any other state or Federal statute relating to environmental protection or to the protection of the public health, safety and welfare; or any rule or regulation of the department; or any order of the department; or any condition of any permit or license issued by the department; or if the department finds that the applicant, permittee or licensee has shown a lack of ability or intention to comply with any provision of this act or any of the acts referred to in this subsection or any rule or regulation of the department or order of the department, or any condition of any permit or license issued by the department as indicated by past or continuing violations.
>
> 35 P.S. §6018.503(c).

Section 503(c) authorizes the Department to deny, suspend, modify, or revoke a permit if it finds that the applicant or permittee has failed or continues to fail to comply with any provision of the SWMA, any other environmental statute or regulation, or any condition of its permit or has shown a lack of ability or intention to comply therewith. 35 P.S. §6018.503(c). In paragraph 53 of its motion for summary judgment, CRY asserts that Mill Service has violated and continues to violate the SWMA, the Clean Streams Law, and other laws of the Commonwealth and, therefore, the reinstatement of its permit should have been denied pursuant to §503.[8] In paragraphs 56-121 of its motion, CRY asserts that the Department either

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[8]Although CRY cites generally to §503 throughout much of its motion, we shall focus specifically on subsection (c) thereof since this is the portion of §503 which we have determined to be applicable to this action.

ignored the language of §503(c) or that its review of Mill Service's compliance history under §503(c) was defective.

In response, Mill Service asserts that the Department did consider and apply §503(c) in deciding to reinstate the permit. Mill Service points out that the Department, in acting on Mill Service's request for reinstatement, required Mill Service to submit an updated Module 10 Compliance History Report.[9] Mill Service also asserts that its compliance history was scrutinized by a Compliance History Screening Panel ("Compliance Panel") established by the Department for the purpose of implementing the provisions of §503(c) and assisting regional offices in making permitting decisions under the SWMA. A report analyzing Mill Service's compliance history which was prepared by the Compliance Panel in connection with Mill Service's request for reinstatement of its permit was submitted by Mill Service as Exhibit MS-24C to its cross-motion and response. Based on its review, the Compliance Panel concluded that Mill Service had not shown a lack of ability or intent to comply with Pennsylvania's environmental statutes and regulations; it further found that Mill Service's compliance history did not provide sufficient justification for revocation or continued suspension of the permit. (Ex. MS-24C, p. 4-5)

In paragraphs 30-40 and 43 of the notice of appeal and paragraphs 60-121 of its motion, CRY attacks the findings of the Compliance Panel. CRY's objections fall into two categories: First, CRY challenges the validity of the Compliance Panel and its review process. Second, CRY argues that the Panel's review of Mill Service's compliance history was defective in that it

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[9]This report was submitted by Mill Service as Exhibit MS-15A to its cross-motion and response.

failed to consider all relevant information or chose to ignore certain violations in reaching its conclusions.

In paragraph 32 of its notice of appeal and paragraph 60 of its motion, CRY objects that the Compliance Panel was not created by statute or regulation. In response, Mill Service counters that none of the Department's internal organizational structure is specifically outlined by statute or regulation and that this does not automatically render the evaluations and recommendations of the Compliance Panel invalid.

CRY provides no discussion of this objection in its memorandum in support of its motion.[10] Nor does CRY cite to any authority which would require an internal advisory panel such as the one in question to be established solely by an act of the legislature, especially where the panel was set up merely to assist in reviewing a certain aspect of a permit application or request for reinstatement and to make a recommendation to the Department officials whose responsibility it is to determine whether the permit should be issued, denied, reinstated, or revoked. Because CRY has provided no authority in support of its objection, and it is unclear that CRY is entitled to judgment as a matter of law, we cannot grant summary judgment on this issue.

In paragraphs 56 and 69 of its motion, CRY argues that the finding of the Compliance Panel was merely advisory and that no official at the Department actually made a determination as to whether §503(c) prohibited

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[10]This is only one of many issues which CRY raises in its motion and then fails to address in its supporting memorandum. As CRY should be aware, the purpose of submitting a memorandum in support of a motion for summary judgment is to provide argument in support of each ground raised in the motion for summary judgment, not to select only certain issues to be discussed in more detail. Where there is no such discussion, the Board is placed in the position of having to guess at a party's basis for its motion.

reinstatement of the permit. In making this assertion, CRY relies on the deposition testimony of Leon Kuchinski, Chief of the Division of Enforcement with the Department's Bureau of Waste Management, and Anthony Orlando, the Department's Regional Manager for Waste Management, Field Operations, Southwest Region. Mr. Kuchinski served on the Compliance Panel which reviewed Mill Service's compliance history in connection with its request for reinstatement of its permit. (Kuchinski Deposition, p. 9)

The deposition testimony of Mr. Orlando and Mr. Kuchinski does not support CRY's argument, however. Mr. Kuchinski testified that the Compliance Panel limits its review to determining whether an applicant's conduct demonstrates an inability or unwillingness to comply, while the actual decision to issue or deny a permit is then left to the Regional Manager. (Kuchinski Deposition, p. 26-27) He further testified that the recommendation of the Compliance Panel is not binding on the Regional Manager; he or she may either concur with the recommendation of the Compliance Panel or disagree with it. (Kuchinski Deposition, p. 27-28) In this case, Mr. Orlando, as Regional Manager, was involved in the decision to reinstate the permit. (Orlando Deposition, p. 7) Mr. Orlando testified that he reviewed the Compliance Panel's report, as well as the remediation steps taken by Mill Service and the inspection reports of his staff. Mr. Orlando also discussed the subject of Mill Service's compliance history with the Compliance Panel, Mr. Kuchinski, and Mr. Spadaro. (Orlando Deposition, p. 5-6) Based on his review, Mr. Orlando concurred with the determination of the Compliance Panel. (Orlando Deposition, p. 7)[11]

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[11]Mr. Orlando testified that, in this case, the final decision to reinstate the permit was made at a higher level than the Regional Office because of its "high visibility". (Orlando Deposition, p. 17) The decision to reinstate the

Because the deposition testimony of Mr. Kuchinski and Mr. Orlando does not support CRY's objection, this issue remains in dispute and, therefore, summary judgment may not be granted.

In paragraph 62 of its motion, CRY states, "There were no regulations or statutes used to develop the criteria [by which the Compliance Panel reviewed Mill Service's request for reinstatement], although §503(c) was looked at." Again, CRY provides no argument in support of this objection in its memorandum. Nor do we understand CRY's specific objection since it admits that the Compliance Panel looked at §503(c) of the SWMA in its compliance review. Because CRY has failed to explain the basis for its objection, we cannot find that it is entitled to judgment as a matter of law. Therefore, summary judgment on this issue must be denied.

In paragraphs 78-82 of its motion, CRY argues that the Compliance Panel ignored the fact that Mill Service was in violation of a 1985 Consent Order into which CRY entered with regard to the Yukon facility and another disposal facility known as the Bulger site. CRY argues that Mill Service's failure to close Impoundment No. 5 at the Yukon facility by the date set forth in the Consent Order caused it to be in violation of the Consent Order, thereby invoking the provisions of §503(c).

Based on the record before us, it is clear that summary judgment cannot be granted on this issue because material facts remain in dispute. According to the deposition testimony of Mr. Kuchinski, Mill Service was approximately six months behind the October 1987 deadline set forth in the Consent Order for closing Impoundment No. 5. (Kuchinski Deposition, p. 130-131) He further

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permit ultimately came from the Department's Deputy Secretary for Field Operations. (Orlando Deposition, p. 11)

testified that closure of the impoundment still had not been completed at the time of his deposition on August 3, 1992. (Kuchinski Deposition, p. 133) When asked if this was a violation of the Consent Order, Mr. Kuchinski replied, "Yes". (Kuchinski Deposition, p. 134) Mr. Spadaro, however, testified that, despite the delay in closing Impoundment No. 5, Mill Service was in compliance with the Consent Order, including the provision dealing with the closure of Impoundment No. 5. (Spadaro Deposition, p. 17) According to Mr. Spadaro, the Department did not approve a closure plan for Impoundment No. 5 until April 1989, at which time it set forth a new timetable for the impoundment's closure. (Spadaro Deposition, p. 17) The Department's letter of approval also stated that Mill Service could, with sufficient justification, require an extension of the dates set forth therein for various stages of closure. (Ex. MS-36, p. 12)

Based on this apparent conflict in testimony from the Department's own personnel, we are unable to determine whether Mill Service was in violation of the Consent Order at the time the Department reinstated its permit or whether this alleged violation barred the Department from reinstating the permit. Because of this dispute, we may not enter summary judgment on this issue.

In paragraphs 63, 64, and 70 of its motion, CRY asserts that the Compliance Panel has no standards for determining the seriousness or willfulness of violations or for determining whether a violation is a continuing one, and, therefore, has no basis for determining when the Department should invoke its discretionary authority under §503(c). In response, Mill Service argues that, by establishing the Compliance Panel to evaluate an applicant's or permittee's compliance history and to provide recommendations as to whether a permit should be issued, denied, reinstated,

or revoked, the Department has attempted to provide for consistency and objectivity in decisions involving compliance history.

Both parties rely on the deposition testimony of Mr. Kuchinski in support of their arguments. Mr. Kuchinski acknowledged that determinations of seriousness and willfulness are subjective judgments and that there is no established standard for determining whether a violation is "serious", "willful", or "continuing". (Kuchinski Deposition, p. 15-16) However, Mr. Kuchinski also testified that the very reason the Compliance Panel was established was in recognition of this problem and to make the evaluation process more effective. (Kuchinski Deposition, p. 11, 111-12) Mr. Kuchinski further testified that the Panel utilizes certain criteria in conducting its compliance review. (Kuchinski Deposition, p. 12)

Viewing this matter in the light most favorable to Mill Service, as the non-moving party, we cannot conclude that CRY has demonstrated that it is entitled to judgment as a matter of law on this issue. Mr. Kuchinski's testimony indicates that the Department's use of the Compliance Panel is an attempt to make the compliance history evaluations more objective and consistent. Because the evidence does not clearly establish that the Compliance Panel's review process is faulty, we cannot grant summary judgment to CRY on this issue.

As noted earlier, CRY also raises a number of issues which it asserts the Compliance Panel did not consider, but should have, in performing its evaluation of Mill Service's compliance history.

In paragraph 48 of its notice of appeal, CRY asserts that the Department has failed to comply with the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 *et seq.*, "by allowing Mill

Service to operate an air pollution source, to wit, the [Yukon] treatment and disposal facilities without the benefit of a permit issued by the Bureau of Air Quality or pursuant to the Air Pollution Control Act." In paragraph 49 of the appeal, CRY contends that "the reaction of the pickle liquor material with neutralizing agents at the Mill Service facility may be emitting $NO_x$ and $SO_x$ into the environment" and that, despite this, the Department has failed to require any air quality testing or monitoring.[12]

In paragraphs 114 and 115 of its motion CRY moves for summary judgment on this issue on the basis that the Compliance Panel failed to determine whether Mill Service was complying with air quality standards. Mill Service does not respond to this assertion in its memorandum.

CRY bases its assertion on the testimony of Mr. Kuchinski, who, when asked whether the Compliance Panel reviewed "any documents that indicated that any tests had been done to determine whether or not there were air pollution problems from the No. 6 impoundment", replied, "No. Except the air quality memo." (Kuchinski Deposition, p. 147) Mr. Kuchinski's testimony does not, however, support CRY's contention. Although Mr. Kuchinski stated that the Compliance Panel looked at no test results in its review, this does not answer the question of whether the Department made a determination as to whether Mill Service was in compliance with air quality standards. Nor has CRY provided any evidence that air quality problems exist at the site or that monitoring is

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[12]"$NO_x$" is nitrogen oxide. Two major nitrogen oxides, nitric oxide and nitrogen dioxide, act as air contaminants. Nitric oxide is formed through the direct combination of nitrogen and oxygen under intense heat and high pressure in a combustion process. When nitric oxide in the atmosphere combines with additional oxygen, it forms nitrogen dioxide, which is a contributor to photochemical smog. "$SO_x$" is sulfur oxide. Two major sulfur oxides, sulfur dioxide and sulfur trioxide, act as air contaminants. The primary source of both is the combination of atmospheric oxygen with the sulfur in certain fuels during their combustion. Lee, supra at 360-61, 508 (1989).

required. Although CRY states in its motion that the reaction of the pickle liquor material with neutralizing agents may be emitting $NO_x$ and $SO_x$ into the environment, it provides no evidence in support of this conclusion. Because Mr. Kuchinski's testimony does not specifically respond to the issue on which CRY bases its motion for summary judgment and because CRY provides no further evidence in support of its contention, this issue remains in dispute, and summary judgment may not be granted.

In paragraph 66 of its motion, CRY states that the Compliance Panel did not consider "policy matters which might appropriately influence the Department's decision in a close case, and leaves decisions on whether to issue or deny a permit to the regional manager." CRY does not elaborate on what policy matters the Compliance Panel may have failed to consider or how such matters would influence the Department's decision. As with several other objections raised in its motion, CRY makes no attempt to explain the basis for its argument. We are further puzzled by CRY's apparent objection to the Regional Manager making decisions on permit issuances or denials, since CRY complained earlier in its motion that no official in the Department takes responsibility for such decisions. Based on CRY's failure to provide any explanation for the basis of its objection, we have no choice but to reject this argument as a basis for summary judgment.

In paragraph 83 of its motion, CRY complains that the Compliance Panel failed to review the "Lumis Information System" during its evaluation of Mill Service's compliance history. CRY does not explain what the Lumis Information System is or why it should have been a part of the Compliance Panel's evaluation. Again, because of CRY's failure to provide any explanation for

its objection, we have no choice but to reject this argument as a basis for summary judgment.

In paragraph 84 of its motion, CRY objects to the fact that the Compliance Panel did not visit the Yukon site. CRY does not, however, explain how a site visit would have aided the Compliance Panel in its review. Moreover, according to the deposition testimony of Regional Manager Anthony Orlando, hundreds of inspections have been performed at the Yukon site by Department personnel. The inspections included sampling and monitoring, and the inspection reports were reviewed by Mr. Orlando in his consideration of Mill Service's request for permit reinstatement. (Orlando Deposition, p. 5, 30) Because CRY has provided no explanation in support of its objection, we find that it is not entitled to summary judgment on this issue.

In paragraphs 84-86 of its motion, CRY objects to the fact that the Compliance Panel did not seek public input with respect to the Yukon facility's compliance history nor determine how many citizen complaints, if any, had been lodged against the Yukon facility. In response, Mill Service argues that the existence of citizen complaints is not evidence of violations and, therefore, they are not relevant. Nor does CRY cite to any authority which would require the Department to obtain public input in evaluating a permittee's compliance history. Viewing this matter in the light most favorable to Mill Service, we find that CRY has failed to demonstrate that it is entitled to judgment as a matter of law on this issue, and, therefore, summary judgment may not be entered.

In paragraphs 87 and 88 of its motion, CRY argues that the Compliance Panel made no attempt to determine the number of times Mill Service may have mixed incompatible wastes or whether any such mixture constituted a permit

violation. In making this argument, CRY relies on the testimony of Mr. Kuchinski, who, when asked if he looked into the question of whether mixing incompatible wastes was a permit violation, replied, "No". (Kuchinski Deposition, p. 73) Nor did he know the number of times Mill Service had been cited for mixing incompatible wastes. (Kuchinski Deposition, p. 73) CRY also argues, in paragraph 89 of its motion, that the Compliance Panel failed to determine the number of times Mill Service had unlawful emissions. Again, this is based on Mr. Kuchinski's testimony. (Kuchinski Deposition, p. 74)

Simply because the Compliance Panel may not have considered these particular matters, however, is not to say that the Department ignored them in deciding to reinstate the permit. As noted earlier, Mr. Orlando reviewed not only the report of the Compliance Panel, but "various reviews, inspections, documents that were prepared by staff in [the Department's Southwest] region, dealing with their determinations at [the Yukon] facility." (Orlando Deposition, p. 5) The report of the Compliance Panel was only one stage of the review process. Thus, merely because the Compliance Panel may not have considered this information does not mean that it was not part of the Department's overall evaluation. Neither Mill Service nor the Department addresses this issue, and, therefore, we have no means of knowing whether such matters were considered by the Department or whether the Department failed to consider them in reviewing Mill Service's compliance history. Moreover, it is possible that the Department did consider these matters and determined that they did not provide sufficient cause for revocation of the permit. Because these questions remain unanswered, we must deny CRY's request for summary judgment on this issue.

In paragraph 90 of its motion, CRY argues that the Compliance Panel failed to determine whether Mill Service had reported all spills and accidents to the Department. In response to Attorney Ging's questioning regarding spills and accidents, however, Mr. Kuchinski testified that the Panel reviewed the "Compliance History Form C" submitted by Mill Service (Kuchinski Deposition, p. 74-75), which requires an applicant to list all violations and any subsequent enforcement actions taken with regard to the activity or facility. (Ex. MS-15A) Because CRY has not alleged or demonstrated that Mill Service's Form C failed to contain reports of spills or accidents, we cannot find that CRY is entitled to summary judgment on this issue.

In paragraph 91 of its motion, CRY complains that Mr. Kuchinski could not explain how the Department "considered" the alleged violation of disposing of hazardous waste into Impoundment No. 6, other than to say that it was given "serious consideration". CRY does not cite to Mr. Kuchinski's deposition testimony, nor does it explain why the Department's giving the violation "serious consideration" was not sufficient. Based on CRY's failure to explain its objection, we cannot grant summary judgment on this issue.

In paragraph 92 of its motion, CRY argues that the Compliance Panel did not know the exact number of gallons of hazardous waste disposed in Impoundment No. 6. CRY bases this allegation on the testimony of Mr. Kuchinski, who, when asked by Attorney Ging if he knew how many gallons of hazardous waste the Department alleged were disposed in Impoundment No. 6, responded that he did not recall the exact number of gallons which were deposited into the impoundment. (Kuchinski Deposition, p. 80-81) Mr. Kuchinski's testimony that he did not recall the exact number of gallons of hazardous waste, however, is not evidence that this information was not known

or reviewed by the Compliance Panel. Moreover, the role of the Panel was to review Mill Service's compliance history; CRY has provided no basis for concluding that it was also the Panel's role to investigate the details of this particular alleged violation. Without further information, we cannot determine whether this allegation provides a basis for summary judgment.

In paragraphs 101 and 102 of its motion, CRY argues that Mr. Kuchinski conceded that Mill Service has a long history of violations and that the Compliance Panel has in the past recommended the denial of permits where willful discharges have occurred or where an operator violated a consent order. When asked whether Mill Service has a long history of violations, Mr. Kuchinski replied, "I guess you could say that." (Kuchinski Deposition, p. 110) Mr. Kuchinski agreed that Mill Service had contaminated the groundwater underneath the Yukon and Bulger facilities, had discharged hazardous waste into streams, had violated permit conditions, including NPDES permit conditions, had buried drums and failed to report them, and had discharged leachate from both the Yukon and Bulger facilities as recently as 1991. (Kuchinski Deposition, p. 110)

CRY argues that this history of violations should have prevented Mill Service from having its Impoundment No. 6 permit reinstated, pursuant to §503(c) of the SWMA. When asked by Attorney Ging what the Compliance Panel would consider to be a sufficiently long history of violations to have justified a refusal to reinstate the permit, Mr. Kuchinski answered that the Compliance Panel "review[s] each case specifically. We made our review of the information relative to Mill Service and we made our recommendation relative to this compliance history." (Kuchinski Deposition, p. 111) According to the testimony of Regional Manager, Anthony Orlando, the Department considered Mill

Service to have demonstrated an ability and intent to comply with Pennsylvania's environmental laws by its compliance with the Department's November 1991 order and by its efforts to remediate problems at the site. (Orlando Deposition, p. 28)

CRY argues that the Compliance Panel, in reaching its conclusions regarding Mill Service's compliance history, either failed to give sufficient consideration to or ignored the aforesaid incidents. The report of the Compliance Panel, however, indicates that the Panel did consider each of these violations. With respect to the Department's November 2, 1991 order charging Mill Service with disposing of hazardous waste in Impoundment No. 6, the Compliance Panel concluded that this incident did not damage Mill Service's compliance history because of the following: (1) In disposing of waste pickle liquor sludge, Mill Service was following a procedure which was authorized by its permit and which had not given rise to any violation in over three years; (2) Mill Service had reported the violation promptly and had taken the corrective action required by the Department; and (3) Mill Service revised its testing procedures so that a similar violation would not recur. (Ex. MS-24C, p. 2) With respect to violations of the effluent limits contained in Mill Service's NPDES permit, the Compliance Panel concluded that the problems appeared to be due to a relatively short term problem with the leachate discharge treatment system and did not result in any damage to natural resources. (Ex. MS-24C, p. 3) With respect to December 1991 discharges of leachate from both the Yukon and Bulger facilities, which resulted in a civil penalty assessment against Mill Service in the amount of $40,000, the Compliance Panel considered the discharges to be "a matter of serious concern", but concluded that the corrective measures taken by Mill Service and

the civil penalty assessment would prevent a recurrence. (Ex. MS-24C, p. 3) Finally, with respect to the 1985 Consent Order and the issue of groundwater contamination at the Yukon and Bulger sites, the Compliance Panel accepted the findings of engineer Carl Spadaro that Mill Service was making efforts to remediate the groundwater contamination at the sites. (Ex. MS-24C, p. 2-4) Thus, based on its report, it is apparent that the Compliance Panel did take into consideration each of these violations in evaluating Mill Service's compliance history. Whether the Compliance Panel gave adequate consideration to each of these violations remains in dispute. Therefore, summary judgment on this issue is not appropriate.

There is one incident in Mill Service's compliance history over which the Compliance Panel appears to have expressed serious concern. That incident involved the uncovering of buried drums at the Bulger site and Mill Service's failure to report the existence of the drums to either the Department or the United States Environmental Protection Agency ("EPA").

The Compliance Panel considered this to be a "serious violation" but found the principal responsibility for the failure to report the drums' existence lay with the vice president of engineering and the plant engineer, who were no longer with the company at the time of the Compliance Panel's investigation. (Ex. MS-24C, p. 3) According to the Compliance Panel's report, Mill Service's president had no recollection of the incident, nor could anyone verify that the president had been informed of the drums' existence. (Ex. MS-24C, p. 3) The Compliance Panel concluded that, absent some evidence connecting the company's current management with knowledge of the violation, this could not serve as a basis for revoking Mill Service's permit. (Ex. MS-24C, p. 3) In reaching this conclusion, the Compliance Panel

relied on the Commonwealth Court's decision in FR & S, Inc. v. DER, 132 Pa. Cmwlth. 422, 573 A.2d 241 (1990), appeal dismissed, 532 Pa. 302, 615 A.2d 734 (1992), which indicated that the sins of past management cannot be visited upon new and future management. Given its finding that Mill Service's current management was not aware of the reporting violations which occurred in the early 1980's, the Compliance Panel concluded that this did not provide a sufficient basis for revoking Mill Service's permit. (Ex. MS-24C, p. 3)

CRY challenges the Compliance Panel's conclusion on two grounds: In paragraphs 94-97 of its motion, CRY alleges that the company's former vice president of engineering, who filed a report with the EPA omitting mention of the buried drums, is now associated with a firm which performs consulting work and water quality monitoring for Mill Service. Second, in paragraph 98 of its motion, it asserts that the FR & S holding is not applicable since the company management did not change from 1980, when the drums were discovered, to 1992, when the Compliance Panel issued its report.

We first address CRY's contention that the former vice president of engineering, who failed to report the drums, now acts as a consultant to Mill Service. Although CRY makes this allegation in its motion, it provides no evidence in support thereof. The testimony of Mr. Kuchinski on which CRY relies is as follows:

> Q. Mr. Berman was a vice president for Mill Service?
>
> A. I believe that was his title.
>
> Q. And you are aware or was the panel aware that Mr. Berman, in his firm Earth Sciences, now acts as a consultant for Mill Service?
>
> A. I wasn't aware of that.
>
> Q. You were not?

A. No.

...

Q. Were you aware that the company which Mr. Berman is now associated with performs water quality monitoring work for Mill Service?

A. No.

Q. Were you aware that the firm with which Mr. Berman is associated prepared the groundwater assessment for Mill Service?

A. No.

(Kuchinski Deposition, p. 85)

The testimony above in no way establishes that Mr. Berman was the individual at Mill Service who concealed the existence of the buried drums or that Mr. Berman now acts as a consultant to Mill Service. Because of this factual dispute, summary judgment may not be entered.

Secondly, CRY argues that the FR & S holding does not apply in this situation since the company's management did not change from the time of the drums' discovery to the time when the permit was reinstated. Mr. Kuchinski testified that Lawrence Spencer was the president of Mill Service at the time the drums were discovered and at the time the EPA report which omitted mention of the drums was filed. Mr. Spencer still was president in 1992 when the Compliance Panel issued its report and the permit was reinstated. (Kuchinski Deposition, p. 93-94) Because the company's presidency remained the same during this time, argues CRY, FR&S did not prevent the Compliance Panel from considering this alleged violation in its review of Mill Service's compliance history.

The Compliance Panel recognized that the presidency of the company did not change from the discovery and non-reporting of the drums to the time of

its review. However, because the Compliance Panel could not establish that the president had knowledge of the drums' existence and non-reporting, it concluded that this violation could not serve as a basis for revoking the permit, based on the FR & S decision. (Ex. MS-24C, p. 3)

We disagree that the holding of FR & S prevented the Compliance Panel from considering this violation in its determination of whether Mill Service's compliance history warranted revocation of the permit. FR & S involved a complete change in management from the prior operator of a landfill, who had committed various violations, to a new management committee, consisting of three individuals. In holding that §§503(c) and (d) of the SWMA did not bar issuance of a permit for operation of the subject landfill in FR & S, the Court determined that there was a lack of substantial evidence linking the unlawful conduct of the prior operator to the replacement management team.

In the present case, the presidency of the company did not change from the time the drums were discovered to the time of the permit's reinstatement. Although the report of the Compliance Panel states that it could not establish that the president had knowledge of the existence of the drums or the failure to report the drums to EPA, there is no evidence in the record as to how the Compliance Panel reached this conclusion. Nor, however, is there any evidence in the record as to whether the Compliance Panel would have reached a different conclusion as to Mill Service's compliance history if it had determined there to be a link between this violation and Mill Service's management. Because questions of material fact remain with respect to this issue, it may not form the basis for a grant of summary judgment.

In summary, CRY has failed to demonstrate that the Department abused its discretion under §503(c) of the SWMA by failing to properly consider Mill

Service's compliance history. Therefore, CRY is denied summary judgment on this issue.

**Standard For Determining Whether Department Has Abused Its Discretion**

Finally, CRY argues that the Board has no gauge or standard for determining whether the Department has abused its discretion. On page 18 of its memorandum in support of its motion, CRY proposes that we employ the standard developed by the Commonwealth Court in Payne v. Kassab, 11 Pa. Cmwlth. 14, 312 A.2d 86 (1973), aff'd, 468 Pa. 226, 361 A.2d 263 (1976), for determining whether the Department has complied with the mandate of Article I, §27 of the Pennsylvania Constitution.[13]

We disagree, first, with CRY's contention that the Board has no gauge or standard for determining whether the Department has abused its discretion in taking a certain action. In Consol Pennsylvania Coal Co. v. DER, 1990 EHB 645, the Board set forth the standard to be followed in reviewing actions taken by the Department: Has the Department manifestly abused its discretion, acted arbitrarily in taking the action in question, or violated the law? Id. at 651-52. In addition, the Commonwealth Court has held that "[t]he Board's duty is to determine if the [the Department's] action can be sustained or supported by the evidence taken by the Board." Warren Sand & Gravel Co., Inc.

---

[13]Article I, §27 of the Pennsylvania Constitution reads as follows:

> **Natural resources and the public estate**
>
> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

v. Commonwealth, DER, 20 Pa. Cmwlth. 186, ___, 341 A.2d 556, 565 (1975); Morcoal Co. v. Commonwealth, DER, 74 Pa. Cmwlth. 108, 459 A.2d 1303 (1983) (citing Warren Sand & Gravel, *supra*.) Where the Department has acted with discretionary authority, the Board may substitute its discretion for that of the Department, based upon the record before it. Id. The Commonwealth Court has defined "discretion" as involving "the ability to exercise judgment and choose between or among different courses of action, not an obligation to pursue a particular course of action." Mathies Coal Co. v. Commonwealth, DER, 522 Pa. 7, 559 A.2d 506, 511 (1989). In Sussex, Inc. v. DER, 1984 EHB 355, the Board held:

> A mere difference of opinion, or even a demonstrable error in judgment, is insufficient under Pennsylvania decisional law to constitute an abuse of discretion; such abuse comes about only where manifestly unreasonable judgment, partiality, prejudice, bias, ill-will, misapplication or overriding of the law, or similarly egregious transgressions on the part of DER or other decision-making body can be shown to have occurred.

*Id.* at 366 (citing In re Garrett's Estate, 335 Pa. 287, 6 A.2d 858 (1939).) See also, Lower Towamensing Township v. DER, 1993 EHB 1442, 1485-86 (citing Sussex, *supra*). The Board has found that the Department has abused its discretion where it has acted in an arbitrary or capricious manner, where there was no reasonable basis for the Department's action, or where the Department has failed to act in accordance with the applicable law. See, e.g., Edward P. McDanniels v. DER, 1992 EHB 1666; Western Pennsylvania Water Co. and ARMCO Advanced Materials Corp. v. DER, 1991 EHB 287; James Buffy and Harry K. Landis, Jr. v. DER, 1990 EHB 1665; Raymark Industries, Inc. v. DER, 1990 EHB 1165. Therefore, we disagree with CRY's claim that we have no

standard for determining whether the Department abused its discretion by reinstating Mill Service's permit.

Secondly, it is unnecessary to employ the Payne test in this case, as CRY suggests, since the balancing of environmental concerns mandated by Article 1, §27 of the Pennsylvania Constitution has been achieved through the provisions of the SWMA and the regulations thereunder. National Solid Wastes Management Association v. Casey, 143 Pa. Cmwlth. 577, 600 A.2d 260 (1991). Because the Article 1, §27 considerations have been incorporated into the SWMA and the regulations, compliance with the provisions of the SWMA and the regulations is tantamount to compliance with Article 1, §27. Larry D. Heasley v. DER, EHB Docket No. 90-311-MJ (Consolidated) (Adjudication issued May 13, 1994), p. 78.

Because CRY has not demonstrated that it is entitled to judgment as a matter of law on this issue, summary judgment may not be granted.

**Dredge Procedure**

Finally, Mill Service has moved for summary judgment on paragraph 46 of the notice of appeal. Paragraph 46 of the appeal reads as follows:

> As a result of the Department's Order of November 15, 1991 Mill Service conducted a procedure involving use of a "dredge" to mix hazardous wastes with sludges deposited in the No. 6 Impoundment. The Department failed to take any steps to determine whether or not the dredge and procedures related to the mixing affected the integrity of the No. 6 liner, and whether or not that process affected the integrity of the facility as a whole.

Mill Service discusses the dredge procedure in paragraph 1.ac of its motion and refers to the affidavit of Carl F. Bender, Mill Service's Vice President-Engineering. According to Mr. Bender, following the Department's November 1991 order, Mill Service implemented a lime stabilization procedure,

which involved the addition of lime in slurry form to the top two feet of waste in certain areas of Impoundment No. 6. This was accomplished with a portable dredge unit. (Bender Affidavit, para. 23) According to Mr. Bender, the underlying waste was not disturbed. (Bender Affidavit, para. 23)

There is nothing in Mr. Bender's affidavit which addresses whether the dredge procedure or the mixing of the lime slurry with the existing waste affected the integrity of the liner of the No. 6 impoundment or the entire operation, as alleged by CRY in paragraph 46 of its appeal. Nor does Mill Service discuss this issue in its memorandum in support of its motion for partial summary judgment. Because there remains a factual dispute surrounding this issue, summary judgment may not be granted to Mill Service on paragraph 46 of CRY's appeal.

## ORDER

AND NOW, this 12th day of January, 1995, it is ordered that:

1) CRY's Motion for Summary Judgment is denied;

2) Mill Service's Cross Motion for Partial Summary Judgment is granted with respect to paragraphs 14-17, 19, 23, and 45 of the notice of appeal, dealing with the issue of whether the Department has authorized the continuous disposal of hazardous waste, in the form of lime stabilized waste pickle liquor sludge, in Impoundment No. 6;

3) Mill Service's Cross Motion for summary judgment is denied in all other respects; and

4) Because Board Member Joseph N. Mack, to whom this matter was originally assigned, has resigned from the Board, this matter is reassigned to Board Member Richard S. Ehmann.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

**Dated:** January 12, 1995

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

| | | |
|---|---|---|
| MCDONALD LAND & MINING COMPANY and SKY HAVEN COAL, INC. | : | |
| v. | : | EHB Docket No. 89-096-MJ |
| | : | Consolidated with 89-556-MJ |
| COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES | : | 89-596-MJ and 89-597-MJ |
| | : | Issued: January 17, 1995 |

**OPINION AND ORDER SUR APPLICATION FOR AWARD OF FEES AND EXPENSES UNDER SMCRA AND IN THE ALTERNATIVE, UNDER THE COSTS ACT**

By: The Board

**Synopsis**

McDonald's application for an award of attorney fees and expenses under §4(b) of the Surface Mining Conservation and Reclamation Act ("SMCRA"), Act of May 31, 1945, as amended, 52 P.S. §1396.1 *et seq.*, at §1396.4(b), is denied. McDonald's application fails to distinguish between fees and expenses incurred in connection with its appeal of a bond release denial, which are recoverable under §4(b), and those fees and expenses incurred in connection with its appeal of the Department's issuance of a compliance order, which are not recoverable under §4(b). McDonald does, however, qualify for an award under the Costs Act in the maximum amount of $10,000.

**OPINION**

This matter was initiated with the filing of two appeals by McDonald Land and Mining Company, Inc. ("McDonald") in connection with its mining operation at the Butler site in Lawrence Township, Clearfield County. The first appeal, filed on April 3, 1989 at Docket No. 89-096-MJ, challenged the Department of

Environmental Resources' ("Department's") denial of McDonald's request for bond release. The second appeal, filed on November 13, 1989 at Docket No. 89-446-MJ, challenged the Department's issuance of a compliance order to McDonald and another miner, Sky Haven Coal, Inc. ("Sky Haven"), directing them jointly to treat two off-site seeps which were alleged to be hydrogeologically connected to their adjacent strip mines.[1] These appeals and those of Sky Haven were all consolidated at Docket No. 89-096-MJ.

On May 16, 1994, the Environmental Hearing Board ("Board") issued an Adjudication which sustained McDonald's appeals as to both the bond release denial and the compliance order. The matter now before the Board is an "Application for Award of Fees and Expenses Under SMCRA and, in the Alternative, Under the Costs Act" ("application"), filed by McDonald on June 15, 1994.[2] The Department filed an answer to the application on July 6, 1994.

By Order dated August 3, 1994, the Board directed McDonald to provide more detailed information in support of its application, including, *inter alia*, evidence from which the Board could assess the reasonableness of the hourly rates for attorney fees and expert witness fees claimed by McDonald. In response to the Board's Order, on August 19, 1994, McDonald filed an amended application, together with supporting affidavits. The Department filed no response to the amended application.

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[1]Sky Haven also appealed the joint compliance order as well as a compliance order issued solely to it in connection with an off-site spring which the Department alleged was hydrogeologically connected to its site. The appeals were docketed at Docket Nos. 89-597-MJ and 89-596-MJ, respectively.

[2]Sky Haven also prevailed in its appeals and sought to recover attorney fees and costs under SMCRA. Its request for fees and costs is addressed by the Board in a separate opinion.

Attorney Fees Under SMCRA

Since McDonald seeks reimbursement of attorney fees and costs initially under §4(b) of SMCRA and, in the alternative, under the Costs Act, Act of December 13, 1982, P.L. 1127, 71 P.S. §2031 *et seq.*, we shall first examine whether McDonald is eligible for an award of fees and costs under §4(b).[3]

Section 4(b) of SMCRA states in relevant part as follows:

> the Environmental Hearing Board, upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to this section

52 P.S. §1396.4(b).

The reference to "this section" is to §4 of SMCRA, which deals with permitting, bond release, and bond forfeiture. McDonald Land and Mining, Inc. and Sky Haven Coal Co. v. DER, EHB Docket No. 89-096-MJ (Opinion and Order Sur Application of Sky Haven Coal, Inc. for Award of Fees, Costs and Expenses issued January 12, 1995) ("Sky Haven"); Big B Mining Co. v. DER, 1990 EHB 248, 250, rev'd on other grounds, 142 Pa. Cmwlth. 215, 597 A.2d 202 (1991), allocatur denied, 529 Pa. 652, 602 A.2d 862 (1992); James E. Martin v. DER, 1986 EHB 101,105, n.2. Thus, §4(b) applies only to permit or bond proceedings and does not extend to enforcement actions taken pursuant to SMCRA. Sky Haven, *supra*.

Clearly, McDonald's appeal of the Department's denial of its request for bond release falls under §4 and, therefore, qualifies for an award under §4(b)

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[3]While the Costs Act places a cap of $10,000 on any award of attorney fees and costs granted thereunder, §4(b) of SMCRA imposes no such limit.

so long as all other criteria are met. McDonald's appeal of the compliance order, however, is an enforcement proceeding which is not covered by §4(b).[4]

Thus, we are faced with the situation where a portion of McDonald's attorney fees and costs are reimbursable under §4(b) of SMCRA, while a portion are not. Unfortunately, McDonald's application does not distinguish between those fees and expenses related to the appeal of the bond release denial and those related to the appeal of the compliance order.

By Order dated October 21, 1994, the Board ordered the parties to address, *inter alia*, the issue of whether McDonald's application and amended application were sufficient on their face to allow the Board to calculate the amount of award which McDonald would be entitled to recover under the Costs Act with respect to its appeal of the compliance order should the Board determine that this matter did not qualify for an award under §4(b). Pursuant to this Order, the parties, specifically McDonald, were to determine whether fees and costs could be apportioned between those related to McDonald's appeal of the bond release denial and those related to its appeal of the compliance order. McDonald did not respond to this portion of the Board's Order. Therefore, we have no means of determining which portion of the attorney fees and expenses are reimbursable under §4(b) and which portion should be examined under the Costs Act. Because we have no means of determining which fees and expenses sought by McDonald are

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[4]Because neither party raised this issue in their filings with the Board, the Board ordered the parties to submit briefs addressing the issue of whether §4(b) applied to McDonald's appeal of the compliance order. McDonald and the Department submitted briefs on November 9 and 10, 1994, respectively. This issue was subsequently addressed by the Board in its review of Sky Haven's application for attorney fees and costs under §4(b). Sky Haven, *supra*. The Board denied Sky Haven's application on the basis that §4(b)'s coverage did not extend to enforcement actions.

reimbursable under §4(b) and which are not, we must reject McDonald's application under §4(b) on that basis.

**Attorney Fees Under The Costs Act**

As noted earlier, McDonald also filed its application for fees and expenses under the Costs Act.[5]

The Costs Act provides in relevant part as follows:

> Except as otherwise provided or prohibited by law, a Commonwealth agency that initiates an adversary adjudication shall award to a prevailing party, other than the Commonwealth, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer finds that the position of the agency, as a party to the proceeding, was substantially justified or that special circumstances made an award unjust.

71 P.S. §2033(a).

A "prevailing party" includes one in whose favor an adjudication is rendered on the merits of the case. 71 P.S. §2032. There are limitations, however, on who may constitute a "party". The term does not include any corporation whose net worth exceeded $2,000,000 or which employed more than 250 employees at the time the adversary action was initiated. Id. The adversary action is the Department's action which gave rise to the appeal. Foster College v. DER, EHB Docket No. 91-429-MJ (Opinion and Order Sur Application For Award of Counsel Fees and Expenses issued November 3, 1994), p. 7.

Attached to McDonald's application as Exhibit K is a copy of an audited financial statement for the years ending June 30, 1989 and June 30, 1990. The statement shows McDonald's net worth to be less than $2,000,000 for the years in

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[5]Applications under the Costs Act must be filed within thirty days of the final disposition of the appeal. Because McDonald's application was filed within thirty days of the Board's adjudication of this matter, its submission was timely.

question. The Department argues, however, that although the financial statement on its face shows McDonald's net worth to be less than $2,000,000, it is not accurate because it fails to include the net worth of McDonald's "affiliates". The Department contends that McDonald's sole shareholder, F. W. McDonald, constitutes an affiliate of the company and, as such, his net worth, including the fair market value of any closely held company under his control, should be included in computing the net worth of McDonald.[6] The Department further contends that the net worths of certain entities listed under the section entitled "Related Party Receivables-Net" on page K-5 of the statement should be aggregated with McDonald's net worth.

Under 4 Pa. Code §2.15 of the regulations propounded under the Costs Act, an "affiliate" is defined to be a business directly or indirectly controlled by the applicant through ownership of a majority of the business' shares or through control of the business' board of directors or managers. Dunkard Creek, *supra*. Under this definition, only a business, and not an individual, may constitute an "affiliate". Secondly, the applicant must exercise some control, either directly or indirectly, over the affiliated company. Because Mr. McDonald is neither a business nor is he controlled by the very company which he himself controls, we reject the Department's argument that Mr. McDonald could be an affiliate of McDonald.

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[6]The Department raised a similar argument in Dunkard Creek Coal, Inc. v. DER, EHB Docket No. 92-439-E (Consolidated) (Opinion and Order Sur Application for Award of Fees and Expenses issued November 3, 1994). There, the Department suggested that certain companies were affiliates of Dunkard Creek by virtue of the relationship between Dunkard Creek's president and sole shareholder and the companies in question. However, because the Board rejected the Department's argument on other grounds, it did not reach the issue of whether any interest held by a company's president and sole shareholder in another business could render that business an affiliate for purposes of the Costs Act.

The Department next argues that the businesses listed on page K-5 of the financial statement are affiliates whose net worth should be aggregated with that of McDonald. These businesses are listed under the heading "Related Party Receivables - Net". This section reads, "The Company transacts business with other enterprises in which the sole stockholder maintains a significant portion of ownership of those other enterprises. Virtually all coal extracted is sold to Thomas Coal Sales, Inc.". Thomas Coal Sales, Inc. is one of the companies listed in this section. Again, the Department argues that because McDonald's sole shareholder, F.W. McDonald, "maintains a significant portion of ownership of those other enterprises", they thereby constitute affiliates of McDonald. The Department relies on the affidavit of James C. Bixby, CPA and a financial investigator in the Department's Bureau of Investigations, Office of Chief Counsel. Mr. Bixby further believes that "[s]uch affiliation is justified by virtue of the entities listed in Exhibit K-5 being either coal or trucking firms." (Bixby Affidavit, paragraph 6)

We reject the Department's argument that the companies listed on K-5 are affiliates of McDonald by virtue of F. W. McDonald's ownership interest in them. Simply because McDonald's sole shareholder holds an ownership interest in other companies, does not in and of itself cause those companies to become affiliates of McDonald according to 4 Pa. Code §2.15. The Department has not demonstrated that McDonald, as opposed to F. W. McDonald, owns a majority of the shares of any of these companies or that it exercises control over the board of directors or management. Therefore, we have no basis for concluding that the companies listed on K-5 are affiliates of McDonald or that their net worth should be aggregated with McDonald's for purposes of determining McDonald's eligibility under the Costs Act.

Based on the evidence before us, we find that McDonald meets the definition of a "party" under the Costs Act.

Having passed these hurdles, we must determine whether McDonald is a "prevailing party", as that term is defined in the Costs Act. A prevailing party includes one "in whose favor an adjudication is rendered on the merits of the case." 71 P.S.§2033. As noted earlier, McDonald prevailed on the merits of both of its appeals and, therefore, constitutes a prevailing party for purposes of an award under the Costs Act. The Department does not challenge that McDonald is a prevailing party.

Next, we must determine whether the Department's position in issuing the compliance order to McDonald and denying McDonald's request for bond release was substantially justified. If so, then McDonald may not recover under the Costs Act. The Department's position will be found to be substantially justified where it "has a reasonable basis in law and fact," 71 P.S. §2032.

The Department cites us to numerous cases where the Commonwealth Court has found that substantial justification existed for an agency's position even though the action taken by the agency was ultimately overturned. In each of these cases, there was evidence establishing that the agency had a reasonable basis in law and fact for its action.

In the present case, the Department failed to present any competent evidence supporting its determination that a hydrogeologic connection existed between the McDonald site and the contaminated seeps. Thus, we cannot find that the Department's position in issuing the compliance order to McDonald to treat the seeps had a reasonable basis in law or fact. The same is true with regard to the denial of McDonald's request for bond release. The basis for the Department's denial was the existence of the seeps. Since the evidence did not

establish a hydrogeologic connection between the permit site and the seeps, there was no reasonable basis in law or fact for the denial of the bond release.

The Department argues that because the Board did not grant a motion for a directed adjudication made by McDonald and Sky Haven at the end of the Department's case-in-chief, this establishes that the Department's position had a reasonable basis in both law and fact. It is the Department's position that where it has established a *prima facie* case, it cannot be found that its action was not substantially justified.

We need not address this contention since the Board did not rule on McDonald and Sky Haven's motion and, thus, did not determine whether the Department had established a *prima facie* case. Because we had evidence placed in the record by the appellants[7] and because McDonald carried the burden of proof with respect to the bond release denial, we elected to adjudicate this matter on the merits, rather than rule on the appellants' motion for a directed adjudication. Thus, because we did not rule on the merit of the motion for a directed adjudication, we did not reach the question of whether the Department had established a *prima facie* case with respect to the issuance of the compliance order. Nor is the Department's argument applicable to the bond release denial since McDonald, and not the Department, carried the burden of proof and, thus, the burden of establishing a *prima facie* case with respect to that matter.

Finally, no award may be made where "special circumstances ma[k]e an award unjust." 71 P.S. §2033. The Department has alleged no such special circumstances, nor do we find any to be present. Therefore, we find that

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[7]Because a directed adjudication may not be granted by a single, presiding Board Member, but requires the vote of a majority of the Board, the appellants elected to proceed with the hearing and the presentation of their case-in-chief.

McDonald is eligible for an award of costs and attorney fees under the Costs Act. We turn now to a calculation of that award.

McDonald seeks fees and costs in the amount of $38,016.50, as follows:

| | |
|---|---|
| Attorney Fees | $29,300.00 |
| Expert Witness Fees | 5,856.50 |
| Civil Penalty Assessments | 2,860.00 |

Pursuant to §2 of the Costs Act, no award may be made in excess of $10,000. 71 P. S. §2032. In addition, attorney fees may not be awarded at a rate exceeding $75 per hour unless the applicant demonstrates that an increase in the cost of living or a special factor, such as limited availability of qualified counsel for the proceeding, justifies a higher fee. Id.

Exhibit A to McDonald's application shows that counsel for McDonald billed a total of 146.50 hours at a rate of $200 per hour, resulting in attorney fees of $29,300. Even at the rate of $75 per hour, McDonald's attorney fees exceed the $10,000 limit. Therefore, we need not address whether McDonald would be entitled to reimbursement of its attorney fees at a rate higher than that set by the Costs Act. We next turn to the question of whether all of the work billed by McDonald's counsel is recoverable under the Costs Act, up to the $10,000 limit.

Exhibit A to McDonald's application outlines the hours and work billed by its counsel. In its answer, the Department argued that Exhibit A to the application was inadequate because it consisted solely of an undated summary covering two years of legal services and, further, because it contained no copies of invoices for those services nor any affidavit attesting to its truth and accuracy. On August 19, 1994, McDonald filed an amended application which

included a supplemental Exhibit A.[8] Supplemental Exhibit A, like its predecessor, provides a summary of the legal services rendered by McDonald's counsel in connection with this appeal. In addition, it provides a slightly more detailed description of the actual services rendered and also includes an affidavit signed by McDonald's counsel, stating that the hours and description of services contained in Exhibit A reflect the actual time spent in preparing and trying this appeal.

The Department asserts that both Exhibit A and Supplemental Exhibit A are insufficient to allow the Board to conduct an informed appraisal of McDonald's application for legal fees. In support of its argument, the Department cites the Board's Opinion in Dunkard Creek Coal, Inc. v. DER, *supra*.

In Dunkard Creek, the applicant submitted a ten-page exhibit containing a month-by-month statement of the work performed on each date in that month and the total number of hours worked that month by each attorney. The exhibit did not contain a statement detailing the number of hours worked each day by each attorney. While the Board noted that the latter was preferred, it accepted the exhibit, combined with the testimony of one of the principal attorneys handling the matter, as evidence of the rates and hours billed for legal services. In so holding, the Board stated, "[The exhibit] coupled with this testimony may be only barely adequate to withstand DER attack, but it is nevertheless an adequate 'detailed explanation' of the fees and how they came to be charged." Id. at 15.

Supplemental Exhibit A, submitted by McDonald, also consists solely of a summary of the legal services provided by counsel for McDonald. However, unlike

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[8]The amended application was filed by McDonald in response to the Board's order of August 3, 1994, requiring McDonald to provide more detailed information with respect to the rates and hours billed by its counsel in this matter.

the exhibit submitted in Dunkard Creek, Supplemental Exhibit A does specify the hours expended by counsel on each date.[9] In addition, McDonald's counsel, Carl Belin, submitted an affidavit attesting to the truth and accuracy of the exhibit. We find that the description of legal services contained in Supplemental Exhibit A coupled with Mr. Belin's affidavit at least rise to the level of evidence submitted by the applicant in Dunkard Creek and, therefore, are a sufficient explanation of the legal services provided and the number of hours expended thereon.[10]

Reviewing Supplemental Exhibit A, we find nothing out of the ordinary with respect to the legal services billed by McDonald's counsel. Nor has the Department raised any objection to a specific entry in the exhibit. We disagree with the Department's contention that the evidence presented does not allow an informed appraisal of the fees sought by McDonald. Supplemental Exhibit A specifically details the work performed on each date by Mr. Belin with respect to the McDonald appeal and the amount of time expended thereon. Our review of this exhibit, coupled with Mr. Belin's affidavit, allows us to conclude that the work performed by Mr. Belin in connection with this appeal and the hours expended thereon are reasonable. Therefore, McDonald is entitled to reimbursement for Mr. Belin's legal services within the guidelines set forth in the Costs Act.

As noted earlier, Mr. Belin billed a total of 146.50 hours. At a rate of $75 per hour, this results in the sum of $10,987.50. Since no award under the

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[9]According to the memorandum filed by McDonald on November 9, 1994, only one attorney, Carl Belin, worked on the McDonald appeal. (McDonald Memorandum, p. 10)

[10]We agree with the Department that an application for costs and fees which is submitted without regard to the specificity of the evidence offered in support of the amount claimed runs the risk of being rejected by the Board. That is not the case here, however, since the evidence offered by McDonald is sufficient to allow the Board to rule on its application under the Costs Act.

Costs Act may exceed $10,000, McDonald is awarded attorney fees and costs in the maximum amount of $10,000.

Because McDonald's attorney fees alone reach the $10,000 limit, we need not examine the other expenses claimed by McDonald in its application.

In conclusion, we make the following findings:

**FINDINGS**

1. The Board has jurisdiction over the application for award of attorney fees and expenses filed by McDonald at EHB Docket No. 89-096-MJ (Consolidated).

2. McDonald is not eligible for an award of attorney fees and costs under §4(b) of SMCRA, 52 P.S.§1396.4(b), for the reasons set forth in this Opinion.

3. McDonald is eligible for an award under the Costs Act with respect to its appeals consolidated at EHB Docket No. 89-096-MJ.

4. McDonald is the prevailing party in this matter.

5. McDonald meets the criteria of a "party", as defined at 71 P.S. §2032.

6. The position of the Department in issuing the compliance order to McDonald to treat two off-site seeps and in denying McDonald's request for bond release was not substantially justified.

7. McDonald's counsel devoted 146.50 hours to this matter and billed at a rate in excess of $75 per hour.

8. Pursuant to §2 of the Costs Act, fees may not be awarded at a rate exceeding $75 per hour unless an increase in the cost of living or other special factor justifies a higher fee.

9. At a rate of $75 per hour, McDonald's legal fees total $10,987.50.

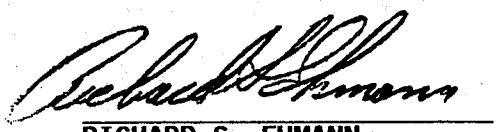
10. Since no award under the Costs Act may exceed $10,000, McDonald is entitled to an award of $10,000.

## ORDER

AND NOW, this 17th day of January, 1995, it is ordered that: 1) McDonald's application for attorney fees and expenses under §4(b) of SMCRA is denied, 2) McDonald's alternative application for attorney fees and expenses under the Costs Act, is granted, and the Department is ordered to pay $10,000 to McDonald within 30 days of the date of this Order.

**ENVIRONMENTAL HEARING BOARD**

**MAXINE WOELFLING**
**Administrative Law Judge**
**Chairman**



**RICHARD S. EHMANN**
**Administrative Law Judge**
**Member**

* Board Member Robert D. Myers dissents. His dissenting opinion is attached.

DATED: January 17, 1995

cc: **DER Bureau of Litigation:**
(Library: Brenda Houck)
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SECRETARY TO THE BOARD

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|---|---|---|
| MCDONALD LAND AND MINING COMPANY, INC. and SKY HAVEN COAL, INC. | : | |
| v. | : | EHB Docket No. 89-096-MJ |
| COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES | : | Issued: January 17, 1995 |

## DISSENTING OPINION BY BOARD MEMBER ROBERT D. MYERS

I dissent for the reasons set forth in my Dissenting Opinion in the related Application of Sky Haven, Inc. issued on January 12, 1995. I have no dispute otherwise with the Board's application of the Costs Act.

ENVIRONMENTAL HEARING BOARD

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: January 17, 1995

sb

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| JOHN HORNEZES | : | |
| | : | |
| v. | : | EHB Docket No. 94-101-E |
| | : | |
| COMMONWEALTH OF PENNSYLVANIA, | : | |
| DEPARTMENT OF ENVIRONMENTAL RESOURCES | : | Issued: January 23, 1995 |

# ADJUDICATION

**By: Richard S. Ehmann, Member**

**Synopsis**

The Department of Environmental Resources' ("DER") denial of John Hornezes' ("Hornezes") application for certification as a storage tank installer/inspector under the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, No. 32, 35 P.S. §6021.101 *et seq.* ("Storage Tank Act"), and regulations promulgated thereunder, is sustained. Appellant has waived his challenge to DER's action by failing to file any Post-Hearing Brief.

## Background

On May 5, 1994, Hornezes filed a Notice Of Appeal with this Board from two DER letters, both dated April 5, 1994. The first of these letters approved Hornezes' application for temporary certification as a tank installer in categories UM_X and UM_R pursuant to 25 Pa. Code §§245.111 and 245.113 and Section 107(d) of the Storage Tank Act (35 P.S. §6021.107(d)). The second DER letter denied Hornezes' application for certification under the Storage Tank Act and regulations in all of the remaining installer categories and in all of the inspector categories.

In his Notice Of Appeal, Hornezes challenges DER's action for the following reasons:

1. I have previous experience installing storage tanks and pumps prior to new DER regulations.
2. I have experience installing storage tanks and pumps prior to seven years which the DER limits an applicant to on the new regulations.
3. I believe knowledge earned prior to seven years should be permitted otherwise the new regulations are unconstitutional.
4. As a black worker, the new regulations prohibit the advancement for the minority races.
5. The new regulations limit the competition for small and minority businesses.
6. I object to having to take a test to obtain permanent certification. Since I have been installing tanks prior to new regulations I should be permanently certified based on past experience.
7. I believe there should be a grandfather clause within the DER regulations that grandfather's [sic] in installers/inspectors who were installing tanks prior to the new DER regulations.

Hornezes repeats these allegations in his Pre-Hearing Memorandum which we received on August 18, 1994 and elaborates on them to the extent he adds: "The law prohibits discrimination against minorities. I feel I am being subjected to discrimination", and a contention that Pennsylvania law has always regulated installing and removing tanks and is now adding to those prior regulations. DER's responding Pre-Hearing Memorandum was filed with us on September 6, 1994 and takes positions contrary to those asserted by Hornezes.

Despite Pre-Hearing Order No. 2's direction to the parties to file a single joint stipulation with this Board prior to the hearing and by October 13, 1994, no such stipulation was filed, although DER filed a copy of a Joint Stipulation it prepared and sent to Hornezes but which was never executed by the parties.

On October 28, 1994, the Board held a hearing on the merits of Hornezes' appeal. Hornezes, who has appeared *pro se* through out this appeal proceeding,

testified on his own behalf, and DER offered testimony from Raymond Powers and Larry K. Smith.

Thereafter on November 10, 1994, with receipt of the hearing's transcript, the Board issued an Order requiring that Hornezes file his Post-Hearing Brief by December 12, 1994, and that DER file its Post-Hearing Brief in response thereto by December 27, 1994. Hornezes filed no Post-Hearing Brief. The Board docketed receipt of DER's Brief on December 28, 1994. Hornezes has not communicated with this Board in any fashion since the merits hearing.

The record consists of a transcript of 66 pages and 8 exhibits. After a full and complete review thereof, we make the following Findings Of Fact.

**Findings Of Fact**

1. Hornezes is an individual whose address is 1122 Franklin Avenue, Pittsburgh, PA 15221. (Hornezes' Notice Of Appeal)

2. DER is the agency with the duty and authority to administer the Storage Tank Act and the rules and regulations promulgated thereunder.

3. Hornezes has taken two courses in storage tank installation. One was from a subsidiary of Owens-Corning Fiberglass (H-3; T-18-19), and from Highland Tank and Manufacturing Company. (H-5; T-22)[1]

4. Using forms supplied by DER and under a letter dated January 26, 1994, Hornezes applied to DER for temporary certification as a tank installer/inspector. (H-4)

5. Hornezes sought temporary certification from DER in each of the 28 categories for installers and inspectors set forth in the regulations. (T-18)

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[1]H-__, signifies an exhibit offered and admitted at the hearing on behalf of Hornezes. C-__, signifies a document admitted on behalf of DER. T-__, is a reference to a transcript page in the merits hearing's transcript.

6. A portion of Exhibit H-2 is Hornezes' temporary certification from DER which expired on September 21, 1994. DER only certified him in two categories. (H-2; T-16)

7. Hornezes is an African-American who is challenging DER on a "minority basis". (H-1; T-10) He believes he is discriminated against because even though he was temporarily certified, he never received a permanent certification. (T-25)

8. DER's certification application form and Attachment A forms seek no information as to an applicant's race. (T-42)

9. In considering whether to issue a temporary or a permanent certification, DER does not look at factors outside of the applications and Attachment A forms accompanying them except as to an applicant's production of the appropriate training completion certificates. (T-43-44)

10. There are 28 types of certification under the regulations to cover the different types of storage tanks and systems. (T-36)

11. In the certification program under the Storage Tank Act, interim certification phased into temporary certification over the course of one year. (T-38) To secure interim certification, all one had to do was obtain training in tank installation. However, the interim certification program is no longer in effect. (T-34)

12. To be temporarily certified, an applicant had to apply and submit both proof of training and a DER form called an Attachment A showing his experience over the last seven years within the category for which he was seeking certification. (T-37-39)

13. The temporary certification program remained in effect for three years. (T-38)

14. The requirements for permanent certification are the same as those for temporary certification, except that, in addition, the applicant must pass DER's examination on the scope of the regulations and industry practices. (T-39)

15. A permanent certification is valid for three years. (T-40)

16. DER's application form tells applicants that they must submit Attachment A forms. (T-52) One must submit an Attachment A form in every category in which one seeks certification because that specific form is where an applicant details the degree of experience prerequisite to being certified in that category. (T-42-46)

17. The Storage Tank Act and regulations do not have a provision to permanently certify current tank installers and thus exempt them from new requirements based solely on the fact that this is the field they work in. (T-47) No such grandfather clause exists because in the past there were no standards from which to judge tank installations and because there is a need for current installers to be familiar with current installation practices. (T-47)

18. In the past, the only regulation of storage tanks was in local codes and the fire marshall's regulations dealing with combustible materials. These regulations did not deal with installer certification or environmental protection. (T-48)

19. DER's Larry K. Smith ("Smith") reviewed Hornezes' application on DER's behalf. (T-53-54)

20. Hornezes' application did not include Attachment A forms in all 28 categories but did include them for two of the 28 categories, to wit: UM_X and UM_R. (T-54)

21. As initially submitted, Hornezes' application and Attachment A forms had too few indications of current experience to allow DER to issue him a temporary certification in any category. (T-56)

22. Smith talked to Hornezes by phone about the existence of additional current experience, and Hornezes sent in further information to DER. (H-6;T-23-24, 57)

23. Based on that added information, DER issued Hornezes his two temporary certifications. (T-59) Hornezes' application for temporary certification as an inspector in category UTT, which he submitted with his follow up information, was rejected because Hornezes failed to submit any proof of training in this field. (T-57-60)

24. Hornezes has not taken the DER examination which is a prerequisite for permanent certification as an installer. (T-28-29)

**Discussion**

As is clear from our rules, Hornezes has the burden of proof in this appeal under 25 Pa. Code §21.101(a) and (c)(1). Hornezes, thus, must show DER abused its discretion in issuing him two temporary certifications, denying him 26 temporary certifications and failing to "grandfather" him into certification.[2] He must also show that DER has discriminated against him based on race.

Our review of DER's actions and Hornezes' challenge thereto are limited to those issues he raises in his Post-Hearing Brief because issues not so raised are deemed to have been waived. Lucky Strike Coal Co. and Louis J. Beltrami v. DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988); Gemstar Corporation v. DER, 1993 EHB

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[2]Many of the issues raised in Hornezes' Notice Of Appeal were previously addressed by this Board in Ted Babich v. DER, EHB Docket No. 94-002-E (Adjudication issued September 9, 1994). The conclusions there on issues like the grandfather clause sustained DER's position on those issues.

1260, ("Gemstar"); Meadowbrook/Cornwallis Homeowners Association v. DER, 1993 EHB 1436 ("Meadowbrook/Cornwallis")

Hornezes did not file a Post-Hearing Brief, so he has waived the issues raised in his Notice Of Appeal. As a result there are no issues for this Board to adjudicate.[3] Meadowbrook/Cornwallis and Gemstar.

Accordingly, we make the following Conclusions Of Law and enter the appropriate Order.

## CONCLUSIONS OF LAW

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

2. Hornezes bears the burden of proof under 25 Pa. Code §21.101 as to each issue raised in his Notice Of Appeal.

3. Hornezes failed to file any Post-Hearing Brief.

4. Hornezes waived each issue raised in his Notice Of Appeal.

## ORDER

AND NOW, this 23rd day of January, 1995, it is ordered that Hornezes' appeal is dismissed.

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[3]By virtue of this conclusion, we fail to reach Hornezes' charge of discrimination against him based on race. Had we reached it, we would have rejected it on its merits because there is no evidence to support it. The fact that DER denied his application for temporary certification and he is an African-American, standing alone, is insufficient to prove discrimination.

We also do not reach the question of whether this appeal has become moot in whole or part by expiration of all temporary certifications on September 21, 1994. See 25 Pa. Code §245.103(c). However, neither party briefed this issue.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

DATE: January 23, 1995

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| | | |
|---|---|---|
| CITY OF SCRANTON AND BOROUGHS OF TAYLOR AND OLD FORGE | : | |
| v. | : | EHB Docket No. 94-060-W (Consolidated Docket) |
| COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and EMPIRE SANITARY LANDFILL, INC., Permittee | : | Issued: January 25, 1995. |

**OPINION AND ORDER SUR**
**MOTION TO DISMISS, OR IN THE ALTERNATIVE,**
**MOTION FOR JUDGMENT ON THE PLEADINGS**

By Maxine Woelfling, Chairman

Synopsis

A motion to dismiss, or in the alternative, for judgment on the pleadings, is granted in part and denied in part.

Where a permit modification authorizing a landfill to accept ash from an out-of-state incinerator expressly states that the landfill shall not accept hazardous waste, the Department did not err by issuing the modification without first requiring that the landfill provide certification that the incinerator would comply with Commonwealth regulations governing generators of hazardous waste. The Board will not grant the landfill's request to dismiss objections raised in host municipalities' notices of appeal where the landfill requests dismissal on the theory that §504 of the Solid Waste Management Act requires that host municipalities preserve objections by raising them within 60 days of the Department receiving the application for a permit modification, and the landfill fails even to aver that the host municipalities did not raise the objections within that 60-day period.

An appellant need not aver facts in its notice of appeal sufficient to show it has standing.

Dismissal or judgment on the pleadings is premature with respect to objections listed in a notice of appeal where significant issues regarding the factual and legal bases of those objections remain outstanding.

The Board will dismiss an objection in a notice of appeal which asserts that a permit modification violates 40 C.F.R. §261.4(b)(1) and 25 Pa. Code §261.4(a)(18) where the modification violates neither regulation.

The Board does not have jurisdiction over claims that a solid waste permit modification fails to comport with 40 C.F.R. Chapter 262. The Resource Conservation and Recovery Act, the Act of October 21, 1976, P.L. 94-480, as amended, 42 U.S.C. §6901 *et seq.* (RCRA) vests the Federal courts with exclusive jurisdiction over citizen suits concerning compliance with that chapter of the Environmental Protection Agency's (EPA) regulations.

So long as a permit modification complies with the Solid Waste Management Act and the regulations promulgated pursuant to it, the modification complies with Article I, §27, of the Pennsylvania Constitution.

The Board does not have the authority to award costs of litigation under the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (the Solid Waste Management Act) or §7002(e) of RCRA, to assess civil penalties for violations of the Solid Waste Management Act, or to grant injunctive relief. Nor does the Board have the power to grant declaratory relief under the Uniform Declaratory Judgment Act, the Act of July 9, 1976, P.L. 586, 42 Pa.C.S.A. §7531 *et seq.* (Declaratory Judgment Act) or 1 Pa. Code §35.19.

The Board is not being asked to render an advisory opinion where the Board

is presented with a concrete question at law, rather than a hypothetical question.

**OPINION**

This matter was initiated with the March 24, 1994, filing of a notice of appeal by the City of Scranton (Scranton) challenging the Department's February 25, 1994, issuance of a modification to a solid waste permit held by Empire Sanitary Landfill, Inc. (Empire). The modification pertains to municipal incinerator ash from a resource recovery facility in New Jersey, and authorized Empire to accept and dispose of the ash at a landfill owned by Empire in the Borough of Taylor (Taylor), the Borough of Old Forge (Old Forge), and the Township of Ransom. The Union County Utilities Authority (UCUA) operates the resource recovery facility generating the ash.

Scranton's notice of appeal asserted that the Department abused its discretion and acted contrary to law because the modification authorized violations of RCRA, the Solid Waste Management Act, and Article I, §27, of the Pennsylvania Constitution. Among other things, the notice of appeal requested that the Board award Scranton attorney fees and costs; declare that Empire and the Department will be in violation of regulations promulgated pursuant to RCRA and the Solid Waste Management Act; enjoin the Department and Empire from engaging in any further violations of RCRA, the Solid Waste Management Act, or the regulations adopted pursuant to those acts; and, assess civil penalties against Empire.

Taylor and Old Forge also filed notices of appeal to the permit modification on March 24, 1994. Those appeals, docketed at EHB Docket No. 94-061-W and EHB Docket No. 94-062-W respectively, raised the same objections to the Department's action and requested the same relief as Scranton did in its

notice of appeal. On July 11, 1994, the Board consolidated the Taylor and Old Forge appeals with the Scranton appeal at EHB Docket No. 94-060-W.

On August 1, 1994, Empire filed a motion to dismiss, or in the alternative, a motion for judgment on the pleadings, together with a supporting memorandum. The motion averred:

> (1) that Scranton does not have standing;
>
> (2) that Scranton, Old Forge, and Taylor (collectively, the Appellants) waived objections concerning compliance with the Solid Waste Management Act by not raising them within 60 days of the Department receiving Empire's application for the modification;
>
> (3) that the Board does not have jurisdiction over:
>
> > (a) alleged violations of the Solid Waste Management Act or RCRA by UCUA in UCUA's role as a generator of hazardous waste; or,
> >
> > (b) alleged violations of RCRA;
>
> (4) that the Appellants failed to plead facts sufficient to establish that the Department acted contrary to Article I, §27, of the Pennsylvania Constitution, or any Pennsylvania law, or that the Department abused its discretion by issuing the modification; and,
>
> (5) that the Board does not have the authority to award costs, or issue injunctions, or assess civil penalties based on the violations alleged here.

The Department filed a response to Empire's motion on August 19, 1994. It asserted that Scranton had standing and that the Board has jurisdiction over the alleged RCRA and Solid Waste Management Act violations.[1] The Department failed to respond to the other issues raised in Empire's motion. The Appellants filed an answer and memorandum in opposition to Empire's motion on August 23,

---

[1]The nature of the Department's response is rather curious, given that it is an appellee and, presumably, will, to some degree, defend the integrity of its issuance of the permit modification. It appears that the Department's response is designed more to mollify the municipalities and defend its municipal waste incinerator ash policy which is at issue in Empire's appeals at Docket Nos. 94-114-W and 94-120-W.

1994, in which they challenged each of the issues raised by Empire.

We need not decide whether to treat Empire's motion as a motion to dismiss or a motion for judgment on the pleadings. At this stage of the proceedings, we treat motions to dismiss the same way we treat motions for judgment on the pleadings: we will dismiss the appeal only where there are no material factual disputes and the moving party is clearly entitled to judgment as a matter of law. Huntingdon Valley Hunt v. DER, 1993 EHB 1533. The facts for purposes of the motion are those framed in the notice of appeal. North American Oil & Gas Drilling Co., Inc., 1991 EHB 22. All of the factual averments in the notice of appeal are viewed as true, and only those facts specifically admitted in the notice of appeal may be considered against the appellant. Kerr v. Borough of Union City, 150 Pa. Cmwlth. 21, 614 A.2d 338 (1992), appeal denied 627 A.2d 181 (1993).

**I. STANDING**

Empire asserts that the Board should dismiss Scranton's appeal because Scranton's notice of appeal failed to aver facts sufficient to establish that the city has a direct and immediate interest in the outcome of the appeal. The notice of appeal asserts, among other things, that Empire is located in Old Forge and Ransom, adjacent to Scranton; that the modification would have serious and deleterious effects upon Scranton's inhabitants; and, that Scranton is responsible for the health, safety, and welfare of its residents. The Appellants argue that Scranton has standing because ash destined for the landfill will be transported through the city to the landfill and because the city abuts the landfill. According to Scranton, waste travelling to or at the landfill could contaminate the city's air or groundwater. The Department argues Scranton has standing for the same reason.

Empire is not entitled to judgment as a matter of law with respect to Scranton's standing. Empire's motion rests on the assumption that a notice of appeal must aver facts sufficient to show that the appellant has standing. That assumption is incorrect. While the Board typically treats notices of appeal as pleadings for purposes of deciding motions for judgment on the pleadings, notices of appeal are not true pleadings. See, Upper Allegheny Joint Sanitary Authority v. DER, 1989 EHB 303, 306 n.5. Rule 1019(a) of the Pa.R.C.P., which governs the contents of pleadings, provides, "[t]he material facts on which a cause of action...is based shall be stated in a concise and summary form." See, Santiago v. Pennsylvania National Mutual Casualty Insurance Co., 418 Pa. Super. 178, 613 A.2d 1235 (1992). A notice of appeal, by contrast, need only contain a party's objections to a Department action. 25 Pa. Code §21.51(c); Huntingdon Valley Hunt v. DER, 1993 EHB 1533, at 1538, n.4. Since there is no requirement that a notice of appeal state all material facts, Scranton's notice of appeal need not allege facts showing that Scranton has standing. See, *e.g.*, S.T.O.P., Inc. v. DER and Envirotrol, 1992 EHB 207

**II. WAIVER**

Empire asserts that the Appellants waived their right to object to the terms of the modification because §504 of the Solid Waste Management Act, 35 P.S. §6018.504, provides that host municipalities waive any objections not raised within 60 days of the Department receiving the permit application and the notices of appeal did not aver that the Appellants raised the objections within the 60-day comment period. The Appellants argue that they did not waive their objections because: (1) they objected to the application within the comment period; (2) §504 does not provide that host municipalities waive objections if they fail to raise them within the comment period; and, (3) the Appellants could

not raise objections to the modification itself within the comment period since the modification did not exist at that time. The Department maintains that the Appellants did not waive the objections, but its rationale for that position is unclear from the response.

Even assuming Empire's construction of §504 of the Solid Waste Management Act were correct, dismissal of the Appellants' objections would be inappropriate here. Empire's position rests on a non sequitur. Empire contends that §504 of the Solid Waste Management Act provides that host municipalities cannot raise objections in an appeal of a permit modification unless they raised those objections within the comment period. But Empire never asserts that the Appellants actually *failed to raise the objections* within the comment period. It simply asserts that the Appellants *failed to aver in their notices of appeal* that they raised the objections within the comment period. Whether the Appellants failed to aver this in their notices of appeal, however, is irrelevant. As noted earlier in this opinion, an appellant need not list all material facts in its notice of appeal; it need only list its objections to the Department's action. Therefore, even assuming the Solid Waste Management Act required that the Appellants preserve objections by raising them within the comment period, the Appellants did not have to aver that they did so in their notices of appeal.

**III. CLAIMS 2-7**

In Claims 2-7 of their notices of appeal, the Appellants assert that the waste produced by UCUA may be hazardous, and that, because 25 Pa. Code Chapter 262 (the Pennsylvania regulations for generators of hazardous waste) and 40 C.F.R. Chapter 262 (the Federal regulations for generators of hazardous waste) impose requirements on generators of hazardous waste, the Department should have

required that Empire provide certification that UCUA would comply with those regulations before issuing Empire the permit modification. Empire argues that the claims fail to state a cause of action cognizable before the Board because: (1) the Federal courts have exclusive jurisdiction over alleged violations of the Federal regulations for generators of hazardous waste; (2) the claims fail to state a cause of action under the Pennsylvania regulations for generators of hazardous waste; and, (3) the Board does not have jurisdiction to adjudicate the rights or alleged violations of a non-party--particularly one from out-of-state. The Appellants counter that: (1) the claims do state causes of action under the Pennsylvania regulations for generators of hazardous waste; (2) the Board has jurisdiction over alleged violations of the Federal regulations for generators of hazardous waste because Federal law controls to the extent that it is more stringent than state law and because 25 Pa. Code §273.501(c) provides that disposal of special handling waste must comply with RCRA; and, (3) the fact that a non-party is involved, even one from out-of-state, does not deprive the Board of jurisdiction, since the Department routinely requires in-state landfills to provide certification from out-of-state resource recovery facilities. The Department failed to address the jurisdictional issues in its response. The Department did argue, however, that since RCRA sets the basic standards for all state hazardous waste programs, the Solid Waste Management Act necessarily incorporates all the provisions of RCRA and the regulations thereunder.

We need not decide whether the Board is deprived of jurisdiction solely because the objections concern a non-party from out-of-state. It is clear from the other two issues Empire raises that claims 2-7 do not state causes of action which are cognizable before the Board. For the reasons set forth below, we do not have jurisdiction over the Appellants' claims that the permit modification

failed to comply with the Federal regulations for generators of interstate waste, and the Appellants' claims fail to state a cause of action under the Pennsylvania regulations for generators of hazardous waste.

A. **Alleged violations of the Federal regulations for generators of hazardous waste.**

The Board does not have jurisdiction over the objections that the permit modification fails to comport with the Federal regulations for generators of hazardous waste. RCRA vests the Federal courts with exclusive jurisdiction over citizen suits concerning compliance with those regulations.

Section 7002 of RCRA, 42 U.S.C. §6972, which governs citizen suits under the act, provides that "any person[2] may commence a civil action on his own behalf...against any person (including...any governmental institution or agency...) who is alleged to be in violation of any...regulation...which has become effective pursuant to [chapter 82 of Title 42, see 42 U.S.C. §6901-6986]...." Section 7002 also provides that those actions "shall be brought in the district court for the district in which the alleged violation occurred...." 42 U.S.C. §6972(a).

The Board does not have jurisdiction here because the Federal regulations for generators of hazardous waste are part of the Federal program under 42 U.S.C. Chapter 82. The regulations were promulgated pursuant to §§1006, 2002, 3002, 3003, 3004, 3005, and 3016 of RCRA, 42 U.S.C. §§6906, 6912, 6922, 6923, 6924, 6925, and 6937. Those sections of RCRA all fall within 42 U.S.C. Chapter 262.

Nor does the Board have jurisdiction with respect to the alleged RCRA violations by virtue of §273.501(c) of the Department's regulations, 25 Pa. Code

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[2]Municipalities are expressly included within the definition of "persons" under 42 U.S.C. Chap. 82. See §1004(15) of RCRA, 42 U.S.C. §6903(15).

§273.501(c). The Appellants argue that Empire's permit modification must comport with the Federal regulations for generators of hazardous waste because §273.501(c) of the Department's regulations provides that special handling waste may not be disposed at a municipal waste landfill unless the waste is disposed in accordance with "the environmental protection acts." But, even assuming §273.501(c) requires that Empire's permit modification comply with "the environmental protection acts," the modification need not comport with the Federal regulations for generators of hazardous waste. The definition of "environmental protection acts," at 25 Pa. Code §271.1, states that the term includes all "State and Federal statutes relating to environmental protection or the protection of public health...." RCRA certainly falls within this definition, but the modification need not comport with the Federal regulations for generators of hazardous waste to comply with RCRA. Section 3006 of RCRA, 42 U.S.C. §6926, authorizes states to develop state hazardous waste programs. Once a state secures approval for its program from the Administrator of the EPA, that state "is authorized to carry out such program in lieu of the Federal program under [subchapter III of Chapter 82, 42 U.S.C. §§6921-6939e]...and to issue and enforce permits for the...disposal of hazardous waste...." §6926(b). In other words, when a state implements an authorized program, the state program supersedes the Federal program under subchapter III of 42 U.S.C. Chapter 82. See, *e.g.*, Lutz v. Chromatex, 718 F.Supp. 413, 30 ERC 1912, 1914 (M.D.Pa. 1989). Pennsylvania received authorization to operate its hazardous waste program in lieu of the federal program effective January 30, 1986, see 51 Fed. Reg. 1791, and the Pennsylvania regulations for generators of hazardous waste were

promulgated pursuant to subchapter III of 42 U.S.C. Chapter 82.[3] Therefore, under RCRA, the Federal regulations for generators of hazardous waste have been superseded.

B. Alleged violations of the Pennsylvania regulations for generators of hazardous waste.

In Claims 2-7 of their notice of appeal, the Appellants aver that the Department abused its discretion or acted contrary to law because the permit modification failed to comply with certain requirements under the Pennsylvania regulations for generators of hazardous waste. Specifically, the Appellants assert that the Department should have required that Empire provide certification that UCUA would:

> (1) obtain an EPA identification number before it offered hazardous waste for transport, as required by 25 Pa. Code §262.12;
>
> (2) ascertain that those transporting or disposing of its hazardous waste have EPA identification numbers, as required by 25 Pa. Code §262.12;
>
> (3) prepare manifests for each shipment of hazardous waste it offered for transportation, as required by 25 Pa. Code §§262.20 and 262.23;
>
> (4) comply with the packaging, labelling, and other pre-transport requirements for hazardous waste, as required by 25 Pa. Code §§262.30-262.34;
>
> (5) comport with the requirements pertaining to the short-term accumulation of hazardous waste by generators, contained in 25 Pa.

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[3]As noted earlier in this opinion, the Federal regulations for generators of hazardous waste were promulgated pursuant to §§1006, 2002, 3002, 3003, 3004, 3005, and 3016 of RCRA, 42 U.S.C. §§6906, 6912, 6922, 6923, 6924, 6925, and 6937. Although the first two sections--§§1006 and 2002--do not fall within subchapter III of 42 U.S.C. Chapter 82, neither deals specifically with the subject matter in the regulations: the standards for generators of hazardous waste. Instead, they refer to the general administration of EPA programs under RCRA. (Section 1006 pertains to financial disclosure requirements for EPA personnel. Section 2002 outlines the Administrator's general authority in carrying out his duties under 42 U.S.C. Chapter 82.) The other sections--§§3002, 3003, 3004, 3005, and 3016 of RCRA--provide the substantive framework for the standards elaborated at 40 C.F.R. pt. 262 and fall within subchapter III of 42 U.S.C. Chapter 262.

Code §§262.34; and,

(6) comply with the requirements pertaining to record-keeping and reporting by generators of hazardous waste, contained in 25 Pa. Code §§262.40-262.43.

The Appellants cannot prevail as a matter of law with respect to any of these claims. Even assuming UCUA will generate some hazardous waste and that the Department did not require Empire to submit certification from UCUA with respect to any of the issues listed above, the Department would not have abused its discretion or acted contrary to law by issuing the modification.

The Appellants argue that, before issuing the permit modification, the Department should have required that Empire provide certification that UCUA would comply with the Pennsylvania regulations for generators of hazardous waste. But the modification issued to Empire prohibits the landfill from accepting any waste which is either hazardous itself or mixed with hazardous waste.[4] The Appellants, therefore, are not arguing that the Department should have required certification that an out-of-state incinerator would comply with Pennsylvania regulations with respect to waste *destined for Empire*; they are arguing that the Department should have required certification from Empire for waste that is *not destined for the landfill.*

The Department did not abuse its discretion or act contrary to law in this regard. The certification the Appellants refer to is simply too attenuated from the subject matter of the modification for the Department to have erred by not requiring it. The Appellants never allege that the permittee, Empire, will generate hazardous waste; the facility the Appellants allege will generate hazardous waste, UCUA, is located in New Jersey, not the Commonwealth; and, the

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[4]Paragraph 8 of the modification provides: "The waste shall not contain or be mixed with any hazardous waste as defined in 25 Pa. Code 261...."

modification which is the subject matter of this appeal expressly states that Empire is not authorized to accept hazardous waste.

## IV. CLAIM 1

In Claim 1 of their notices of appeal, the Appellants aver that the permit modification issued to Empire is deficient in twenty specific respects. Among other things, the Appellants assert that the modification does not require adequate safeguards against the release of dust and ash; that it does not require an adequate testing protocol to determine whether ash received by Empire contains hazardous constituents; and, that it contains inadequate safeguards to prevent the disposal of hazardous waste. Although Empire contends that it is entitled to judgment as a matter of law with respect to all twenty objections, it only addressed two of those objections--those listed at paragraphs 24(o) and 24(p) of the notices of appeal--individually in its motion and memorandum. As for the other eighteen, Empire simply lumped them all into a group and asserted that the Appellants had failed to allege facts sufficient to establish that the Department acted unlawfully with regard to any of the objections.

Neither the Appellants nor the Department went through the objections under Claim 1 and explained why each one should withstand Empire's motion. Instead, they treated the objections collectively. The Appellants' answer and supporting memorandum asserted that the notice of appeal is the only pleading before the Board and, therefore, that the assertions in the notice of appeal are deemed admitted. The Department simply argued that the Appellants pled sufficient facts to establish that the Department violated RCRA and the Solid Waste Management Act.[5]

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[5]Here again, the Department's willingness to attack its own issuance of the modification is disconcerting. If the Department felt it acted contrary to RCRA and the Solid Waste Management Act by issuing the modification, why did it issue

A. **The objections under Claim 1 which Empire failed to individually address.**

Empire's motion is denied with respect to the eighteen objections Empire failed to individually address. We have noted above that a notice of appeal need not list all material facts upon which an appellant's objections are based and that all three parties here failed to discuss the objections individually. In addition, the notices of appeal did not identify the specific statutory or regulatory bases for the objections. Given the lack of resolution regarding the factual and legal foundation for these objections, judgment on the pleadings here would be premature. The Board will enter judgment on the pleadings only where proceeding to hearing would create a fruitless endeavor. Bensalem Township School District v. Commonwealth, 518 Pa. 581, 544 A.2d 1318 (1988), Commonwealth v. Riverview Leasing, Inc., ___ Pa. Cmwlth. ___, 648 A.2d 580 (1994). That is clearly not the case here.

B. **The objections under Claim 1 which Empire did individually address.**

Empire is more successful with regard to the two objections under Claim 1 which it addressed specifically.

The objection listed at paragraph 24(o) of the notices of appeal asserts that the modification is deficient because it was based on the Department's ash policy and that policy incorrectly interpreted 40 C.F.R. §261.4(b)(1) and 25 Pa. Code §261.4(a)(18).[6] Empire argues that whether the Department's ash

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the modification in the first place? If, on the other hand, the Department concluded that the modification was contrary to law only after the modification was issued, why did the Department not revoke it?

[6]The notices of appeal referred to "25 Pa. Code §261(4)(18)," but there is no provision in the Department's regulations with that citation. The citation in the regulations which is closest to the citation in the notice of appeal is §261.4(a)(18). We will treat Appellants' objection as though it referred to §261.4(a)(18), therefore, rather than §261(4)(18).

policy complied with 40 C.F.R. §261.4(b)(1) and 25 Pa. Code §261.4(a)(18) is irrelevant for purposes of this appeal because neither of those regulations are inconsistent with the terms of the modification. We agree.

Section 261.4(b)(1) of 40 C.F.R. pt. 261 provides that "household waste" is not hazardous waste and that, even if solid waste managed by a municipal waste resource recovery facility constitutes hazardous waste, the facility will not be deemed to be managing hazardous waste for purposes of Subtitle C of EPA's hazardous waste regulations so long as the facility meets certain criteria. The permit modification issued to Empire is not at loggerheads with either of these provisions. It is silent with respect to household waste, and it does not contradict the exemption in §261.4(b)(1) for municipal waste resource recovery facilities. To violate that exemption, the modification would have to either (a) deem a municipal waste resource recovery facility to be managing hazardous waste, although the facility meets the criteria for exemption listed in the regulation, or (b) deem a municipal waste resource recovery facility to be managing non-hazardous waste, despite the fact that the waste would ordinarily be considered hazardous and the facility does not fall within the criteria for exemption listed in §261.4(b)(1).[7] The modification here does neither. It is silent on the issue of whether the UCUA facility will be deemed to be managing

[7]Although neither the Appellants nor the Department responded to the specific argument Empire raised in its motion and memorandum, it is clear from the Appellants' answer and the Department's response that both Appellants and the Department are under the impression that, if a particular solid waste is not excluded from the definition of hazardous waste under §261.4(b)(1), that waste is necessarily hazardous. That interpretation of the EPA's regulations is incorrect. Even if not excluded from the definition of hazardous waste under §261.4(b), solid waste is not considered hazardous if it (1) exhibits none of the characteristics specified in Part 261, subpart C, and (2) does not contain waste listed in subpart D, or contains only waste excluded from subpart D or §261.3 in accordance with 40 C.F.R. §§260.20 and 260.22. See 40 C.F.R. Chap. 260, Appendix I, Figure 1.

hazardous waste.

Nor does the permit modification violate 25 Pa. Code §261.4(a)(18). That provision of the Department's regulations provides that certain pulping liquors are excluded from the definition of hazardous wastes. Since the permit modification says nothing with regard to pulping liquors--much less treats them as hazardous waste--the modification does not run afoul of §261.4(a)(18).

The objection listed at paragraph 24(p) of the notices of appeal asserts that the modification is deficient because it allows hazardous waste to be placed in the landfill and does not contain "adequate retrieval mechanisms" for that waste. Empire argues that the objection fails to state a cause of action because the modification expressly prohibits Empire from receiving hazardous waste. We agree. The Appellants' objection is clearly based on the premise that, under the modification, Empire can accept hazardous waste. The objection fails as a matter of law because that premise is incorrect. As noted earlier in this opinion, the modification expressly provides that Empire shall not accept hazardous waste.

## V. CLAIM 8

In Claim 8 of their notices of appeal, the Appellants aver that the Department violated Article I, §27, of the Pennsylvania Constitution by issuing the permit modification because: (1) the Department failed to comply with applicable regulations pertaining to public natural resources; (2) the permit modification does not demonstrate a reasonable effort to reduce environmental incursion to a minimum; and, (3) the environmental harm of the Department's action outweighs the benefit to be derived. Empire contends that it is entitled to judgment as a matter of law with respect to this issue because the Department complied with all relevant provisions of Pennsylvania law by issuing the

modification and the issues of whether there was a reasonable effort to reduce environmental incursions to a minimum and whether the environmental harm clearly outweighs the benefit to be derived are irrelevant for purposes of determining compliance with Article I, §27. The Appellants maintain that the Department failed to comply with the Solid Waste Management Act and RCRA and that the issues of whether there was a reasonable effort to reduce environmental incursions to a minimum and whether the environmental harm clearly outweighs the benefit to be derived are relevant for purposes of determining compliance with Article I, §27, by virtue of Payne v. Kassab, 11 Pa. Cmwlth. 14, 312 A.2d 86 (1973), aff'd, 468 Pa. 226, 361 A. 2d 263 (1976). The Department failed to respond to this aspect of Empire's motion.

Empire is correct with respect to the standard used to determine compliance with Article I, §27. The Commonwealth Court held in National Solid Wastes Management Association v. Casey and DER, 143 Pa.Cmwlth 577, 600 A.2d 260 (1991), aff'd, 583 Pa. 97, 619 A.2d 1063 (1993), that where the Department acts pursuant to the Solid Waste Management Act or other legislation which expressly states that one of its purposes is to implement Article I, §27, the Payne v. Kassab test is not the standard for determining compliance with Article I, §27.[8] In Concerned Residents of the Yough, Inc. v. Commonwealth, DER, 162 Pa.Cmwlth 669, 639 A.2d 1265 (1994) ("CRY"), the court explained that the Solid Waste Management Act and the regulations promulgated thereunder indicate an intent by the General Assembly "to regulate in plenary fashion every aspect of the disposal of solid waste, [and] consequently, the balancing of environmental

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[8]Section 102 of the Solid Waste Management Act, 35 P.S. §6018.102, provides:

> It is the purpose of this act to...(10) implement Art. I, Section 27 of the Pennsylvania constitution.

concerns mandated by Article I, Section 27 has been achieved through the legislative process." CRY, 639 A.2d at 1275. We need not determine, therefore, whether there was a reasonable effort to reduce environmental incursion to a minimum or whether the environmental harm will outweigh the benefits to be derived. So long as a solid waste permit modification complies with the Solid Waste Management Act and the regulations promulgated pursuant to it, the permit complies with Article I, §27.

Empire has not established, however, that it has complied with the Solid Waste Management Act and the regulations thereunder. As noted earlier in this opinion, none of the parties addressed the specific issues raised in eighteen of the individual objections raised under Claim 1 of the Appellants' notices of appeal, and the factual and legal bases underlying those objections are unclear at this stage of the proceedings. Those objections remain part of the appeal and it is likely that many of them involve alleged violations of the Solid Waste Management Act or the regulations thereunder. Given the lack of resolution regarding the factual and legal bases for the objections, judgment on the pleadings here would be premature for the same reasons set forth in our discussion above with respect to the objections under Claim 1.

**VI. CLAIM 9**

In Claim 9 of their notices of appeal, the Appellants reserve the right to add, so long as the Appellants show good cause, any additional objections which may arise as the result of discovery. Although Empire requested judgment as a matter of law with respect to all of the issues raised in the notices of appeal, neither Empire's motion nor the supporting memorandum addressed Claim 9. The moving party bears the burden of proving that it is entitled to the relief requested. Empire has failed to sustain that burden with respect to

Claim 9.

## VII. RELIEF REQUESTED

### A. Costs

In their notices of appeal, the Appellants assert that they are entitled to their costs of litigation pursuant to the §7002(e) of RCRA, 42 U.S.C. §6972(e) and pursuant to the Solid Waste Management Act. Empire argues that the Board should dismiss this aspect of the appeal because neither §7002(e) of RCRA nor the Solid Waste Management Act authorize the Board to award costs. The Appellants failed to respond to Empire's argument in their answer or memorandum in opposition. The Department also failed to address the issue in its response.

Section 7002(e) of RCRA does not authorize the Board to award costs. It provides that courts may award costs of litigation for two types of actions: those brought pursuant to §7002 of RCRA, and those brought pursuant to §7006 of RCRA, 42 U.S.C. §6976.[9] Jurisdiction for both types of actions lies only in the Federal courts. Section 7002 provides that actions brought pursuant to that section against persons other than the EPA Administrator must be brought in the Federal district court for the district in which the alleged violation occurred. 42 U.S.C. §6972(a). Section 7006, meanwhile, provides that actions brought pursuant to §7006 must be brought in one of the Federal Courts of Appeals. 42 U.S.C. §6976.

Nor does the Solid Waste Management Act authorize the Board to award costs. The Appellants failed to point to any authority in support of that proposition in their notices of appeal--or answer, or memorandum in opposition--

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[9]The exact language of §7002(e) is as follows: "The court, in issuing any final order in any action brought pursuant to this section or section 6976 of this title [section 7006 of RCRA], may award costs of litigation...to the prevailing party, whenever the court determines such an award is appropriate." 42 U.S.C. §6972(e).

and for good reason. There is none. The only provision in the Solid Waste Management Act pertaining to the award of costs relates to actions by the Department to recover abatement costs from persons who cause public nuisances. That provision is clearly inapposite here.

B. Request for injunctive relief.

In their notices of appeal, the Appellants request that the Board enjoin the Department and Empire from violating any provisions of the Solid Waste Management Act or RCRA. Empire contends that we do not have jurisdiction to grant that relief because the Board does not have equitable powers. In support of that position, Empire points to the Commonwealth Court's decision in Marinari v. DER, 129 Pa.Cmwlth 569, 566 A.2d 385. The Appellants argue that Marinari did not turn on the specific issue involved here--whether the Board can grant an injunction--and that the Board has the authority to grant injunctions under City of Reading v. Austin, 816 F.Supp. 351 (E.D., Pa. 1993). The Department failed to address the issue in its response.

The Board does not have the power to grant injunctions. The Appellants are correct when they argue that Marinari did not turn on the specific question of whether the Board has the power to grant injunctions. But it is clear from that decision that the Board does not have the power to grant injunctive relief. In Marinari, the Commonwealth Court held that the Board did not have jurisdiction to compel the Department to process a permit application for a landfill. In reaching its conclusion, the court reasoned that the Board did not have the authority to direct the Department to decide upon the landfill's permit because "[t]he EHB is not statutorily authorized to exercise judicial powers in equity." 129 Pa.Cmwlth ___, 566 A.2d at 387. While the Appellants contend the quoted language is mere dicta, they are mistaken. The court's analysis in

Marinari turned on the fact that the Board was being asked to grant *any* equitable relief--not on the specific type of equitable relief requested. Furthermore, even if Marinari were not controlling, the Board itself has held specifically that it does not have the power to grant injunctive relief. See, Conley v. DER, 1973 EHB 55.

As for the Appellants' assertion that the Board has the power to grant injunctive relief under City of Reading, the Appellants' reliance upon that case is misplaced. City of Reading held that the *Federal* Administrative Procedure Act, 5 U.S.C. §551 *et seq.*, authorizes injunctive relief to set aside agency action where the agency has abused its discretion or acted contrary to law. The Administrative Procedure Act applies only to Federal agencies, not to agencies of the Commonwealth. West Penn Power Co. v. Train, 522 F.2d 302 (3rd Cir. 1975), *cert. denied*, 426 U.S. 947, 96 S.Ct. 3165 (1977).

**C. Request for advisory opinion or declaratory judgment.**

In their notices of appeal, the Appellants assert that the modification was deficient because it will "allow or potentially allow" ash to escape into the air during transportation and disposal; it "will allow" ash to be stored in the landfill without sufficient analysis of how the ash will interact with the leachate, other waste, and liner at the landfill; and, "hazardous or potentially hazardous substances will be allowed" to be disposed of in the landfill. (Paragraphs 24(a), 24(k), and 24(s) of the notices of appeal, respectively.) In addition, the "relief requested" portion of the notices of appeal asks that the Board declare that the Department and Empire "have been and will continue to be" in violation of regulations promulgated under the Solid Waste Management Act and RCRA. Empire maintains that it is entitled to judgment as a matter of law with respect to these aspects of the notices of appeal

because they involve hypothetical or future events and the Board cannot issue an advisory opinion or grant declaratory relief.[10] The Appellants' position is discombobulated. They never respond to the claim that they are asking for an advisory opinion, but they deny that they seek declaratory relief. Then, after conceding in their memorandum in opposition that "the Board does not have power to issue declaratory relief due to its status as a quasi-judicial agency," the Appellants argue in the same paragraph that, even if they were requesting declaratory relief, the Board has the power to grant declaratory relief by virtue of the Declaratory Judgment Act and §35.19 of the General Rules of Administrative Practice and Procedure, 1 Pa. Code §35.19. (The Appellants' memorandum in opposition, p. 18.) The Department concedes that the Board does not have the authority to issue advisory opinions or declaratory relief, but insists that the Appellants are not asking for either here.

1. Declaratory Judgment

Of the provisions Empire argues should be dismissed, only one asks for relief: the provision requesting that the Board declare Empire and the Department have, and will continue to be, in violation of the Solid Waste Management Act and RCRA. The issue here, therefore, is whether that provision requests declaratory relief. If it does, Empire is entitled to judgment as a matter of law with respect to that provision: the Board does not have the power to grant declaratory relief under either the Declaratory Judgment Act or §35.19 of the General Rules of Administrative Practice and Procedure. Costanza v. DER, 146 Pa.Cmwlth. 588, 606 A.2d 645 (1992).

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[10]Empire raised similar objections to provisions in Claims 2-7 of the notices of appeal and to the objection at paragraph 24(p) of Claim 1. Since we have already decided to dismiss those aspects of the appeal, we will not address them here.

The request that the Board declare that Empire and the Department have been violating, and will continue to violate, the Solid Waste Management Act and RCRA constitutes a request for declaratory relief. A declaratory judgment "simply declares the rights of the parties or expresses the opinion of the court on a question of law, without ordering anything to be done." Black's Law Dictionary (rev'd. 4th ed.). The Appellants here request that the Board express its opinion on a question of law without ordering anything to be done.

2. Advisory Opinion

Empire is not entitled to judgment as a matter of law with respect to its assertion that the Appellants are requesting an advisory opinion. While the Board does not have the power to issue advisory opinions, see, *e.g.*, Boyle Land and Fuel Co. v. DER, 1982 EHB 326, the Appellants are not requesting an advisory opinion here.

An "advisory opinion" is "a formal opinion by a judge...or a court...upon a question of law presented by a legislative body or government official, but not actually presented in a concrete case at law." Black's Law Dictionary, (rev'd. 4th ed.). The question before us, however, is a concrete case at law. The Appellants are not simply asking the Board to determine whether some future conduct of Empire would be contrary to law; they are asking the Board to determine whether the Department erred by issuing the permit modification to Empire. The fact that the Board is being asked to consider what the present terms of the modification would allow Empire to do in the future does not make the issue before us a hypothetical question.

D. **Request for civil penalties.**

In their notices of appeal, the Appellants request that the Board impose civil penalties upon Empire. Empire contends that the Board does not have the

authority to grant that request. The Appellants maintain that the Board is authorized to impose civil penalties by virtue of 25 Pa. Code §21.65 and points to the Commonwealth Court's decision in Lucky Strike Coal Co. and Louis J. Beltrami v. Department of Environmental Resources, 119 Pa. Cmwlth. 440, 546 A. 2d 447 (1988) (Lucky Strike), in support of that proposition. The Department failed to address the issue in its response.

The Board does not have the authority to assess civil penalties here. It is a cardinal principle of administrative law that administrative agencies have only those powers expressly conferred, or necessarily implied, by statute. See, e.g., Department of Environmental Resources v. Butler County Mushroom Farm, 499 Pa. 509, 454 A.2d 1 (1982), and Costanza v. Department of Environmental Resources, 146 Pa. Cmwlth 588, 606 A.2d 645 (1992). Section 605 of the Solid Waste Management Act, 35 P.S. §6018.605, provides that "*the department* may assess a civil penalty" (emphasis added) for violations under the act, but nowhere in the act is the Board authorized to assess a civil penalty if the Department has not. We know of no other statute which confers that authority on the Board, nor do the Appellants point to any. Instead, they point to §21.65 of the Board's rules and to Lucky Strike.

Section 21.65 of the Board's rules does not authorize the Board to assess civil penalties in response to a request by a third-party appellant. The provision simply states, in pertinent part, that "[c]omplaints for civil penalties shall conform to the requirements of §§21.56 and 21.57 of this title." Section 21.56 of the Board's rules provides, "Complaints for civil penalties may be filed by the Department where authorized by statute." 25 Pa. Code §21.56 The phrases "by the Department" and "where authorized by statute" in §21.56--both conveniently overlooked in the Appellants' memorandum--are key. The phrase

"where authorized by statute" conclusively shows that §21.65 confers no independent authority upon the Board to assess civil penalties. The phrase "by the Department," meanwhile, shows that, even assuming §21.65 did independently authorize the Board to assess civil penalties, it would only authorize the Board to consider requests for civil penalties filed by the Department, not those filed by third-party appellants, as here.

The Appellants' reliance upon Lucky Strike is also misplaced. In Lucky Strike, the Commonwealth Court upheld a civil penalty assessed by the Board under 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) against a colliery. The court never even addressed the question of whether the Board had the authority to assess the penalty. The court did not have to; none of the parties raised the issue in the appeal. Had the Appellants examined our decision in DER v. Lucky Strike Coal Co. and Louis J. Beltrami, 1987 EHB 234--the Board decision the Commonwealth Court upheld in Lucky Strike--they would have discovered that the Board assessed the penalty against the colliery pursuant to Section 605 of the Clean Streams Law, 35 P.S. §691.605, as that section existed prior to the 1980 amendments. 1987 EHB 244. Prior to the 1980 amendments, §605 expressly provided that the Board--not the Department--had the authority to assess penalties for all violations of the Clean Streams Law.[11] Id. There is no analogous provision in the Solid Waste Management Act.

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[11]Section 605 was amended, effective October 10, 1980, by Act 157 of 1980, to provide that in cases related to mining the Department assesses civil penalties, rather than the Board. 1987 EHB 244

## O R D E R

AND NOW, this 25th day of January, 1995, it is ordered that:

1. Empire's motion to dismiss, or in the alternative, for judgment on the pleadings, is granted with respect to the following portions of the Appellants' notices of appeal:

   a. Claims 2-7;

   b. the objections at paragraphs 24(o) and 24(p) under Claim 1; and,

   c. the requests for costs, injunctive relief, civil penalties, and a statement from the Board declaring that the Department and Empire "have been and will continue to be" in violation of regulations under RCRA and the Solid Waste Management Act.

2. Empire's motion is denied with respect to all other issues.

3. Empire and the Department shall file their pre-hearing memoranda on or before February 17, 1995.

4. This matter is reassigned to the Honorable Richard S. Ehmann.

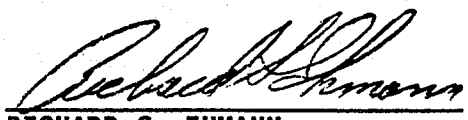
**ENVIRONMENTAL HEARING BOARD**

Maxine Woelfling

**MAXINE WOELFLING**
**Administrative Law Judge**
**Chairman**

Robert D. Myers

**ROBERT D. MYERS**
**Administrative Law Judge**
**Member**



**RICHARD S. EHMANN**
**Administrative Law Judge**
**Member**

**DATED:** January 25, 1995.

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| | | |
|---|---|---|
| LOWER PAXTON TOWNSHIP AUTHORITY, APPELLANT: AND PAXTOWNE LIMITED PARTNERSHIP, et al. INTERVENORS | : | |
| v. | : | EHB Docket No. 94-167-MR |
| COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES APPELLEE, AND SWATARA TOWNSHIP AUTHORITY, INTERVENOR | : | Issued: January 26, 1995 |

**OPINION AND ORDER SUR DEVELOPER-INTERVENORS' MOTION FOR LEAVE TO JOIN LOWER PAXTON TOWNSHIP**

By Robert D. Myers, Member

Synopsis:

In an appeal by a sewer authority from DER's conditional approval of a plan and schedule to relieve overloaded facilities, in which developers affected by a moratorium on connections have intervened on the side of the sewer authority, the developers' request to join the township as an involuntary appellant under Pa. R.C.P. 2227 is denied. The Environmental Hearing Board Act and the Board's procedural rules do not provide for joinder and, even if they did, the township's interest is not such a joint interest with the authority that it qualifies as a necessary and indispensable party.

## OPINION

Lower Paxton Township Authority (LPTA) filed a Notice of Appeal on June 30, 1994 challenging the conditions of a May 31, 1994 letter of the Department of Environmental Resources (DER) approving LPTA's Plan and Schedule to Reduce Hydraulic Overloading of the Beaver Creek Interceptor. The Plan and Schedule, dated April 18, 1994 with supplements dated May 15 and May 24, 1994,

were submitted in response to DER's letter of April 8, 1994 stating that the hydraulic carrying capacity of the Beaver Creek Interceptor was being exceeded and that LPTA should take action pursuant to 25 Pa. Code §94.21. That action included a prohibition on new connections to the Interceptor and the submission of a plan and schedule for correcting the condition.

On July 1, 1994 Paxtowne Limited Partnership, Locust Lane Limited Partnership, Fine Line Homes, Inc., Kings Crossing, Inc. and Stratford Homes, Inc. (Developers) petitioned to intervene as parties Appellant, alleging substantial economic harm and denial of constitutional rights by DER's action. On July 27, 1994 Swatara Township Authority (STA) petitioned to intervene as a party Appellee, alleging that LPTA's exceedances were causing violations of an Intermunicipal Agreement and of STA's NPDES permit for a sewage treatment plant handling flows from the Borough of Hummelstown and from portions of Swatara Township and portions of Lower Paxton Township. Both the Developers and STA were permitted to intervene by a Board Order issued August 30, 1994.

On October 28, 1994 the Developers filed a combined Motion for Leave to Join Lower Paxton Township and Motion for Supersedeas. The Supersedeas Motion was disposed of in an Opinion and Order issued December 1, 1994. The Joinder Motion is the subject of this Opinion and Order. STA filed its Response to the Motion on November 3, 1994; DER filed on November 15, 1944.

The Developers contend that Lower Paxton Township (Township) is a necessary party which needs to be joined as an Appellant under Pa. R.C.P. 2227. Since the Township has not voluntarily joined the appeal, the Developers request permission to join the Township involuntarily. The Developers recognize that recent Board precedent holds that joinder of parties is not within the scope of the Board's jurisdiction; they maintain, however, that these decisions did not

properly interpret the Environmental hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7511 *et seq.*

The Board's prior decisions on joinder arose, in part, in appeals from DER enforcement actions in which the appellant, the target of the action, sought to join another party under Pa. R.C.P. 2251 *et seq.* dealing with the joinder of additional defendants. The notion of fastening this original jurisdiction device onto the quasi-appellate proceedings before the Board was considered too anomalous in *Berwind Natural Resources v. DER*, 1985 EHB 356; *North Cambria Fuels v. DER*, 1986 EHB 777; *Al Hamilton Contracting Company v. DER*, 1989 EHB 383; and *McKees Rocks Forging, Inc. v. DER*, 1991 EHB 405.

Another line of cases involved DER complaints for civil penalties against a named defendant under the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* The named defendant then sought to join an additional defendant under Pa. R.C.P. 2251 *et seq.* Joinder was allowed in *DER v. Consolidated Rail Corporation*, 1980 EHB 415, but disallowed in *DER v. Doylestown Federal Savings and Loan*, EHB Docket No. 93-376-CP-W (Opinion and Order issued May 6, 1994) on the ground that the reasoning of the earlier decision had since been rejected. The split of authority may stem from the fact that proceedings for the assessment of civil penalties are solely original jurisdiction in nature with none of the attributes of appellate practice.

A third line of cases arose out of the joinder provisions at Pa. R.C.P. 2226 to 2250 dealing with compulsory joinder and permissive joinder. In *Ferri Contracting Company, Inc. v. DER*, 1985 EHB 339, a contractor on a sewer project eligible for Federal grants appealed from DER's denial of additional funding sought by the sewer authority by reason of change orders. When the contractor's standing was challenged, it argued that the sewer authority should

be joined as an involuntary plaintiff under Pa. R.C.P. 2227(b). The Board rejected the argument and dismissed the appeal. Commonwealth Court affirmed, 96 Pa. Cmwlth. 30, 506 A.2d 981 (1986), stating as follows at 506 A.2d 984:

> As for petitioner's second argument, its reliance on Pa. R.C.P. Nos. 2227 and 2229 is completely misplaced. A proceeding before the Board is governed by the Administrative Law and Procedure Act, 2 Pa. C.S. §§101-754, and by the DER regulations governing practice before the Board. Board proceedings are not normally governed by the Rules of Civil Procedure. The regulation cited by petitioner, 25 Pa. Code §21.64, refers only to pleadings before the Board as being governed by the Pa. R.C.P. Nos. 2227 and 2229 are not incorporated into Board practice by 25 Pa. Code §21.64, in the Board's own view. *See Berwind Natural Resources v. Department of Environmental Resources*, EHB Docket No. 84-130-G (January 16, 1985). The interpretation by an agency of its own regulations is controlling unless such interpretation is clearly erroneous or inconsistent with the regulation or the regulation itself is inconsistent with the underlying legislative scheme. *Diehl v. Commonwealth of Pennsylvania*, 88 Pa. Commonwealth Ct. 404, 489 A.2d 988 (1985); *Michael Manor, Inc. v. Commonwealth of Pennsylvania*, 88 Pa. Commonwealth Ct. 583, 490 A.2d 957 (1985). We perceive no clear error or inconsistency with the regulation or the underlying legislative scheme in EHB's holding itself to lack power of compulsory joinder under 25 Pa. Code §21.64.
>
> (footnotes omitted)

Without citing the *Ferri* case, the Board applied its principal in *New Hanover Township et al. v. DER et al.*, 1988 EHB 812, a third party appeal from DER's issuance of a permit, by disallowing the appellant from joining additional appellees under Pa. R.C.P. 2229(b). *Parker Township Board of Supervisors v. DER*, 1991 EHB 1724, produced the same result in an appeal from a DER enforcement action. Finally, in *Empire Sanitary Landfill, Inc. v. DER et al.*, Board Docket No. 94-114-W (consolidated), (Opinion and Order issued September 30, 1994), the Board refused the request of an intervening appellee in an appeal from a DER

enforcement action to join involuntarily as an additional appellant an entity claimed to be a necessary and indispensable party.

All of the decisions subsequent to *Consolidated Rail Corporation* in 1980 have disallowed joinder for the reasons articulated by Commonwealth Court in *Ferri Contracting*, supra. Board proceedings are not normally governed by the Rules of Civil Procedure; they are controlled currently by the Administrative Law and Procedure Act, Act of April 28, 1978, P.L. 202, as amended, 2 Pa. C.S.A. §101 *et seq.*; The Environmental Hearing Board Act, Act of July 10, 1988, P.L. 530, 35 P.S. §7511 *et seq.*; The Board's Rules of Practice and Procedures at 25 Pa. Code Chapter 21; and the General Rules of Administrative Practice and Procedure at 1 Pa. Code part II (except to the extent they are inconsistent with the Board's own Rules). While these statutes and regulations allow interested parties to join voluntarily as appellants or intervenors, they make no provision for bringing in a person or entity that does not voluntarily choose to do so.

The present case resembles most closely the third line of cases discussed above, especially the *Empire Sanitary Landfill* case. The Developers argue, however, that this line of cases fails to consider the changes made by the Environmental Hearing Board Act, *supra*. That statute made the Board an independent quasi-judicial agency with the power to adopt its own rules of procedure. As such, the argument goes, the Board is now similar to the Board of Claims which permits joinder. The case cited by the Developers in support of this argument - *Stevenson v. Commonwealth, Dept. of Revenue and Board of Arbitration of Claims*, 489 Pa. 1, 413 A.2d 667 (1980) - actually deals with class action suits. Nonetheless, the Board of Claims has been held to have the power of involuntary joinder, *Commonwealth, General State Authority v. J.C. Orr and Son, Inc.*, 17 Pa. Cmwlth. 433, 332 A.2d 832 (1975), by reason of provisions in

its enabling act authorizing the impleading of other parties whenever necessary for a complete determination of a claim or counterclaim and by reason of a provision in the Board of Claims' rules of procedure stating that proceedings shall be, as nearly as possible, in accordance with the Pennsylvania Rules of Civil Procedure relating to the action of assumpsit.

The two provisions relied on by Commonwealth Court in the *General State Authority* case, *supra*, are not present in the Board's enabling act (The Environmental Hearing Board Act) or its rules of procedure. Nor have the Developers pointed us to any other provisions that would reach the same result. Involuntary joinder, therefore, is not allowed in proceedings before the Board.

There are times when the inability to join another person or entity may work hardship upon a party. See, for example, *North Cambria Fuel v. DER*, 1986 EHB 777 at 784, but we fail to see hardship here. The Developers, intervening on the side of the Appellant LPTA, wish to compel Lower Paxton Township to join as another party Appellant, maintaining that the Township has a joint interest with LPTA in the subject matter of the appeal and must be a participant in the appeal in order that the Board may afford effective relief. The Developers do not expand upon their claim that the Township has a joint interest in the appeal. We have not been presented with any evidence that the Township rather than LPTA owns the Beaver Creek Interceptor or any of the sewage collection lines connecting to it. There likewise is an absence of evidence showing that the Township rather than LPTA is the permittee with respect to any of these facilities.

DER's April 8, 1994 letter declaring that the Beaver Creek Interceptor is hydraulically overloaded is addressed to LPTA. The Plan and Schedule to reduce the hydraulic overloading of the Interceptor was submitted by

LPTA. DER's May 31, 1994 letter approving the Plan and Schedule with conditions (the letter from which the appeal was filed by LPTA) was addressed to LPTA. While the Township was copied on this correspondence, so were other municipalities, authorities and government officials. Nothing here indicates that Lower Paxton Township has a joint interest with LPTA in the sewage facilities or permits.

It is true that DER's letters impacted the Township as well as LPTA. The provisions of 25 Pa. Code §94.21, which were triggered by DER's April 8, 1994 letter, required LPTA and the Township to prohibit new connections to the overloaded facilities, begin work on a plan to eliminate the overload and submit a plan within 90 days. These requirements were met - apparently by actions of LPTA rather than the Township. But the Township, at least, had to cooperate by not issuing any building permits that would impact the overloaded facilities. Apparently, the Township carried out this responsibility.

There is no doubt that Lower Paxton Township has an interest in the subject matter of this appeal. Overloaded sewage facilities pose a threat to the health of Township residents and, until relieved, disrupt the Township's orderly growth and development. Clearly, then, the Township could have intervened in this appeal as a party Appellant. The fact that it has a sufficient interest to join the appeal voluntarily, however, falls far short of proving that it has a joint interest with LPTA requiring both entities to maintain the appeal.[1] Lower Paxton Township apparently is satisfied that its interests will be adequately represented by LPTA and sees no need to complicate matters by intervening.

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[1]Where two or more persons or entities have a true joint interest, all of them must be parties to the appeal. If less than all are parties, they may lack standing unless their authority to proceed is established.

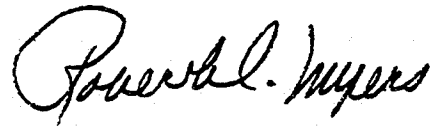
By filing the appeal in the first instance and by undertaking an ambitious program designed to relieve the overloaded facilities, LPTA has demonstrated its solidarity with the Developers. There is nothing to indicate that the Township, which apparently is in agreement with LPTA, opposes the Developers and might frustrate the issuance of additional building permits if the Board ultimately rules in favor of the Appellants.

Compulsory joinder under Pa. R.C.P. 2227 is not permitted in proceedings before the Board. Even if it were allowed, Lower Paxton Township is not an entity having such a joint interest in the subject matter of the appeal that it qualifies as a necessary or indispensable party. Finally, we see no prejudice to the Developers in denying joinder.

**O R D E R**

AND NOW, this 26th day of January, 1995, it is ordered that Developer-Intervenors' Motion for Leave to Join Lower Paxton Township is denied.

**ENVIRONMENTAL HEARING BOARD**



**ROBERT D. MYERS**
**Administrative Law Judge**
**Member**

**DATED:** January 26, 1995

**cc: See next page for service list**

**EHB Docket No. 94-167-MR**

cc: **DER Bureau of Litigation:**
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| | | |
|---|---|---|
| BRIAN SHOFF, ALAN MILLER AND RUSMAR, INC. | : | |
| v. | : | EHB Docket No. 94-130-W |
| COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and SOUTHERN ALLEGHENIES DISPOSAL SERVICE, INC., Permittee | : | Issued: January 31, 1995. |

## OPINION AND ORDER SUR MOTION TO DISMISS

By Maxine Woelfling, Chairman

Synopsis

A motion to dismiss for lack of standing is granted. Where standing is not conferred by statute, a private party has standing to maintain an appeal only so long as it has a direct, immediate, and substantial interest in the appeal. Volunteer firemen do not have standing to challenge the issuance of a solid waste permit modification authorizing the use of a geomembrane as alternative daily cover where they have not alleged a substantial probability that the approval of the geomembrane will lead to a fire. A manufacturer of a competing alternative daily cover does not have standing to challenge the issuance of the modification because the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (Solid Waste Management Act) is not meant to protect one daily cover manufacturer from another. The manufacturer's alleged interest in the uniform and consistent application of the Department's regulations is not a "substantial" interest for standing purposes because it does not surpass the common interest of all citizens in seeking compliance with the law.

## OPINION

This matter was initiated with the June 6, 1994, filing of a notice of appeal by Brian Shoff (Shoff), Alan Miller (Miller), and Rusmar, Inc. (Rusmar) challenging the Department of Environmental Resources' (Department) April 15, 1994, issuance of a modification to a solid waste permit held by Southern Alleghenies Disposal Service, Inc. (Southern Alleghenies Disposal). The modification authorizes Southern Alleghenies Disposal to utilize a geomembrane as alternate daily cover at a landfill owned by Southern Alleghenies Disposal in Conemaugh Township, Somerset County. The notice of appeal asserts that, by issuing the modification, the Department abused its discretion and acted contrary to law because Southern Alleghenies Disposal did not affirmatively demonstrate that the geomembrane would comply with the performance standard for combustibility contained in the Department's municipal waste landfill regulations. The two individual Appellants, Shoff and Miller, are volunteer firemen who belong to fire companies in the Conemaugh Township area. (Notice of appeal, paragraphs 12 and 14.) Rusmar is a Pennsylvania corporation which manufacturers a foam which the Department has previously approved for use as an alternative daily cover at municipal waste landfills. (Notice of appeal, paragraph 17.)

On September 1, 1994, the Department filed a motion to dismiss together with a supporting memorandum. The Department argued that none of the Appellants had standing to challenge the issuance of the permit modification to Southern Alleghenies Disposal.[1] The Appellants filed a response to the Department's

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[1]The Appellants, Department and Southern Alleghenies Disposal had filed cross motions for summary judgment prior to the Department's filing of the motion to dismiss. The Board has not issued an opinion and order with respect to those motions. After reviewing the motion to dismiss and the cross-motions for summary judgment, it became apparent that the Department's motion should be granted and

motion together with a memorandum in opposition on September 26, 1994. They argued that Shoff, Miller and Rusmar all had standing because each had a substantial, direct, and immediate interest in the outcome of the appeal. Southern Alleghenies Disposal did not respond to the Department's motion.

Where standing is not conferred by statute, a private party has standing to maintain an appeal only if he has a direct, immediate, and substantial interest in the appeal. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). To have a "substantial" interest, the party must have an interest surpassing the common interest of all citizens in seeking compliance with the law. Empire Coal Mining & Development, Inc. v. Commonwealth, Department of Environmental Resources, 154 Pa.Cmwlth 296, 623 A.2d 897 (1993), *appeal denied*, 629 A.2d 1384 (1993). To have a "direct" interest, the party must have been harmed by the challenged action or order. *Id.* And to have an "immediate" interest, a causal connection must exist between the action or order complained of and the injury suffered by the party asserting standing. *Id.*

The Department's motion will be granted because each of the Appellants has failed to meet the test for standing articulated in William Penn.

**Shoff and Miller**

In support of the proposition that Shoff and Miller do not have a direct, substantial, and immediate interest in the permit modification, the Department points to Interrogatory No. 12 of the Department's first set of interrogatories. That interrogatory asked the Appellants to, "[f]or each APPELLANT named in this appeal, state in detail every way that individual or company has been or will

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that, therefore, resolving the cross-motions for summary judgment was unnecessary.

be aggrieved and/or adversely affected by the Department's action." (Department's motion, paragraph 17; Appellants' response, paragraph 17.) With respect to Shoff and Miller, the Appellants responded as follows:

> Brian Shoff: "Brian Shoff is a member of the Ideal Fire Department and in the event of a fire at the [Southern Alleghenies Disposal] landfill, would be called as additional help, or mutual aide [sic] to the Community Volunteer Fire Department." (Motion and response, at paragraph 17.)
>
> Alan Miller: "Alan Miller is the fire chief of the Community Volunteer Fire Department. In the event of a fire at the [Southern Alleghenies Disposal] landfill, the Community Volunteer Fire Department would be the first fire department called upon to respond. Mr. Miller, like any fire fighter, is at risk of personal harm when called to respond to a fire." (Motion and response, at paragraph 17.)

The interests asserted by Shoff and Miller here are virtually identical to those asserted by an appellant in Fred McCutcheon and Rusmar, Inc.v. DER and Joseph J. Brunner, Inc., EHB Docket No. 94-096-W (Opinion issued January 5, 1995). There, McCutcheon, a volunteer fireman, appealed the issuance of a solid waste permit modification authorizing the use of a geomembrane as an alternative daily cover for a municipal waste landfill. We granted a motion to dismiss filed by the landfill and the Department because we concluded McCutcheon did not have standing to appeal the modification. McCutcheon had asserted that he had standing because he was a volunteer firefighter and had a long-term interest in fire prevention. We held that, even if McCutcheon would likely be called to extinguish fires at the landfill, he did not have a "direct" and "immediate" interest in the Department's action for purposes of standing:

> Even if McCutcheon's avocation as a volunteer firefighter is regarded as conferring upon him an interest in fire prevention surpassing that of every citizen--and, therefore, a substantial interest--it cannot be concluded that such an interest is also direct and immediate.
>
> In order for an interest to be "direct," the aggrieved party must show causation of the harm to his interest by the matter about which he complains. Ferri Contracting Co., Inc. v. DER, 1985 EHB 339; William Penn, *supra*. The prospective litigant should demonstrate that there is a "substantial probability" that the

> result he seeks would materialize. Ferri Contracting Co., Inc., *supra*; Warth v. Seldin, 422 U.S. 490, 504 (1975). McCutcheon, as the Department points out in its memorandum of law in support of its motion, lives eight miles from the landfill and there is only a likelihood that he would be called on to extinguish any fire at the landfill. Moreover, McCutcheon has not alleged a substantial probability that the Department's approval of the geomembrane tarpaulin will lead to a fire at the landfill, much less to a fire that McCutcheon will respond to as a volunteer firefighter. (McCutcheon, at pp. 3-4.)

The same rationale applies to Shoff and Miller here. Although Shoff and Miller are the chiefs of their respective fire companies, rather than simple members, that distinction is immaterial for purposes of the standing analysis. Neither Shoff nor Miller has alleged a substantial probability that the geomembrane would combust under the conditions of use at the landfill or that, if the goemembrane did combust, the resulting fire would require the assistance of their fire companies to extinguish.

**Rusmar**

In support of the proposition that Rusmar does not have standing, the Department points to language in the notice of appeal which avers, "Rusmar has a substantial, direct, and immediate interest in this matter because Rusmar...will be financially injured by the Department's arbitrary and capricious approval of a competing material which does not meet the regulatory performance standard that daily cover material shall be noncombustible. Rusmar has a direct interest in the uniform and consistent application of the Department's regulations." (Department's motion, paragraph 6.) The Appellants argue in their response that, under the Board's Rules of Practice and Procedure, an appellant need not assert facts sufficient to establish standing in the notice of appeal. (Appellants' response, paragraph 6).

The Appellants are correct when they assert that they need not have alleged facts in the notice of appeal sufficient to establish that they have

standing. See, *e.g.*, S.T.O.P., Inc. v. DER and Envirotrol, 1992 EHB 207. But that does not thwart the Department's motion to dismiss with respect to Rusmar. The Appellants may not have *had* to assert in the notice of appeal how their interests were adversely affected, but they did.[2] The Board need not ignore the averments regarding the harm to the Appellants' interests simply because the Appellants were not required to include those averments in the notice of appeal.

The Department is entitled to judgment as a matter of law with respect to Rusmar because Rusmar does not have a direct, substantial, and immediate interest in the appeal. McCutcheon, *supra*, is instructive here as well. McCutcheon, the volunteer fireman, was not the only appellant in that appeal. Rusmar joined with him in challenging the modification authorizing the use of a geomembrane as alternative daily cover, and we granted the motion to dismiss for lack of standing with respect to Rusmar as well as McCutcheon. In McCutcheon, Rusmar argued that it had standing because it would be financially harmed by the Department's approval of a competing alternative daily cover and that it has already suffered economic injury by expending time and expense in developing an alternative daily cover which complied with the Department's regulations. We held that Rusmar did not have standing because it was evident from the purposes of the Solid Waste Management Act, enumerated in §102, 35 P.S.

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[2]The Appellants averred the same harm to Rusmar's interest in response to Interrogatory No. 12, included as part of Exhibit A, in support of the Department's motion. There, in response to a request to state how each appellant "has been or will be aggrieved and/or adversely affected by the Department's action" the Appellants averred: "Rusmar Incorporated has been aggrieved and/or adversely affected by the Department's approval of a competitor's alternative daily cover which fails to meet the Department's mandatory performance standard that daily cover shall be non-combustible. Furthermore, Rusmar has an interest in the uniform and consistent application of the Department's regulations." (Exhibit A of the Department's motion to dismiss.)

The Department inexplicably neglected to refer to this language in the interrogatory in support of the proposition that Rusmar did not have standing.

6018.102, that the act was not meant to protect "one private enterprise's interest over that of another." McCutcheon, at p. 4.

Rusmar raises the same standing argument here that it did in McCutcheon and, in addition, argues that it has an interest in the uniform and consistent application of the Department's regulations. Neither of these arguments is persuasive. As we noted in McCutcheon, the Solid Waste Management Act was not meant to protect one manufacturer of alternative daily cover from another. As for Rusmar's alleged interest in the uniform and consistent application of the Department's regulations, that is not a "substantial" interest for standing purposes because it does not surpass the common interest of all citizens in seeking compliance with the law.

## O R D E R

AND NOW, this 31st day of January, 1995, it is ordered that the Department's motion to dismiss is granted and the appeal of Shoff, Miller, and Rusmar is dismissed.

**ENVIRONMENTAL HEARING BOARD**

Maxine Woelfling

**MAXINE WOELFLING**
**Administrative Law Judge**
**Chairman**

Robert D. Myers

**ROBERT D. MYERS**
**Administrative Law Judge**
**Member**

Richard S. Ehmann

**RICHARD S. EHMANN**
**Administrative Law Judge**
**Member**

**DATED:** January 31, 1995.

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| | | |
|---|---|---|
| **BETH ENERGY MINING COMPANY, *et al.*** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 87-131-MR, *et al.*** |
| | : | **(consolidated docket)** |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | |
| **DEPARTMENT OF ENVIRONMENTAL RESOURCES** | : | **Issued: February 6, 1995** |

**OPINION AND ORDER SUR**
**MOTION FOR PARTIAL SUMMARY JUDGMENT**

By: Robert D. Myers, Member

Synopsis

A motion for partial summary judgment is granted. For purposes of §4(b) of the Surface Mining Conservation and Reclamation Act, the Act of November 30, 1971, P.L. 554, as amended, 52 P.S. §1396.4(b) (SMCRA), and §5(g) of the Bituminous Mine Subsidence and Land Conservation Act, the Act of April 27, 1966, P.L. 31, as amended, 52 P.S. §1406.5(g) (BMSLCA) (hereafter collectively referred to as §§4(b) and 5(g)), a party does not incur attorney's fees and costs if it has no obligation to pay those expenses.

**OPINION**

The appellants in this matter are 14 underground bituminous coal mine operators, who, between May 24, 1985, and July 6, 1989, filed 52 appeals challenging, among other things, the validity of various "standard conditions" contained in their Coal Mining Activity Permits (CMAPs).[1] These 52 CMAP appeals were eventually consolidated so the Board could resolve common legal

[1]In addition to these 52 appeals, ten appeals were filed from coal refuse disposal permits and three appeals were filed from permits for coal preparation facilities. These permits also contained the standard conditions found in the CMAPs. *See*, Rushton Mining Co. v. DER, 1990 EHB 50, 51 (note 2).

issues, such as the validity of the standard conditions. In an opinion and order dated January 22, 1990, the Board held that the standard conditions were, in essence, unpromulgated regulations and, therefore, invalid. Rushton Mining Co. v. DER, 1990 EHB 50. Commonwealth Court affirmed the Board's order. Dept. of Env. Resources v. Rushton Mining Co., *et al.*, 139 Pa.Cmwlth. 648, 591 A.2d 1168, *petition for allowance of appeal denied*, ___ Pa. ___, 600 A.2d 541 (1991). On June 4, 1993, following a period of inactivity, the Board granted appellants' motion to unconsolidate and dismiss these appeals as moot.[2]

Appellants filed a petition on July 6, 1993, pursuant to §§4(b) and 5(g),[3] for reimbursement of the costs and attorneys' fees expended to successfully prosecute the CMAP appeals.[4] Appellants seek to recover not only the costs and attorneys' fees paid by themselves but also the costs and fees paid by the Pennsylvania Coal Association (PCA), the principal trade association of the underground bituminous coal mine industry.

In its July 27, 1993, response, the Department opposed appellants'

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[2]Of the 52 appeals, 42 were initially dismissed as moot. An additional five appeals have since been dismissed as moot and consolidated at docket number 87-131-MR.

[3]Section 4(b) states, in relevant part:

> The Environmental Hearing Board, upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such party in proceedings pursuant to this section.

52 P.S. §1396.4(b). The fee-shifting provision of §5(g) contains exactly the same language. *See*, 52 P.S. §1406.5(g).

[4]In their January 5, 1994, response to the Board's December 17, 1993, order, appellants indicated that they are also seeking the costs and attorneys' fees expended in pursuing the ten appeals from coal refuse disposal permits and the three appeals from coal preparation plant permits. *See*, note 1, *supra*. These 13 appeals were unconsolidated and dismissed as moot on December 9, 1993.

petition for several reasons: appellants did not pay all of the fees and costs for the CMAP litigation; appellants did not succeed on the merits of the underlying appeals; appellants did not gain any benefit from having the permit conditions invalidated; appellants did not secure a final order in the underlying appeals; and only a portion of the claimed fees and costs were expended in challenging the standard conditions. Appellants filed a reply to the Department's response on August 13, 1993.

Currently before the Board for disposition is the Department's June 27, 1994, motion for partial summary judgment, which requests that the Board deny appellants' fee petition to the extent it seeks reimbursement of the costs and fees paid by PCA. The Department contends it is entitled to partial summary judgment because appellants did not "incur," for purposes of §§4(b) and 5(g), the attorneys' fees and costs associated with the CMAP litigation. Relying on federal case law interpreting a similar provision in the Equal Access to Justice Act, 28 U.S.C. §2412(d)(1)(A) (EAJA), the Department argues a party does not incur attorneys' fees and costs if it does not pay them or have an obligation to pay them. The Department contends appellants did not incur the attorneys' fees and costs associated with the CMAP litigation because PCA, and not appellants, paid them and had the obligation to pay them. Since §§4(b) and 5(g) only authorize the Board to order the payment of costs and fees that a party incurred, the Department argues appellants may not receive an award of the legal expenses paid by PCA.

In their July 19, 1994, response, appellants correctly note that this is a case of first impression under both SMCRA and BMSLCA. Appellants contend the Department's argument overlooks the plain meaning of the term "incurred," which is "to become liable for or subject to," not "paid." *See*,

Webster's Ninth New Collegiate Dictionary. Accordingly, the relevant inquiry in this matter, according to appellants, is not whether the costs and fees for which appellants seek reimbursement were paid by appellants, but rather whether they were reasonably incurred by appellants. The Department filed a reply to appellants' response on August 1, 1994.

The Board is authorized to enter a summary judgment if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Pa.R.C.P. 1035(b); Robert L. Snyder, *et al.* v. Dept. of Environmental Resources, 138 Pa.Cmwlth. 534, 588 A.2d 1001 (1991), *appeal dismissed*, ___ Pa. ___, 632 A.2d 308 (1992).

The following facts are not in dispute. In 1985, when the first CMAP appeal was filed, the Keystone Bituminous Coal Association (KBCA) was the principal trade association of underground bituminous coal mine operators in the Commonwealth (Appellants' Fee Petition). The purpose of the KBCA was to represent and advance the interests of bituminous coal mine operators in Pennsylvania by, among other things, coordinating and funding litigation on behalf of its members (*Id.*). KBCA believed the Department had overstepped its authority by inserting standard conditions in the CMAPs (Deposition of Stephen G. Young, V.P. for Government Affairs for Consolidation Coal Co.). After the Department denied KBCA's request to amend the CMAPs, KBCA encouraged its coal producing members to carefully review the standard conditions in their CMAPs and appeal them if necessary (*Id.*). KBCA also informed its members that counsel would be made available for those who wanted to file appeals (*Id.*). Several KBCA members filed CMAP appeals in 1985 and 1986 and paid their own

legal bills during those two years. After 1986, however, all of the legal bills for the CMAP litigation were addressed to KBCA, not the individual appellants.

On January 1, 1988, KBCA merged with the Pennsylvania Coal Mine Association (PCMA) to form the Pennsylvania Coal Association (PCA) (Affidavit of J. Anthony Ercole, President of the PCA). Similar to KBCA, the purpose of PCA is to promote the general welfare of its coal-producing members and the coal industry (Appellant's Fee Petition; Ercole Affidavit). One of the ways PCA accomplishes this purpose is by funding litigation the PCA Board of Directors believes will have an impact on the coal industry (Ercole Affidavit). PCA receives its funding primarily from dues paid by its members, but a small portion of its income is also derived from investments (Ercole Affidavit). Coal producing members, which include all of the appellants in this matter, are assessed dues based on the amount of coal they produce annually, from a minimum of $1,000 to a maximum of $125,000 (*Id.*). Dues from associate members (those that are not coal producers), on the other hand, are based on the amount of business they have with the coal industry, and average $500 annually (*Id.*). PCA derives approximately 90% of its income from dues paid by coal-producing members (*Id.*).

After its formation, PCA agreed not only to pay the legal bills that had already been sent to KBCA, but also to continue to fund the CMAP litigation (Young Deposition; Ercole Deposition; Ercole Affidavit). PCA continued to pay the attorneys' fees and costs for all of the appellants involved with the CMAP litigation, even if they resigned their membership in

PCA (Ercole Deposition).[5]

Given this factual background, it becomes apparent that the issue raised by this motion for partial summary judgment is essentially a matter of law: Does a party incur costs and fees in an action, for purposes of §§4(b) and 5(g), if those expenses were charged to and paid by another organization, not a party to the action, to whom the party paid annual dues? The Board begins with an analysis of the Department's position.

The Department's motion for partial summary judgment is based primarily on two federal cases interpreting §2412(d)(1)(A) of the EAJA, which states, in relevant part:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . .

28 U.S.C. §2412(d)(1)(A). In S.E.C. v. Comserv Corp., 908 F.2d 1407 (8th Cir. 1990), the issue before the court was whether a fee petitioner, whose legal expenses were paid entirely by his employer, had incurred those expenses for purposes of the EAJA. *Id.* at 1410. The court found that in such a situation the petitioner had not incurred any legal expenses and could not, therefore, recover an award of costs and fees under the EAJA. *Id.* at 1416. Similarly, in U.S. v. Paisley, 957 F.2d 1161 (4th Cir. 1992), the court found that under applicable state law the fee petitioners had a right of indemnification from their ex-employer for the costs and fees expended in the underlying

---

[5]With this fee petition, therefore, appellants seek reimbursement of the attorneys' fees and costs: paid by some of the appellants in 1985 and 1986; addressed to KBCA but eventually paid by PCA; and addressed to and paid by PCA from 1988 on. The Department's motion for partial summary judgment only requests that the Board dismiss appellants' fee petition to the extent it seeks reimbursement for the funds paid by PCA. The Department does not move for summary judgment with respect to the fees and costs paid by some of the appellants in 1985 and 1986.

litigation. As a result, the court, citing Comserv, decided that petitioners had not incurred any legal expenses and were ineligible for an award under the EAJA. *Id.* at 1164.

According to the Department, these decisions are dispositive because the fee-shifting mechanisms in §§4(b) and 5(g) are almost identical to the fee-shifting mechanism in the EAJA. While the language used in these provisions is similar, the Department's position is nevertheless without merit because the decisions in Comserv and Paisley merely reflect the limited scope and purposes of the EAJA. Under the EAJA, a party may recover an award of costs and fees only if it satisfies strict financial and size limitations.[6] The purpose of the EAJA, therefore, is to help the "little guy" overcome the deterrent effect that legal expenses play on its willingness or ability to defend against or challenge unreasonable government actions. Unification Church v. I.N.S., 762 F.2d 1077, 1082 (D.C. Cir. 1985). The EAJA was not intended to provide a subsidy to a party who could easily afford legal services. *Id.*

For example, in Comserv, because petitioner's legal expenses were paid entirely by his employer, the court found that petitioner was never deterred from maintaining his action by the possibility of having to satisfy these expenses. As a result, the court found that an award would not further the purpose of the EAJA. Comserv, 908 F.2d at 1415-16. Likewise, in Paisley, the petitioners were indemnified, pursuant to state law, by their ex-employer. Accordingly, the court found that an award would not serve the purpose of the

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[6]These eligibility requirements limit awards to: individuals with a net worth of $2 million or less; and partnerships, corporations, associations, units of local government, organizations, and owners of unincorporated businesses with a net worth of $7 million or less and 500 employees or less. 28 U.S.C. §2412(d)(1)(C)(2)(B).

EAJA. Paisley, 957 F.2d at 1164.

In both Comserv and Paisley, therefore, the courts construed the term "incurred" in such a way as to deny an award to those parties who could afford legal representation. As the Paisley court succinctly explained, if there is any doubt a party incurred costs and fees for purposes of the EAJA, the tribunal should determine whether the petitioner would have been deterred from litigating had it known a fee award was not available. Paisley, 957 F.2d at 1164. According to the court, "[t]his is the critical concern underlying the EAJA precondition that a fee claimant shall have 'incurred' the expense." *Id. See also*, Wall Industries, Inc. v. U.S., 15 Cl.Ct. 796, 802-803 (1988), *aff'd without opinion*, 883 F.2d 1027 (Fed.Cir. 1989) (petitioner's expenses paid by accounting firm, which, in return, would get fee award).[7]

There are, however, no similar eligibility requirements in §§4(b) and 5(g). In order to qualify for an award of costs and attorney's fees under these provisions, the applicant need only be a prevailing party who achieved some degree of success on the merits and made a substantial contribution to a full and final determination of the issues. Township of Harmar, *et al.* v. DER, *et al.*, EHB Docket No. 90-003-MJ (Opinion issued August 9, 1994) (decided under §4(b) of SMCRA). Because there are no financial or size constraints under §§4(b) and 5(g), the Board finds that the intent of these provisions is merely to make the winning party whole, regardless of its size or financial

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[7]Other courts have similarly denied a fee award under the EAJA when they determined that the entity which would benefit from the award, the "real party in interest," could not satisfy the EAJA's strict eligibility requirements. *See, e.g.*, American Assoc. of Retired Persons v. EEOC, 873 F.2d 402 (D.C. Cir. 1989) (petitioners relied, for most part, on attorneys funded by AARP, who would get most of fee award); Unification Church v. I.N.S., 762 F.2d 1077, 1082 (D.C. Cir. 1985) (petitioners' legal expenses paid by church, which would get fee award).

condition.[8] Given the difference between the purposes underlying the EAJA and §§4(b) and 5(g), the federal decisions construing §2412(d)(1)(A) of the EAJA are neither dispositive nor persuasive.

Instead of relying on decisional law construing other fee-shifting provisions, the Board looks to the plain meaning of the language of §§4(b) and 5(g). "[A]bsent any evidence to the contrary, a statute's plain meaning must prevail." O'Boyle's Ice Cream Island, Inc. v. Commonwealth, 146 Pa.Cmwlth. 374, ___, 605 A.2d 1301, 1302 (1992). Where the language of a statute is clear and free from ambiguity, the Board may not disregard the plain meaning of that language to pursue the legislature's alleged intent. 1 Pa.C.S. §1921(b); Big "B" Mining Co. v. Dept. of Environmental Resources, 142 Pa.Cmwlth. 215, ___, 597 A.2d 202, 203 (1991), *allocatur denied*, ___ Pa. ___, 602 A.2d 862 (1992); City of Harrisburg v. DER and Cumberland County, EHB Docket No. 93-205-W (Opinion issued September 16, 1994).

Under §§4(b) and 5(g), the Board is authorized to order the payment of costs and attorney's fees that were "reasonably incurred by such party" in proceedings pursuant to §4 of SMCRA and §5 of BMSLCA. *See*, note 3,

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[8]In construing the term "incurred" in §§4(b) and 5(g), the Board was unable to find any support for its view of the legislative intent of these provisions in §1 of SMCRA, 52 P.S. §1396.1 (relating to the purposes of SMCRA), or §§2 and 3 of BMSLCA, 52 P.S. §§1406.2 and 1406.3 (relating to the findings and declarations of policy, as well as the purposes of BMSLCA). The Board also could not find any support in the fee-shifting provision of the federal Surface Mining Control and Reclamation Act, the Act of August 3, 1977, P.L. 95-87, *as amended*, 30 U.S.C. §1275(e), or any of the many similar fee-shifting provisions in other state environmental statutes. *See*, *e.g.*, §307(b) of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.307(b); §5(i) of the Coal Refuse Disposal Control Act, the Act of September 24, 1968, P.L. 1040, *as amended*, 52 P.S. §30.55(i); and §4b(f)(5) of SMCRA, 52 P.S. §1396.4b(f)(5).

Nevertheless, despite the absence of supporting citations, the Board is satisfied that its view of §§4(b) and 5(g) is correct. Because they lack the financial and size limitations of the EAJA, these provisions were intended merely to make the winning party whole.

*supra*. As appellants correctly state, the plain meaning of the term "incur" is "to become liable for or subject to." *See*, *Webster's Ninth New Collegiate Dictionary*. In order to incur attorney's fees and costs, therefore, a party must become liable for or subject to those expenses. As a result, the Board may only order the payment of costs and attorney's fees that a party has become liable for or subject to. Conversely, if a party is not liable for or subject to the attorney's fees and costs for which it requests reimbursement, the Board may not order an award of costs and fees. Furthermore, the Board may only order the payment of costs and attorney's fees incurred by *a party*. Costs and attorney's fees incurred by a non-party may not be awarded.

It is undisputed that KBCA and PCA assumed the obligation to pay the attorneys' fees and costs associated with the CMAP litigation; that the bills for these expenses were sent directly to both KBCA and PCA; and that these bills were paid by PCA. Because KBCA and PCA assumed the obligation to pay the attorneys' fees and costs associated with the CMAP litigation, the Board finds that KBCA and PCA, not appellants, incurred those expenses. As a result, the Board may not order the Department to reimburse appellants for the costs and attorneys' fees associated with the CMAP litigation. In addition, even though the Board finds that KBCA and PCA incurred the costs and fees at issue in this matter, neither is entitled to a fee award because they were not parties to the underlying proceeding.

Appellants counter that they incurred the attorneys' fees and costs associated with the CMAP litigation because they would have had to pay those expenses if they had not arranged for PCA to do so. This argument, however, is without merit. As the Board explained above, under the plain meaning of the term, appellants must have become liable for or subject to the

costs and fees associated with the CMAP litigation in order to have incurred them. It is not enough that appellants would have been billed had KBCA and PCA not assumed the obligation in the first place. The Board has no doubt that if KBCA or PCA had never assumed the obligation to pay appellants' legal expenses, appellants would have had to do so themselves in order to secure counsel. This, however, is not the situation currently before the Board.

In this case, KBCA and PCA assumed the obligation to pay the legal expenses associated with the CMAP litigation. There is nothing to suggest that if PCA had declined to satisfy its and KBCA's obligations appellants would then have been held liable.[9] As a result, the Board cannot conclude that appellants were liable for or subject to the attorneys' fees and costs for which they seek reimbursement. Appellants, therefore, did not incur those expenses.

Because appellants did not incur the attorneys' fees and costs at issue here, the Board is without authority to order the Department to reimburse appellants for those expenses. To find otherwise in this matter would do damage to the plain meaning of "incurred" and undermine the legislature's use of that term.[10]

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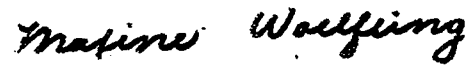
[9]In fact, the law on this issue appears to support the opposite conclusion. In the absence of a contract, a party who benefits from an attorney's work does not have an obligation to pay that attorney. *See, e.g.*, Pennsylvania Power & Light Co. v. Gulf Oil Corp., 74 D.& C.2d 431, 438 (1975); Goldstein v. Sylk, 69 D.& C.2d 338, 339 (1974). While these decisions are not directly on point, they support the general proposition that an agreement cannot bind those who are not party to the agreement. *See*, Chambers Dev. Co. v. Cmwlth., *ex rel.* Allegheny County, 81 Pa.Cmwlth. 622, ____, 474 A.2d 728, 731 (1984). In other words, appellants cannot be held liable pursuant to an agreement between PCA and its counsel, even if appellants benefitted from that agreement.

[10]Although Chairman Woelfling did not participate in the Rushton Mining Co. opinion regarding the merits of appellants' objections to the standard conditions, she is participating in this decision. Because this opinion relates solely to the merits of appellants' claims for costs and attorneys' fees, the

## ORDER

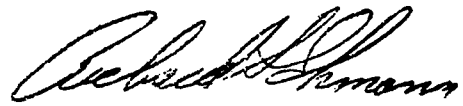
AND NOW, this 6th day of February, 1995, it is ordered that the Department's motion for partial summary judgment is granted.

**ENVIRONMENTAL HEARING BOARD**



**MAXINE WOELFLING**
**Administrative Law Judge**
**Chairman**

**ROBERT D. MYERS**
**Administrative Law Judge**
**Member**



**RICHARD S. EHMANN**
**Administrative Law Judge**
**Member**

DATED: February 6, 1995

cc: DER Bureau of Litigation:
(Library: Brenda Houck)
**For the Commonwealth, DER:**
L. Jane Charlton, Esq.
Southwest Region
**For Appellant:**
Stanley R. Geary, Esq.
Henry Ingram, Esq.
BUCHANAN INGERSOLL
Pittsburgh, PA
sb

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conflict which prevented her participation in Rushton Mining Co. no longer exists.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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M. DIANE SMITH
SECRETARY TO THE BOARD

| | | |
|---|---|---|
| BOARD OF SUPERVISORS OF MIDDLE PAXTON TOWNSHIP | : | |
| v. | : | EHB Docket No. 89-081-MR |
| COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES | : | Issued: February 8, 1995 |

# ADJUDICATION

By Robert D. Myers, Member

## Syllabus

The Board dismisses an appeal by the Township from DER's disapproval of an update to the Township's Official (Act 537) Plan under the Sewage Facilities Act. In reaching this result, the Board rules that DER's disapproval action was timely because the Township's last-minute request to review DER's soil and water sampling data constituted a waiver of the time limits. The Board concluded that the evidence established the existence of ongoing malfunctions with on-site sewage disposal systems throughout the Township, posing a threat to public health and pollution of waters of the Commonwealth. That threat can be removed, pursuant to requirements of the Sewage Facilities Act, only by installation of public sewers in populated areas of the Township. Handling the threat on a site-by-site basis as malfunctions occur, as proposed by the Township, unacceptably extends the threat for decades to come.

## Procedural History

This proceeding was begun on March 27, 1989, when Middle Paxton Township (Appellant) filed a Notice of Appeal, seeking Board review of the

disapproval by the Department of Environmental Resources (DER) on February 24, 1989 of Appellant's Sewage Facilities Plan Update of July 1988. On August 31, 1989 proceedings were stayed pending the outcome of related proceedings in Commonwealth Court and later in the Supreme Court. The stay was removed on July 18, 1990 but was reinstated on May 9, 1991 pending the outcome of another related case in Commonwealth Court and later in the Supreme Court. That stay was removed finally on January 5, 1993.

After completion of discovery and the filing of pre-hearing memoranda, the appeal came to hearing in Harrisburg on October 5, 6 and 7, 1993 before Administrative Law Judge Robert D. Myers, a Member of the Board. Both parties were represented by legal counsel and presented evidence in support of their positions. In a Stipulation, the parties agreed, *inter alia*, to a partial stipulation of facts; to a stipulation that the Board's Findings of Fact in *Board of Supervisors of Middle Paxton Township v. DER* (Board Docket No. 89-084-MR), 1991 EHB 546, may be used as factual findings in this appeal, if relevant; and to a stipulation that Appellant may use the transcript testimony of Herbert C. Fry and Dr. Louis Kaplan from Board Docket No. 89-084-MR in lieu of their appearing and undergoing direct and cross examination here.

Appellant filed its post-hearing brief on January 14, 1994; DER filed its post-hearing brief on March 9, 1994. The record consists of the pleadings, the partial stipulation of facts, the relevant Findings of Fact in Board Docket No. 89-084-MR, a hearing transcript of 437 pages, 64 exhibits plus the testimony of Herbert C. Fry and Dr. Louis Kaplan and 4 exhibits from Board Docket No. 89-084-MR.

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

## FINDINGS OF FACT

1. Appellant (the Township) is a Pennsylvania municipal corporation located in Dauphin County (Stip.[1])

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Pennsylvania Sewage Facilities Act (SFA), Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 *et seq.*; the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the rules and regulations adopted pursuant to said statutes.

3. The Township, bounded on the west by the Susquehanna River, extends to the east for about 11 miles. It is roughly 5 miles wide from north to south. The Susquehanna, which flows generally to the southwest upriver from the Township, makes a sweeping curve to the east and then to the southeast as it flows past the Township. The Borough of Dauphin (Borough) is on the arc of this curve and is completely surrounded by the Township except on its river side. Running east from the river are three narrow valleys, divided by four mountain ranges. The valleys, named for the streams draining them, are Fishing Creek Valley on the south, Clarks Creek Valley on the north, and Stony Creek Valley in the middle (with the Borough at its western terminus). No roads cross the mountains to interconnect the three valleys (N.T. 22-23; Exhibit A-2).

4. The major roads in the Township are U.S. Routes 22/322 (following the riverbank), Pa. Route 225 (heading north from the Borough over Peters Mountain) and Pa. Route 325 (running east from Route 225 through Clarks Creek Valley) (Exhibit A-2).

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[1]The partial stipulation of facts.

5. Because of steep slopes on the mountains and floodplains in the valleys, much of the Township's 53 square miles consists of land that is unsuitable for development. 39% of it is state-owned game lands. Except for areas in the lower (western) portions of the three valleys, the Township is heavily wooded (N.T. 22-23; Exhibit A-2).

6. The Township, with a current population of about 5,100, has no dense residential concentrations. Some of the population is dispersed in thin bands along the river and the three valleys. Most development, however, has taken place in the northwestern portion of the Township adjacent to the Borough in Stony Creek Valley and north and west of the Borough in the area between Routes 22/322 and Route 225, most of which is in Clarks Creek Valley. These areas are the most suitable for future development (N.T. 22-23; Exhibit A-2).

7. About 4% of the approximate 1,715 households in the Township are served by public sewers of the Borough. These households are all adjacent to the Borough on the north and northwest. About 17% of the households are served by public water of the Dauphin Consolidated Water Supply Company. While some of these households are adjacent to the Borough on the north, others are in two residential developments east of the Borough in Stony Creek Valley - Delwood Acres and, farther to the east, Stony Creek Manor (Exhibit A-2).

8. The remaining households are served by on-site sewage disposal systems and on-site water wells[2] (Exhibit A-2).

9. All the soils in the Township have been designated by the U.S. Soil Conservation Service as having severe limitations for on-site sewage disposal systems (Exhibit A-2).

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[2]Sewer lines have been installed in some of the streets of Delwood Acres, but the lines are not functioning (presumably because there is no system to connect to).

10. The Township adopted as its "Official Plan"[3] under Section 5 of the SFA, 35 P.S. §750.5, the "Sewage Plan - Cumberland and Dauphin County Area, dated 1969, and the "Preliminary Report - Sewage Facilities, Middle Paxton Township, Dauphin County," dated 1973. This Official Plan provided, *inter alia*, for the eventual installation of sewers in Stony Creek Manor and the Fertig's Farm area (the location of which has not been identified in the record) and the conveyance of sewage to a treatment plant in the Borough about 1/2 mile to the west (Stip.; Finding of Fact No. 5;[4] Exhibit C-5).

11. By 1985 this portion of the Official Plan had not been implemented. On November 20, 1985 DER notified the Township that the Borough was upgrading its sewage treatment plant, advised the Township to negotiate for capacity in the upgraded plant, and directed the Township to update its Official Plan within 120 days (Stip.; Finding of Fact No. 6; Exhibit A-1).

12. On January 9, 1986 DER notified the Township that, pursuant to §7(b)(4) of the SFA, 35 P.S. §750.7(b)(4), it must cease issuing permits for individual or community sewer systems until it implements or updates its Official Plan (Stip.; Finding of Fact No. 7).

13. On April 30, 1986 DER and the Township entered into a Consent Order and Agreement (CO&A), providing, *inter alia*, for the updating and implementation of the Official Plan and for continuing limitations on permit issuance in the meantime. From the date of this CO&A to the present, DER has had to give its approval before any new individual or community sewer system could be permitted by the Township (Stip.; Finding of Fact No. 8; Exhibit C-6).

14. In October 1986 the Township submitted to DER an Official Plan

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[3]Also called an Act 537 Plan.

[4]These Findings of Fact are from Board Docket No. 89-084-MR.

Update prepared by Dresdner Associates, Pa., Inc. This Update recognized malfunctions of existing on-site sewage systems, especially in Stony Creek Manor, and proposed the installation of sewers within the next 10 years to connect Delwood Acres and Stony Creek Manor to the Borough's treatment plant (Stip.; Finding of Fact No. 9; Exhibit C-8).

15. After discussions with DER about deficiencies in this Update, the Township submitted a second Official Plan Update, also prepared by Dresdner Associates, Pa. Inc., in June 1987. The major difference between the first and second was a provision in the second for sewers in Delwood Acres and Stony Creek Manor as a long term option and the construction of a separate sewage treatment plant (Stip.; Finding of Fact No. 9; Exhibit C-9).

16. The first and second Official Plan Updates were unacceptable to DER because they did not address, to DER's satisfaction, the need for sewers in built-up areas of the Township, particularly Stony Creek Manor (Finding of Fact No. 9; Exhibits C-18A, B, C, D & E).

17. After further discussions with DER, the Township retained R.E. Wright Associates, Inc. (REWAI) to do water sampling and other studies to determine whether sewers were, in fact, needed in these areas (N.T. 21; Exhibit A-2).

18. REWAI conducted three water sampling events (Finding of Fact No. 12; Exhibit A-2).

19. The first event

(a) was conducted on January 21, 1988;

(b) involved the following 6 surface water locations:

ST-3 in an unnamed tributary to Stony Creek that runs along the east side of Stony Creek Manor (east tributary),

ST-5 in an unnamed tributary to Stony Creek that runs along the west side of Stony Creek Manor (west tributary),

ST-6 in an unnamed tributary to Stony Creek that runs along the west side of Delwood Acres,

ST-7 in an unnamed tributary to the Susquehanna River that runs along the western boundary of the Borough,

ST-8 in a developed area north of the Borough, and

ST-9 in Stony Creek near its mouth;

(c) involved the following 16 private water wells:

WS-6, WS-7 and WS-8 north of Stony Creek Manor,

WS-10 and WS-11 south of Stony Creek Manor,

WS-12 south of Delwood Acres,

WS-1 and WS-4 north of the Borough,

WS-2, WS-3 and WS-14 northwest of the Borough,

WS-15, WS-16, WS-17, WS-18 and WS-19 west of the Borough;

(d) sampled each location for total coliform, fecal coliform, fecal streptococci, and nitrate-nitrogen

(Exhibit A-2).

20. The second event

(a) was conducted on February 3, 1988;

(b) involved the following 7 surface water locations:

ST-3, ST-5 and ST-6 as sampled on January 21, 1988,

ST-1 in the east tributary,

ST-2 north of Stony Creek Manor,

ST-4 in the west tributary, and

ST-10 in a developed area north of the Borough;

(c) sampled each location for fecal coliform and fecal streptococci

(Exhibit A-2).

21. The third event

(a) was conducted on April 20, 1988;

(b) involved the following 2 shallow monitoring wells drilled at REWAI's suggestion earlier in April:
Well 1 on the south side of Delwood Acres, and Well 2 on the south side of Stony Creek Manor;

(c) sampled each location for total coliform, fecal coliform, fecal coliform, fecal streptococci, nitrate-nitrogen and chloride

(Exhibit A-2)

22. REWAI concluded

(a) that the soils generally are unsuitable for conventional on-site sewage disposal systems but are normally suitable for sand mound systems;

(b) that the bedding planes within the underlying Mauch Chunk Formation are oriented northeast-southwest and dip steeply to the northwest;

(c) that there is a condition of higher permeabilities along the bedding plane orientation;

(d) that the groundwater flow is roughly perpendicular to the surface topography but may be skewed somewhat to the northeast and southwest by the preferential permeability along the bedding planes;

(e) that discharges from on-site sewage disposal systems infiltrate to the water table, mix with the groundwater and discharge eventually into surface water courses;

(f) that the nitrate-nitrogen concentrations found in the surface water (ranging from 2.6 mg/l to 4.4 mg/l) indicate some man-induced impacts, possibly from farming or on-site sewage disposal systems, but do not exceed the 10 mg/l safe drinking water standard set by EPA;

(g) that the fecal coliform and fecal streptococci concentrations in the surface water (ranging from 0 to 224 colonies/100 ml) reflect the presence of low levels of these bacteria but do not determine whether their source is human or animal waste;

(h) that upstream and downstream samples from the east and west tributaries, which show only minor increases or decreases in concentrations of fecal coliform and fecal streptococci, do not reflect widespread contamination from malfunctions of on-site sewage disposal systems;

(i) that the nitrate-nitrogen concentrations found in the groundwater (ranging from 2.1 mg/l to 8.4 mg/l) indicate some man-induced impacts (similar to the surface water) but do not exceed to 10 mg/l safe drinking water standard;

(j) that the total coliform, fecal coliform and fecal

streptococci concentrations in the groundwater (ranging from 0 to 780 colonies/100 ml) reflect the presence of low levels of the bacteria in areas north and west of the Borough and a near total absence of the bacteria in the vicinity of Stony Creek Manor, the point of greatest concentration being a well located about 1,700 feet south of Delwood Acres;

(k) that the samplings do not show the presence of widespread contamination from existing on-lot sewage disposal systems, especially in the vicinity of Stony Creek Manor and Delwood Acres; and

(l) there is no need to put in a sewer system

(Finding of Fact No. 14; Exhibit A-2).

23. The Township also directed its sewage enforcement officers, Grove Associates, to study subsurface sewage disposal system repairs in Stony Creek Manor and Delwood Acres from 1981 to March 1988 to determine the effectiveness of the repairs. The study determined

(a) that 19 repair permits had been issued for 18 sites, all of which were located in Stony Creek Manor;

(b) that 4 of the permits involved only minor repairs while 15 involved major repairs;

(c) that the main causes of malfunction of the original system were the use of substandard materials and poor construction methods;

(d) that 5 of the sites were unsuitable for on-site sewage disposal systems under DER regulations at the

time the repair permits were issued, primarily because of inadequate renovating soils and steep slopes;

(e) that repair permits were issued for these unsuitable sites using "best technical guidance";

(f) that the repair systems for all of the sites were functioning properly; and

(g) that future malfunctions at other sites could be remedied by properly designed and installed repair systems

(Finding of Fact No. 13; Exhibit A-2).

24. Using the results of these studies, the Township submittted to DER on August 26, 1988 a third Official Plan Update prepared by REWAI. This Update took the position that a sewer system would not be needed within the next 10 years and that the Township's sewage disposal needs could be adequately met by on-site systems. The Update proposed an active maintenance program for existing and new systems, an ongoing water quality monitoring program, and the establishment of a capital reserve fund which could be used, *inter alia*, as seed money for a future sewer system
(Stip.; Finding of Fact No. 9; Exhibit A-2).

25. During this time, the Township also revised their zoning and subdivision regulations to increase minimum lot sizes to 1 acre and to restrict development on slopes and floodplains (N.T. 21-22).

26. After receipt of the third Official Plan Update, DER's E. Lester Rothermel, a soil scientist, DER's Mark J. Siqouin, a hydrogeologist, and Timothy Finnegan, who was the person in charge of reviewing the Update, investigated soils and waters in the Township (Stip.; N.T. 118-121, 169-171, 275-277).

27. Rothermel

(a) conducted 14 soil probes (using either hand tools or a backhoe), of which 4 were in the vicinity of Stony Creek Manor and Delwood Acres, 6 were in the area north of the Borough, 1 was northwest of the Borough, 1 was in Stony Creek Valley about .9 mile east of Stony Creek Manor, 1 was in Fishing Creek Valley about 3 miles east of the river and 1 was in Clarks Creek Valley about 2 miles east of Route 225;

(b) found no sites suitable for conventional on-site sewage disposal systems;

(c) concluded that, because of soil limitations and shallow depth to bedrock, about 80% of the on-site sewage disposal systems in the Township should be elevated sand mounds; and

(d) observed very few elevated sand mounds in the Township

(N.T. 121-151; Exhibits C-1A, C-15 and C-20).

28. Siqouin

(a) took surface water samples at 28 locations, of which 12 were adjacent to Stony Creek Manor (including the east and west tributaries), 1 was west of Delwood Acres, 3 were further east in Stony Creek Valley, 7 were in Fishing Creek Valley, 2 were north of the Borough and 3 were northwest of the Borough;

(b) had the samples analyzed for fecal coliform, fecal

streptococci, ammonia nitrogen, nitrite-nitrogen, nitrate-nitrogen, chloride, sulfates and MBAs (optical brighteners found in laundry detergent);

(c) found the following, in connection with the samples taken adjacent to Stony Creek Manor:
nitrate-nitrogen concentrations exceeding the safe drinking water limit in one sample and coming close to exceeding it in several others, fecal coliform concentrations, about 1/2 of which were low and 1/2 of which were high, fecal streptococci concentrations, the majority of which were high, chloride concentrations above the threshold level, and no MBA concentrations;

(d) found the following, in connection with samples taken in other areas of the Township:
ammonia nitrogen concentrations in 2 samples, nitrate-nitrogen concentrations exceeding the safe drinking water level in 1 sample and well below the level in all the others, fecal coliform concentrations, 1 of which was high, fecal streptococci concentrations, 2 of which were high, chloride concentrations above the threshold level, and no MBA concentrations;

(e) concluded that the surface water is contaminated, especially adjacent to Stony Creek Manor, by untreated or improperly treated sewage

(Findings of Fact Nos. 16, 17 and 18; N.T. 182-250; Exhibits C-1A, C-1B, C-2A through C-2Z, C-3A, B, C,

E, F, G, C-14, C-19).

29. Siqouin also

(a) found the third Official Plan Update deficient in that it did not contain a groundwater survey covering 25% of the wells in the Township;

(b) measured the strike of the bedrock in the vicinity of Stony Creek Manor and found it to be North 40° East;

(c) concluded that the strike of the bedrock would influence groundwater flow beneath Stony Creek Manor so that it would flow in a more or less east-west direction toward the two tributaries rather than south toward Stony Creek;

(d) concluded that the two shallow monitoring wells drilled by REWAI directly south of Stony Creek Manor and Delwood Acres would not intercept the groundwater flowing beneath those developments;

(e) criticized REWAI's monitoring wells because of their low yield; and

(f) criticized the surface water and groundwater sampling program done by REWAI because it ignored large areas of the Township

(N.T. 171-181; Exhibits C-1B and C-13).

30. Finnegan

(a) took water samples from 3 surface water points and from 8 private wells in the area north and northwest of the Borough;

(b) found one of the surface water points to have a

moderate concentration of fecal streptococci and a high concentration of fecal coliform;

(c) found nitrate-nitrogen concentrations in 4 of the private wells but not exceeding the safe drinking water level; and

(d) found elevated chlorides in all the surface water points and private wells

(N.T. 279-291; Exhibits C-2AA, AB, AC, AF, AK, AL, AO, AS, AU, AY and AZ).

31. After reviewing the third Official Plan Update and performing the soils and waters investigations, DER sent a letter to the Township, dated December 8, 1988, informing the Township of the sampling done by DER and setting up a meeting to discuss the matter on December 21, 1988. The letter also contained this paragraph:

> Please note that information available to the Department indicates that there is a serious health hazard present. Citizens should be advised to avoid contact with groundwater seeps and water in ditches and small streams close to developed areas especially Stoney Creek Manor. Owners of wells in developed areas should consider bacterial treatment of drinking water until the township resolves problems with ongoing groundwater contamination.

(Stip.; Exhibit C-18G).

32. On the scheduled date of December 21, 1988, DER and the Township met and discussed the third Update. DER informed the Township of its concerns with the third Update, especially in view of the sampling results, and made it clear that third Update would not be approved. The Township requested to review the sampling data (Stip. N.T. 27-28, 354-359).

33. DER sent a letter to the Township, dated December 30, 1988, stating as follows:

> As a result of the meeting held on December 21, 1988, Middle Paxton Township has requested that all information gathered by the Department [DER] be turned over to the Township. Therefore, the Department of Environmental Resources is requiring a sixty (60) day extension to the review time for the above referenced Official 537 Plan, as per Chapter 71, Section 71.16.
>
> If you have any questions, please contact me at the above address or number.

(Stip.; Exhibit C-18H).

34. After reviewing the information from DER, the Township decided not to reconsider the third Update and informed DER of that decision in a letter dated January 9, 1989. The letter went on to state the following:

> We note receipt by the Township of the enclosed letter [C-18H] which purports to claim an extension of time which, we believe, is untimely.

(Stip.; Exhibit C-18I).

35. On February 24, 1989 DER formally disapproved the third Official Plan Update, stating, *inter alia*, the following:

> The plan fails to adequately address the existing and long term sewage disposal needs of the Township in violation of the [CSL] and the [SFA] and otherwise fails to meet the requirements of §71.14 of [DER's] regulations.

(Stip.; Exhibit A-3).

36. The Township filed on March 27, 1989 an appeal to the Board from DER's disapproval action (Stip.; Notice of Appeal).

37. DER's Finnegan continued to take water samples in the Township until February 1, 1990. Finnegan

(a) sampled 6 private wells, of which 2 were between Stony Creek Manor and Delwood Acres, 1 was north

of the Borough, 1 was in Fishing Creek Valley, and 2 were in unidentified locations;

(b) found nothing of significance in any of the private wells except for 1 of the wells between Stony Creek Manor and Delwood Acres where he found low total coliform and moderate nitrate-nitrogen (less than the safe drinking water level) and except for 1 of the unidentified wells where he found moderate nitrate-nitrogen;

(c) sampled 9 surface water points in and adjacent to Stony Creek manor, finding ammonia at 1 point, nitrate-nitrogen levels exceeding (or close to) the safe drinking water level at 4 points, high levels of fecal coliform and fecal streptococci at 2 points and moderate levels of nitrate-nitrogen at 3 points;

(d) sampled an overflow from a dry-capped sewer in Delwood Acres, finding MBAs;

(e) sampled 6 surface water points north of the Borough, finding ammonia at 1 location, high fecal coliform and fecal streptococci at 2 locations, nitrate-nitrogen exceeding (or close to) the safe drinking water level at 1 location, moderate nitrate-nitrogen at 2 locations and moderate fecal streptococci at 1 location;

(f) sampled 2 surface water points in Fishing Creek Valley, finding ammonia at 1 location and high fecal coliform and fecal streptococci at both locations;

(g) sampled 3 surface water points in Stony Creek Valley east of Stony Creek manor, finding high fecal coliform at 1 location and moderate fecal streptococci at 1 location; and

(h) sampled 3 surface water points at unidentified locations, finding high fecal coliform and fecal streptococci at 2 of them

(Finding of Fact No. 24; N.T. 292-329; Exhibits C-2AD, AE, AG, AH, AI, AJ, AM, AN, AP, AQ, AR, AT, AW, AX, BA through CJ, 3H through 3T, 3V).

38. At the Township's request, REWAI resampled on June 12, 1989 the 2 monitoring wells previously drilled and a surface water point in the west tributary. These samples

(a) revealed the presence in the monitoring wells of moderate levels of nitrate-nitrogen but no fecal coliform or fecal streptococci; and

(b) revealed the presence in the surface water of low levels of nitrate-nitrogen and low levels of fecal coliform and fecal streptococci

(Finding of Fact No. 25; N.T. (89-084-MR) 349-350; Exhibit A-6).

39. The Township retained Louis A. Kaplan, Assistant Curator of the Stroud Water Research Center of the Academy of Natural Sciences, Philadelphia, PA, for his expertise in stream ecology and microbiology. Kaplan reviewed REWAI's sampling data and a portion of DER's sampling data and recommended a supplemental program designed to determine:

(a) whether Stony Creek Manor had an impact on the surface water in the east and west tributaries;

(b) whether the values for chemical and microbiological parameters from the east and west tributaries were different from those in undeveloped watersheds; and

(c) whether the variability between replicate samples at a given site at a single point in time was greater than or less than the variability between two different sites.

(Finding of Fact No. 26; N.T. (89-084-MR) 370-374).

40. On November 7, 1989, Kaplan and REWAI personnel made a site examination, during which Kaplan examined DER's and REWAI's sampling locations, collected surface water samples from the east and west tributaries to have analyzed for dissolved organic carbon, examined the macroinvertebrate fauna in these tributaries, observed land use patterns in the watersheds, and selected surface water locations for additional sampling by REWAI (Finding of Fact No. 27; N.T. (89-084-MR) 374-378; Exhibit A-6).

41. On November 14, 1989 REWAI obtained surface water samples in triplicate at 3 locations in the east tributary (2 upstream and 1 downstream of Stony Creek Manor), 4 locations in the west tributary (3 upstream and 1 downstream of Stony Creek Manor), and 2 locations in an undeveloped watershed about 1/2 mile east of Stony Creek Manor (Finding of Fact No. 28; N.T. (89-084-MR) 349-350; Exhibit A-6).

42. On November 29, 1989 REWAI obtained surface water samples in triplicate at 2 locations near the intersection of Denison Drive and Middle Street on the east side of Stony Creek Manor, and a single surface water sample

at the downstream location in the east tributary sampled on November 14, 1989 (Finding of Fact No. 28; N.T. (89-084-MR) 350-352; Exhibit A-6).

43. Kaplan found land in the vicinity of the undeveloped watershed to be wooded, fallow, in brush or in hay and corn. He found land in the vicinity of the east and west tributaries (excluding that in Stony Creek Manor and Delwood Acres) to be wooded, fallow or in hay and corn (Finding of Fact No. 29; Exhibit A-6).

44. Kaplan found the east and west tributaries to be healthy streams in that they supported pollution-sensitive insect life (N.T. (89-084-MR) 378-379, 392-393).

45. Kaplan performed a statistical analysis on the water samples obtained on November 14 and 29, 1989 and concluded

(a) that Stony Creek Manor has no statistically significant impact on the levels of dissolved organic carbon, nitrate-nitrogen, fecal coliform and fecal streptococci in the east tributary;

(b) that Stony Creek Manor has no statistically significant impact on the levels of dissolved organic carbon, nitrate-nitrogen, fecal coliform and fecal streptococci in the west tributary; and

(c) that, when the samples from all three watersheds are grouped together, there is no statistically significant difference in the levels of dissolved organic carbon, nitrate-nitrogen, fecal coliform and fecal streptococci between the developed watersheds adjacent to Stony Creek Manor and the undeveloped watershed to the east

(Finding of Fact No. 30; N.T. (89-084-MR) 379-386; Exhibit A-8).

46. Kaplan acknowledged that elevated readings have been found at times near malfunctioning disposal systems but is of the opinion that those readings are limited in time and location (N.T. (89-084-MR) 386).

47. Since rejection of the third Official Plan Update, the Township has continued to monitor on-site sewage disposal systems, has continued to monitor the groundwater, especially near Stony Creek Manor, and has set aside annual amounts for a capital reserve fund (N.T. 28-29).

48. Grove Associates studied subsurface sewage disposal system repairs in the entire Township from February 1988 to June 1993. The study revealed

(a) the issuance of 36 repair permits, of which 19 involved major repairs (the absorption area) and 17 involved minor repairs (other than the absorption area);

(b) that 14 of the 19 major repairs involved malfunctioning systems;

(c) that 7 (and possibly 12)[5] of the 17 minor repairs involved malfunctioning systems;

(d) that soil tests found inadequate renovating soils at 11 of the 19 major repair sites;

(e) that most of the major repairs consisted of the installation of an elevated sand mound; and

(f) that 8 of the 11 major repair sites in Stony Creek

[5]Grove Associates could not determine whether or not a malfunction was involved in 5 of the systems.

Manor and areas north and northwest of the Borough had inadequate renovating soils and were repaired by the installation of elevated sand mounds with 2 exceptions[6]

(N.T. 52-60, 64-65, 79-95; Exhibit A-9).

49. There are a few elevated sand mound systems in Stony Creek Manor but they are not in general use in that development. The soils are such that most of the systems should be elevated sand mounds (N.T. 96-99).

50. Testing done by the Township of private wells in three areas northwest of the Borough revealed a significant number of contaminated private wells but the source of the contamination was not discovered (N.T. 68-69, 76-78, 333-334; Exhibit C-7).

**DISCUSSION**

The Township has the burden of proof: 25 Pa. Code §21.101(c)(1). To carry its burden, the Township must show by a preponderance of the evidence that DER acted unlawfully or abused its discretion in disapproving the third Official Plan Update: 25 Pa. Code §21.101(a). Issues not raised in the post-hearing briefs are deemed waived: *Lucky Strike Coal Co. and Louis J. Beltrami v. Commonwealth, Dept. of Environmental Resources*, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988). In this connection, we note that the Township's post-hearing brief consists of 62 proposed findings of fact and 7 proposed conclusions of law without any discussion to connect the facts to the conclusions. Proposed findings and conclusions are important to our assessment of a litigant's legal

[6]One exception is a site north of the Borough where Grove Associates' decision that an elevated sand mound was required was reversed by the Township's Board of Supervisors. The other exception is a site in Stony Creek Manor where an in-ground system was installed but money placed in escrow.

position but, without a discussion, we are often forced to speculate on the legal reasoning and legal precedents supporting it.

We have admonished litigants recently that we will not engage in speculation and will consider to be waived an issue touched upon in the proposed findings and conclusions but not explained in the discussion: *Concerned Citizens of Earl Township v. DER and Delaware County Solid Waste Authority* (Board Docket No. 88-516-MR consolidated, Adjudication issued November 2, 1994, at page 69). Since the post-hearing briefs in the present appeal were filed months before issuance of that Adjudication, we will not enforce the waiver. Nonetheless, we will not speculate on the rationale behind the issues raised in the proposed findings and conclusions. If it is not apparent, we will not address the issue.

We will first deal with the issue of timeliness, because if we conclude that DER's disapproval was untimely, the third Update to the Official Plan "shall be deemed to have been approved...." 25 Pa. Code §71.16(d). As it existed on February 24, 1989, the date of DER's disapproval, §71.16(c) and (d) read as follows:

> (c) Within 120 days after submission of the official plan or revision, [DER] shall either approve or disapprove the plan or revision.
>
> (d) upon [DER's] failure to approve an official plan within 120 days of its submission, the official plan shall be deemed to have been approved, unless [DER] informs the municipality that an extension of time is necessary to complete review.[7]

It is undisputed that the third Update was filed with DER on August 26, 1988. The 120-day review period would normally have expired on December 24, 1988; but, since that was a Saturday, followed by Christmas on Sunday and the official Christmas holiday on Monday, the review period did not end until

[7]Section 71.16 was amended and replaced by §71.32, effective June 10, 1989.

Tuesday, December 27, 1988. Even then, the review period would not have expired if, on or prior to that date, DER had informed the Township that an extension of time was necessary. Such a letter was first sent on December 30, 1988, three days after the apparent expiration of the review period.

The stated reason for the extension, as set forth in the December 30, 1988 letter, was the Township's request at the December 21, 1988 meeting to review all of DER's soil and water sampling data. DER had made it clear to the Township at that meeting and in the December 8, 1988 letter setting it up that it had completed its review of the third Update and would not approve it. On the date of the meeting, there was still adequate time remaining in the 120-day review period to issue a formal disapproval. When the Township asked to review the data, however, it was obvious that the period had to be extended. The Township's request, therefore, effectively waived the 120-day limit. See *Crowley v. DER*, 1989 EHB 44 at 52, and *James Craft v. DER*, 1990 EHB 1607, and cases cited in these two decisions. This happened on December 21, 1988 (before the period ran out) and set the stage for DER's December 30, 1988 letter tacking on an additional 60 days. The extended period closed on February 25, 1989[8]; DER's formal disapproval, issued the day before, was timely.

The next and main issue is whether the third Update satisfied the requirements of the SFA.[9] Section 5(d) of the SFA, 35 P.S. §750.5(d), states, in part, as follows:

Every official plan shall:

---

[8]This too was a Saturday, postponing the close of the extension period to Monday, February 27, 1989.

[9]While the stipulated legal issues refer to 25 Pa. Code §71.14, DER's brief does not cite or discuss this regulation, limiting its contentions to provisions of the SFA. We will do the same.

(1) Delineate areas in which community sewage systems are now in existence, areas experiencing problems with sewage disposal including a description of said problems, areas where community sewage systems are planned to be available within a ten year period, areas where community sewage systems are not planned to be available within a ten year period and all subdivisions existing or approved;

(2) Provide for the orderly extension of community interceptor sewers in a manner consistent with the comprehensive plans and needs of the whole area, provided that this section shall not be construed to limit the development of such community facilities at an accelerated rate different than that set forth in the official plan;

(3) Provide for adequate sewage treatment facilities which will prevent the discharge of untreated or inadequately treated sewage or other waste into any waters or otherwise provide for the safe and sanitary treatment of sewage or other waste;

(4) Take into consideration all aspects of planning, zoning, population estimates, engineering and economics so as to delineate with all practical precision those portions of the area which community systems may reasonably be expected to serve within ten years, after ten years, and any areas in which the provision of such services is not reasonably foreseeable;

(5) Take into consideration any existing State plan affecting the development, use and protection of water and other natural resources;

(6) Establish procedures for delineating and acquiring on a time schedule consistent with that established in clause (4) of this subsection, necessary rights-of-way or easements for community sewage systems;

(7) Set forth a time schedule and proposed methods of financing the construction and operation of the planned community sewage systems, together with the estimated cost thereof;

****

Clearly, an Official Plan is intended to be a thorough, comprehensive and considered assessment of current conditions and, what is more important, a projection of future needs and the facilities necessary to meet them. Only by

the adoption, revision and implementation of Official Plans is it possible to protect the public health, safety and welfare by preventing and eliminating water pollution -- the declared legislative policy in §3 of the SFA, 35 P.S. §750.3. The seriousness of this policy demands responsible actions on the part of local officials and DER: §§8 and 10 of the SFA, 35 P.S. §§750.8 and 750.10.

While both of these levels of government should be striving toward the same goal, it is inevitable that differences will arise over the methods and timing to be employed in reaching them. When the locality is caught up in the rural/urban evolution, the likelihood of disputes with DER increases. Public sewer systems, expensive to build even when populations are tightly concentrated, are significantly more costly when concentrated areas are separated by stretches of undeveloped land. Connecting these areas requires the installation of trunk lines sized to handle the flows likely to be generated when all the undeveloped land is occupied. Building this infrastructure so that it is capable of serving a future population places an immediate burden on current residents.

Public sewers facilitate development, stimulating growth; and, since growth brings more customers onto the sewer system, rates tend to level off and drop. This chain of circumstances, with its promise of economic benefits to current residents, often leads to uncontrolled growth and even more urban sprawl. Those who oppose that form of growth and who seek (perhaps unrealistically) to preserve rural environments often view public sewers as the enemy.

We do not know the motives that prompted the Township's Board of Supervisors in 1988. Prior to that year, the Official Plan and the first and second Updates had proposed the installation of public sewers to serve Stony Creek manor, Delwood Acres and other populated areas near the Borough within a 10-year period. Apparently, the Township was never enthusiastic about the

provision of public sewers but did not actively oppose it. In 1988, however, the Township changed course, declaring in the third Update that public sewers were not needed within the next 10 years. That is the nub of the controversy, the point of contention on which negotiations broke down and on which the third Update was disapproved. To succeed in its appeal, the Township must show by a preponderance of the evidence that DER is unreasonable in its insistence that public sewers be provided for within the 10-hear period covered by the third Update.

Viewing the Township's evidence, it is interesting to note its concessions that very little of the land is suitable for development and that very little of the developable land is suitable for conventional on-site sewage disposal systems. It also concedes that, in the past, many conventional systems were installed where only elevated sand mound systems should go - a circumstance that generates malfunctions. Despite these conditions, the Township contends, the surface water and the groundwater have not been polluted to a statistically significant degree. As a result, public sewers are unnecessary within the next 10 years and sewage disposal concerns can best be implemented by a program of strict enforcement of the regulations when issuing permits for initial installation or subsequent repair of on-site systems.

There is no doubt that the 1600+ households in the Township that are using on-site sewage disposal systems are vulnerable to malfunctions and the need for major repairs. Nineteen of these households experienced that fate during the five years 1988 to 1993. We have not been provided with the total major repairs authorized on a Township-wide basis prior to 1988 but we have been given the data for Stony Creek manor and Delwood Acres for the years 1981 to 1988 - 14

households. From this evidence, it is clear that a steady stream of households have been faced with the cost of replacing systems unsuitable for the sites.

Of greater importance is the pollution generated by these malfunctioning systems and, potentially, by other systems where malfunctions have not yet been discovered but where inadequate renovating soils permit the discharge of partially treated sewage into the groundwater. DER produced water samples with elevated levels of fecal coliform, fecal streptococci, nitrate-nitrogen and other substances suggestive of human waste. REWAI produced water samples with much lower levels. Kaplan's statistical analysis (using only some of the surface water samplings in or close to Stony Creek manor) found no significant difference between those levels and levels in an undeveloped tributary to the east. However, Kaplan acknowledged the existence of elevated levels and stated at N.T. (89-084-MR) 386:

> I am not saying that [DER]'s data aren't real. I am not saying that those values aren't valid. I think what it indicates is this is clearly a temporally variable phenomenon. As to the extent, how often during the year you would find that situation, I don't know the answer to but, obviously, it is an intermittent problem and it is not only temporally intermittent but it is spatially isolated.

If each of the sites is considered separately, the impact of polluted surface water probably is limited in time and space. But the samplings done by DER during the 16-month period from October 1988 to February 1990 show 30 instances of elevated readings at 23 sites throughout the Township. While some of these sites are isolated, most of them are in the built-up areas near the Borough. The cumulative impact of these ongoing slugs of pollution clearly threatens the surface and groundwater.

The fact that they have not as yet statistically degraded the east and west tributaries is important but not controlling. For one thing, the fact

is limited to the two surface water sources flanking Stony Creek Manor; it says nothing about other surface flows in the Township where elevated levels of pollutants have been found. Second, it ignores the groundwater; and there is evidence of polluted private wells adjacent to Stony Creek Manor and in areas north and northwest of the Borough. Finally, it deals only with the present; it makes no projections of future impacts.

We agree with DER that, viewing the evidence as a whole, the on-site sewage disposal systems in the populated areas of the Township are like ticking time bombs. No one can be certain when one of them will malfunction, sending partially treated sewage to the ground surface or to the groundwater or both. It is certain, however, that they will malfunction on an ongoing basis for many years in the future. The threat to waters of the Commonwealth and to public health, safety and welfare is obvious and in need of prompt removal as required by §5 of the SFA, 35 P.S. §750.5. That can be done only by the installation of public sewers in the built-up areas of the Township. Attempting to handle it on a site-by-site basis as malfunction occurs, as the Township proposes, unacceptably extends the threat for decades to come.

Although we sympathize with the Township's desire to retain its rural environment and applaud its efforts to handle growth responsibly, we agree with DER that the time for public sewers has come and can no longer be postponed.

In view of our disposition of this appeal, we find it unnecessary to discuss whether the Township's evidence made out a *prima facie* case. DER's motion for a directed adjudication, made at the close of the Township's case-in-chief, was denied. The motion is raised again in DER's post-hearing brief. We deny it without further discussion.

## CONCLUSIONS OF LAW

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

2. The Township has the burden of proving by a preponderance of the evidence that DER acted unlawfully or abused its discretion in disapproving the third Official Plan Update.

3. Issues not raised in the post-hearing briefs are deemed waived.

4. The Township's request to review DER's soil and water sampling data, made shortly before the expiration of the 120-day review period, constituted a waiver of the deadline.

5. DER's disapproval of the third Official Plan Update was timely.

6. The Township's third Official Plan Update violated §5 of the SFA, 35 P.S. §750.5, in that it did not provide for adequate sewage treatment facilities (public sewers in this instance) to prevent the discharge of untreated or inadequately treated sewage into waters of the Commonwealth.

7. DER was justified in disapproving the third Official Plan Update.

## ORDER

AND NOW, this 8th day of February, 1995, it is ordered that the appeal is dismissed.

**ENVIRONMENTAL HEARING BOARD**

Maxine Woelfling

**MAXINE WOELFLING**
**Administrative Law Judge**
**Chairman**

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

**DATED:** February 8, 1995

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SECRETARY TO THE BOARD

| | | |
|---|---|---|
| CAMBRIA COGEN COMPANY | : | |
| v. | : | EHB Docket No. 92-308-MJ |
| COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES | : | Issued: February 10, 1995 |

**OPINION AND ORDER**
**SUR CROSS MOTIONS FOR**
**SUMMARY JUDGMENT**

**By: The Board**

**Synopsis**

Where a Motion for Summary Judgment merely generally cites to all of the facts and documents stipulated to by the parties as a block, and fails to specify which facts support movant's contentions, it fails to specify with adequate particularity the basis for the motion and must be denied. A proper motion for summary judgment cannot specify the grounds for granting it solely by reference to a simultaneously filed Memorandum Of Law, which in turn argues the supporting facts.

In interpreting a statute or regulation, this Board will give great weight to the interpretation thereof by the Department of Environmental Resources (DER) when DER administers it. Further, a statute granting a tax exemption must be strictly construed against expansion of the exemptions. Here, these concepts are applied to an appeal from DER's partial rejection of a request that it certify an entire electricity and steam cogeneration facility as tax exempt.

Since section 602.1 of the Tax Reform Code of 1971 only empowers the

Department of Revenue (Revenue) to promulgate regulations on how the exemption may be claimed and granted, DER's use of the "to remove pollutants" concept found only in 61 Pa. Code §155.11(3), promulgated under section 602.1, to reject CoGen's application, must itself be rejected, as Revenue and DER are not authorized to restrict the language in section 602.1 to cover only devices which remove pollutants.

The Board interprets Section 602.1's reference to pollution control equipment as equipment which alters, destroys, disposes of or stores contaminants or waste. Pollution abatement devices within this section are defined to be those which reuse waste, modify it, or eliminate it to some degree. Devices which passively prevent pollution from occurring are not eligible for tax exempt status since this statute, as drafted, does not include a passive pollution prevention concept within it.

A piece of equipment controlling or abating air pollution need not be 100% efficient to be eligible for tax exemption status under section 602.1. Moreover, a piece of equipment's use in a production process does not automatically disqualify such equipment from consideration for exemption where such a device also contains within it a process change to abate a certain pollutant.

CoGen's argument that its entire facility's equipment constitutes a single unit which reduces pollution, and thus its entire facility is exempt, is rejected because this facility's purpose is commercial generation of electricity and steam, with coal refuse only serving as a fuel source. Section 602.1 exempts machinery, facilities and other tangible property employed to control or abate pollution, not the entire facility to which the machinery is attached. Moreover, there is no evidence of record that the coal refuse burned in CoGen's boilers created pollution at its original location.

To be exemptible, a pollution control or abatement device must be utilized for the benefit of the general public. DER may properly consider this issue in issuing certifications to Revenue. Where a device is used to help bring about the efficient generation of saleable steam or electricity by CoGen, it is not used for the benefit of the general public, and thus is not exemptible. We reject CoGen's argument that under section 602.1, a pollution control device need not be operated for the public benefit but an abatement device must. The statute applies the public benefit concept to both abatement devices and control devices. A device is also not certifiable merely because it reduces pollution and to some degree this reduction is a societal "good". The Legislature's inclusion in the statute of the requirement that the devices be employed or utilized for the benefit of the general public compels us to interpret this section to give effect to all its provisions, according to 1 Pa. C.S.A. §1921(a). Similarly, the lack of public benefit language as to other tax exemptions has no impact on the insertion of that language in section 602.1. Operation of specific equipment for the benefit of CoGen rather than the public provides a further reason to sustain DER's rejection of portions of CoGen's request for an exemption certification.

The Board has applied these holdings to the various disputed components for which tax exemption is sought.

## OPINION

### Background

By letter dated July 9, 1992, Joseph P. Pezze, the Regional Manager of DER's Air Quality Control Program in Pittsburgh, wrote to the Federal Income Tax Administration supervisor at Air Products and Chemicals, Inc. (the company operating Cambria CoGen Company's ("CoGen") facility for CoGen) to advise the

company that its three applications for tax exemptions for various pieces of CoGen's equipment under section 602.1 of the Tax Reform Code of 1971, Act of March 4, 1971, P.L. 6, §602.1 added August 31, 1971, P.L. 362, No. 93, §6, as amended, 72 P.S. §7602.1 ("Section 602.1"), and 61 Pa. Code §155.11(3) in regard to the Pennsylvania Capital Stock and Franchise Tax, had been granted in part and denied in part. On August 7, 1992, we received CoGen's appeal from the denial portions of Pezze's letter.

Thereafter, both parties engaged in some discovery and filed their respective Pre-Hearing Memoranda. A site view was also held by the then presiding Board member. The parties then stipulated to certain facts and agreed to attempt the disposition of this appeal through cross motions for summary judgment. Each party then filed such a motion and a supporting brief; they also filed responses to each other's motions. The parties also each filed replies to each other's responses, with the last such filing being CoGen's Response To The Department's Objections And Brief In Response To Cambria's Motion For Summary Judgment, which was received by the Board on September 14, 1993.

While this appeal was previously assigned to former Board Member Joseph N. Mack, he was unable to prepare an opinion on these motions before he resigned from this Board. This situation poses no obstacle to our ability to decide the merits of these cross motions because we are empowered to adjudicate the merits of these motions. See Lucky Strike Coal Co., et al. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

As to motions for summary judgment, there is no question of our authority to grant them. Robert L. Snyder, et al. v. DER, 138 Pa. Cmwlth. 534, 588 A.2d 1001 (1991). However, we can grant them 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); MacCain v. Montgomery Hospital, 396 Pa. Super. 415, 578 A.2d 970 (1990). Moreover, we view each of these motions in a light most favorable to the non-moving party. RESCUE Wyoming, et al. v. DER, et al., EHB Docket No. 91-503-W (Opinion issued March 30, 1994). In deciding motions of the type now before us, we do so if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Pa. R.C.P. 1035(b), New Hanover Corp. v. DER, 1993 EHB 656, 657. We do not resolve disputes of fact in evaluating these motions. Rather, we grant these motions only when such disputes do not exist. New Hanover Corp. v. DER, 1993 EHB 510.

Here the parties agree as to some facts, disagree as to how to interpret others, and disagree as to how the law should be interpreted concerning tax exemptions for CoGen's property.

**Cogen's Facility**

The parties agree that CoGen is a general partnership which owns a cogeneration facility ("facility") located near Ebensburg in Cambria County.[1] CoGen's facility has this name because its operation generates two streams of saleable product for its owners. It produces not only electric power, which it sells to a local electric utility, but also steam, which is generated by its boilers' operation and is sold to a nearby nursing home. The facility has a generating capacity of 85 megawatts and an export steam capacity of

[1]The description of CoGen's facility and the underlying facts of this appeal come from the generally excellent and comprehensive factual stipulation of the parties unless otherwise indicated.

approximately 35,000 pounds per hour.

CoGen's facility functions like many electric power generating plants except that its main fuel is coal refuse from coal refuse piles located in East Carroll Township, Cambria County. This facility burns bituminous coal refuse mixed with a lesser amount of run-of-mine (ROM) raw bituminous coal.[2]

Coal refuse is the remnant of raw coal after the commercial grade coal has been extracted. The coal refuse used as CoGen's facility as fuel has fewer BTUs per pound than the fuel coal but the same percentage of sulfur. It has more moisture and ash than the coal. The coal refuse used as fuel contains elements which would, if released uncontrolled, cause air or water pollution.

Coal refuse and coal are trucked to CoGen's facility by third parties. The coal refuse is passed through an "oversized material scalper" and conveyed to the Coal Refuse Storage Dome, which is a hemispherical covered structure containing about 20,000 tons of refuse. This dome protects the coal refuse from precipitation and/or minimizes fugitive dust generation (a form of air pollution). The raw coal, which increases the BTU content of the coal refuse being burned and is also a backup fuel in the event coal refuse deliveries are interrupted, is delivered to a facility hopper and then conveyed to the Coal Storage Tepee. This Tepee is a conically shaped covered structure which stores a seven day supply of coal (5,000 tons). This Tepee is equipped with a concrete stacking tube to minimize dust during the coal's unloading and storage. Coal stored in this Tepee is not exposed to precipitation, and the Tepee minimizes fugitive dust generation from the coal piles. The Dome and

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[2]From January 1, 1992 to March 31, 1993, over 98 percent of the fuel consumed was coal refuse, but in its approved submissions to DER, CoGen has authorization to burn coal refuse and coal in up to a four to one ratio.

Tepee both prevent or minimize the generation of leachate, which would be created if precipitation percolated through the stored coal and coal refuse entraining contaminants. Leachate from the coal refuse stored in the Dome or coal stored in the Tepee would contain sulfur and other pollutants. Leachate flowing into ground or surface waters would cause water pollution.

When they are to be burned, coal refuse and coal are conveyed from their piles by conveyors to separate crushers, crushed and conveyed to a coal refuse bunker and coal hopper before each is injected into the facility's boilers. CoGen's boilers combust dry fuel more efficiently than wet fuel.

Limestone for CoGen's facility is crushed off-site by an independent third party and delivered pneumatically to the facility's limestone silo. The silo is equipped with a fabric filter vent to remove "limestone transport air" from the silo. Limestone is injected into the boilers through three discharge hoppers.

The facility has two circulating fluidized bed ("CFB") boilers, each of which consists of a furnace, two cyclone units and structural components capable of burning 47 tons per hour of the blended coal and coal refuse. Fuel and limestone are injected into the base of the furnace and entrained in a fluidized mass supported by combustion air. The entrained material and flue gas flow into a cyclone collector which separates the hot gases from the solid bed and ash material, with the solid material being injected back into the furnace's combustion chamber.

The direct injection of limestone into these boilers permits the limestone to absorb sulfur released as the fuel is burned. The furnace heat calcines the limestone to form calcium oxide. This calcium oxide reacts with sulfur dioxide to form calcium sulfate. Calcium sulfate is an inert solid

which can be removed from flue gases in either a baghouse or with bottom ash. Limestone is injected for the sole purpose of capturing sulfur and sulfur compounds in the by-products from burning coal refuse. The boilers' design is sufficiently efficient to eliminate the need for additional flue gas desulfurization equipment to meet current air pollution control standards. In section 4.3.2 of CoGen's PSD-Permit Application[3] dated May 1987, CoGen evaluated the best available sulfur dioxide pollution control technology and concluded these boilers were superior to systems requiring a separate sulfur dioxide removal system.

Continuous Emission Monitors ("CEMs") are located in the facility's smoke stacks. Information from the CEMs is fed into a data acquisition system computer, into which the computer operator also feeds information obtained from a fuel sampling program. The computer uses both sets of data to automatically regulate the amount of limestone being fed into the furnaces so as to remove the required degree of sulfur. The computer operator may also manually regulate the limestone's injection. The CEM data is needed because the amount of sulfur in the refuse varies enough to require constant adjustment of the limestone feed rate.

Bottom ash generated by operation of these furnaces is removed by a screw conveyor to the bottom ash silo, and then is discharged from the silo's bottom to the ash conditioner. The silo regulates the bottom ash flow to the conditioner and prevents or minimizes fugitive dust emissions from this ash. Bottom ash consists of noncombustible portions of the coal refuse, uncombusted

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[3]PSD stands for Prevention of Significant Deterioration. That is the concept that a new source of air pollution must be controlled to the point it does not create a significant deterioration in "the ambient air quality of the area in which the facility is located".

limestone, lime and calcium sulfate. While not as fine as fly ash, bottom ash still has a high percentage of fine materials and must be conditioned to minimize the generation of subsequent fugitive dust emissions.

Fly ash is the ash from combustion which leaves the furnace with the flue gas and is removed therefrom through use of a type of air pollution control equipment known as a baghouse. This ash's components are the same as those of bottom ash. The fly ash collected by the baghouse is discharged from the baghouse hopper and transported to the fly ash silo from whence it is transported to the ash conditioning system. The fly ash silo minimizes the generation of fugitive dust emissions from this ash's components and controls the flow of ash to the ash conditioners. Fly ash, like bottom ash, is stored on site in its own storage silo prior to disposal off-site.

The Ash Conditioning System consists of two 100 percent intensive mixer type conditioners. Each unit conditions the ash with water to hydrate the free lime in the ash materials (15% in bottom ash, 25% in fly ash). After conditioning, the ash is discharged to the ash transfer conveyor. Treating this ash in this fashion minimizes fugitive dust emissions which might occur in transporting this ash for disposal or in disposing of same. This conditioning treatment is the final step before the ash is disposed of at an ash disposal area.

Coal refuse and coal refuse piles are potential sources of air and water pollution, and the elimination of such piles in Pennsylvania may reduce water and air pollution in our state.

**Cogen's Application**

On September 30, 1991 CoGen applied to DER, pursuant to section 602.1 of the Tax Reform Code (72 P.S. §7602.1) and 61 Pa. Code §155.11(3), to have

certain portions of its facility certified by DER as eligible for exemption under the Pennsylvania Capital Stock and Franchise Tax because they are air and water pollution control devices. In CoGen's Application No. 1, it sought certification for the wastewater pond, the neutralization sump pump and the oil/water separator. DER issued this certification to CoGen. This DER decision is not challenged in this appeal.

In Application No. 2, CoGen sought certification of the Boiler Baghouses, the CFB Boilers and CEMs. DER issued the certification as to the Baghouses, but denied the application as to CFB Boilers because they are not components or certain components to a water/air pollution control device. DER denied the application as to the CEMs both for the reason set forth above and because they are not employed or utilized to reduce pollutants.

In CoGen's Application No. 3, it sought a certification of the Fuel Handling System's Dust Collection Equipment, the Limestone Handling System, the Coal Refuse Storage Dome, the Coal Storage Tepee, the Ash Storage Silos and the Ash Conditioning Equipment. DER certified the Dust Collection Equipment. It rejected the Limestone Handling System as not being components or certain components to a water/air pollution control device. DER rejected the application for the remaining equipment because these are storage facilities and thus were not employed or utilized to remove pollutants during the tax year in question. DER's letter conveying DER's position on denial of the various portions of the latter two applications is the basis for the instant appeal.

<u>CoGen's Motion</u>

We consider the merit of CoGen's Motion first because its facial adequacy is challenged by DER. CoGen's brief Motion (when the list of the

equipment it seeks to exempt is removed from the motion--it is one page long) asserts that based on the parties' stipulated facts, DER erred and abused its discretion in denying CoGen each of the equipment certifications mentioned above. CoGen's motion fails to say how this is so and merely references the reasons for this conclusion set forth in the Brief accompanying its Motion. In stating its position in this fashion, CoGen's motion subjects itself to DER's first challenge thereto.

DER objects that CoGen's Motion is facially insufficient because it fails to adequately detail the rationale for the motion. To the extent CoGen's motion asserts facts to support the theories for its motion by incorporating specific facts from the parties' stipulated facts by reference, this is a satisfactory methodology for placing specific facts, which it contends support this motion, before us. See 3 Goodrich Amram 2d §1035(a)(5); and County of Schuylkill, et al. v. DER, et al., 1990 EHB 1370 ("County of Schuylkill"). However, CoGen's Motion fails to specify which of these facts support the Motion. CoGen merely incorporates all the facts to which the parties stipulated. These facts are set forth on 12 typed pages containing numbered paragraphs of stipulated facts. Moreover, at numbered paragraph 42 of this Stipulation, DER and CoGen stipulate to the "authenticity, admissibility, accuracy and relevance" of 27 documents which are enclosed in a large binder filed by the parties (many of which are multi-paged). For example, document 6 is the twenty-two page supplement to CoGen's application for certification which CoGen submitted to DER on May 26, 1992 (and it is not the lengthiest document within this group of 27 documents). Importantly, CoGen makes no effort whatsoever to cite the Board to any specific fact or document in its motion; rather, it merely cites us to the entire block of

evidence. This approach is a fatal error as to CoGen's motion. We have written more than once that motions for summary judgment "...are to set forth, with adequate particularity, the reasons for the motion. This is so because representations in legal memoranda...cannot form the basis for a grant of summary judgment". County of Schuylkill, 1990 EHB at 1373. It is the movant's responsibility, not the Board's, to sift through the affidavits and other documents he uses in support and to frame the motion so as to present his best case. Earnest Barkman et al. v. DER, 1993 EHB 738, 745 ("Barkman"). A motion is insufficient under the law in these opinions if everything in support of the movant's theories for this motion is found in the supporting memorandum of law. Barkman; County of Schuylkill; and Adams Sanitation Company, Inc. v. DER, EHB Docket No. 90-375-W (Opinion issued April 5, 1994). Based on these opinions, we reject any argument that CoGen's Motion is adequate because CoGen's arguments are set forth not in its Motion but in its Memorandum Of Law accompanying the Motion.

Finally, we reject the plea on page 4 of CoGen's Response To The Department's Objections And Brief In Response To Cambria's Motion For Summary Judgment that, if its Motion is inadequate, it be granted leave to amend same. This appeal arose in 1992; the parties have each filed Motions, Responses to Motions and Replies to each other's Responses. These filings occurred in the period from the commencement of the appeal through September of 1993. Judge Mack was unable to draft an opinion in this appeal in the period between September of 1993 and August of 1994 when he left this Board. It is now 1994. CoGen could have amended its motion to make it specific in this period if it had wished to do so, but it did not. Instead, it elected to argue its motion's adequacy. CoGen made its choice and must live with the consequences

thereof. If we were to allow CoGen to amend now, we would have to allow DER to respond thereto and in essence repeat this entire process. This we will not do. It is time to move this matter toward resolution, not to start the process over again. Moreover, our position on this issue was spelled out in County of Schuylkill and Barkman before CoGen's motion was filed, and thus, it can claim no surprise from our continued reliance on our prior line of cases. Accordingly, we sustain DER's objection to CoGen's motion and deny it.

**DER's Motion**

However, CoGen is correct to the extent it asserts that merely because we deny its motion, that does not mean DER prevails on DER's Motion. We must review the merits of DER's motion and CoGen's response thereto before reaching any conclusions on the merits of DER's arguments.

The one thing both parties agree to by implication in their Briefs is that there are no prior reported decisions to illuminate this statute and regulation. Neither party cites any and we can find none. They also agree, by disagreeing on what the statute and regulation mean, that we are faced with the job of statutory and regulatory interpretation.

Section 602.1 provides:

> Notwithstanding the foregoing provisions of section 602, to the contrary, equipment, machinery, facilities and other tangible property employed or utilized within the Commonwealth of Pennsylvania for water and air pollution control or abatement devices which are being employed or utilized for the benefit of the general public shall be exempt from the tax imposed under this Article VI. The Department of Revenue shall have the power, through publication in the Pennsylvania Bulletin, to prescribe the manner and method by which such exemption shall be granted and claimed.

61 Pa. Code §155.11 provides:

*Pollution control devices exemption.* Exemptions for pollutions control devices shall be as follows:

(1) *General.* An exemption will be given for water and air pollution control or abatement devices which have been employed or utilized for the benefit of the general public during the tax year in question. The pollution control devices exemption is expressed as a deduction from the Capital Stock Tax exempt assets fraction, or as a deduction from the Property Factor in the case of a Foreign Franchise Tax taxpayer or a Capital Stock Tax taxpayer which elects to compute and pay its tax on the basis of the Three Factor Formula as provided in section 602(b) of the TRC (72 P.S. §7602(b)).

(2) *Condition precedent.* As a condition precedent to the granting by the Department to the taxpayer of the pollution control device exemption, the taxpayer is required to apply to the Department of Environmental Resources and obtain a certificate for the purpose of claiming exemption for each specific pollution control device. This certification is designated "Notice of State Certification" (DER Form ER-BWQ-21). See section 602.1 of the TRC (72 P.S. §7602.1). The taxpayer is required to file with the Department the Notice of State Certification covering the specific control device for which exemption is claimed during the tax period in question. This requirement for the filing of a Notice of State Certification may apply not only to a new device but may also apply to modifications or changes of an existing device.

(3) *Notice of State Certification by Department of Environmental Resources.* Notice of State Certification shall conform with the following:

(i) The Notice of State Certification issued by the Department of Environmental Resources shall certify:

(A) That certain components are components to a water or air pollution device.

(B) That a device is installed and completed in place.

(C) That is employed or utilized to remove pollutants commencing in, or during, the tax year in question.

> (D) That, where a plan approval or permit is required by the Department of Environmental Resources, plan approval or permit has been obtained.
>
> (ii) The Department of Environmental Resources certification is not required to be filed annually. The exemption shall be subject to audit by the Department, or the taxpayer may be called upon by the Department to update the prior Certification upon which the particular exemption has been based.

Each party interprets this statute and regulation differently for a host of reasons. Each then concludes each separate piece of equipment is or is not exempt. We will not summarize these lengthy arguments here but will interpret this statute, addressing these arguments below and then apply the interpretative results to equipment.

**Deference To DER's Interpretation**

In interpreting this statute section and the regulation, the first principle of administrative law to guide us is that the construction given a statute by those charged with its execution and application is entitled to great weight and should not be disregarded unless clearly erroneous. Starr v. Department of Environmental Resources, 147 Pa. Cmwlth. 196, ___, 607 A.2d 321, 323 (1992); Commonwealth, DER v. Washington County, 157 Pa. Cmwlth. 1, 629 A.2d 172, appeal denied, ___ Pa. ___, 631 A.2d 1011; City of Harrisburg v. DER, et al., EHB Docket No. 93-205-W (Opinion issued September 16, 1994). See also Smith, et al. v. DER, et al., 1993 EHB 336 (a duly promulgated regulatory scheme is presumed to meet the objectives of the underlying statute). In this regard, we point out that this statute has existed since 1971, and the Pennsylvania Bulletin says 61 Pa. Code §155.11 was promulgated in its current form in 1977. DER has administered both without any challenge thereto since that time.

**Strict Construction**

In reviewing section 602.1 under DER's Motion, we begin with DER's argument that tax exemption statutes are to be construed against exemptions, and find it has merit. Statutes imposing taxes are to be strictly construed according to 1 Pa. C.S. §1928(b)(3) and Penn Traffic Company, et al. v. City of DuBois, 156 Pa. Cmwlth. 107, 626 A.2d 1257 (1993). However, once the tax statute has been so construed, those claiming exemptions from it find the exempting statutes are also to be strictly construed against expansion of exemptions under 1 Pa. C.S. §1928(b)(5), and those claiming exemption bear a heavy burden of proof. In re Pittsburgh NMR Institute, et al., 133 Pa. Cmwlth. 464, 577 A.2d 220 (1990); Anthony J. F. O'Reilly, et ux. v. Fox Chapel Area School District, 521 Pa. 471, 555 A.2d 1288 (1989).

**CoGen's "Single Facility" Argument**

While we set forth below our problems with portions of DER's arguments, we reject CoGen's broadest interpretation of Section 602.1. Section 602.1 cannot be read to allow all of CoGen's facility to be exempt on the theory that its parts are parts of a cohesive whole.

There is no question that CoGen's equipment is part of a single facility. The components of this single facility work together to enable it to perform the function for which it is designed. According to the record, the function of CoGen's equipment is the production of saleable steam and electricity through the combustion of a mixture of coal and coal refuse. The function of this whole is not the disposal of coal refuse or the control or abatement of pollution; rather, the coal refuse provides a no cost or low cost source of fuel to facilitate accomplishment of the facility's real purpose, and pollution is abated or controlled as required based upon CoGen's election

of this fuel source. In other words, the disposal of coal refuse by combustion is a fortuitous happenstance. It would be an inaccurate mischaracterization to suggest the facility's purpose is coal refuse disposal because coal refuse combustion is incidental to the facility's purpose and nothing more. For example, if water were a less expensive fuel, there is no question from this record that CoGen's facility would be located next to such a fuel source rather than its present location and the facility would burn water, not coal refuse. This is one reason for our rejection of CoGen's argument that its operation is an integrated whole which disposes of an admitted source of pollution and that we should not narrowly interpret section 602.1 against exempting the facility.

Our second reason for rejecting this argument is the fact that while the parties have stipulated that coal refuse is a source of pollution in the form of polluted runoff (leachate), this is a generic stipulation rather than one which provides that the coal refuse currently brought to CoGen to fuel its boilers is the source of so much air pollution or so many discharges of polluted water *in situ* at the location from which it is transported to CoGen's plant. While coal refuse may be a material which under many conditions is capable of producing pollution, just as cigarette smoke contains carcinogens, there is no evidence of record that the coal refuse brought to CoGen's facility to be burned causes any *in situ* pollution where it has reposed since the commercial grade coal was initially removed from it.

The fact that CoGen's post-combustion ash can be used to ameliorate conditions caused by other coal refuse does not change this conclusion. Such ash is not the CoGen facility's product. It is a waste by-product of combustion, just as sewage sludge, used to increase the fertility of a

reclaimed mine site, is still a waste product of the sewage treatment plant.

Finally, we reject CoGen's single-cohesive-unit argument because this argument is contrary to the statute. The Legislature did not write section 602.1 broadly to say that if any manufacturing operation effects a net reduction in pollution, all of that operation's equipment must be considered as part of an exempt whole. The words used in section 602.1 are "...machinery, facilities and other tangible property employed or utilized ... for water and air pollution control or abatement... ." This clear language states that the equipment which accomplishes this pollution abatement or control is exemptible, not the entire facility at which such equipment is but a part. As 1 Pa. C.S. §1921(a) instructs, we may not ignore these simple clear words of section 602.1 to pursue some other course which searches for what one of the conflicting parties claims to be the statute's true spirit. We also are barred from expanding the scope of an exemption through a liberal construction of section 602.1 by 1 Pa. C.S. §1928(b)(5).

**Removal Of Pollutants**

We do not reject CoGen's argument as to interpretation of 61 Pa. Code §155.11(3)(c). CoGen asserts that Revenue was not empowered by section 602.1 to do more than promulgate regulations on how the exemption may be "granted and claimed". CoGen says this limited legislative grant of authority to promulgate some regulations is not an authorization to say that pollution control and abatement equipment is only exempt if it "removes pollutants", as specified in 61 Pa. Code §155.11(3)(c). On the other side, DER argues that 61 Pa. Code §155.11(3)(c) says in certifying DER must find the device has been utilized to "remove pollutants", so much of CoGen's equipment is ineligible because it does not "remove" pollutants. Moreover, DER asserts DER's

interpretation of this regulation and the regulation itself are entitled to deference by this Board.

While we are well aware of the deference generally shown to an agency's interpretation of regulations which it administers, only deference is to be shown, not blind adherence. As the Commonwealth Court has stated, an agency's interpretation is controlling "unless such interpretation is clearly erroneous or inconsistent with the regulation *or the regulation itself is inconsistent with the underlying legislative scheme*." Ferri Contracting Company, Inc. v. Commonwealth, DER, 96 Pa. Cmwlth. 30, ___, 506 A.2d 981, 985 (1986) ("Ferri"); Baney Road Association v. DER, et al., 1992 EHB 441. DER's role under this regulation is not exclusively ministerial, and to the degree its actions go beyond a ministerial role, it administers them. To the extent Revenue, in promulgating 61 Pa. Code §155.11(3)(c), or DER, in administering it, interpret this statute as authorizing them to insert this "removal" concept as an additional modification to the statutory definition of what equipment is exempt, they collectively run afoul of Ferri. Whether it is DER's reading of this regulation in administering it or the regulation itself, it is irrelevant. What is clear is that section 602.1 does not authorize insertion of the "removal" concept in DER's evaluation of what equipment is entitled to exemption. Since DER offers no other theory for its argument that unless-the-equipment-removes-pollutants-it-is-not-exempt, we reject it.

This conclusion leaves us with no clear regulatory or statutory definition of what is exempt; however, the statute's words are not without meaning themselves and it is that which must be followed according to 1 Pa. C.S. §1921(a). However, DER's own Notice of State Certification for Corporate Tax Benefits for Pollution Control Devices (Stipulation 42e) defines a

pollution control device as a "treatment facility which removes, alters, destroys, disposes of or stores contaminants or wastes."[4] To this pollution control device definition we can add the definition for "abatement" found in the Environmental Engineering Dictionary, C.C. Lee, 1989. There, abatement is defined as: "reducing the degree or intensity of or eliminating, air, water or land pollution through waste reuse, process modification or pollution control." These definitions, while slightly overlapping, nevertheless give clear definition to the meaning of these terms, so that we may apply them to the devices at CoGen's facility in accordance with the mandate of 1 Pa. C.S. §1903(a).[5] In doing so, we note that under both definitions, pollution control or abatement can occur via a process change.

<u>CoGen's Efficiency In Removal Argument</u>

While we sustained CoGen on the removal of pollutants issue, we reject its attack on DER's decision to the extent CoGen argues we should reject DER's position because DER seeks to limit tax exemptions by requiring that equipment cannot be exempt unless it is 100 percent effective. CoGen apparently drew its conclusion that this was DER's position from DER's assertion that equipment which partially controls pollution is not exempt. We believe this is how CoGen reached this conclusion because we can find nothing else in DER's

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[4]This same document indicates structural and protective devices or coverings used in connection with the pollution correction and control devices are included in the definition of these devices.

[5]1 Pa. C.S. §1903(a) provides:

> (a) Words and phrases shall be construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a peculiar and appropriate meaning or are defined in this part, shall be construed according to such peculiar and appropriate meaning or definition.

filings which could remotely relate to CoGen's assertion that this is one of DER's arguments. DER does not assert this position and clearly the statute does not require 100 percent efficiency in pollution control or abatement equipment for it to qualify for exemption. Indeed this Board is unaware of any air or water pollution abatement and control equipment with that degree of efficiency under any or all operating conditions.

**Pollution Eliminated By Process Changes**

In reaching this conclusion, however, we do not endorse the idea that a piece of equipment which does more than treat an air or water waste stream from a production operation to control or abate pollution is not qualified to be exempt. Mere participation of a device as part of a manufacturer's production process is not, by the nature of its participation in the production process, reason for automatic disqualification from exemption. While DER's notice mentioned above (Stipulation 42e), may say that to be exempt a device must be devoted solely to pollution elimination and control, we do not find this limitation to be sound. To adopt such a theoretical approach to exemption is to ignore the idea that pollution abatement can come about through a production process change. If a business operation like CoGen's produces four types of pollution from the cogeneration of electricity and steam and then treats the polluting air or water emissions, clearly the treatment equipment is exempt under section 602.1. If instead of one of those types of treatment CoGen changes its method of cogeneration to eliminate that type of pollution, it has accomplished abatement of this pollutant by a process change, and the pollution is as effectively eliminated as if it was treated with tax exempt pollution treatment equipment. From this analysis, we conclude that DER errs where it rejects exempt status for process equipment

selected and installed with the concept in mind that selection of a particular process abates pollution by not initially allowing its creation. To hold otherwise is to create a tax exemption disincentive for election to install pollution eliminating process equipment as opposed to another process whose pollutants must be subsequently and separately cleaned from the process' emissions. No evidence of any such legislative intent to create such a disincentive is before us.

At the same time, however, installation of a more efficient engine in a bus may reduce pollution from the bus but that does not mean the entire bus is a pollution control or abatement device. We must look at each device in a facility and determine its primary purpose. If its purpose is not primarily pollution control and abatement, and if it was not installed as a process change to abate pollution, then DER's decision thereon is valid and may not be overturned.

**Pollution Prevention**

CoGen also asserts in its broad reading of section 602.1 that what should be exempt under "control and abatement" includes passive pollution prevention. Further, it asserts that, since other states use primary or exclusively pollution control and abatement concepts in their statutes but our General Assembly did not, the General Assembly did not intend the exclusive approach suggested by DER. In interpreting section 602.1, we will not be guided by what appears in the laws passed by other states' legislatures where there is no legislative history showing any reliance thereon by our General Assembly.[6] The same is true as to the federal Internal Revenue Code.

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[6]The parties agree that there is no legislative history as to section 602.1 to offer us guidance on the General Assembly's intent on the issues now before us.

Further, CoGen offers no evidence of legislative intent that prevention of pollution is an idea included within the "pollution control and abatement" concept within section 602.1.

We must give appropriate deference to DER's position on the section's meaning under Ferri and similar appellate opinions and see no reason not to do so here. Clearly, if the General Assembly had intended pollution control and abatement to include pollution prevention so that every roof, silo or wall which keeps out the elements is exempt, it could have written section 602.1 to read pollution prevention, control or abatement. If it had, since every factory building accomplishes this to some degree, they all would be exempt. It did not, and we must not only interpret section 602.1 strictly, according to 1 Pa. C.S. §1928(b)(5) but, as pointed out in CoGen's own Brief, though on another point, under 1 Pa. C.S. §1921(a) we are also precluded from ignoring the clear words of the statute to pursue what amounts to CoGen's interpretation of its spirit. Since the General Assembly did not exempt every roof, wall, tepee or dome because it prevents precipitation generated water pollution or fugitive emissions caused by the wind, we are not at liberty to do so.

CoGen also argues that a pollution prevention device which does not exclusively control or abate pollution should nevertheless be exempt because when the Legislature means to have something be exclusive it says so, as it did in section 602 of the Tax Reform Code of 1971, 72 P.S. §7602. CoGen then asserts that since the General Assembly did not do so here, DER errs in interpreting section 602.1 in this fashion. CoGen cites two cases as supporting this concept. They are Pallon v. Republic Steel Corp., 342 Pa. Super. 101, 492 A.2d 411 (1965); and O'Boyle Ice Cream Island, Inc. v.

Commonwealth, 146 Pa. Cmwlth. 374, 605 A.2d 130 (1992). Both opinions state the principle that where a legislature includes specific language in one section and excludes it in another, the language should not be implied where excluded. However, this principle is not applicable here. Sections 602 and 602.1 are two separate sections of our current tax code but they were not enacted as separate sections in the same bill. As DER's Reply points out, section 602 was enacted in March of 1971 as part of the original version of the Tax Reform Code. Section 602.1, however, was enacted not in March of 1971 but in a subsequent bill enacted on August 31, 1971. Where there are two separate enactments in this fashion, the premise cited by CoGen does not apply. In fact, the Statutory Construction Act contains many sections dealing with subsequent modifications to statutes, all of which suggest the latter in time of two conflicting provisions always prevails or at least that the two do not conflict. See 1 Pa. C.S. §§1934, 1935, 1936 and 1955. Moreover, the Statutory Construction Act, enacted in 1972, was passed after the Tax Reform Code, and 1 Pa. C.S. §1928(b)(5) imposes a burden of strict construction in interpreting Section 602.1 so as not to expand the exempting language. We cannot add concepts to the clear language of section 602.1 in the face of this limitation.

**Devices Utilized To Benefit The General Public**

Because section 602.1 says the tax exemption applies only to "pollution control or abatement devices which are employed or utilized for the benefit of the general public..." (emphasis added), the parties advance several other arguments concerning CoGen's facility and whether otherwise potentially eligible components run afoul of this benefit-the-public concept.

DER argues that some of the pollution control or abatement devices at

CoGen's facility are not pieces of equipment employed to benefit the public, but rather are employed for the benefit of CoGen's facility in that they produce more efficient facility operation. DER asserts that these devices are not utilized to benefit the public and thus are unexemptible. DER theorizes that pieces of equipment utilized to help CoGen's bottom line, rather than not to benefit the public, are not exempt because the Legislature only intended to exempt equipment which has the role of benefiting society rather than that which benefits an applicant's bottom line. Moreover, DER urges that it is required to consider the public benefit from the equipment for which exemption is sought according to the delegation to it from Revenue. DER also asserts under 1 Pa. C.S. §1922, public interests are to be favored over private interests and this concept is codified in section 602.1. Finally, DER also argues that its interpretation of section 602.1 does not produce an absurd result, whereas CoGen's arguments produce that result, and that 1 Pa. C.S. §1922 says the legislature does not intend absurdities to be produced.

CoGen offers a series of challenges to DER's rationale which we address below.

<u>Public Benefit Applies To Both Abate And Control Devices</u>

CoGen argues this statute is written in the disjunctive. Based on this conclusion, it reads Section 602.1 as saying that abatement equipment must be for the public benefit but pollution control equipment need not be. From this conclusion, it then asserts certain of its equipment which controls pollution is exempt, even if the Board finds it is not operated to benefit the public.

We disagree with CoGen on this argument. Section 602.1 is not written disjunctively. Even if we were to disregard the requirement of 1 Pa. C.S. §1928(b)(5) concerning strictly construing statutes exempting property from

taxation and our obligations to give some deference to the interpretation of the statute by DER according to the line of cases including Ferri, we would still be unable to accept CoGen's argument. To start out, we do not see section 602.1 as having to be crafted in the disjunctive as CoGen suggests. The Legislature did not create two classes of exemptions in this statute section, i.e., one exemption for property used for air and water pollution control and a second exemption for property used for air and water abatement devices as long as those devices are utilized for the benefit of the general public. We read the statute's language so that the "benefit to the general public" applies to tangible property used both for pollution control devices and pollution abatement devices. The General Assembly could have stated two exemptions in the fashion urged by CoGen if it had intended there to be two exemptions within this section of the statute but it did not do so. As a result, we conclude it exempted equipment used for both water pollution control or abatement and air pollution control or abatement so long as this equipment's use is to the benefit of the general public. Thus, a public benefit from the equipment is required before such equipment may be exempted under section 602.1.

**DER Is To Consider Public Benefit**

We also reject CoGen's argument that DER could not consider public benefit issues while certifying equipment to Revenue (and that, if it did, it exceeded it authority). Nothing in section 602.1 explicitly prohibits DER's consideration of this issue. 61 Pa. Code §155.11 repeats the statute's public benefit requirement but says nothing about which agency makes the public benefit determination, although either DER or the Revenue must decide such issues. Although the regulation does prescribe requirements for a Notice of

State Certification which the taxpayer is to secure from DER if it wants the device to be exempted by Revenue, and does not mention public benefit, that is not a determination that public benefit issues are not for DER. Clearly, as between DER and Revenue, it is DER, rather than Revenue, which has the environmental technological competency to determine which pollution control or abatement devices perform public benefits as opposed to benefits for the equipment's owner/operator. Moreover, DER points out in its Reply Brief that 7 Pa. Bull. 2899 is clear evidence of Revenue's intent to have DER perform any public benefit analysis needed. As quoted by DER, in 7 Pa. Bull. 2899 Revenue states in adopting its initial regulation under the statute and responding to comments to Revenue on Revenue's proposed regulation:

> Since pollution control devices are within the purview of the Department of Environmental Resources, that Department possesses the expertise and administrative ability to determine what constitutes a pollution control device and whether such a device is "employed or utilized for the benefit of the general public."

Accordingly, we conclude that DER does not exceed its authority when it considers such issues in issuing certifications to Revenue.

**Pollution Reduction Is Insufficient Standing Alone**

Likewise, we reject CoGen's argument that as long as its equipment produces cleaner air or water, DER must certify its equipment because this reduction in pollution is a benefit to the general public. It is true that reduced pollution is generally a "public good" as CoGen suggests. However, if General Assembly meant to merely exempt all air and water pollution control and abatement in section 602.1 because reducing pollution is a societal good as CoGen asserts, it could have said that and stopped. It need not have added the phrase "which are being employed or utilized for the benefit of the general public." 1 Pa. C.S. §1921(a) instructs, in interpreting section

602.1, that it shall be construed, if possible, to give effect to all its provisions. This sentence in 1 Pa. C.S. §1921(a) means that the Legislature does not intend its laws to contain surplusage. David S. Masland, M.D., et al. v. Leonard Bachman, M.D., et al. 473 Pa. 280, 374 A.2d 517 (1977). Thus, we cannot ignore this language or treat the differentiation between such devices used to benefit the general public and all other such devices as mere surplusage.

**Lack Of "Public Benefit" For Other Exemption**

We next reject CoGen's argument that the lack of a public benefit concept in other legislative tax exemptions has an impact on the meaning of section 602.1. CoGen fails to point out any reason why the General Assembly could not have decidedly put this concept in section 602.1 without using it as in other exceptions. There is no legislative history on section 602.1, but that fact does not weigh any more in favor of CoGen on this point than it does in favor of DER. The fact is the language is there and we must interpret this statute with it in the section and with it having meaning.

**Only Purely Private Equipment Is Not Exempt**

Finally, CoGen asserts DER's interpretation is too narrow, and only those devices which are purely private should be denied exemption.[7] CoGen's

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[7]Both DER and CoGen cite statutes enacted in other states as to tax exemption for pollution control devices as guides to what the General Assembly intended in section 602.1. Each also argues an interpretation of the section 169 of the Internal Revenue Code (26 U.S.C. §169) dealing with amortization of pollution control facilities. Neither party offers any evidence the General Assembly considered statutes in other states as guides in enacting section 602.1 or wanted section 602.1 interpreted in accordance with 26 U.S.C. §169. Absent such indicia, we disregard these arguments and DER's musings on legislative intent based on several law review articles (which fail to even mention section 602.1) as to what the General Assembly intended by enacting this section. In doing so, we also note that our research fails to disclose any case law interpreting 26 U.S.C. §169. Further, although DER issues state tax exemption certification to Revenue and also issues federal certifications under 26 U.S.C.

argument uses a building's interior air conditioner as an example of a purely private air pollution device which it contends is not exempt, and it asserts a device installed to comply with pollution control laws or public policies of Pennsylvania should be exempt. While this argument is addressed and rejected above and is implicitly contrary to the strict construction requirements of 1 Pa. C.S. §1928(b)(5), its major flaw is that it does not point out an error in DER's reasoning. CoGen merely concludes that section 602.1 does not limit the tax exemption to exclude equipment which provides economic benefit to the taxpayer; it fails to say why DER's interpretation is in error. The fact that CoGen does not agree with DER's argument is not sufficient in and of itself to defeat the argument. In light of the Ferri line of cases mentioned above, we must give deference to DER's argument on this point.

**CoGen's Fuel Storage And Handling Equipment**

Turning to the specific pieces of equipment, it is clear to us that the Coal Storage Tepee, the Coal Refuse Storage Dome, crushing, cleaning and conveying equipment and the hoppers holding the crushed refuse and cleaned crushed ROM coal for injection into the boilers CoGen's facility are not within the definition of what is exempt. Even if these buildings and related equipment passively prevent rain from reaching the coal and coal refuse or wind from blowing fine particles from the fuel piles enclosed thereby, they prevent pollution rather than actively controlling or abating it. In this regard, DER's policy document on certifications support this contention. Titled "Certification of Industrial Anti-Pollution Facilities For Tax Benefits" this document (Stipulation 42(c)) specifically says a building is

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§169, that does not link the statutes for purposes of providing guidance as to the General Assembly's intent in enacting section 602.1.

ineligible for an exemption unless part of a treatment system. Because this is so, the Ferri line of cases requires we give deference to DER's interpretation of section 602.1 on this point also.

Further, this equipment is the on-site fuel storage and handling equipment needed to assure continuous operation of CoGen's boilers and a continuous supply of fuel. While the coal and refuse storage devices may minimize fugitive air emissions from the stored fuel and contact between the stored fuel and precipitation which might generate runoff from the piled fuel, it is obvious that dry coal and refuse combust better than wet coal and refuse. Moreover, CoGen's boilers operate continuously (Stipulation 42(f) page 1-3) and these fuel storage and handling facilities protect the fuel from the elements, processing it and delivering it as a more optimum form for combustion to CoGen's boilers to enable this continuous operation. Clearly, therefore, this system's operation is also not a series of devices employed or utilized for the benefit of the general public, but is a series of devices operated to maximize the efficiency of CoGen's production of saleable electricity and steam. Accordingly, DER properly denied certification regarding it for this reason, too.

CoGen's Boilers

The exemptibility of CoGen's boilers is less clear and thus a more difficult proposition. DER is correct that they generate pollution. A part of that is collected by the baghouses installed on the boilers' flues, which baghouses DER exempted. However, the fact that these boilers create pollution is not grounds for sustaining DER's rejection of the exemption as asserted by DER. We must look beyond that fact because the boilers were rebuilt by CoGen to function in a fashion which, when lime is added, eliminates at least enough

of the sulfur emissions created by burning the coal refuse/coal mixture, that separate control technology need not be affixed to the boiler flues to treat the combustion gases to remove sulfur therefrom. Moreover, this method of sulfur emission control apparently is superior to add-on-technology which captures or cleans emissions after combustion. It appears to be BAT or best available technology to control this type of pollution. Based upon the definition of abatement adopted above, such a technology choice by CoGen is installation of a pollution abatement device. Further, our conclusion does not change because of the fact that CoGen was required to secure a permit for these boilers from DER because they emit air pollutants. When operating, they are a source of pollutants of different types but they also are designed to operate in a fashion which abates one type of pollutant through the method of their operation.

DER's Brief in support of its motion also argues (on page 9) that this boiler's operation to eliminate sulfur dioxide by lime addition and controlled low temperature burning may change the sulfur dioxide to calcium sulfate but it increases the emissions of nitrogen oxide pollutants, and cites factual Stipulation No. 17 and the document stipulated to as Stipulation 42u. This fact is not disputed by CoGen, but we will not sustain DER's Motion based thereon since DER has failed to point out any evidence of record before us establishing that the nitrogen oxides emitted are of any amount requiring installation of control or abatement devices to address this pollutant. If nitrogen oxide emissions increase to a level which is itself so low that the law does not require they be controlled or abated, then they form no barrier to an exemption. If these emissions were to reach a level which required treatment, then they may form such a barrier since that would establish that

the process change merely trades types of controllable or abatable pollutants, but DER points us to no evidence in our stipulated record from which to draw this conclusion.

Finally, DER's Motion also asserts that even if CFB boilers are operated in such a way that they change the sulfur emissions to non-polluting calcium sulfate, that is but a small offshoot of their function, which is to produce steam and electricity. DER argues it is not allowed to certify parts or percentages of the boilers because section 602.1 must be strictly construed and does not indicate parts of devices may be certified. The hole in this DER argument is that this strictly construed statute does not prohibit apportionment either and there is no strict construction reason why the portion of the CFB boiler's cost attributable to sulfur emission abatement should not be exempted by DER. Accordingly, we conclude apportionment of a portion of the boilers' value.

With the conclusion having been drawn, we must deny DER's Motion on this point. However, we cannot simultaneously grant a judgment to CoGen on this point. As the Supreme Court has held in Bensalem Township School District v. Commonwealth, 518 Pa. 581, 544 A.2d 1318 (1988)("Bensalem"), summary judgment may not entered in favor of a non-moving party. Moreover, even if this decision did not exist, there are no facts before us on the boilers' value from which we can apportion any amounts and direct issuance by DER of an exemption in that amount. Accordingly, the question of the exemption of a portion of boilers' value must be remanded to DER for it to gather information from CoGen and to decide the percentage of the boilers' value apportionable for pollution control or abatement and thus exemptible under Section 602.1. Of course, since that decision will also be appealable by CoGen to this Board

if it disagrees therewith, we need not retain jurisdiction over that aspect of this appeal while that is done.

**The Limestone Storage, Handling And Injection System**

The limestone storage, handing, and injection system clearly exists at this facility solely for use with the boiler's designed ability to abate sulfur oxide emissions. By analogy, it is just like the portion of a pollution control system designed to neutralize acids which holds a caustic and feeds it into the device which mixes the acid and caustic to bring about neutralization. It could also be analogized to the devices used to hold and feed liquid into the air pollution devices known as scrubbers, which "wash" types of pollutants from flue gas. It is an integral part of a device accomplishing "process change" which abates by a process change, and is thus certifiable so long as it meets the public benefit requirement of section 602.1.

The limestone storage, handling and injection system is operated to benefit the public. The lime handling equipment serves no bottom line purpose. Its one purpose in the facility's operation is the control of sulfur dioxide emissions. There is no evidence before us supporting the idea that CoGen would continue to add lime to its boilers if not for pollution control. In fact, the parties stipulate at No. 16 that the limestone has no independent value other than sulfur capture; no heat is produced by burning it and the limestone absorbs heat, which in turn requires the addition of more fuel. We reject DER's argument that the limestone addition is not exempt because it only changes one form of pollution to another. A treatment plant is no less beneficial to the general public because in its operation chemicals are added which, as a result thereof in treatment, produces a chemical reaction forming

a sludge. The matter of sludge disposal, or as here, ash disposal may or may not be a "bottom line" issue but the equipment to add the limestone to treat the emission (or here, abate the emission's formation), clearly is not.

Accordingly, we must reject DER's motion in regard thereto.

**The CEMs**

DER also denied certification to what the parties refer to as the CEMS. These monitors are located in the boilers' exhaust stacks and they extract a sample of flue gas and analyze it for sulfur dioxide and nitrogen dioxide. The CEM units here also monitor opacity for visible emissions control. (Stipulation 42a) These units do not abate or control pollution and remove no pollution by themselves. They gather data about the quality of the boilers' post-combustion emissions. During normal operation of CoGen's facility the CEM sample analyses are then fed to a micro-computer. This data is combined with data as to the results of analyses of samples of coal refuse hauled to CoGen's facility for use as fuel which CoGen's boiler operator feeds into this computer, and the computer, using both groups of information, then adjusts the rate of limestone injection into the boiler for sulfur dioxide control. Because of varying sulfur content in the fuel mixture, limestone addition rates are adjusted continually. Thus, the CEM generated data provides a portion of the equation used to determine the lime feed rates needed to comply with DER mandated limitations on the emission of sulfur dioxide. The question thus posed is whether CEMs used to produce compliance with emission limitations are exemptible if they do not abate pollution itself, and we answer it "yes". A valve operated by a sensor which automatically adjusts the flow of a chemical in a waste treatment plant is exempt because it is part and parcel of the treatment process. By analogy, these CEMs perform this same

function unlike the more conventional use of monitoring equipment which is merely to record treatment results.[8] The fact that a facility employee adds other data to the CEM information to determine the amount of adjustment does not change this fact. In determining if a device is a pollution control or abatement device, while the exemption must be strictly construed, the strict construction requirement does not imply ignorance, during review of a request for exemption, of the various components of a device which act together to abate or control the emission. The CEMs in this appeal are such a component of a pollution control or abatement device.

However, the CEMs perform functions beyond those used to assist in regulation of the amount of limestone needed to be injected into CoGen's boilers. As stipulated to by the parties, they also monitor the opacity of emissions and there is no suggestion by CoGen that that function is related to limestone feed rate controls. Further, we lack factual data showing how DER treats equipment which monitors for whether other control equipment achieves compliance with emission limitations under section 602.1 and can see reasons why DER could conclude such equipment was not subject to exemption. Accordingly, there are material facts not before us, the absence of which, coupled with Bensalem, present two grounds to prevent our rendering a judgment in favor of CoGen. As a result, we must thus treat the CEMs in the same fashion as we treated CoGen's boilers. We cannot grant DER's motion and cannot grant judgment to CoGen as to exemption of the CEMs but we remand DER's exemption decision on the CEMs to DER for further consideration in accordance with this opinion as to the question of an apportionment of the amount of the

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[8]Indeed, during the facility's tests the CEM equipment directly controlled the lime feed rates. (Page 8 of DER's Brief)

value of the CEMs, and, if there is to be an apportionment, the amount thereof.

**Ash Storage And Handling**

As to CoGen's request for certification of its ash storage and handling equipment, it seeks certification for equipment which stores both particulate matter pollutants removed from the boiler stacks by the baghouses (fly ash) and the bottom ash (the residue from the combustion which does not leave the boiler via the stack), until it is conditioned (by wetting) to be hauled off site for disposal. The ash silos are "waste storage" silos which DER's own notice defines as exempt. While DER's Brief asserts they are not exemptible, its notice says they are. We cannot give deference to both interpretations simultaneously, but consistent with the definition adopted above, we find the better approach is to say devices for containment of polluting waste after its collection and prior to disposal are exemptible.

CoGen's ash conditioning equipment is pollution control or abatement equipment. This equipment is a closed system which takes dry fly ash and bottom ash from the ash storage silo and adds water to it. According to CoGen's Application for Certification (Stipulation 42a), this conditioning operation produces a damp, non-dusting ash which can be handled for haulage to the ash disposal site and disposed of there. This equipment's operation prevents the creation of fugitive dust in the removal, transportation and disposal of the waste ash by abating the polluting condition. The equipment operates to take the fine particulate materials caught by the baghouse and, by mixing it with the bottom ash (both fine and coarse materials) and water, change the mixture to something handleable and disposable. It does not passively prevent pollution occurring the way a roof does, but is equipment

which actively changes the waste to a form which does not emit fugitive emissions in the same way as liquids added to flour produce dough.

Adopting DER's interpretation of the portion of Section 602.1 dealing with benefit to the public and applying it to CoGen's ash storage system provides no reason for us to sustain DER's denial of certification for that portion of CoGen's facility, contrary to DER's suggestion. Bottom ash from combustion in CoGen's boilers remains after the combustion process to be carried out of the boiler and stored. Fly ash is collected by a baghouse as it leaves a boiler's flue. The fly ash would be air pollution if it were not so collected, and it and the bottom ash are waste by-products generated by the combustion process. The total ash storage and handling system is a system designed to make CoGen's waste products more readily handleable for disposal as DER suggests. However, "handleability" here, has a strong pollution control and abatement component in it which DER does not recognize, in that the collected ash is prevented from again become a pollutant.

According to the Stipulation, if the ash is not handled properly, because much of it is very fine it would create fugitive dust emissions. CoGen would be liable for fugitive emission violations from this portion of its facility under the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 *et seq.*, and 25 Pa. Code Chapter 123. DER's suggestion, that this is merely a "bottom line" production-related portion of CoGen's facility rather than a portion thereof operated to benefit the general public, does not cause us to change this conclusion or find these facilities are not exemptible. This is because this equipment stores previously captured pollutants and prevents their reescape. This system is no different than any sludge collection and disposal system at a "wet" treatment

plant.[9]

Based on the reasoning set forth above, we can only grant DER's Motion in part and must reject it as to the remainder. However, in light of Bensalem and our denial of CoGen's Motion, we cannot issue a judgment in favor of CoGen, either. A portion of this remainder must be remanded to DER for further consideration consistent with this decision. Accordingly, we enter the following order.

**ORDER**

AND NOW, this 10th day of February, 1995, it is ordered that CoGen's Motion For Summary Judgment is denied. It is further ordered that DER's Motion For Summary Judgment is granted as to CoGen's Coal Refuse Storage Dome, Tepee and fuel handling equipment but is denied as to CoGen's Limestone Storage, Handling and Injection System, the CFB Boilers, CEMs and Ash Storage and Handling System.

It is further ordered that this appeal is reassigned to Board Member Richard S. Ehamann for purposes of holding a merits hearing on the remaining issues in this appeal and that hereafter this appeal shall bear Docket No. 92-308-E.

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[9]In reaching this conclusion, we have not addressed CoGen's argument that the beneficial effects of its ash at ash disposal sites also makes this equipment exemptible. This beneficial impact has not been agreed to by the parties. Rather, attached to CoGen's Response to DER's Motion For Summary Judgment is an affidavit from a CoGen employee and 2 DER permits. We have not considered them or the attachments to DER's filings in rendering our decision. None of these DER and CoGen attachments are part of the stipulated record from which the parties agreed we were to decide their motions. Because this is so, consideration of them would be contrary to the basis on which these motions were submitted to us and like considering facts not-of-record after a merits hearing's record is closed in adjudicating an appeal. We cannot and will not consider such "supplements".

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

RICHARD S. EHMANN
Administrative Law Judge
Member

Board Member Robert D. Myers concurs in part and dissents in part. His concurring and dissenting opinion is attached hereto.

**DATED:** February 10, 1995

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| COMMONWEALTH OF PENNSYLVANIA, | : | |
| DEPARTMENT OF ENVIRONMENTAL RESOURCES | : | Issued: February 10, 1995 |

## CONCURRING AND DISSENTING OPINION OF ROBERT D. MYERS

I concur in much of the Board's Opinion and Order; but I dissent from that portion granting the exemption for tangible property which is part of a process change or a technological improvement that coincidentally reduces or eliminates pollution. The intention of the legislature, in my opinion, was simply to exempt pollution control equipment as such, without getting into the detailed analysis of every nut and bolt and what role it plays in reducing pollution.

ENVIRONMENTAL HEARING BOARD

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: February 10, 1995

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| COMMONWEALTH OF PENNSYLVANIA | : | Issued: February 13, 1995 |
| DEPARTMENT OF ENVIRONMENTAL RESOURCES | : | |

**OPINION AND ORDER SUR**
**MOTION *IN LIMINE* TO PLACE BURDENS OF PROCEEDING**
**AND PERSUASION UPON APPELLANT**

**By Maxine Woelfling, Chairman**

**Synopsis**

A motion *in limine* to shift the burden of proceeding and burden of persuasion with respect to selected issues is denied. The burden of proof and burden of proceeding shifts under §21.101(d) of the Board's rules, 25 Pa. Code §21.101(d), from the Department to the subject of an order to abate environmental damage only where the Department establishes that the subject of the order is in possession, or should be in possession, of facts relating to the environmental damage. The Board will not shift the burden pursuant to §21.101(d) with respect to information regarding who authorized water monitoring at a mine site absent any indication that who authorized the water monitoring affected the nature or extent of environmental harm at the site. The Board will not shift the burden of proceeding pursuant to §21.101(a) of the Board's rules, 25 Pa. Code §21.101(a), from the Department to an appellant alleged to have superior access to certain relevant information where (1) it is unclear whether the appellant has superior access to the evidence the Department seeks and (2) where the Department has not established that it has exhausted the usual means

of recourse available to a party whose opponent fails to comply with discovery requests.

**OPINION**

This matter was initiated by a notice of appeal filed in the name of the "Ingram Coal Company" (Ingram Coal) by the Rockwood Energy and Minerals Corporation (REMCorp) seeking review of an August 30, 1988 compliance order issued by the Department pursuant to 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). The compliance order asserted that acid mine discharges exceeding the effluent limits at §87.102 of the Department's regulations, 25 Pa. Code §87.102, were escaping from a surface mining site (the Frenchville site) near the town of Frenchville in Girard Township, Clearfield County, and entering an unnamed tributary of Deer Creek. The compliance order directed Ingram Coal Company, among others, to treat the discharges so that they conformed with 25 Pa. Code §87.102. REMCorp, which presently does business as "Ingram Coal Company," averred in its notice of appeal that it is not liable for the discharges because it did not hold the mine drainage permit for the site and did not conduct mining, reclamation, or any other surface mining activities there.

Although the motion and answer do not address all of the facts necessary for a meaningful overview of this appeal, the rest of the factual backdrop has been sketched in our previous opinion and order in this appeal and in the Commonwealth Court's decision affirming that opinion and order. The picture which emerges is as follows: In 1976, the Department issued a mining permit and mine drainage permit for the Frenchville site to an entity known as "Ingram Coal Company." 555 A.2d at 734. At that time, the Ingram Coal Company was owned by Clark R. Ingram, George M. Ingram, Gary C. Ingram, and Gregory B. Ingram (the

Ingram Partnership). 1990 EHB at 396-397. The Ingram Partnership mined the site from 1976 to 1980, then conducted reclamation and other post-mining activities there from 1980 to 1982. *Id.* On May 28, 1982, Ingram Partnership sold some of the assets of Ingram Coal Company to Herman J. Israel (Israel) and the remainder to REMCorp. (The Department's motion and REMCorp's answer, at paragraphs 10.) The purchase did not involve a transfer of the mine drainage permit, but as part of the transaction, Israel did obtain a license to use the name "Ingram Coal Company." 555 A.2d at 735. Israel employed Gary, George, and Gregory Ingram--three of the four partners in the Ingram partnership--after the purchase. 1990 EHB at 397, ftnt. 5.

Both REMCorp and Ingram were intimately involved in the sale of Ingram's assets to the other. Israel was a stockholder in a parent company of REMCorp and there were agreements between Israel and REMCorp regarding the Frenchville site. 1990 EHB at 397, ftnt. 5. As part of the purchase, Israel made a downpayment of at least $125,000 on behalf of REMCorp, for which he was later reimbursed. (The Department's motion and REMCorp's answer, at paragraphs 14.) The in-house counsel for REMCorp and Rockwood Holding Company represented both REMCorp and Israel during the sale. (The Department's motion and REMCorp's answer, at paragraphs 13.) And Israel gave the president of REMCorp's ultimate parent corporation, Rockwood Holding Company, the authority to decide whether Ingram would participate in the purchase, what Israel would acquire, and what price he would pay.[1] (The Department's motion and REMCorp's answer, at paragraphs 12.)

The close relationship between Israel and REMCorp continued after the

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[1] Rockwood Holding Company was no longer REMCorp's ultimate parent corporation at the time this motion *in limine* was filed. (REMCorp's answer, paragraph 1.)

purchase. On June 1, 1982, four days after Ingram Partnership sold Ingram Coal Company, Israel entered into an equipment lease, a sublease agreement, and a purchase option agreement with REMCorp. (The Department's motion and REMCorp's answer, at paragraphs 15.) Under the terms of the purchase option agreement, REMCorp had the option to purchase the entire business of Ingram Coal Company--including all the company's assets and liabilities. (The Department's motion and REMCorp's answer, at paragraphs 15.) REMCorp did not choose to exercise the option until November 7, 1984. (The Department's motion and REMCorp's answer, at paragraphs 17 and 18.) During the year-and-a-half that Israel owned Ingram Coal Company, REMCorp personnel set up the company's accounting books, prepared its financial statements, and performed other accounting services for the concern. (The Department's motion and REMCorp's answer, at paragraphs 16.)

Sometime after the Department issued the compliance order at issue here, Rockwood Insurance Company (RIC) went into receivership. (REMCorp's answer, paragraph 1.) REMCorp is a wholly-owned, indirect subsidiary of RIC.[2] (REMCorp's answer, paragraph 1.)

Ingram Coal Company was not the only entity associated with the site to be the subject of the compliance order. The order also directed Ingram Partnership and Israel to treat the discharges emanating from the Frenchville site. Both filed separate appeals to the Department's order which were subsequently consolidated at this docket number, EHB Docket No. 88-291-W, with REMCorp's appeal.

The Board's previous opinion and order pertained to a motion to dismiss

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[2] The Commonwealth Court appointed the Insurance Commissioner as the statutory liquidator of RIC on August 26, 1991. (REMCorp's answer, paragraph 1)

filed by Israel's attorney after Israel died, a motion for partial summary judgment filed by the Department, and cross-motions for summary judgment filed by the Ingram Partnership and REMCorp. There, the Board substituted the personal representatives for Israel's estate for Israel; dismissed the appeals of Ingram Partnership and Israel on the basis that both were liable for the discharges because they were "operators" of the site within the meaning of Section 315(a) of the Clean Streams Law, 35 P.S. §691.315(a);[3] and held that REMCorp was not entitled to judgment as a matter of law because whether REMCorp was liable as an "operator" of the site turned on whether REMCorp had authorized the final round and discontinuance of water monitoring at the site, and material issues of fact remained with respect to that issue. See Ingram Coal Company *et al.* v. DER, 1990 EHB 395. Ingram Partnership and Israel's estate appealed the Board's dismissal of the Ingram Partnership and Israel appeals, but the Commonwealth Court affirmed the Board's decision. See Ingram v. Commonwealth, Department of Environmental Resources, 141 Pa.Cmwlth 324, 595 A.2d 733 (1991). Significantly, the Commonwealth Court did not hold Israel liable as an "operator" of the site as the Board had. Instead, the court held Israel liable as the *owner* of the site on the basis that §315(a) of the Clean Streams Law prohibits owners of a mine site from allowing discharges from the site to enter waters of the Commonwealth. It was undisputed, the court noted, that discharges from the Frenchville site entered Commonwealth waters during the time period Israel owned the site. 595 A.2d at 738-9.

The current controversy surrounds the burden of proof and the burden of

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[3] Section 315(a) of the Clean Streams Law provides, in pertinent part: No person...shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth...unless such discharge is authorized by the rules and regulations of the department or such person...has first obtained a permit from the department. 35 P.S. §691.315(a)

proceeding in the upcoming hearing on the merits. On November 2, 1994, the Department filed a motion *in limine* to place the burden of proceeding and the burden of proof on REMCorp together with a supporting memorandum. REMCorp filed an answer and memorandum in opposition on November 30, 1994.

The Department maintains that under §21.101(d) of the Board's rules of practice and procedure, REMCorp bears the burden of proceeding and the burden of proof because the Department order at issue here is an order to abate environmental damage and REMCorp is--or should be--in possession of facts which show whether it operated the Frenchville mine and whether REMCorp is liable as a successor to the other entities associated with the site. The Department also argues that, even if §21.101(d) is inapposite here, the burden of proceeding with respect to evidence concerning REMCorp's alleged liability as an operator of the Frenchville mine or as a successor to the other entities associated with the site shifts to REMCorp under §21.101(a) of the Board's rules because REMCorp has superior access to relevant evidence.

REMCorp, for its part, contends that §21.101(a) and §21.101(d) do not provide that the burden of proof or proceeding should shift to REMCorp here, and that, even if they did, shifting the burden of proof would deprive REMCorp of due process, violating the Fourteenth Amendment of the U.S. Constitution and §§502, 504, and 505 of the Administrative Agency Law, 2 Pa. C.S. §§502, 504, and 505.

The Department has not shown that the burden should shift to REMCorp under either §21.101(d) or §21.101(a) of the Board's rules. The peculiarities of the litigation here do not warrant reversing Board precedent, much less ignoring the plain language of the Board's rules.

**§21.101(d) of the Board's rules**

Section 21.101(d) of the Board's rules provides:

> (d) When the Department issues an order requiring abatement of alleged environmental damage, the private party shall nonetheless bear the burden of proof and the burden of proceeding when it appears that the Department has initially established:
>
> (1) that some degree of environmental damage is taking place, or is likely to take place, even if it is not established to the degree that a prima facie case is made that a law or regulation is being violated; and
>
> (2) that the party alleged to be responsible for environmental damage is in possession of the facts relating to such environmental damage or should be in possession of them.

REMCorp concedes for purposes of this motion that environmental damage is occurring at the site and that the order at issue here is an "order requiring abatement of alleged environmental damage." (The Department's motion and REMCorp's answer, at paragraphs 5 and 8.) The only question here, therefore, is whether the Department has established that REMCorp is in possession of facts relating to the environmental damage, as required by subsection (2) of §21.101(d).

The Department contends that REMCorp fulfills the criterion under subsection (2) because REMCorp has--or should have--information regarding the final round and discontinuation of water monitoring at the site which will show that REMCorp "operated" the Frenchville mine within the meaning of §315 of the Clean Streams Law, 35 P.S. §691.315; information regarding REMCorp's role in Israel's operations at the site; and information regarding what liabilities were transferred to whom when the Ingram Partnership and Israel sold their interests in Ingram Coal. Even assuming the Department's allegations were true, however, the Department would not have established that REMCorp meets the criteria under subsection (2) of §21.101(d). The Department seems to assume that the burdens will shift under subsection (2) so long as the party alleged to be responsible

for environmental damage is in possession of the facts which are not readily available to the Department. But subsection (2) is not so broad. It expressly provides that the burdens will shift only where "the party alleged to be responsible for environmental damage is in possession of the facts *relating to such environmental damage* or should be in possession of them." (emphasis added) Thus, the Board held in Newlin Corp., et al v. DER, 1989 EHB 1106, *aff'd*, 134 Pa.Cmwlth 396, 579 A.2d 996 (1990), *allocatur denied*, 527 Pa. 595, 588 A.2d 915 (1991), that where environmental damage is not at issue, the burden of proof does not shift under §21.101(d).

The information which Department avers REMCorp possesses does not relate to the environmental damage caused by the discharges. With respect to the water monitoring at the site, the Department avers that REMCorp possesses information regarding the extent of REMCorp's involvement in the water monitoring (i.e. whether REMCorp contracted or paid for the final round of water sampling); it does not dispute the results of the water monitoring or explain how the extent of REMCorp's involvement in the monitoring relates to the environmental damage at the site. The Department's argument regarding REMCorp's potential liability as a successor suffers from a similar problem. The Department asserts that REMCorp possesses information which will show that REMCorp is liable as a successor to the other entities at the site, but the Department never explains how the relationship between the entities at the site pertains to the environmental damage resulting from the discharges.

The conclusion that the burden of proof and burden of proceeding do not shift under §21.101(d) here is consistent with our decisions in Hawk Contracting and Adam Eidemiller v. DER, 1981 EHB 150, and Luzerne Coal Corp., et al v. DER, 1990 EHB 1. The Department argues that those decisions stand for the

proposition that the burdens shift under §21.101(d) even when environmental damage is not at issue in the appeal. That is not what Hawk and Luzerne held, however.

Both Hawk and Luzerne involved appeals filed by coal mine operators to orders issued by the Department directing the operators to abate discharges emanating from land which they had mined. In both appeals, the Board held that the burden of proof would shift to the mine operators under §21.101(d) because environmental damage was taking place and because, among other things, the mine operators' personnel were on the site during the mining. While the actual existence of environmental damage resulting from the discharges was not in dispute in either Hawk or Luzerne, factors pertaining to the environmental damage remained at issue: in both appeals, the parties differed as to how the discharges were created and how they were affected by subsequent mining at the site.

**§21.101(a) of the Board's rules**

Section 21.101(a) of the Board's rules provides, in pertinent part:

> In cases where a party has the burden of proof to establish his case by a preponderance of the evidence, the Board may nonetheless require the other party to assume the burden of going forward with the evidence in whole or in part if that party is in possession of facts or should have knowledge of facts relevant to the issue.

The Department argues that REMCorp has greater access to information on the issues of REMCorp's alleged liability as an operator of the Frenchville mine or as a successor to the other entities associated with the site. With respect to the issue of REMCorp's liability as an operator of the Frenchville mine, the Department argues that whether REMCorp is liable turns on who paid for, authorized, or benefitted from water monitoring conducted on the site, and that

REMCorp has better access to that evidence because the bills for the monitoring should be in REMCorp's business records or in the business records of Israel, which were given to REMCorp, and because REMCorp personnel performed Ingram Coal Company's accounting when Israel operated the concern. With respect to the issue of REMCorp's liability as a successor entity, the Department argues that REMCorp's liability turns on corporate financial records, the activities conducted at the site by each entity, and the nature of the business transactions between those entities. According to the Department, REMCorp has better access to information pertaining to those issues because REMCorp has access to its own records and those of Israel pertaining to the operation of Ingram Coal, and because REMCorp personnel were involved in the negotiations and transactions between the various entities associated with Ingram Coal and performed the accounting for Ingram Coal while Israel operated the concern. Although the Department concedes that §21.101(a) should not be applied as a discovery sanction, the Department nevertheless states in its brief that REMCorp has failed to comply with numerous Department requests for records pertaining to the billing for water monitoring at the site.

REMCorp, meanwhile, argues that the burden of going forward should not shift to it because it does not have any information which the Department does not also have, and because REMCorp's access to business records is limited because REMCorp is an indirect subsidiary of Rockwood Insurance Company (RIC), which is in receivership with the Insurance Commissioner.

What we have here is essentially a discovery dispute. The information the Department seeks is not atypical of that ordinarily sought by parties in discovery, and the reasoning the Department advances in support of shifting the burden of going forward could be used to support shifting that burden with

respect to virtually any case involving issues of successor liability for environmental damage. Even assuming REMCorp was initially more familiar than the Department with the facts concerning REMCorp's relationship with the other entities associated with the site, it does not follow that the burden of going forward with respect to that issue should shift to REMCorp. In a vast majority of actions, one party or another will have superior access to information with respect to particular aspects of the case. This problem is only very rarely addressed by shifting the burden of going forward, however. Ordinarily, the initial disparities in information are resolved during the course of discovery, where parties ferret out witnesses, documents and other evidence which may be known to other parties and germane to the case. Absent some indication that discovery could not cure the initial disparity in information between parties, we will not ordinarily resort to shifting the burden of going forward under §21.101(a). There is no such indication here.

Of all the information the Department complained it did not have equal access to, the Department averred that it could not obtain equal access to only one category--the billing information regarding the water monitoring--through discovery. Specifically, the Department suggested that REMCorp has shirked its discovery obligations because it has refused to respond to the Department's repeated requests for that billing information.[4] REMCorp has still not

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[4] During the deposition of Alan Miller, Rockwood's designated representative, counsel for the Department asked Miller whether he had looked through Rockwood's records to determine whether there were bills from G&C Coal pertaining to water monitoring at the site. (Department's motion and Appellant's answer, paragraphs 34; Exhibit 1, at pp. 258, 289-90.) When Miller replied that he had not, the Department asked him to do so and to provide copies of any bills found to Rockwood's counsel so he could forward them to the Department. (Department's motion and Appellant's answer, paragraphs 34; Exhibit 1, at 258, 289-90.) Miller agreed that he would do so. (Department's motion and Appellant's answer, paragraphs 34; Exhibit 1, at 258, 289-90.) The Department repeated the request on at least four additional occasions. (Department's motion

specifically responded to the Department's request, but presumably it does not have the billing information since it maintains in its memorandum opposing the motion that it does not have any information which the Department does not. (Appellant's memorandum, p. 15, ftnt. 3).

While we find the REMCorp's refusal to respond to the Department's repeated requests troubling, it is inappropriate to shift the burden of going forward on the issue at this stage in the proceedings. Given the fact that RIC is in receivership and that REMCorp avers that the Department has all the information REMCorp does, it is unclear whether REMCorp even possesses the information the Department seeks. In any event, the Board is reluctant to shift the burden where, as here, the Department has not availed itself of the usual means of recourse available to a party whose opponent fails to comply with discovery requests.

Since we have determined that the burden of going forward and the burden of persuasion should not shift here, we need not address REMCorp's claims that shifting the burden of proof would violate the due process guarantees in the Fourteenth Amendment of the U.S. Constitution or in the Administrative Agency Law.

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and Appellant's answer, paragraphs 35-38.) On the first of these occasions, Miller again promised that he would provide the Department with the information. (Department's motion and Appellant's answer, paragraphs 35.) Thereafter, REMCorp failed to respond at all to the requests.

## O R D E R

AND NOW, this 13th day of February, 1995, it is ordered that the Department's motion *in limine* to place the burdens of proceeding and persuasion upon REMCorp is denied.

**ENVIRONMENTAL HEARING BOARD**

Maxine Woelfling

**MAXINE WOELFLING**
**Administrative Law Judge**
**Chairman**

**DATED:** February 13, 1995

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| | | |
|---|---|---|
| KELLY RUN SANITATION, INC. | : | |
| v. | : | EHB Docket No. 94-270-E (Consolidated) |
| COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES | : | Issued: February 13, 1995 |

## OPINION AND ORDER
## SUR MOTION TO DISMISS

By: Richard S. Ehmann, Member

Synopsis

The Board grants in part and denies in part the Department of Environmental Resources' (DER) motion to dismiss the appellant/landfill operator's appeal at Docket No. 94-270-E, in which it challenged DER's issuance of a modification to its Solid Waste Disposal and/or Processing Permit. Where DER has, by another modification issued subsequent to appellant's having filed this appeal, deleted two of the three conditions contained in the challenged modification, the appellant's challenge of those deleted two conditions has been rendered moot.

Where the appellant also is seeking in this appeal to challenge a condition set forth in a permit modification issued prior to the challenged modification, and it is unclear from the record whether the third condition of the challenged modification amends this previous permit modification's conditions, we deny DER's motion as to this third condition.

## OPINION

Appellant Kelly Run Sanitation, Inc. (Kelly Run) commenced an action

with us at Docket No. 94-270-E on October 7, 1994. This appeal seeks our review of DER's September 9, 1994 modification, pursuant to the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq., to Kelly Run's Solid Waste Disposal and/or Processing Permit No. 100663 (permit) for the operation of its municipal waste landfill located in Forward Township, Allegheny County. Kelly Run's notice of appeal, *inter alia*, raises objections based on DER's precluding Kelly Run from accepting waste from states other than Pennsylvania and counties other than the Pennsylvania counties of Allegheny, Washington, and Philadelphia, and from places of origin not approved within its permit or any subsequent permit modifications. Kelly Run also asserts in its notice of appeal that DER's action is a violation of the Interstate Commerce Clause of the United States Constitution.

On November 23, 1994, DER issued another modification to Kelly Run's permit pursuant to the Solid Waste Management Act. Thereafter, we received from DER, on December 23, 1994, a motion to dismiss Kelly Run's appeal at Docket No. 94-270-E, along with a supporting memorandum of law, asserting that we lack jurisdiction over Kelly Run's appeal because DER's November 23, 1994 modification rendered this appeal moot and Kelly Run's appeal is barred by the doctrine of administrative finality.[1] Kelly Run filed its response to DER's motion and a supporting memorandum of law on January 17, 1995. DER

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[1] On December 22, 1994, we received from Kelly Run a notice of appeal, originally assigned Docket No. 94-351-E, challenging DER's November 23, 1994 modification. A copy of DER's November 23, 1994 modification, as well as a transmittal letter from DER's Regional Manager of Waste Management, is attached to the notice of appeal at Docket No. 94-351-E as Exhibit A. By an Order issued January 23, 1995, we consolidated Kelly Run's appeals at Docket Nos. 94-270-E and 94-351-E at the instant docket number. This opinion, however, deals solely with the appeal initially assigned Docket No. 94-270-E.

subsequently filed its Reply Brief in Support of Motion to Dismiss on January 25, 1995. DER's motion is before us for consideration in this opinion.

As we explained in City of Scranton, et al. v. DER, et al., EHB Docket No. 94-060-W (Consolidated Docket)(Opinion issued January 25, 1995),

> At this stage in the proceedings, we treat motions to dismiss the same way we treat motions for judgment on the pleadings: we will dismiss the appeal only where there are no material factual disputes and the moving party is clearly entitled to judgment as a matter of law. The facts for purposes of the motion are those framed in the notice of appeal. All of the factual averments in the notice of appeal are viewed as true, and only those facts specifically admitted in the notice of appeal may be considered against the appellant.

Id. at 5 (citations omitted). We view the motion in the light most favorable to the non-moving party. Solar Fuel Company, Inc. v. DER, EHB Docket No. 93-353-E (Opinion issued May 16, 1994).

It is apparent from the record that DER issued a series of modifications to Kelly Run's Permit, specifically: 1) a September 14, 1990 modification (1990 modification); 2) a March 31, 1993 modification; 3) an August 30, 1994 modification; 4) a September 9, 1994 modification (September 1994 modification); and 5) a November 23, 1994 modification (November 1994 modification). Attached to Kelly Run's notice of appeal as Exhibit A is a copy of a transmittal letter dated September 9, 1994 from DER's Regional Manager of Waste Management, along with a copy of DER's September 1994 permit modification, which states that the modification is to the 1990 modification. The September 1994 modification provides:

> 1. This permit modification amends Permit Condition No. 37 of the August 30, 1994 modification regarding management of special handling municipal waste and residual waste as follows:
>
> > This facility is permitted to accept the following specific waste types and waste composition:

Residual waste(s) identified in Permit Condition No. 5 of the March 31, 1993 permit modification.

Special handling municipal waste(s) identified in Permit Condition No. 5 of the March 31, 1993 permit modification.

Special handling residual waste(s) identified in Permit Condition No. 5 of the March 31, 1993 permit modification.

Municipal waste from Allegheny, Washington and Philadelphia Counties.

Except to the extent this permit provides otherwise, the permittee shall conduct solid waste management activities as described in the approved application. The permittee shall not accept any municipal waste from places of origin not approved in this permit modification. The permittee shall file an application for a permit modification with the Department and shall receive approval from the Department prior to receiving any waste volumes in excess of the maximum or average daily volume stated in the permit, any waste from any place of origin not approved in the permit.

2. If Kelly Run Sanitation, Inc. is not designated in the revised Washington County Solid Waste Management Plan, then the facility will no longer be able to accept municipal waste from Washington County once the facilities' existing contracts expire.

3. Unless amended by this permit modification, all previous conditions remain in effect.

This modification shall be attached to the existing Solid Waste Permit described above and shall become a part thereof effective on September 9, 1994.

(See Exhibit A to notice of appeal at Docket No. 94-270-E.)

The November 1994 modification states in pertinent part:

1. Permit Condition No. 37 of the August 30, 1994 permit modification and Permit Conditions Nos. 1 and 2 of the September 9, 1994 permit modification are hereby deleted.

This modification shall be attached to the existing Solid Waste Permit described above and shall become a part thereof effective on November 23, 1994.

(See Exhibit A to Kelly Run's notice of appeal at Docket No. 94-351-E.)

**Is Kelly Run's Appeal Moot as to Conditions 1 and 2?**

It is DER's position that the November 1994 modification had the effect of deleting Conditions 1 and 2 of the September 1994 modification, and that Condition 3 of the September 1994 modification imposed no substantive obligations on Kelly Run, so that the entire appeal is now moot.

We have previously held that we will dismiss an appeal as moot if, during its pendency, an event occurs which deprives the Board of its ability to render relief. Giorgio Foods, Inc. v. DER, 1989 EHB 331. We explained in Pequa Township, et al. v. DER, EHB Docket No. 94-044-E (Consolidated with 94-054-E) (Opinion issued May 27, 1994):

> The key to looking at mootness is the question of whether this Board can grant meaningful or effective relief to the appellant. Where DER has acted to rescind or withdraw its prior appealable action, we have not hesitated to dismiss such appeals as moot.

Id. at 4 (citations omitted).

Here, DER's issuance of the November 1994 modification, deleting the September 1994 modification's Conditions Nos. 1 and 2, deprived the Board of its ability to provide relief pertaining to Conditions Nos. 1 and 2 of DER's September 1994 modification. Kelly Run contends, however, that exceptions to the mootness doctrine should be applied here.

We recognized in Empire Sanitary Landfill, Inc. v. DER, 1993 EHB 1283, 1286, that exceptions to the mootness doctrine exist (citing County Council of Erie v. County Executive of County of Erie, 143 Pa. Cmwlth. 571, 600 A.2d 257 (1991). The Commonwealth Court in County Council of Erie stated that the only time that otherwise moot questions will be decided is when one or more of the following exceptions to the mootness doctrine apply: 1) when the case

involves questions of great public importance, or 2) when the conduct complained of is capable of repetition yet avoiding review, or 3) when a party to the controversy will suffer some detriment without the court's decision. See also, Pequea Township, supra, (citing Strax v. Commonwealth, Department of Transportation, Bureau of Driver Licensing, 138 Pa. Cmwlth. 368, 588 A.2d 87 (1991)).

We do not believe that DER's deletion of Conditions 1 and 2 of the September 1994 modification falls within any of the recognized exceptions to the mootness doctrine, which are only rarely applied by the courts. See County Council of Erie, supra; Strax, supra. We thus conclude that Kelly Run's appeal is moot with regard to Conditions 1 and 2 of the challenged modification. As to Condition No. 3 of the September 1994 modification, the mootness question is more complicated.

**Is Kelly Run's Appeal Moot as to Condition 3?**

Condition 3 of the September 1994 modification provided that all previous permit conditions remained in effect unless they were amended by the September 1994 modification. DER argues that the Condition 3 of the September 1994 modification imposed no substantive obligations on Kelly Run, but merely reiterated that previous conditions not modified by the September 1994 modification remained in effect. DER contends that the November 1994 modification had the effect of reinstating the permit requirements which had been in place prior to September 9, 1994, and, because these previous conditions were not appealed when DER initially issued them, Kelly Run is barred from challenging them at this time.

Kelly Run contends that the November 1994 modification renewed prior existing requirements relating to flow control which are unconstitutional and

unenforceable, specifically pointing to paragraph 13 of the 1990 modification. According to Kelly Run's brief, paragraph 13 of the 1990 modification provided:

> This permit is, hereby, conditioned to prohibit the facility's receipt and processing or disposal of municipal waste from any municipality whose Department approved solid waste management plan designates another facility for the current receipt and processing or disposal of its municipal wastes. However, this condition shall not apply in those instances in which the plan designated facility is unable to accept such municipal wastes in a manner that is consistent with the rules and regulations of the Department.

(Kelly Run's Brief at p. 3) Kelly Run contends that a justiciable controversy exists concerning the lawfulness of paragraph 13, which Kelly Run says precludes it from receiving out-of-county or out-of-state waste at its landfill.

DER responds in its reply brief that the September 1994 modification did not delete paragraph 13 of the 1990 modification but, rather, identified the specific counties from which paragraph 13 allowed Kelly Run to accept waste. At the same time, DER contends Condition 1 of the September 1994 modification was consistent with paragraph 13 and did not modify it, and that pursuant to Condition 3 of the September 1994 modification, paragraph 13 has continuously remained in effect. DER argues that Kelly Run's failure to appeal paragraph 13 at the time DER issued the 1990 modification rendered final DER's action in issuing paragraph 13, pursuant to the doctrine of administrative finality.

Thus, Kelly Run's challenge to Condition 3 of the September 1994 modification turns on whether paragraph 13 of the 1990 modification was amended by the September 1994 modification or whether, pursuant to Condition 3, paragraph 13 remained in effect after DER issued the September 1994

modification.

The doctrine of administrative finality precludes any collateral attack on an appealable action which was not challenged by a timely appeal. See Lower Paxton Township Authority, et al. v. DER, et al., EHB Docket No. 94-167-MR (Opinion issued December 1, 1994); Commonwealth, DER v. Wheeling-Pittsburgh Steel Corporation, 22 Pa. Cmwlth. 280, 348 A.2d 765 (1975), aff'd, 473 Pa. 432, 375 A.2d 320 (1977), cert. denied, 434 U.S. 969 (1977).[2]

While Kelly Run does not specifically address DER's doctrine of administrative finality argument, it contends that the reinstatement or renewal of paragraph 13 created in Kelly Run a right of appeal, particularly in light of the changing circumstances and law finding such a condition unconstitutional.

Relying on the exception to the doctrine of administrative finality discussed in Bethlehem Steel Corporation v. Commonwealth, DER, 37 Pa. Cmwlth. 479, 390 A.2d 1383 (1978), we ruled in Specialty Waste Services, Inc. v. DER, 1992 EHB 382, that in permit renewal appeals, the appellant may raise issues which have arisen between the time the permit was first issued and the time it was renewed, but that an appellant may not challenge the renewal by raising arguments which were available when the initial permit was issued.

It is unclear from the record before us as to what the impact of the September 1994 modification was on paragraph 13 of the 1990 modification. We have only the September 1994 and the November 1994 modifications before us; we do not have any of the previous modifications before us. We can not discern

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[2] To the extent that Kelly Run contends that by the appeal right provision set forth in DER's transmittal letter accompanying the September 1994 modification, DER has admitted that Kelly Run is not barred from challenging the previously imposed conditions at this time, it is incorrect.

from the record whether the September 1994 modification amended paragraph 13 or whether, pursuant to Condition 3, it left paragraph 13 in effect as set forth in the 1990 modification. However, DER's brief argues a "reinstatement" of prior conditions. That word implies these conditions were in effect, then were suspended or vacated to some degree, and now are no longer suspended or vacated. Such a DER reimposition of the suspended conditions might be appealable. However, it may be the case that DER has simply not exercised enough care in describing what transpired, and that neither the September 1994 nor the November 1994 modification changed the *status quo ante* with regard to paragraph 13. With a dispute as to the material issue of fact with regard to the impact of the September 1994 and November 1994 modifications on paragraph 13 of the 1990 modification, however, we cannot rule at this time on whether Kelly Run's challenge to the lawfulness of paragraph 13 is a collateral attack on a permit condition which is now final and binding on Kelly Run. We therefore must deny DER's motion to dismiss with regard to Condition 3.

We thus enter the following order, granting DER's motion to dismiss as to only Conditions 1 and 2 of the September 1994 modification, and denying DER's motion to dismiss as to Condition 3 of the challenged modification.

**ORDER**

**AND NOW**, this 13th day of February, 1995, it is ordered that DER's motion to dismiss is granted only as to Conditions 1 and 2 of the modification challenged in this appeal, and DER's motion is otherwise denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

**DATED:** February 13, 1995

cc: **DER Bureau of Litigation:**
**(Library: Brenda Houck)**
**For the Commonwealth, DER:**
Jody Rosenberg, Esq.
Western Region
**For Appellant:**
Kevin J. Fiore, Esq.
Pittsburgh, PA

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M. DIANE SMITH
SECRETARY TO THE BOARD

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| COMMONWEALTH OF PENNSYLVANIA<br>DEPARTMENT OF ENVIRONMENTAL RESOURCES | : | |
| v. | : | EHB Docket No. 93-095-CP-E |
| EASTERN EMPIRE CORPORATION | : | Issued: February 15, 1995 |

**OPINION AND ORDER**
**SUR MOTION FOR DEFAULT JUDGMENT**

**Richard S. Ehmann, Member**

**Synopsis**

In an action before this Board commenced by DER's filing a Complaint For Civil Penalties, when the Defendant fails to file any response to DER's Complaint and DER complies with Pa. R.C.P. 237.1 as to notice to the Defendant of its intent to seek a default judgment, a Motion For Default Judgment on issues of liability will be granted.

**OPINION**

The instant proceeding was commenced on April 16, 1993, when the Department of Environmental Resources ("DER") filed its Complaint For Assessment of Civil Penalties with this Board. The Complaint, filed under Section 605 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605 ("Clean Streams Law"), names Eastern Empire Corporation ("Eastern"), which has a postal address in Lansdale, Pennsylvania as the Defendant, and charges Eastern with a series of violations of the Clean Streams Law at its sewage treatment plant in Potter Township, Centre County.

Attached to DER's Complaint is the Notice to Eastern mandated by Pa. R.C.P. 1018.1. Also attached to it was a certificate by DER's counsel that it was served on Eastern by first class mail. After this Complaint was filed, this proceeding was assigned to former Board Member Joseph N. Mack. Thereafter, DER undertook discovery in this proceeding, but Eastern neither had counsel enter an appearance on its behalf nor filed any response to DER's Complaint. On March 25, 1994, after completing discovery in this proceeding, DER filed its Pre-Hearing Memorandum with us. Subsequently, because of settlement discussions between DER and Eastern, proceedings were ordered to be stayed in this appeal.

On October 14, 1994, after Board Member Mack's resignation from this Board, the proceeding was reassigned to Board Member Ehmann. By our Order dated November 2, 1994, the Board ordered in part that Eastern was to file its response to DER's Complaint by November 22, 1994, and advised that DER could proceed to secure a default on issues of liability if Eastern failed to do so. Eastern filed no response to that Order or DER's Complaint.[1]

On January 6, 1995 DER filed its instant Motion For Default Judgment To Deem Facts In Complaint Admitted And To Preclude Defendant From Entering

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[1] On January 30, 1995, we did receive a letter from Charles Andrichyn (a shareholder in Eastern) on behalf of Eastern. It indicated that Eastern is trying to transfer its treatment plant to the Township, which has operated it since 1993. It also indicates his opinion that, based on a conference telephone call with DER's counsel and former Board Member Mack in the spring of last year, "this matter would be settled as material in one of my earlier letters." It also expresses a desire to end this proceeding but does not address DER's Motion. A prior letter from Mr. Andrichyn indicates his impression that DER would drop or reduce the civil penalties it seeks if Eastern transferred those facilities to the Township.

Evidence On Its Behalf. By letter of January 10, 1995 we notified Eastern that it was to respond to the Motion by January 30, 1995. January 30, 1995 came and went without Eastern responding to DER's Motion.[2]

Attached to DER's Motion as Exhibit B is the Notice as to possible entry of default judgment mandated by Pa. R.C.P. 237.1, which is dated December 19, 1994. DER's Motion avers DER mailed it to Eastern on December 19, 1994. DER has adherred to the proper procedure for entry of a default judgment on liability against Eastern. Moreover, in at least one other case involving Complaints for Civil Penalties brought pursuant to Section 605 of the Clean Streams Law, we have granted DER a default judgment on liability in similar circumstances. See DER v. Allegro Oil and Gas Company, 1991 EHB 34 ("Allegro").[3] Accordingly, we will follow this precedent here.

DER's Motion also asks that we deem certain facts to be admitted. DER's four count Complaint charges that Eastern has failed to have a certified operator operate its plant (Count One), failed to submit monthly discharge monitoring reports (Count Two), failed to properly operate its treatment plant (Count Three) and allowed its treatment plant to discharge an effluent which failed to meet the effluent limitations in Eastern's permit (Count Four). The specifics of DER's allegations are set forth in detail in paragraph numbers 1

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[2] Throughout the period in which this matter has been before us, Eastern has been without legal counsel. We have admonished it to rectify this situation because of our opinion in Keystone Carbon and Oil, Inc. v. DER 1993 EHB 765 but this has not changed this situation. As a result, sanctions have been imposed on Eastern in our order of December 21, 1994, which will bar it from offering evidence unless represented at the hearing by counsel. We will not, however, sustain DER's Complaint as a sanction under 25 Pa. Code §21.124.

[3] This decision is miscited in DER's Brief as being at 1991 EHB 821. The adjudication at that citation dealt with the amount of penalties assessed against Allegro after we had already granted DER a default judgment on liability in the opinion cited above.

through 12 of DER's Complaint. As we did in Allegro (at page 43), we incorporate paragraphs 1 through 12 of DER's Complaint herein by reference as if fully set forth at length as our findings of fact as to liability. As to Conclusions of Law as to liability we again follow Allegro and incorporate paragraph numbers 1, 4, 15, 19, 20, 23, 24, 26 and 27 of DER's Complaint as our Conclusions of Law.

Finally, DER's Motion asks that, based on Eastern's total silence as to the Complaint, 25 Pa. Code §21.124, and Eastern's failure to respond to our Order of November 2, 1994 directing it to file its Response to DER's Complaint, we issue an order precluding Eastern from introducing evidence at any hearing setting the amount of penalty. To the extent we have made findings of fact as set forth above, we grant DER's request because those findings now bind Eastern. To the extent DER seeks to preclude Eastern from offering any evidence, even by cross-examination of DER's witnesses, during the hearing on the amount of civil penalties, we decline DER's request because it would amount to a virtual default judgment on the issue of the penalties to be assessed by this Board. Eastern has sanctions imposed on it as to presentation of evidence in our Order dated December 21, 1994. Further sanctions are not warranted at this time. However, as suggested by implication from the prayer for relief in DER's Motion, we will order Eastern to file a Pre-Hearing Memorandum addressed specifically to the issues surrounding the penalty question. Moreover, we advise Eastern that failure to file such a Pre-Hearing Memorandum and retain counsel may be cause for the Board to bar it from offering evidence on its own behalf on the amount of the penalty should DER so request, even if it retains legal counsel.

## ORDER

AND NOW, this 15th day of February, 1995, it is ordered that a judgment by default as to liability is entered against Eastern for the violations of the Clean Streams Law pled in DER's Complaint. It is further ordered that Eastern shall file with this Board a Pre-Hearing Memorandum dealing with all penalty issues by March 7, 1995.

**ENVIRONMENTAL HEARING BOARD**

Maxine Woelfling

**MAXINE WOELFLING**
**Administrative Law Judge**
**Chairman**

Robert D. Myers

**ROBERT D. MYERS**
**Administrative Law Judge**
**Member**

Richard S. Ehmann

**RICHARD S. EHMANN**
**Administrative Law Judge**
**Member**

**DATED:** February 15, 1995

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

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES | : | |
| v. | : | EHB Docket No. 94-196-CP-E |
| EAST PENN MANUFACTURING COMPANY, INC. | : | Issued: February 15, 1995 |

**OPINION AND ORDER SUR**
**MOTION FOR SUMMARY JUDGMENT**

**By: Richard S. Ehmann, Member**

Synopsis

In this civil penalties proceeding brought by the Department of Environmental Resources (DER) pursuant to section 605 of the Clean Streams Law, 35 P.S. §691.605, the Board grants in part and denies in part DER's motion for partial summary judgment. Partial summary judgment is granted in favor of DER, as we find there is no genuine issue as to whether as a matter of law DER can use the Industrial Wastewater Effluent Analysis Reports, submitted by the defendant to DER, to show that the reported discharges from the defendant's facility exceeded the parameters set forth in its Water Quality Management Permit issued under the Clean Streams Law. The Board otherwise denies DER's motion for partial summary judgment as to the defendant's liability for violating the conditions of its Water Quality Management Permit.

## OPINION

### Procedural Background

This matter was commenced on July 15, 1994 by DER filing with us a complaint seeking civil penalties against East Penn Manufacturing Co., Inc., (East Penn) pursuant to section 605 of the Clean Streams Law, the Act of June 22,

1937, P.L. 1987, as amended, 35 P.S. §691.605 (Clean Streams Law). East Penn manufactures lead acid storage batteries, battery cables, and wholesale automobile parts at its Deka Road facility located in Lyon Station, Berks County. DER issued East Penn Water Quality Management (WQM) Permit No. 0675206 on October 26, 1976 (1976 WQM Permit) pursuant to the Clean Streams Law. (Exhibit A to Complaint) It is undisputed that this 1976 WQM permit authorized East Penn's discharge of treated industrial waste to the ore pit located on its Deka Road facility and set effluent limitations for the facility's discharge for total dissolved solids, copper, nickel, zinc, lead, antimony, pH, and arsenic.

DER's complaint alleges certain discharges from East Penn's facility occurred between July 17, 1989 and June 2, 1993, as reflected in East Penn's Industrial Wastewater Effluent Analysis Reports (EARs) submitted by East Penn to DER (Exhibit B to Complaint), and these discharges were violations of East Penn's 1976 WQM Permit's effluent limitations and sections 301, 307(a) and (c), and 611 of the Clean Streams Law, 35 P.S. §§691.301, 307(a) and (c), and 611. DER further claims in its complaint that each of these alleged violations is a ground for our assessment of a civil penalty.

DER filed a motion simultaneously with its complaint for civil penalties in which it seeks partial summary judgment as to East Penn's liability for the effluent limitation violations alleged in DER's complaint. By Order dated July 22, 1994, we stayed East Penn's obligation to respond to this motion until further order of the Board. East Penn then filed its answer and new matter and a preliminary objection to DER's complaint.

Upon reviewing East Penn's preliminary objection and DER's reply thereto, we issued an Opinion and Order on October 21, 1994, in which we denied East Penn's preliminary objection and lifted the stay of East Penn's obligation to

respond to DER's motion for partial summary judgment. In accordance with our October 21, 1994 order, we received East Penn's response to DER's motion on November 10, 1994. DER filed its reply to East Penn's response on November 18, 1994. DER's motion is before us for consideration in this opinion.

In order for us to grant summary judgment in DER's favor, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, must show there is no genuine issue as to any material facts and the moving party is entitled to judgment as a matter of law. Robert L. Snyder, et al. v. Department of Environmental Resources, 138 Pa. Cmwlth. 534, 588 A.2d 1001 (1991); Pa. R.C.P. 1035(b). "A fact is material if it directly affects the disposition of a case." Fulmer v. White Oak Borough, 146 Pa. Cmwlth. 473, ___, 606 A.2d 589 (1992). Summary judgment may only be entered if the case is clear and free of doubt. Hayward v. Medical Center of Beaver County, 530 Pa. 320, 608 A.2d 1040 (1992). In deciding a motion for summary judgment, the Board will view the facts in a light most favorable to East Penn, as it is the non-moving party. Id., New Castle Township Board of Supervisors v. DER and Reading Anthracite Company, 1993 EHB 1541.

**Should DER's Motion Be Denied As Premature?**

Citing Pa.R.C.P. 1035(a), East Penn initially argues we should deny DER's motion on the basis that it was prematurely filed before the pleadings were closed. The pleadings in this matter were closed as of September 22, 1994 (see Pre-Hearing Order No. 2). We subsequently denied East Penn's preliminary objection and gave East Penn twenty days to respond to DER's motion for partial summary judgment.

East Penn does not assert that the time it was given to respond to DER's motion for partial summary judgment was inadequate. East Penn cites no Board

precedent in support of its position, nor has our research revealed any such cases. While we do not endorse the procedure employed by DER here, we will not deny DER's motion on the basis that it was prematurely filed. We believe our denial, without prejudice, of DER's motion at this point in this litigation, where the pleadings are closed, would not serve the interests of judicial economy. See Jacques v. Akzo Intern. Salt, Inc., 422 Pa. Super. 419, 619 A.2d 748 (1993). Moreover, any possible prejudice to East Penn which might have existed if East Penn had to simultaneously file its answer to DER's complaint and response to DER's motion was cured by our July 22, 1994 order, which stayed East Penn's duty to respond to DER's motion until after the pleadings were closed.

**Should Summary Judgment Be Granted on the Issue of Liability?**

The Clean Streams Law at sections 301 and 307, 35 P.S. §§691.301 and 307, prohibits the discharge of pollutants into Commonwealth waters other than pursuant to a permit or other prior authorization by DER, without regard to the willfulness of the discharge. Section 611 of the Clean Streams Law, 35 P.S. §691.611, further provides that it is unlawful to fail to comply with a DER permit or to violate any provision of the Clean Streams Law. See Commonwealth, DER v. PBS Coals, Inc., 112 Pa. Cmwlth. 1, 534 A.2d 1130 (1987).

Section 605(a) of the Clean Streams Law, 35 P.S. § 691.605(a), authorizes the assessment of civil penalties for discharges which were violations of the conditions contained in a permit issued under the Clean Streams Law. This section provides in pertinent part:

> In addition to proceeding under any other remedy available at law or in equity for a violation of a provision of [the Clean Streams Law], rule, regulation, order of [DER], or a condition of any permit issued pursuant to the [Clean Streams Law], [DER], after hearing, may assess a civil penalty upon a person or municipality for such violation. Such a penalty may be assessed whether or not the violation was wilful. The

> civil penalty so assessed shall not exceed ten thousand dollars ($10,000) per day for each violation. In determining the amount of the civil penalty [DER] shall consider the willfulness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors.

35 P.S. §691.605.

We will grant partial summary judgment as to the liability portion of a civil penalty action under section 605 where it is clear that there have been discharges from the defendant's facility which exceeded the effluent limitations contained in the defendant's National Pollutant Discharge Elimination System (NPDES) permit. These exceedances can be shown by Discharge Monitoring Reports (DMRs) submitted by the defendant to DER in compliance with its NPDES Permit to report the levels of pollutants contained in its discharges. See Commonwealth, DER v. Wawa, Inc., 1992 EHB 1095; DER v. Monessen, Inc., 1992 EHB 247; Lower Paxton Township v. DER, 1987 EHB 282. See also Connecticut Fund For The Environment v. Job Plating, Inc., 623 F. Supp. 207 (D. Conn. 1985); Chesapeake Bay Foundation, et al. v. Bethlehem Steel Corp., 608 F. Supp. 440 (D. Md. 1985).

Here, DER's motion raises two issues for us to decide as to the matter of East Penn's liability for violating the Clean Streams Law: whether DER can rely on the EARs submitted by East Penn as proof that East Penn's discharge exceeded the effluent limitations contained in East Penn's 1976 WQM Permit, and whether East Penn's discharge was required to meet the effluent conditions contained in its 1976 WQM Permit between July 17, 1989 and June 2, 1993.

**May DER Rely on East Penn's EARs?**

DER asserts that the EARs submitted by East Penn should receive the same treatment as DMRs for purposes of showing violations of East Penn's WQM Permit, and that East Penn's EARs submitted from July of 1989 to June of 1993 (Exhibit B to Complaint) thus constitute admissions and are conclusive and compelling

evidence that East Penn's discharge exceeded the 1976 WQM Permit's effluent limitations for total dissolved solids, copper, nickel, zinc, lead, antimony, pH, and arsenic. DER has attached as Appendix 1 to its motion a compilation of information taken from Exhibit B to the Complaint showing the date, the reported parameter, the permit limit, and the value reported by East Penn for each of the violations DER alleges. DER contends that summary judgment should be granted in DER's favor because this data taken from the EARs shows East Penn violated the effluent limitations contained in its 1976 WQM Permit and violated §§301, 307, and 611 of the Clean Streams Law, 35 P.S. §§301, 307, and 611.

East Penn asserts that EARs should not be treated as DMRs for the purpose of showing liability for violations because DMRs are submitted pursuant to the NPDES system developed under the Federal Clean Water Act, as implemented by Pennsylvania, and that this program has no counterpart in the Clean Streams Law. East Penn also asserts that 25 Pa. Code §92.41 requires the DMRs to show the sampling location and frequency, and to identify the analytical techniques used, and further, that the DMRs be certified by a responsible corporate official. East Penn claims that DER admits that the 1976 WQM Permit does not specify location, frequency, or analytical methods, nor does it require East Penn to certify its submission. Further, East Penn asserts that the portion of the 1976 WQM Permit which is Exhibit A to DER's complaint does not contain any requirement that East Penn was required to submit the monitoring data. On this basis, East Penn contends that the Board's precedent regarding the use of DMRs is inapplicable here to the use of EARs. Instead, citing Wawa, supra, East Penn argues that summary judgment should be denied as the 1976 WQM Permit did not specify monitoring, analysis, or certification procedures.

We are not persuaded that we should treat East Penn's EARs differently from

DMRs simply on the basis that DMRs are submitted pursuant to the NPDES program and EARs were submitted under the Clean Streams Law. As we previously explained in Chevron USA, Inc. v. DER, 1991 EHB 1025, Congress established the NPDES program by amending the federal Clean Water Act, 33 U.S.C. §1251 et seq., in 1972. Pursuant to the intent of the NPDES program, the Commonwealth was given primary jurisdiction to administer the NPDES program within its borders. Id. The permitting program already established in §§202, 307, and 315 of the Clean Streams Law, 35 P.S. §691.202, 307, and 315, was the vehicle for implementing the NPDES program in the Commonwealth. City of Bethlehem v. DER, 1992 EHB 493; 25 Pa. Code §92.5 (NPDES permit is DER permit for purposes of sections 202 and 307 of the Clean Streams Law). Both EARs and DMRs are self-reports and both indicate the levels of pollutants in a discharge and compliance with the effluent limitations in the company's permit.

East Penn's 1976 WQM Permit set forth effluent limitations for East Penn's discharge at Special Condition B, and required East Penn to submit to DER evidence of the efficiency and adequacy of its approved waste treatment works in treating East Penn's discharge at Special Condition C, and to monitor its groundwater quality at Special Condition F. Clearly, DER has the power to prescribe appropriate permit conditions, including monitoring. DER should be able to rely on the veracity of the monitoring data submitted via East Penn'a DMRs, as East Penn run the risk of running afoul of the Pennsylvania Crimes Code's provisions regarding falsification of records. See, e.g., 18 Pa. C.S.A. §§4104, 4904, and 4911. We also agree with DER that the public policy behind using DMRs and EARs is the same: to encourage compliance with the law through self-monitoring, thus conserving government resources and emphasizing permittee responsibility. See Wawa, supra. We further reject East Penn's argument based

on Wawa. In Wawa, which was a civil penalty proceeding brought under section 605 of the Clean Streams Law, we denied summary judgment on the issue of whether a violation of an average monthly limitation for a parameter must be regarded as a violation on every day of the month in question. We reasoned that there were outstanding questions of material fact regarding sampling protocol, pointing out that it was difficult for us to conclude that Wawa had violated its average monthly limit on a day when no samples were taken and no production occurred. There is nothing before us in the present matter to suggest that a similar question of material fact exists here. Thus, Wawa does not lead us to conclude that summary judgment should be denied on the basis of East Penn's argument. We thus find that the EARs East Penn submitted to DER can be used to show the alleged violations.

**Do Drinking Water Standards Apply?**

East Penn argues that a genuine issue of material fact exists as to whether drinking water standards, and not the effluent limitations contained in the 1976 WQM Permit, might have been applicable to the discharges from East Penn's facility during the time period in which DER alleges that violations occurred. To support this argument, East Penn asserts that a Consent Order and Adjudication (COA) entered into by East Penn and DER in 1976 (1976 COA) (Exhibits A and B to East Penn's Answer and New Matter) established interim effluent limits for East Penn's discharge, and that the 1976 WQM Permit contained essentially the same effluent limits as the 1976 COA for the relevant parameters but neither expressly nor implicitly revoked the 1976 COA. East Penn claims that a DER memorandum dated December 15, 1982 from Richard W. Pfaehler, Field Supervisor of DER's Bureau of Water Quality Management, Wernerville Office (Exhibit B to East Penn's Response to DER's motion) shows Pfaehler questioned whether drinking water

standards or the limits of the 1976 WQM Permit applied to East Penn's discharge. East Penn further asserts that portions of Pfaehler's July 27, 1994 deposition transcript (Exhibit A to East Penn's Response to DER's motion) show Pfaehler was confused as to the applicable standards for East Penn's discharge. East Penn argues that Pfaehler's present recollection of his 1982 memorandum and of the operation of the 1976 WQM Permit and the 1976 COA are issues of credibility which cannot be decided on summary judgment (citing Pennsylvania Gas and Water Co. v. Nenna and Frain, Inc., 320 Pa. Super. 291, 467 A.2d 330 (1980)).

East Penn further points to Exhibit C to its response to DER's motion, which it says is a memorandum prepared by DER geologist Richard Kraybill after he conducted a survey of the groundwater wells at the East Penn plant in July and August of 1972 before the discharge from East Penn was permitted, and to Exhibit D to its response to DER's motion, which it says is a copy of DER's minutes of a December 7, 1972 meeting between DER and East Penn which was held to discuss the discharge from East Penn's facility. East Penn asserts that these documents were obtained by East Penn via discovery, and that they "strongly suggest that DER viewed East Penn's discharge as a discharge to groundwater and that drinking water standards should apply to the effluent". As further support for this argument, East Penn notified the Board, by a letter dated January 10, 1995, that on January 6, 1995, it had taken the deposition of Robert Flicker, who is East Penn's Executive Vice-President and who was employed by East Penn prior to 1976. East Penn's letter states that Flicker gave testimony regarding discussions he had with DER representatives prior to execution of the 1976 COA and 1976 WQM Permit. East Penn's letter further states that Flicker referred to two documents which East Penn has attached to its letter: the first, dated November 17, 1975, contains reports on a meeting held on November 5, 1975 and was authored by

Flicker; the second, dated March 31, 1976, refers to a meeting held on March 31, 1976. East Penn asserts that both of these documents refer to statements made by DER representatives to the effect that the effluent discharge standards were to be drinking water standards. It is East Penn's contention that these documents, when considered with the December 15, 1982 Pfaehler memorandum, present a question of material fact as to whether drinking water standards applied to East Penn's discharge rather than the effluent limitations contained in its 1976 WQM Permit. Additionally, East Penn has submitted to the Board on January 31, 1995, a request that we consider a portion of Flicker's deposition testimony and three East Penn exhibits from Flicker's deposition. Exhibit D-1 is a Report of a Meeting Concerning Industrial Wastes, dated January 23, 1975; Exhibit D-2 is a Report of a Meeting Concerning Industrial Waste dated November 5, 1975; and Exhibit D-3 is a memorandum regarding a March 31, 1976 meeting between East Penn and DER representatives.

DER responded to East Penn's January 10, 1995 letter with a letter dated January 11, 1995, in which it objected to our consideration of the documents submitted with East Penn's January 10, 1995 letter and stated that neither of these documents modified the 1976 WQM Permit. In a telephone conference call between the presiding Board Member and counsel for East Penn and DER on January 11, 1995, we indicated that we would consider the documents attached to East Penn's January 10, 1995 letter. DER also opposed our consideration of the exhibits submitted with East Penn's January 31, 1995 letter.

We do not agree with East Penn that the exhibits attached to its Response show there is a genuine issue of material fact as to whether drinking water standards, rather than the effluent limits in its 1976 WQM Permit, were applicable. Both Pfaehler's December 15, 1982 memorandum and the portion of

Pfaehler's deposition transcript show only that Pfaehler was questioning whether some standard more stringent than the 1976 WQM Permit limitations was or would later be required.[1] Moreover, as Kraybill's memorandum and the DER meeting minutes (Exhibits C and D to East Penn's Response) both pre-date the effluent limitations in the 1976 WQM Permit, we do not see how these alleged facts directly affect the disposition of this case, where the issue is whether East Penn's 1976 WQM Permit's effluent limitations are applicable to East Penn's discharges between July of 1989 and June of 1993. Whether a standard more stringent than the 1976 WQM Permit's effluent limitations was needed is not the issue before the Board with regard to this motion. The documents submitted with East Penn's January 10, 1995 letter do not cause us to change this conclusion, nor do the documents submitted with East Penn's January 31, 1995 letter.

**Do the 1976 WQM Permit's Effluent Limitations Apply?**

Absent a DER-issued permit, East Penn's discharges from its facility would have been unauthorized. East Penn does not assert that it raised a challenge to the effluent limitations set forth in the 1976 WQM Permit authorizing the discharge after that permit was issued by DER. Under the doctrine of administrative finality, the 1976 WQM Permit became final and binding on DER and East Penn when East Penn failed to challenge it. East Penn cannot now attack the

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[1] We do not need a hearing to determine the credibility of Pfaehler's testimony at his deposition. East Penn is correct that the Superior Court in Pennsylvania Gas and Water Co. indicated that summary judgment should not be granted where it requires the acceptance of the testimony of the moving party's witness, citing Nanty-Glo Borough v. American Surety Co., 309 Pa. 236, 163 A. 523 (1932), for the proposition that credibility is a matter for the jury. We have pointed out, however, that the Nanty-Glo rule has been held by the Commonwealth Court to be inapplicable to proceedings before the Board. See Snyder v. Department of Environmental Resources, 138 Pa. Cmwlth. 534, 588 A.2d 1001 (1991); Envyrobale Corporation v. DER, EHB Docket No. 94-148-E (Opinion issued December 6, 1994).

effluent limitations in its 1976 WQM Permit. See Lower Paxton, et al. v. DER, et al., EHB Docket No. 94-167-MR (Opinion issued December 1, 1994); Commonwealth, DER v. Wheeling-Pittsburgh Steel Corporation, 22 Pa. Cmwlth. 250, 348 A.2d 765 (1975), aff'd, 473 Pa. 432, 375 A.2d 320 (1977), cert. denied, 434 U.S. 969 (1977). Thus, we conclude that the effluent limitations contained in East Penn's 1976 WQM Permit were applicable to East Penn's discharge. East Penn raises several arguments in its response to DER's motion, relating to the affirmative defenses it raised in its new matter and to DER's issuance of an NPDES Permit No. PA0055310 to East Penn in 1990 (1990 NPDES Permit), and also relating to a COA entered into by the parties in 1993, which it urges present issues of material fact which preclude us from granting summary judgment. We therefore address these issues.

**Affirmative Defenses**

East Penn urges that the facts asserted by East Penn in its new matter in support of its affirmative defenses of release, estoppel/waiver, laches, consent, and impossibility of performance present genuine issues of material fact and that these affirmative defenses bar entry of summary judgment on the issue of liability as a matter of law. In its response to DER's motion, East Penn does not specify which factual material it means in making this argument except as to its defenses of release and consent.

**Release**

Under paragraph 6 of the 1976 COA, DER agreed that:

> The Department shall not prosecute the Corporation for any alleged past violations of the Clean Streams Law or the Solid Waste Management Act at the Corporation's business site and shall not prosecute the Corporation for future violations of the same so long as the Corporation complies with the terms of the Consent Order entered into the 22nd day of October, 1976, and so long as the discharge from the Corporation's business site

> does not add contamination to the waters of the Commonwealth at any point outside the Corporation's business site.

Regarding its affirmative defense of release raised in its new matter, East Penn asserts in its response to DER's motion that the 1976 COA between it and DER requires DER to satisfy two conditions precedent before DER can initiate this action against East Penn, and that DER has failed to meet the requirements of one of these conditions, i.e., that DER notify East Penn that it was contributing to off-site contamination. DER responds, in its reply to East Penn's response, that the factual issue of whether DER ever notified East Penn that its discharge was contributing to off-site contamination is not a fact which is material to the issue of whether East Penn violated its 1976 WQM Permit.

Clearly, there is a dispute between the parties as to the meaning of paragraph 6 of the 1976 COA as quoted above. We do not decide issues of fact on motion for summary judgment; thus, we make no determination as to whether paragraph 6 contains conditions precedent to DER's prosecution in this matter. This factual dispute causes us to deny DER's motion as to this issue.

**Consent**

In its response to DER's motion, East Penn argues that its affirmative defense of consent raised in its new matter precludes summary judgment. East Penn claims that DER issued the 1990 NPDES Permit to it on November 26, 1990, authorizing the discharge of treated industrial wastewaters from the plant to a dry swale located on the plant property, and, that after issuance of this permit, DER instead directed it, both orally and in writing, to continue to discharge to the ore pit. East Penn points to Exhibit E to its new matter, which is a letter dated September 19, 1991 from DER's Regional Water Quality Manager, Leon Oberdick, as further support for its argument that DER directed the discharge

from East Penn's facility to be to the ore pit. East Penn also asserts that at a meeting between representatives of DER and East Penn on November 23, 1992, DER stated that East Penn should continue to discharge to the ore pit rather than to the dry swale.

We view East Penn's consent defense as a "springing defense", as it springs from the NPDES Permit issuance in 1990 and would only be a defense to the alleged violations occurring after November 26, 1990. Material facts, i.e., DER's intent in issuing the 1990 NPDES Permit and the impact of Oberdick's letter, are unclear. We cannot tell what set of parameters East Penn was held responsible for meeting, and thus, whether East Penn's discharges were violations, except insofar as its discharge would be in excess of both the parameters contained in the 1990 NPDES Permit and the 1976 WQM Permit after November of 1990. The 1990 NPDES Permit is not before us. We thus agree with East Penn's response to DER's motion that whether DER consented to the discharge to the ore pit rather than to the dry swale presents a disputed issue of material fact which precludes us from granting summary judgment in DER's favor.

Having drawn these conclusions, we do not address East Penn's other affirmative defenses and whether they are a bar to our granting DER all of the relief it seeks.[2]

**Change of Circumstances**

East Penn argues that DER's issuance of the 1990 NPDES Permit to East Penn,

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[2] DER also argues that because East Penn's affirmative defenses concerning estoppel/waiver, laches, and impossibility of performance go to the issue of the penalty amount, they are irrelevant to the issue of liability here (citing DER v. Sharon Steel, 1979 EHB 316, 325). In Sharon Steel, the Board stated that the same "facts which support laches, waiver, fundamental fairness, and estoppel could mitigate against the assessment of a civil penalty and thus can be considered by the Board in the determination of an appropriate penalty." By our conclusion in this matter, we do not repudiate what we said in Sharon Steel.

"coupled with other changes which had occurred in the 14 years since the 1976 COA and WQM Permit" constitute changed circumstances which allow East Penn to challenge the effluent limitations in its 1976 WQM Permit under the "doctrine of changed circumstances", citing Bethlehem Steel Corporation v. Commonwealth, DER, 37 Pa. Cmwlth. 479, 390 A.2d 1383 (1978); and Specialty Waste Services, Inc. v. DER, 1992 EHB 382.

East Penn, as the party seeking to avoid the imposition of summary judgment, has to show by specific facts in its depositions, answers to interrogatories, admissions, or affidavits that there is a genuine issue for trial. Marks v. Tasman, 527 Pa. 132, 589 A.2d 205 (1991); Envyrobale Corporation v. DER, EHB Docket No. 94-148-E (Opinion issued December 6, 1994); Pa. R.C.P 1035(d). Thus, East Penn cannot merely state unspecified, generic changes of circumstances give rise to disputed facts which are sufficient to defeat DER's motion for summary judgment. The only factual dispute identified by East Penn as to this argument is with regard to the effect of the effluent limitations contained in its 1990 NPDES Permit on the effluent limitations set forth in its 1976 WQM Permit.

While the Board is not aware of a "doctrine of changed circumstances", the cases cited by East Penn do discuss a very narrow exception to the doctrine of administrative finality. In Bethlehem Steel, Bethlehem had sought and was granted a variance pursuant to DER's Air Pollution Control regulations relating to emissions from to its draw furnace operation. Bethlehem's variance application specifically stated that the rate of emissions from its facility was unknown at that time. After Bethlehem subsequently completed testing on its emissions and obtained the test results, DER issued a clarification of its regulations with regard to the prohibition of fugitive emissions, and Bethlehem

applied to DER for an exemption pursuant to DER's "clarification" of its regulation. The Commonwealth Court rejected the Wheeling-Pittsburgh decision's application to the facts in Bethlehem Steel on the basis that Bethlehem Steel was seeking to have applied a regulation not previously addressed by DER, stressing that this regulation could not previously have been addressed because the rates of emission from Bethlehem's operation were unknown when Bethlehem originally sought and obtained its variance from DER's regulation and that the regulation was thereafter arguably clarified.

In Specialty Waste Services, we considered whether the appellant's challenge to the renewal of its operating permit for its incinerator was precluded by the doctrine of administrative finality. We ruled in Specialty Waste Services that in permit renewal appeals, the appellant may raise issues which have arisen between the time the permit was first issued and the time it was renewed, but that an appellant may not challenge the renewal by raising arguments which were available when the initial permit was issued.

As we explained supra, East Penn was required by the Clean Streams Law to have a permit before it could discharge its industrial wastewaters to waters of the Commonwealth, and its 1976 WQM Permit served this purpose. After DER issued East Penn's 1990 NPDES Permit, it also met the purpose of authorizing the discharge from East Penn's facility pursuant to the Clean Streams Law. Lower Paxton, supra, 1987 EHB at 286; 25 Pa. Code §§92.3 and 92.5. We do not know from the facts before us, however, whether the 1990 NPDES Permit was intended to supersede East Penn's 1976 WQM Permit or whether it was issued with regard to a discharge different from the discharge which was addressed by the 1976 WQM Permit. If the 1990 NPDES Permit was intended to supersede the 1976 WQM Permit as to the same discharge, then we cannot foreclose the possibility that a case

could be made that a violation occurring after 1990 could be a violation of the 1990 NPDES Permit. As we concluded with East Penn's release and consent arguments, there are too many genuine issues of material fact in dispute for us to grant summary judgment in DER's favor as to the effect of the 1990 NPDES Permit on the effluent limitations contained in East Penn's 1976 WQM Permit.[3]

We accordingly enter the following order granting DER's motion for partial summary judgment as to whether DER may use the EARs submitted by East Penn to show that discharges from East Penn's facility exceeded the effluent limitations contained in its Permit. We otherwise deny DER's motion for partial summary judgment as to the issue of East Penn's liability in accordance with the foregoing opinion.

**ORDER**

AND NOW, this 15th day of February, 1995, it is ordered that DER's motion for partial summary judgment as to the issue of East Penn's liability for

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[3] We note East Penn alleges in its response to DER's motion that there are genuine questions of material fact as to whether the COA entered into between the parties on June 3, 1993 (1993 COA) superseded, revoked, and rescinded the effluent limits which were in effect before June 2, 1993, such that DER may not seek civil penalties for alleged exceedances of <u>any</u> previously effective limits.

East Penn raised this argument as a preliminary objection, which we have addressed. In our October 21, 1994 Opinion, we ruled that East Penn had failed to establish that DER's complaint did not state a claim upon which civil penalty relief could be granted. We did not rule that the effluent limitations in the 1976 WQM Permit were not affected by the 1993 COA, as DER contends, nor did we indicate acceptance by the Board that the 1993 COA was raised by East Penn as an affirmative defense. Rather, our Opinion says that as the issue was raised as a preliminary objection, we could not pass on it without some factual record before us.

East Penn should have pled its argument concerning the 1993 COA as an affirmative defense, and, by its failure to do so, has waived this argument. <u>Sewickley Valley Hospital v. Commonwealth, DPW</u>, 121 Pa. Cmwlth. 337, 550 A.2d 1351 (1988). To the extent that East Penn reserved the right to amend its new matter to assert additional facts, objections, or defenses in its pleading, and that the Board has permitted leave to file amended pleadings pursuant to Pa.R.C.P. 1033, East Penn may nevertheless seek to bring this issue before us. <u>See</u> <u>DER v. Petro-Tech, Inc.</u>, 1986 EHB 490.

violations of the Clean Streams Law is granted in part and denied in part. It is ordered that summary judgment is granted in favor of DER on the issue of whether DER may use the EARs submitted by East Penn to show East Penn's discharges exceeded the effluent limitations contained in its Permit. As to whether discharges from East Penn's facility which exceeded the effluent limitations of its 1976 WQM Permit would constitute the violations of the Clean Streams Law alleged in DER's complaint, it is ordered that partial summary judgment is denied in accordance with the Opinion accompanying this Order.

**ENVIRONMENTAL HEARING BOARD**

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**ROBERT D. MYERS**
**Administrative Law Judge**
**Member**

Richard S. Ehmann

**RICHARD S. EHMANN**
**Administrative Law Judge**
**Member**

**DATED:** Februay 15, 1995

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M. DIANE SMITH
SECRETARY TO THE BOARD

| | | |
|---|---|---|
| NORMAN DESOUZA, *et al.* | : | |
| | : | |
| v. | : | EHB Docket No. 94-291-MR |
| | : | |
| COMMONWEALTH OF PENNSYLVANIA | : | |
| DEPARTMENT OF ENVIRONMENTAL RESOURCES | : | Issued: February 15, 1995 |

**OPINION AND ORDER**
**SUR**
**MOTION TO DISMISS APPEAL**
**FOR LACK OF JURISDICTION**

**Robert D. Myers, Member**

**Synopsis**

The Board dismisses for lack of jurisdiction an appeal based on oral statements of DER's legal counsel pertaining to a proposal made by DER at a settlement conference at which the Appellants were not parties. The oral statements here are not appealable. Proposals made during settlement discussions cannot form the basis of an appeal. Formal procedures established by the regulations cannot be circumvented by taking an appeal from informal discussions.

**OPINION**

The Department of Environmental Resources (DER) sent a letter, dated April 8, 1994, to Lower Paxton Township Authority (LPTA), stating that the hydraulic carrying capacity of the Beaver Creek Interceptor was being exceeded and that LPTA should take action pursuant to 25 Pa. Code §94.21. That action included a prohibition on new connections to the Interceptor and the submission of a plan and schedule for correcting the condition.

On April 18, 1994, LPTA submitted to DER a Plan and Schedule to Reduce Hydraulic Overloading of the Beaver Creek Interceptor and submitted supplements on May 15 and 24, 1994. DER approved with conditions the Plan and Schedule on May 31, 1994. LPTA filed a Notice of Appeal (Board Docket No. 94-167-MR) on June 30, 1994, challenging the conditions of the approval. On August 30, 1994, Swatara Township Authority (STA) and Paxtowne Limited Partnership, Locust Lane Limited Partnership, Fine Line Homes, Inc., Kings Crossing, Inc. and Stratford Homes, Inc. (Developers) were allowed to intervene - STA as an Appellee, the Developers as Appellants.

On October 13, 1994, the Developers were taking the deposition of Leon Oberdick, Program Manager of the Water Management Program in DER's Southcentral Regional Office, in connection with the appeal at 94-167-MR. The Developers claim that, during that deposition, Mr. Oberdick stated that the issuance of an additional 90 connection permits was technically justified. The Developers' legal counsel (Mr. Slap) requested DER's legal counsel (Ms. Thomas) to have DER authorize the issuance of the additional permits, which request was denied in a telephone conversation of October 17, 1994. Mr. Slap summarized these events in a letter to Ms. Thomas dated October 25, 1994.

On October 28, 1994, the Developers[1] filed a Notice of Appeal at the above docket number from DER's denial of the request to issue the 90 additional permits. Also on that date, the Developers requested a supersedeas

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[1] Norman DeSouza, John L. Schilling and John E. Glise, who we understand are principals in the businesses named as the Developers, also are parties to the appeal at 94-291-MR. Hereafter, they all will be referred to collectively as the Developers.

in both appeals and sought to have both appeals consolidated. A supersedeas was denied by an Opinion and Order issued by the Board on December 1, 1994. The request for consolidation is still pending.

Meanwhile, on November 2, 1994, DER filed a Motion to Dismiss [the present] Appeal for Lack of Jurisdiction supported by a legal memorandum. The Developers filed a letter response on November 15, 1994. The Motion is ripe for disposition.

DER contends that an oral response by DER counsel to an oral request by opposing counsel that DER take some action is not appealable and the Board, therefore, lacks jurisdiction of this appeal. The Developers argue that DER's denial of that request affects their personal and property rights and, whether oral or written, is appealable.

We had occasion in JEK Construction Company, Inc. v. DER, 1990 EHB 535, to consider the appealability of oral statements made by a DER employee. We said at page 543:

> Whether it is a DER action or an adjudication which is appealed, each contemplates a writing reflecting DER's position, just as we implied in Municipal Authority of Buffalo Township v. DER, supra. Neither DER's counsel nor JEK's counsel has pointed us to a case where an oral statement by a DER employee has been held to be such an appealable action or adjudication. Our own research has failed to disclose such a case either. We believe this lack of cases on oral statements comes about for a good reason. DER acts pursuant to statutes and regulations which require permits in writing, detailed written applications, and the myriad of other pieces of paper which form the gasoline on which DER's bureaucratic engine runs. For better or worse and whether we like it or not, we exist in a regulated world where the final word is a written word. Persons may have oral discussions, but their commitments to each other in this regulated world are on paper (in one form or another). It is that paper which records precisely what a party means others to conclude as to its position on various matters.

> A writing allows an adjudicatory body to review what has transpired rather than what each side subjectively and retrospectively thinks has occurred.

The other problem with oral statements, also mentioned in JEK, supra, is that they tend to reflect interim thinking or tentative opinions rather than final decisions. That's why they are stated orally in the first place. When the thinking coalesces into final action, a writing is prepared with carefully chosen words used to express the decision. Oral statements rarely reflect that care and deliberation.

We have held that provisional, interlocutory decisions of DER, even if written, are not reviewable by this Board because they are not final: Phoenix Resources, Inc. v. DER, 1991 EHB 1681; John D. and Sandra T. Trainer *et al.* v. DER *et al.*, Board Docket No. 94-016-W (Opinion and Order issued May 17, 1994); Eric Joseph Epstein v. DER *et al.*, Board Docket No. 94-030-W (Opinion and Order issued October 27, 1994). The same result applies to pre-final decisions that are oral: JEK, supra. This is not to say that oral statements can never under any circumstances be appealable. We simply see no reason here to depart from our holding in JEK, supra.

There are additional reasons why the oral statements here cannot form the basis for an appeal. During his deposition on October 13, 1994, Mr. Oberdick was asked the following at page 2-21:

> Q And would it also be fair to say that since July 5th, 1994, the Department has not made a determination as to whether or not to allow additional building permits in the Beaver Creek basin?
>
> A We did make a determination.
>
> Q And what was that determination?

A The determination was that we were going to allow an additional 90 building permits to be issued.

Q Has that been communicated in writing to Lower Paxton Township Authority?

A I don't believe it was in writing. I think it was just verbal in settlement discussions of this appeal, but I don't recall that anything went into writing because there was no agreement with regard to a settlement appeal.

DER's counsel, Ms. Thomas, objected that settlement discussions are confidential. The Developers' attorney, Mr. Slap, then tried to phrase his questions so as to avoid the objection. Mr. Oberdick wanted to consult with Ms. Thomas before answering but Mr. Slap objected and insisted that the question be answered. Mr. Oberdick responded on page 2-23:

A The determination was yes it was possible if, along with the commitment on the part of the Authority to do some -- to follow up on their commitment to do flow monitoring.

Q So it was technically justified?

A Yes.

On the basis of this testimony, Mr. Slap orally requested Ms. Thomas to authorize issuance of the additional 90 permits and Ms. Thomas orally denied the request. That denial, as noted above, is the basis for the appeal.

It is clear that, after DER's conditional approval of the Plan and Schedule (which approval authorized the issuance of some connection permits) and after LPTA took the appeal at 94-167-MR, DER and LPTA engaged in settlement discussions in an effort to resolve the appeal. Part of DER's proposals was the authorization to issue 90 more connection permits. Oberdick was satisfied that another 90 could be justified technically if LPTA met certain commitments such as flow monitoring. These proposals were presented

to LPTA orally at a settlement conference but never put in writing because a settlement was not achieved.

Certainly, LPTA would not be allowed to use these oral statements (made during settlement negotiations) as a basis for appeal. How then can a stranger to those negotiations do so? The same public policy (encouraging settlements) that prohibits their use by LPTA prohibits their use by others such as the Developers.

25 Pa. Code §94.21(b) sets forth the procedure for seeking and obtaining DER's approval for the issuance of connection permits. That procedure is formal, involves writings, and requires consideration by DER of specified subjects. An attempt to circumvent that procedure by appealing from informal oral discussions is objectionable even if they were not settlement conferences. And here it is not LPTA that made the demand for more permits; it is the Developers. LPTA is not even a party to this appeal.

For all of the foregoing reasons, we conclude that we have no jurisdiction to proceed with this appeal.

## ORDER

AND NOW, this 15th day of February, 1995, it is ordered as follows:

1. DER's Motion to Dismiss Appeal for Lack of Jurisdiction is granted.

2. The appeal is dismissed.

3. The request to consolidate this appeal with the appeal at 94-167-MR is denied as moot.

**ENVIRONMENTAL HEARING BOARD**

Maxine Woelfling

**MAXINE WOELFLING**
**Administrative Law Judge**
**Chairman**

Robert D. Myers

**ROBERT D. MYERS**
**Administrative Law Judge**
**Member**

**RICHARD S. EHMANN**
**Administrative Law Judge**
**Member**

**DATED:** February 15, 1995

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| CESAR MUNOZ, ET UX. | : | |
| | : | |
| v. | : | EHB Docket No. 93-373-MR |
| | : | |
| COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and PLEASANT VALLEY SCHOOL DISTRICT, PERMITTEE | : | Issued: February 16, 1995 |

## OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT

By Robert D. Myers, Member

Synopsis:

The Board enters partial summary judgment in favor of a permittee in an appeal from DER's issuance of a sewage facilities construction permit because most of the issues raised in the appeal pertain to siting of the facilities. Siting is an issue that must be raised at the planning stage which, in this instance, occurred when the planning module for new land development was processed and approved by the municipality and DER. Since appellants did not appeal from DER's approval of the module, the siting issue is final and binding and cannot be relitigated in this appeal. Summary judgment is denied in connection with one issue because of uncertainty about whether it is a siting or a construction issue.

## OPINION

Cesar Munoz *et ux.*, Appellants, filed a Notice of Appeal on December 13, 1993 seeking Board review of the issuance by the Department of Environmental Resources (DER) of Water Quality Management Permit No. 4593407 (Permit) to

Pleasant Valley School District (Permittee). The Permit, notice of which was published in the *Pa. Bulletin* on November 13, 1993, authorized construction of a sewage treatment plant and spray irrigation system to serve the Pleasant Valley School District Elementary School in Polk Township, Monroe County.

On August 9, 1994 Permittee filed a Motion for Summary Judgment and accompanying brief. The Motion was supported by 9 exhibits, including the June 10, 1994 deposition of Cesar Munoz. Appellants filed Objections to the Motion on August 31, 1994 along with a request for permission to file an omnibus brief covering both the Motion for Summary Judgment and Permittee's Motion to Dismiss or, in the Alternative, Motion to Limit Issues and Request for More Specific Pre-hearing Memorandum.[1] Permission was granted by Board Order dated September 2, 1994, but no brief has been filed.[2]

The Board can grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of fact and that the moving party is entitled to judgment as a matter of law: Pa. R.C.P. 1035(b). We must view the Motion in the light most favorable to the non-moving party: *Robert C. Penoyer v. DER*, 1987 EHB 131.

The crux of Permittee's Motion is that Appellants' appeal seeks to litigate issues that were pertinent to DER's approval of the Sewage Facilities Planning Module for New land Development (Module) on April 26, 1993 (Exhibit C to the Motion). Since Appellants did not take an appeal from that approval

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[1]This Motion was filed on August 17, 1994. Appellants' Objections were filed on September 12, 1994.

[2]In accordance with its policy where a third party attacks DER's issuance of a permit, DER has relied on Permittee to defend the action and has not taken an active role in this appeal.

(notice of which was published in the *Pa. Bulletin* on May 22, 1993 (Exhibit D to the Motion)), the action is final and binding on Appellants and cannot be relitigated in the present appeal. Appellants contend that there are unresolved issues of fact in the appeal and that Permittee is not entitled to judgment as a matter of law.

The four unresolved issues of fact listed by Appellants all relate to the impact of the sewage treatment facilities on neighboring properties, particularly that of Appellants. This is consistent with the objections included in the Notice of Appeal and the contentions made in the pre-hearing memorandum. Three of them clearly pertain to the siting of the treatment plant and spray irrigation field.

We held in *Bobbi L. Fuller et al. v. DER et al.*, 1990 EHB 1726, that issues related to the siting of sewage treatment facilities must be raised at the planning stage and cannot be raised at the construction stage. Commonwealth Court affirmed our holding at 143 Pa. Cmwlth. 392, 599 A.2d 248 (1991). The planning stage for this project encompassed the consideration and approval of the Module, first by the Township of Polk and then by DER. The Module made clear at numerous points that the proposed method of sewage disposal involved an on-site treatment plant providing secondary treatment, two effluent storage lagoons, and spray irrigation on a 12-acre portion of the site. The size and location of each component of the sewage disposal system were shown both in the text and on the drawings. Soils and hydrogeologic data gathered from the proposed spray field formed the basis of calculations establishing rates and quantities of sprayed effluent.

Any interested persons, including Appellants, could have challenged the siting of these facilities and their impact on neighboring properties by

taking a timely appeal to this Board from DER's approval of the Module. No one did. The Permit from which the appeal was taken constitutes the construction phase of this project - a phase in which siting is no longer a viable issue.

While it is not necessary to our decision, it is apparent from Cesar Munoz's deposition (Exhibit G to the Motion) that Appellants were aware of the proposed project in late 1991 or early 1992, a year or more before DER's approval of the Module. Cesar Munoz went to the municipal building and examined the plans, learning at that time that sewage treatment facilities and a spray irrigation system were to be used. Appellants then retained an engineer and legal counsel to advise them. They attended a township meeting and expressed their concerns about the location of the sewage treatment and disposal facilities (deposition, pp. 52-60).

This is not a case where a nearby property owner first learns of a proposed project when the construction permit is issued. Rather, it is a case where nearby property owners learned of the proposed project at an early stage, became aware of its (to them) objectionable features, made an initial protest, but inexplicably sat on their rights for 1-1/2 years while the planning phase concluded and the construction phase received its final approval. They waited too long.

The Permit contains several special conditions dealing with spray irrigation - limiting application rates, application seasons and the uses that can be made of the spray field. These conditions address post-permit operations rather than siting of the facilities. A challenge to these special conditions could properly be raised in an appeal from the Permit but Appellants did not do so - perhaps because the conditions appear to make the spray field less objectionable to nearby residents.

The only issue about which we have any doubt is whether the proposed project will overload the storm sewer system. This too could be a siting issue, since Appellants admit that the school property is topographically higher and that surface runoff from the school property has ponded on Appellants' property since they moved there in 1988. Their concern, initially, appeared to be that the runoff would now be contaminated because of the spray irrigation. In their Pre-Hearing Memorandum and in their Objections to the Motion, however, they focus on the volume of the runoff and its impact on the storm sewer system. While, as already noted, this could be a siting issue, it could also be a construction issue. We cannot determine with certainty which it is. Since we must view the Motion in the light most favorable to Appellants, we will deny it with respect to the storm sewer issue.

**ORDER**

AND NOW, this 16th day of February, 1995, it is ordered that partial summary judgment is entered in favor of Permittee with respect all issues except that pertaining to whether the proposed project will overload the storm sewer system serving Appellants' property.

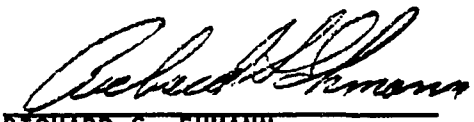
**ENVIRONMENTAL HEARING BOARD**

Maxine Woelfling

**MAXINE WOELFLING**
**Administrative Law Judge**
**Chairman**

Robert D. Myers

**ROBERT D. MYERS**
**Administrative Law Judge**
**Member**



**RICHARD S. EHMANN**
**Administrative Law Judge**
**Member**

**DATED:** February 16, 1995

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| LOWER PAXTON TOWNSHIP AUTHORITY, APPELLANT: AND PAXTOWNE LIMITED PARTNERSHIP, et al. INTERVENORS | : | |
| v. | : | EHB Docket No. 94-167-MR |
| COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES APPELLEE, AND SWATARA TOWNSHIP AUTHORITY, INTERVENOR | : | Issued: February 16, 1995 |

**OPINION AND ORDER SUR MOTION TO STAY PROCEEDINGS OR DISMISS AS MOOT**

By Robert D. Myers, Member

Synopsis:

The Board denies a motion to dismiss an appeal as moot on the basis that an intermunicipal agreement bars additional connections to a hydraulically overloaded sewer interceptor. The issues surrounding the overload and the rate as which future connections can be made (the subjects of the appeal) are separate from the issues surrounding the municipality's contracted-for capacity in the line. The former are within the Board's jurisdiction; the latter are not. The motion to stay Board proceedings while the latter issues are resolved by civil litigation also is denied because the civil litigation will not determine the outcome of the Board's proceedings.

## OPINION

The history of the proceedings in this appeal have been thoroughly stated in our previous Opinions and Orders issued December 1, 1994 and January 26, 1995. Before us now is a Motion to Stay Proceedings or Dismiss as Moot filed by the Department of Environmental Resources (DER) on November 2, 1994. The

Intervening Developers filed their Answer on November 15, 1994. Intervening Swatara Township Authority (STA) filed its Response on November 22, 1994. Appellant Lower Paxton Township Authority (LPTA) filed its Answer/Objection on the same date. All answering parties oppose the Motion.

In the Motion, DER contends that, under the terms of an Agreement, dated November 1, 1985, among LPTA, STA and others (Intermunicipal Agreement), LPTA cannot allow any more connections that would produce flows into the Beaver Creek Interceptor until the dispute over the terms of the Intermunicipal Agreement has been resolved by arbitration. Because of this impediment to additional connections, DER argues, the Board cannot give Appellant any effective relief in this appeal (which seeks permission for additional connections). Therefore, the appeal should be dismissed as moot or, in the alternative, stayed until the arbitration has run its course.

The present dispute between LPTA and STA began on May 19, 1993 when STA informed LPTA that its flows into the Beaver Creek Interceptor had exceeded LPTA's reserved capacity for two consecutive months and that, as a result, a ban on new connections was in effect pursuant to Section 4.06(c)(2) of the Intermunicipal Agreement. Nearly a year later, on April 8, 1994, DER notified LPTA that its portion of the Beaver Creek Interceptor was hydraulically overloaded and that LPTA was required to comply with the requirements of 25 Pa. Code §94.21 - prohibiting new connections and submitting a plan and schedule for correcting the condition.

While related, the two matters are entirely different. STA is claiming that LPTA's flows exceed its contracted-for capacity in the Beaver Creek Interceptor that extends beyond Lower Paxton Township into Swatara Township where it connects to a sewage treatment plant. Neither the portion of the Beaver Creek

Interceptor lying in Swatara Township nor the treatment plant is hydraulically overloaded. It is just that LPTA, according to STA, is exceeding its share of the capacity. DER is claiming, on the other hand, that the portion of the Beaver Creek Interceptor that lies in Lower Paxton Township is hydraulically overloaded - that flows exceed the carrying capacity of the pipe, back up into some manholes and overflow the manholes. While these excess flows may also cause LPTA to exceed its capacity in the Interceptor downstream of Lower Paxton Township, that is only coincidence. LPTA could be exceeding its capacity even without overloaded facilities and, conversely, it could have overloaded facilities and not exceed its capacity.

It is possible that the Board could proceed with the appeal and reach a decision which gives LPTA the right to permit additional connections. Whether LPTA could exercise that right under the Intermunicipal Agreement depends upon the contractual provisions. This is a private matter between STA, LPTA and the other contracting parties and we have no jurisdiction over it. Clearly, that also was DER's opinion when it approved LPTA's plan and schedule on May 31, 1994, the action forming the basis for the appeal. That approval authorized LPTA to allow the additional connection of 90 EDUs up to December 31, 1994. Yet, the Intermunicipal Agreement, as claimed by STA, had a ban on further connections dating back to the prior year. If that ban did not impede DER's power to authorize additional connections, how can it impede the Board's power to do so? Since we can give effective relief, the appeal is not moot.

We have, at times, stayed our proceedings while the parties engaged in civil litigation. Generally, this has been done in cases where the civil litigation will resolve the appeal one way or another. That is not the case here. The civil litigation dealing with interpretation of the Intermunicipal

Agreement may find that LPTA has not exceeded its capacity. Yet, the hydraulic overload would exist in LPTA's portion of the line and the issue of how many connections can reasonably be approved under 25 Pa. Code §94.21(b) would still be before us. For this reason, we believe that justice will be served best by allowing both proceedings to move at their own pace through their respective tribunals.

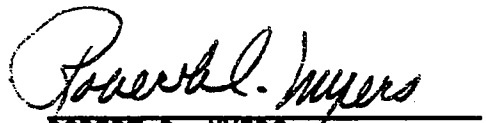
## ORDER

AND NOW, this 16th day of February, 1995, it is ordered as follows:

1. DER's Motion to Stay Proceedings or Dismiss as Moot is denied.

2. The appeal will be placed on the list of cases to be scheduled for hearing.

**ENVIRONMENTAL HEARING BOARD**



**ROBERT D. MYERS**
**Administrative Law Judge**
**Member**

**DATED:** February 16, 1995

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M. DIANE SMITH
SECRETARY TO THE BOARD

| | | |
|---|---|---|
| GREEN THORNBURY COMMITTEE, et al. | : | |
| | : | |
| v. | : | EHB Docket No. 93-271-W |
| | : | (Consolidated Docket) |
| COMMONWEALTH OF PENNSYLVANIA, | : | |
| DEPARTMENT OF ENVIRONMENTAL RESOURCES | : | Issued: February 17, 1995. |
| and MARK STEPHEN and HELEN McGINLEY, | : | |
| et al. | : | |

## OPINION AND ORDER SUR MOTION TO DISMISS

By the Board

Synopsis

A motion to dismiss is granted in part and denied in part.

Publication of notice in the *Pennsylvania Bulletin* is sufficient to toll the thirty-day appeal period with respect to third parties not directly engaged in a Department action. The Board will not treat an appeal as an appeal *nunc pro tunc* absent a showing of fraud, breakdown in the Board's operation, or unique and compelling circumstances establishing a non-negligent failure to file a timely appeal. Since objections concerning the timeliness of a notice of appeal go to the Board's subject matter jurisdiction, they cannot be waived.

The Board may award costs and attorney fees only where authorized by statute. It does not have the "inherent authority" to do so.

### OPINION

These consolidated appeals were initiated with the September 28, 1992, filing of a notice of appeal by New Brinton Lake Club (New Brinton), challenging the Department's August 26, 1992, approval of an amendment to Thornbury Township's official sewage facilities plan. The amendment authorized the

installation of single residence sewage treatment plants (SRSTPs) on a lot owned by Mark and Helen McGinley (McGinleys), a lot owned by Charles and Jeanne Marie Pagano, and a lot owned by Peter Pagano (collectively, the Permittees), all of Thornbury Township, Delaware County. The appeal was docketed at EHB Docket No. 92-441-MR.

A related appeal was filed on September 23, 1993. Green Thornbury Committee (GTC), Paul Crits-Christoph (Crits-Christoph), and Robert G. and Amelia L. Sokalski (Sokalskis), and Roger Clarke (Clarke) appealed the Department's December 8, 1992, issuance of three NPDES sewage permits and three water quality management permits. The Department had issued one of each type of permit to McGinleys, to Charles and Jeanne Marie Pagano, and to Peter Pagano for their SRSTPs. This appeal was docketed at EHB Docket No. 93-271-W.

The appeals of the sewage facilities plan approval and the issuance of the NPDES and water quality management permits were consolidated here, at EHB Docket No. 93-271-W, on November 2, 1993. A hearing was held in Harrisburg on August 15-17, 1994, before Board Chairman Maxine Woelfling. On December 8, 1994--after New Brinton, GTC, Crits-Christoph, Sokalskis, and Clarke (collectively, the Appellants) had filed their post-hearing memorandum--the Permittees filed a motion to dismiss the appeal to the extent that it challenges the NPDES permit issued to McGinleys. Since the motion asserts that the notice of appeal was not timely filed, and since the timeliness of filing goes to the Board's jurisdiction, see Pennsylvania Game Commission v. Commonwealth, Department of Environmental Resources, 97 Pa.Cmwlth 78, 509 A.2d 877 (1986), *rev'd on other grounds*, 521 Pa. 121, 555 A.2d 812 (1989), we shall confine our attention here to the motion to dismiss. We shall address the remaining issues in the appeal later, when we issue the adjudication on the merits.

The Appellants filed a response and memorandum in opposition on December 8, 1994, and on December 16, 1994, the Permittees filed a reply. On December 28, 1994, the Department joinded in the Permittees' motion to dismiss and filed a reply to the Appellants' response.

We shall address each of the issues raised by the parties separately below.

**Did the filing of the notice of appeal here comply with the timeliness requirement at §21.52(a), 25 Pa. Code §21.52(a), of the Board's rules?**

Section 21.52(a) of the Board's rules provides, in pertinent part:

> Except as specifically provided in §21.53 of this title (relating to appeal *nunc pro tunc*), jurisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of such action or within 30 days after notice of such action has been published in the *Pennsylvania Bulletin* unless a different time is provided by statute....

There is no question here that notice of the issuance of McGinley's permit was published in the *Pennsylvania Bulletin* on December 26, 1992--roughly nine months before the Appellants filed their notice of appeal. (Permittees' motion to dismiss, paragraphs 2 and 3 and Exhibit B; Appellants' response, paragraphs 2 and 3.) The sole issue with respect to compliance with §21.52(a) is when the thirty-day appeal period starts to run. The Permittees contend it runs from the date the appellant receives written notice or from the date notice is published in the *Pennsylvania Bulletin*, whichever is *first*. The Appellants, meanwhile, contend that the use of the disjunctive in the phrase "*or* within 30 days after notice of such action," (emphasis added), indicates that the thirty-day appeal period starts to run from whichever is the *latter* of the two dates. The Department maintains that when the thirty-day appeal period starts to run depends on the nature of the appellant and that, where the appellant is a third

party not directly affected by the Department's action, the appeal period starts to run from the date of publication of notice in the *Pennsylvania Bulletin.*

The question presented here is virtually identical to that the Board confronted in Citizens Opposing Sewage Treatment Systems v. Commonwealth, Department of Environmental Resources, 1983 EHB 612. There, a citizens group challenged the Department's issuance of two NPDES permits. The Department had published notice of the issuance of the permits in the *Pennsylvania Bulletin* more than thirty days before the citizens group filed its notice of appeal, and the Department filed a petition to quash the appeal as untimely filed. The citizens group argued that the notice of appeal had been timely filed because it had been filed within thirty days of receiving written notice from the Department. The Board dismissed the appeal pursuant to §21.52(a), holding that the thirty-day appeal period ran from the date the notice was published in the *Pennsylvania Bulletin*, rather than the date of receipt of the written notice. We explained:

> It is obvious from a plain reading of 25 Pa. Code §21.52(a) that the notice requirements for appeals from final actions of DER are divided into two (2) categories, those wherein notice is given to the person engaged directly with DER in some function or process such that DER knows the identity of the person who will be affected by DER's final action...and those situations wherein DER's action may affect the public and the specific identity of members thereof is not known to DER.... To place upon DER the burden of notifying directly all persons who may be adversely affected by its final action would be unreasonable and unworkable.
>
> However, in order to serve notice of appeal rights to such members of the public as might be adversely affected by the final actions of DER, and in order to meet the requirements of due process, the framers of the regulation, 25 Pa. Code §21.52(a), properly provided for publication in the *Pennsylvania Bulletin* of the fact of DER final actions which have the potential of adverse effect upon the public. 1983 EHB at 614-615.

The same rationale controls here. The Department does not have an obligation to individually notify all persons who may be adversely affected by

a final action. Publication of notice in the *Pennsylvania Bulletin* is sufficient to toll the thirty-day appeal period with respect to third parties not directly engaged in the Department's action.[1,2]

**Does the appeal qualify as an appeal *nunc pro tunc*?**

The Appellants argue that, even if the notice of appeal was not filed within the appeal period set forth in §21.52(a), the circumstances here dictate that the appeal be treated as an appeal *nunc pro tunc* under §21.53(a) of the Board's rules, 25 Pa. Code §21.53(a). According to the Appellants, the untimely filing resulted from the fact that the Permittees failed to post notice of the permit on or about the premises as required by §92.61(a), and they became aware of the issuance of the permit only after Sokalskis received a September 9, 1993, letter from the Department which, among other things, informed Sokalskis that

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[1] It is clear, moreover, that this is the manner in which the Commonwealth Court construes §21.52(a). In Grimaud v. Commonwealth, Department of Environmental Resources, 161 Pa.Cmwlth. 647, 638 A.2d 299 (1994), a group of landowners argued that they were entitled to *personal* notice of the issuance of an NPDES sewage permit and that the Board had erred by quashing their appeal of the permit because it had been filed more than thirty days after publication of notice of the permit issuance in the *Pennsylvania Bulletin*. The Commonwealth Court affirmed the Board's decision, holding that publication of notice in the *Pennsylvania Bulletin* was sufficient to put third-parties on notice and that the appeal was untimely because it had not been filed. While the court focused more on the quality of the notice than on when the appeal period started to run, the court expressly stated that "25 Pa. Code §21.52 provides that a third party must file its appeal within thirty days after publication of a notice in the *Pennsylvania Bulletin* in order for the Board to have jurisdiction." 638 A.2d at 301.

[2] The result here may appear consistent with the Permittees' argument that the appeal period under §21.52(a) runs from the date of publication in the *Pennsylvania Bulletin* or receipt of written notice--whichever is first. We are unwilling to go so far, however. The Board's holding here is limited to situations where notice is published in the *Pennsylvania Bulletin before* the appellant receives written notice of the action. Where a third party is not directly engaged in a Department action and notice is published *after* the appellant receives written notice, the appeal period start to run upon *publication of the notice*--despite the fact that the appellant had prior personal notice. See, *e.g.*, Lower Allen Citizens Action Group, Inc. v. Commonwealth, Department of Environmental Resources, 119 Pa.Cmwlth. 236, 538 A.2d 130 (1988).

the permit had been issued and that appeals to Department actions could be filed with the Board within 30 days of receipt of written notice of the action. The Permittees maintain that the appeal should not be treated as an appeal *nunc pro tunc* because the letter to Sokalskis expressly stated that it did not create any additional right to appeal and because there is no evidence of record establishing that the Permittees failed to post notice of the permit issuance near the premises or whether Sokalskis knew of the permit issuance before receiving the Department's letter. In addition, the Permittees argue that the Appellants have not shown that the late filing resulted from fraud or a breakdown in the Board's operation, or from any misrepresentation on the part of the Department. The Department argues that the letter could not have misled the Appellants because it was sent long after the appeal period had run and that, in any event, the letter could not create jurisdiction where none would exist otherwise.

Section 21.53(a) of the Board's rules, 25 Pa. Code §21.53(a), creates an exception to the general rule that the Board will have jurisdiction only over appeals which are filed with the Board within the thirty-day appeal period set forth in §21.52(a). Section 21.53(a) provides:

> The Board upon written request and for good cause shown may grant leave for the filing of an appeal *nunc pro tunc*; the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in the Courts of Common Pleas.

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. Commonwealth, Department of Environmental Resources, 148 Pa.Cmwlth 90, 94, 609 A.2d 876, 878 (1992).

It would be inappropriate to treat the appeal at issue here as an appeal *nunc pro tunc*.

Even assuming the Permittees failed to post notice of the permit issuance, the Appellants' appeal would not qualify as an appeal *nunc pro tunc*. While all of the parties here seem to be under the impression that §92.61(a) requires that notice of the issuance of NPDES sewage treatment permits must be posted, that construction of §92.61(a) is incorrect. Section 92.61(a) provides, in pertinent part:

> Public notice of every *complete application* for an NPDES permit shall be published by the Department in the Pennsylvania Bulletin. Such public notice shall also be posted by the applicant near the entrance to the premises of the applicant and in nearby places. (emphasis added)

Since §92.61(a) pertains to the posting of notice of *complete applications*--not the issuance of permits--the Permittees had no duty under that provision to post notice of the permit issuance here.

The only remaining question, then, is whether treating the Appellants' appeal as an appeal *nunc pro tunc* is appropriate given the Department's letter to Sokalskis. We conclude it is not. Even assuming the Appellants' allegations with respect to the letter were true, they would not establish that the untimely filing resulted from fraud, breakdown in the administrative process, or unique and compelling factual circumstances not involving appellant negligence. The fact that the Department did not personally notify Sokalskis before the appeal period expired cannot serve as grounds for an appeal *nunc pro tunc* since, as noted above, the Department had no duty to personally notify the Appellants. And, the letter the Department sent to the Sokalskis cannot serve as grounds for an appeal *nunc pro tunc* because the untimely filing of the appeal did not result from the letter. The Appellants received the letter long after the appeal

period expired.

**Did the Permittees waive their right to object to the timeliness of the appeal by failing to object to it sooner?**

The Appellants argue in their response to the motion to dismiss that the Permittees waived any objections regarding the timeliness of filing by failing to raise the timeliness issue in their pre-hearing memoranda or otherwise before the hearing on the merits. The Permittees maintain, however, that the timeliness of filing the notice of appeal is a jurisdictional issue and may be raised at any time.

The Permittees did not waive their objection to the timeliness of the appeal by failing to raise it sooner. As we have noted above, the timeliness of filing a notice of appeal goes to the Board's subject matter jurisdiction. It is well settled that objections to a tribunal's subject matter jurisdiction cannot be waived. See, *e.g.*, Drummond v. Drummond, 414 Pa. 548, 200 A.2d 887 (1964), and Civil Service Commission of Borough of Jim Thorpe v. Kuhn, 85 Pa.Cmwlth 85, 480 A.2d 1327 (1984). Indeed, objections to subject matter jurisdiction can be raised for the first time even on appeal. See, *e.g.*, *Pennsylvania Appellate Practice 2d*, §302:47.

**Are the Permittees entitled to attorneys fees?**

In their motion to dismiss, the Permittees requested that the Board award them costs and attorneys fees. When the Appellants argued in their response and memorandum in opposition that the Costs Act did not authorize such an award here, the Permittees countered that they were not requesting the award under the Costs Act but, rather, under the Board's "inherent authority to impose fee awards as a deterrent to the filing of frivolous actions."

Even assuming the award of costs and fees would be reasonable here, the Board does not have the "inherent authority" to award such costs. It is a

cardinal principle of administrative law that administrative agencies have only those powers expressly conferred, or necessarily implied, by statute. See, *e.g.*, Department of Environmental Resources v. Butler County Mushroom Farm, 499 Pa. 509, 454 A.2d 1 (1982), and Costanza v. Department of Environmental Resources, 146 Pa. Cmwlth 588, 606 A.2d 645 (1992). And, parties to litigation are responsible for their own counsel fees and costs unless otherwise provided by statutory authority, agreement of the parties, or some other recognized exception. Chatham Communications, Inc. v. General Press Corp., 463 Pa. 292, 300-301, 344 A.2d 837, 842 (1975); Mantell v. Mantell, 384 Pa.Super. 475, 559 A.2d 535 (1989). A moving party bears the burden of showing that it is entitled to the relief requested. Since the Permittees failed to point to any statutory authorization for the award of costs and attorney fees, they are not entitled to that relief here.

## O R D E R

AND NOW, this 17th day of February, 1995, it is ordered that:

1) the Permittees' motion to dismiss is granted to the extent that it requests that the Board dismiss the Appellants' appeal of the issuance of McGinleys' NPDES sewage permit; and,

2) the Permittees' motion is denied to the extent that it requests that the Board award the Permittees costs and attorneys fees.

**ENVIRONMENTAL HEARING BOARD**

Maxine Woelfling

**MAXINE WOELFLING**
**Administrative Law Judge**
**Chairman**

Robert D. Myers

**ROBERT D. MYERS**
**Administrative Law Judge**
**Member**

Richard S. Ehmann

**RICHARD S. EHMANN**
**Administrative Law Judge**
**Member**

**DATED:** February 17, 1995.

**(See next page for service list.)**

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| KEVIN SWEENEY | : | |
| | : | |
| v. | : | EHB Docket No. 95-019-E |
| | : | |
| COMMONWEALTH OF PENNSYLVANIA | : | |
| DEPARTMENT OF ENVIRONMENTAL RESOURCES and | : | |
| ENLOW FORK MINING COMPANY, Intervenor | : | Issued: March 2, 1995 |

**OPINION AND ORDER**
**SUR INTERVENOR'S MOTION TO DISMISS**

**By: Richard S. Ehmann, Member**

**Synopsis**

A motion to dismiss, suggesting the untimeliness of an appeal because it was not filed within 30 days of Intervenor's filing of an application for issuance of orders by the Department of Environmental Resources ("DER") to plug certain gas wells, is denied. Timeliness of appeals is measured under 25 Pa. Code §21.52(a), as promulgated under and pursuant to the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, as amended, 35 P.S. §7511 *et seq.*, rather than Section 13(c) of the Coal and Gas Resource Coordination Act, Act of December 18, 1984, P.L. 1069, No. 214, 58 P.S. §513(c) ("Coal and Gas Resource Coordination Act"). As a result, the 30 day appeal period in 25 Pa. Code §21.52(s) runs from the date DER acts, not from the date the Intervenor seeks DER authorization to plug these wells.

## OPINION

On January 24, 1995, Kevin Sweeney ("Sweeney") filed an appeal with this Board from DER's issuance of two orders dated October 14, 1994, authorizing Enlow Fork Mining Company ("Enlow") to replug "Well No. 690 on the Sweeney tract" in East Findlay Township, Washington County and to replug Well No. 695 on that same tract. These orders to Enlow were issued under Section 13(c) of the Coal and Gas Resource Coordination Act.

On February 17, 1995, Enlow petitioned to intervene in Sweeney's appeal. Accompanying its Petition was its Motion To Dismiss Sweeney's appeal.[1]

Enlow's Motion asserts that Sweeney was given timely written notice of Enlow's application to DER for these "plugging" orders by letter dated July 29, 1994. Enlow then asserts Section 13(c) of the Coal and Gas Resource Coordination Act requires Sweeney to object to or appeal within 30 days of the filing of Enlow's application with DER. Enlow contends that Sweeney's Notice of Appeal is more than four months untimely because it was not filed until January of 1995.

Sweeney's response to Enlow's Motion was received by the Board on February 24, 1995. In it, he contends that the correct time period for filing an appeal is within 30 days of the issuance date of DER's orders, and it is the Environmental Hearing Board Act, passed in 1988, which controls as

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[1]Since the Petition was not opposed, we granted it by Order dated February 28, 1995.

to appeals instead of the Coal and Gas Resource Coordination Act, passed in 1984. Sweeney also asserts that he timely objected to the application as is evident from his letter of August 19, 1994 to DER (attached to his Reply).[2]

Section 13(c) of the Coal and Gas Resources Coordination Act provides:

> (c) Any person may apply to the department for an order authorizing him to clean out, plug or replug a nonproducing well. Such application shall be filed with the department and shall contain the well number, a general description of the well location, the name and address of the owner of the surface land upon which the well is located, a copy of or record reference to a deed, lease or other document which entitles the applicant to enter upon the surface land, and a description of the method by which such applicant proposes to clean out and replug or to plug the well. At the time such application is filed with the department, the person plugging the well shall mail, by registered or certified mail, a copy of the application to the owner or owners of the land and the oil and gas lessor and lessee of record, if any, of the site of the well. If no objection to the plugging or replugging of such well is filed by any such landowner, lessor or lessee within 30 days after the filing of the application and if the applicant proposes to plug the well in accordance with subsection (a)(1) or (2), whichever is applicable, then the applicant may proceed with the cleaning out, plugging or replugging.

This subsection mentions nothing about appeals from DER's orders or issuance of DER orders, but mentions only objections to the application submitted to DER and that an applicant may proceed to plug a well if there are no objections.

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[2]DER has also filed a Motion To Dismiss Sweeney's appeal but it is based on a different theory of untimeliness and is not addressed in this opinion.

Section 13(c) does not address appeals to this Board and is inapplicable with regard thereto. As we have written many times, this Board has limited jurisdiction. Section 4 of the Environmental Hearing Board Act (35 P.S. §7514) vests us with authority to hold hearings and issue adjudications on "orders, permits, licenses or decisions" of DER. We are not empowered to hold hearing on applications to DER, but only on DER actions in response thereto. As pointed out in Subsection 4(c) of the Environmental Hearing Board Act, an appeal not perfected in accordance with our regulations allows DER's action to be final as to any appellant, but if an appeal is perfected properly, DER's action is not final until the appeal is adjudicated. Thus, it is a DER action which is the prerequisite to this Board being in a position to acquire jurisdiction over the instant matter through an appeal, not Enlow's filing of an application with DER. In the final analysis, this only makes sense logically because if, after Enlow applied, DER rejected Enlow's application for these orders, Sweeney would not be affected by DER's decision and could not appeal from it even though Enlow clearly would have been affected and might elect to take its own appeal.

Moreover, Subsection 14(a) of the Coal and Gas Resource Coordination Act, (58 P.S. §514(a)) implicitly recognizes the correctness of this conclusion. It is the only section of the Coal and Gas Resource Coordination Act dealing with appeals to this Board, and it only authorizes appeals from DER actions to this Board. While this subsection speaks of appeals pursuant to the Administrative Code of 1929, this reference is understandable because in 1984, when the Coal and Gas Resource Coordination Act was enacted, appeals were perfected pursuant to Section 510-21 of The Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21. Subsequently,

Section 510-21 was repealed by Section 8(a) of the Environmental Hearing Board Act and appeals are now brought pursuant to that Act. Thus, the Coal and Gas Resource Coordination Act also only authorizes appeals to us from final DER actions.

Accordingly, since we have rejected the sole basis for Enlow's motion, it must be denied, and we enter the following Order.[3]

**ORDER**

AND NOW, this 2nd day of March, 1995, Enlow's Motion To Dismiss is denied.

**ENVIRONMENTAL HEARING BOARD**

**RICHARD S. EHMANN**
**Administrative Law Judge**
**Member**

**DATED:** March 2, 1995

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[3]In reaching this conclusion, we do not adjudicate the merits of Enlow's contention that Sweeney did not timely object to its application. However, attached to Enlow's motion is a letter to Sweeney dated July 29, 1994, sending Sweeney a copy of its application. Attached to Sweeney's reply is a copy of his letter to DER dated August 19, 1994, objecting to the application. These two dates on these letters suggest Sweeney objected timely; so, though we have no formal record yet in this appeal, there is enough information before us in this Motion and Reply, that we would have been compelled to conclude, absent a hearing on this issue, Enlow's motion was not so clear and free from doubt that Sweeney's appeal should be dismissed and he be denied any ability to proceed further with this appeal. Huntington Valley Hunt v. DER, 1993 EHB 1533.

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| **E. MARVIN HERR, E.M. HERR FARMS** | : | |
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| **v.** | : | **EHB Docket No. 94-098-E** |
| | : | **Consolidated with** |
| **COMMONWEALTH OF PENNSYLVANIA,** | : | **94-099-E** |
| **DEPARTMENT OF ENVIRONMENTAL RESOURCES** | : | |
| **and PEQUEA TOWNSHIP, Intervenor** | : | **Issued: March 7, 1995** |

# ADJUDICATION

**By: Richard S. Ehmann, Member**

Synopsis

An appeal from the Department of Environmental Resources' ("DER") decision to withdraw an administrative order is dismissed. Such a DER decision is an exercise of DER's prosecutorial discretion and not a type of DER action subject to review by this Board.

In an appeal from DER's denial of a private request to order a municipality to revise its 537 Plan, the appellant bears the burden of proof under 25 Pa. Code §21.101(a) and, where appellant fails to show error on DER's part in denying this request, the appeal must be dismissed. Section 508(4)(i) of the Pennsylvania Municipalities Planning Code (MPC) does not govern actions taken under Act 537 to dictate which of two adopted 537 Plans governs DER's evaluation of E. Marvin Herr, E. M. Farms' ("Herr") private request. The MPC and Act 537 represent the General Assembly's division of responsibility on planning as to land development, with land use and zoning issues being local issues, and sewage disposal being for DER, but neither statute, nor the regulations promulgated under them is paramount over the other in the other's distinct and separate sphere of authority.

Where DER fails to reject a municipally proposed 537 Plan or to communicate to the municipality within 120 days of DER's receipt of the municipality's proposed 537 Plan that, under 25 Pa. Code §71.32, DER needs more time to evaluate this new Plan, Section 71.32(c) causes the new 537 Plan to be deemed to be approved by DER. DER does not abuse its discretion by rejecting a private request to order a municipality to approve sewerage service for Herr's property, when the deemed approved 537 Plan says the area will remain unsewered.

The operative date for determining what 537 Plan applies in evaluating a request for a private revision under 25 Pa. Code §71.14 is the date after expiration of the period for municipal comments to DER in response to the private request, and not the date that Herr first indicated to DER a desire for it to act to consider such a request.

Where more than 120 days expire before DER rejects Herr's request for a private revision, a deemed approval of Herr's proposal does not occur under either 25 Pa. Code §§71.32(c) or 71.54(d), because his proposal does not have the municipal approval prerequisite to commencing the running of such a period.

Herr cannot claim vested rights in his proposal under Flynn and Pelosky sufficient to compel this Board to sustain his appeal, because within the period for challenging DER's action, it was successfully challenged by the municipality and, thus, Herr could never have had an unappealed DER order to rely upon. Moreover, Bichler does not apply here, as there is no evidence that DER's actions caused Herr to expend futile and unproductive efforts; rather, his efforts were expended on his independent election to intervene in an appeal where DER was already defending its order.

## Background

The matters now before the Board for adjudication arise in two consolidated appeals by Herr.

By letter dated April 4, 1994, DER advised Herr and Pequea Township ("Pequea") that in light of the Board's March 25, 1994 Opinion in Pequea Township v. DER, et al., EHB Docket No. 94-044-E ("Pequea v. DER") on Pequea's Petition For Supersedeas, DER was withdrawing its administrative order to Pequea to amend Pequea's "537 Plan" to provide sewerage service to Herr's subdivision. On May 4, 1994, Herr appealed therefrom. This appeal bears docket number 94-098-E.

Simultaneously Herr also filed the appeal docketed at EHB Docket No. 94-099-E. This appeal is from a second letter from DER also dated April 4, 1994. In this letter DER advised Herr that it was denying his private request to issue Pequea an administrative order compelling it to revise its "537 Plan" to address his tract.

Pequea sought intervention in both appeals and, over the objection of Herr, was permitted to intervene. However, the Board's Order of June 15, 1994 granting Pequea intervention also limited the issues Pequea was allowed to raise to those defending the position adopted in DER's letters, i.e., Pequea could not raise further independent reasons why DER should have taken the actions reflected in these letters, and was limited to the reasons DER set forth therein.

Shortly thereafter, on July 8, 1994, these two appeals were consolidated at No. 94-098-E and Pre-Hearing Memoranda were submitted. Thereafter, as reflected in our Order dated September 22, 1994, the parties proposed to this Board that this consolidated appeal be submitted for adjudication on a stipulated record. The executed stipulation was filed by the parties, who then filed their "Post Hearing" Briefs in accordance with the filing schedule set forth in the

aforesaid Order. The last brief to be filed, Herr's Reply Brief, was received by this Board on November 8, 1994.

The record in this appeal, as specified by the Joint Stipulation, consists of the facts stipulated to by the parties in their Joint Stipulation, the 258 page transcript of the hearing on the Petition For Supersedeas in Pequea v. DER, and all of the exhibits admitted in that hearing. After a full and complete review of this stipulated record, the Board makes the following Findings of Fact.

**Findings Of Fact**

1. Appellant is Herr, who is the owner of 135.5 acres of land located north of Sprecher Road (T-561) and west of Millwood Road (S.R. 3009) in Pequea Township. (Stip.)[1]

2. Appellee is DER, which is the agency with the duty and authority to administer and enforce the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §750.1 *et seq.* ("Act 537"); The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.*; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §510-17; and the rules and regulations properly adopted pursuant to each. (Stip.)

3. Intervenor is Pequea, which is a second class township located in Lancaster County with a mailing address of: c/o Board of Supervisors, 1028 Millwood Road, Willow Street, PA 17584. (Stip.)

4. On July 10, 1990, Herr duly filed at the Lancaster County Planning Commission ("LCPC") an application for approval of a plat for Millwood Industrial

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[1]"Stip." is a reference to the facts contained in the Stipulation filed by the parties. "T-" is a citation to a page in the transcript. "A-" references an Exhibit offered by Pequea; "C-" references a DER Exhibit; and "H-" references an Exhibit offered by Herr.

Park ("Millwood"). (Stip.) This park was to be a thirteen lot subdivision located on 44.6 acres of Herr's 135.5 acre tract. (Stip.)

5. LCPC is the local agency which handles zoning approvals for lands in Pequea. (Stip.)

6. When Herr filed his plat for the Millwood Industrial Park with LCPC, the property whereon Millwood Industrial Park is proposed to be located was zoned industrial. (Stip.; T-74)

7. On August 22, 1990, Pequea changed the zoning for this property to agricultural. (Stip.)

8. In response to Herr's July 10, 1990 filing, LCPC, on September 28, 1993, gave conditional final approval to Herr's proposal. It attached numerous conditions including, as one condition, DER approval of a sewage module for the property. (Stip.; A-21; T-146-147)

9. This conditional final approval was given by LCPC instead of unconditional final approval because it believed that under the Pennsylvania Municipalities Planning Code, Act of December 21, 1988, P.L. 1329, 53 P.S. §10101 *et seq.* ("MPC"), it lacked authority to address Act 537 sewage planning issues. (T-148)

10. Pequea took no appeal from the LCPC's grant of conditional approval.

11. On April 24, 1990, Pequea had passed a comprehensive land use plan pursuant to its authority under Article III of the MPC. (Stip.; T-25) This plan, which did not have zoning recommendations in it, recommended the entire Herr tract remain agricultural in use. (T-27, 31)

12. Pequea's land use plan recommended agricultural use because the soils on Herr's tract are soils of statewide import and prime agricultural soils (T-28), and because Pequea desired to maintain its rural character, which could be

accomplished by maintaining a large prime farm land area of Pequea for agriculture and directing projected growth into other areas. (T-37-38)

13. Pequea's 1990 land use plan replaced its 1969 land use plan. (T-25, T-40)

14. In August of 1993, Pequea adopted an urban growth boundary for itself which conforms to the LCPC's comprehensive plan for all of Lancaster County. (A-3.1; T-88-89) This boundary is identical to current zoning in Pequea and is another tool attempting to direct urbanization into areas where Pequea wants it to occur. (T-89)

15. Herr's tract lies outside this urban growth boundary. (T-91)

16. LCPC takes the position that under the MPC, Herr has a vested right to rely on the zoning of his land for a period up to five years from the date he submitted his proposal to LCPC. (T-147, 159, 161)

17. Pursuant to the provisions of Act 537 and on July 30, 1992, Herr submitted to Pequea his Act 537 Planning Module for Millwood. (Stip.)

18. On September 2, 1992, Pequea advised Herr of its refusal to adopt the proposal for sewering Millwood contained in Herr's Module. (Stip.; A-11; T-97)

19. At the time of Pequea's rejection of Herr's module, its 537 Plan was the County-wide 537 Plan put together by the LCPC in 1970 and adopted by Pequea on January 4, 1971. (T-173-174, 176; C-1)

20. On June 3, 1992, Pequea adopted a new 537 township-wide Plan. (A-8.1) Thereafter, it submitted this plan to DER for its approval, and DER received this 537 Plan on June 22, 1992. (Stip.) In its Resolution adopting this 537 Plan, Pequea repeals all prior Act 537 Plans for Pequea. (C-1; T-40)

21. On October 20, 1992, Herr submitted a private request to DER requesting that DER order Pequea to revise its Official Act 537 Plan by adopting his Act 537 Planning Module for Millwood. (Stip.)

22. DER sent a letter to Pequea on October 20, 1992, which Pequea received on October 21, 1992, wherein DER advised Pequea that DER would require an additional sixty (60) days to review Pequea's new Act 537 Plan, which it had received on June 22, 1992. (Stip.) Pequea's receipt of this letter occurred 121 days after it submitted its 537 Plan to DER. DER had not made any prior requests to Pequea for more time to review this plan. (T-199)

23. On November 16, 1992, DER sent a letter to Pequea stating its opinion of the proposed new 537 Plan submitted to it by Pequea. (Stip.)

24. On November 10, 1993, Herr hand-delivered to DER documents which constituted the final submissions regarding his private request. (Stip.)

25. On February 8, 1994, DER ordered Pequea to adopt, as a revision to its 537 Plan, the Planning Module for New Land Development, DER Code No. P3-36945-093-IV, for Millwood. (Stip.; A-28)

26. As a result of DER's February 8, 1994 Order to Pequea on or about March 2, 1994, Pequea appealed to the Environmental Hearing Board ("Board"), and petitioned the Board to supersede DER's Order. That appeal was docketed at EHB Docket No. 94-044-E. (Stip.)

27. Herr petitioned to intervene in Pequea's appeal at Docket No. 94-044-E on March 8, 1994, the Petition being granted on March 11, 1994. (Stip.)

28. On March 11, 1994, Herr also appealed the February 8, 1994 Order, with his appeal docketed at EHB Docket No. 94-054-E. (Stip.)

29. On March 16, 1994, the Board held a hearing on the Pequea's Petition for Supersedeas. At the end of that hearing, the Board orally ordered a

supersedeas of DER's February 8, 1994 Order to Pequea and the following day issued a written order confirming the supersedeas. (Stip.)

30. On March 25, 1994, the Board issued an Opinion explaining why it granted supersedeas and affirmed its previous order granting the supersedeas. That opinion stated that Pequea had a likelihood of success on the merits because the 537 Plan submitted on June 22, 1992 to DER by Pequea was deemed approved as a result of Pequea's receipt of DER's October 20, 1992 letter on the one hundred and twenty-first day after submission its proposed plan to DER. (Stip.)

31. On April 4, 1994, DER withdrew its February 8, 1994 Order to Pequea and denied ("Denial") Herr's private request for new land development for his proposed industrial park. (Stip.) DER based its two actions on the conclusions reflected in the Supersedeas Opinion issued by this Board. (See DER's letters attached to Herr's Notices Of Appeal)

32. On April 5, 1994, the Board issued a Rule To Show Cause on Herr as to why EHB Docket No. 94-044-E should not be dismissed as moot. (Stip)

33. By Order dated April 13, 1994, the Board consolidated Pequea's appeal at Docket Nos. 94-044-E with Herr's appeal at 94-054-E. (Stip.)

34. On May 27, 1994, the Board dismissed as moot the appeals consolidated at Docket No. 94-044-E (consolidated) with an Opinion and Order. (Stip.)[2]

35. On May 4, 1994, Herr appealed the April 4, 1994 withdrawal and denial, which appeals were docketed at 94-098-E and 94-099-E, respectively. (Stip.)

36. LCPC has agreed and stipulated that by March 16, 1994, Herr had met all other conditions of its September 28, 1993 conditional approval of Herr's

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[2]Herr appealed from this dismissal to the Commonwealth Court. By Order dated October 25, 1994, Commonwealth Court granted Pequea's Petition to Dismiss that appeal.

plot plan except No. A.6 on page 2 of the approval, which deals with Act 537 approval of his plan by DER. (Stip.)

37. LCPC has taken no position for or against Herr's sewage module and does not believe it has any jurisdiction over modules seeking 537 Plan approvals. (T-148-150)

38. DER has not issued any formal approval of the 537 Plan submitted to it in 1992 by Pequea. (T-181)

39. According to the Planning Module Herr submitted to Pequea and Pequea rejected in 1990, Millwood is surrounded on one side by agricultural land and on the other three sides by residential properties. (A-10)

40. Soils like those on Herr's land are also found on lands north of Millwood, which is currently zoned as industrial. (T-76)

41. A municipal sewer line lies near Millwood to the north, and another sewer line adjoins Herr's property to the south. (T-78-79)

## Discussion

As the reader is undoubtedly already aware from a review of the Findings of Fact, this appeal again pits a real estate developer and a municipality against each other in a struggle over development of a tract of land which is sought by the one and resisted by the other. In this struggle, the arena is Act 537 and the regulations promulgated thereunder.

### Jurisdiction Over Exercises Of Prosecutorial Discretion

Because Herr has appealed from DER's decision to withdraw its Order to Pequea, in addition to separately appealing from its simultaneous rejection of his private request to DER to issue such an Order to Pequea, the presiding Board Member asked the parties to brief the question of whether this Board has jurisdiction over Herr's appeal from the withdrawal of its Order to Pequea. Not

surprisingly, DER and Pequea assert we lack jurisdiction, while Herr asserts we have jurisdiction. Because a lack of jurisdiction would end our inquiry as to issues raised in that one of these two consolidated proceedings, we address it before addressing the merits arguments raised by each side.

Herr's argument in favor of this Board's jurisdiction is found in his Reply Brief. He asserts that DER's withdrawal of its order constitutes a decision by DER which is appealable under Section 4(a) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. §7514(a). Moreover, Herr asserts he is adversely impacted by DER's decision since it withdrew an order issued by DER on Herr's behalf. Herr then argues that neither Columbo v. DER, 1991 EHB 370, nor Westtown Sewer Co. v. DER, 1992 EHB 979, cited by his opponents to support their "no jurisdiction" position, is applicable to this appeal. Herr further asserts these DER withdrawal and private request rejection actions are all part of an integrated process and too interrelated to separate without injury to Herr.

We reject these arguments on Herr's behalf and conclude we lack jurisdiction over Herr's appeal from DER's withdrawal of its order. In so doing, we emphasize our conclusion that Herr's position as to the merits of his contentions (as to the wrongfulness of DER's action) is not diminished in any fashion. This Board is one of limited jurisdiction and limited powers. Under the terms of Section 4 of the Environmental Hearing Board Act, we may hear and adjudicate appeals from DER's actions or decisions, but that does not mean that every action of DER is appealable to this Board. While there is no doubt that Herr is adversely impacted by the withdrawal of DER's Order, a decision by DER not to take an action is an exercise of that agency's prosecutorial discretion. Such DER decisions are not "adjudicatory actions" subject to this Board's review,

Margaret C. and Larry H. Gabriel, M.D. v. DER, 1990 EHB 526; Ralph D. Edney v. DER, 1989 EHB 1356; Downing v. Commonwealth, Medical Education & Licensure Board, 26 Pa. Cmwlth. 517, 364 A.2d 748 (1976).

DER's decision to take a different course as a result of the conclusion reached in Pequea v. DER was manifested simultaneously in two ways: one, the rejection, the other, the order's withdrawal. Herr loses nothing by our conclusion on jurisdiction as to the order's withdrawal, however, because any argument he could raise that he might assert as to withdrawal of this order is equally raiseable as to DER's rejection of his request to issue this order. There is no question that DER's rejection of his request is appealable. Wesley H. & Carole O. Young, et. al. v. DER, 1993 EHB 380; Solomon Run Community Action Committee v. DER, et. al., 1992 EHB 39. Indeed a strong case is made that Herr is well aware that this is so since the objections to DER's two manifestations of its decision set forth in the two notices of appeal filed by Herr, are identical. Thus, the underlying DER decision is still fully reviewable.

Finally, on this jurisdiction issue, Herr argues that by asserting a lack of jurisdiction, Pequea and DER seek to return to the days of unappealable "negative orders". Herr then asserts the concept of unappealable negative orders "has been rejected by the United State Supreme Court and must be rejected here" (citing Rochester Telephone Corp. v. United States, 307 U.S. 125 (1939) ("Rochester"), and City of Chicago v. United States, 396 U.S. 162 (1970).[3] From these conclusory statements, we assume Herr is arguing this principle here although his brief does not say this or offer any discussion of how Herr comes to this conclusion.

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[3]This opinion was issued in 1969, not 1970 as asserted.

From a reading of these two cases, it is clear that a negative order is an outmoded term used to describe an action by a federal administrative agency which rejects the complaints raised to it by a complaining party and elects to continue the *status quo*. Apparently, such negative orders were at one time argued to be unappealable, and such arguments were found to have some merit by some District Courts up until Rochester was issued.

Rochester and City of Chicago do not change our conclusion that the withdrawal of DER's order is not appealable. In deciding these two appeals, the Supreme Court said that where an agency decides to maintain the *status quo* and dismiss a complaint, that decision is reviewable. Accordingly, where the Interstate Commerce Commission ("ICC") elected to abandon an investigation of a railway's notice that operation of four passenger trains was discontinued despite objection to discontinuance (so discontinuance continued), the Court said that the objections had a right to judicial review of the ICC's decision. Here, the same result occurs because Herr may raise all his issues in a review of DER's rejection of his request that it order Pequea to amend its 537 Plan to provide sewerage services to Millwood. If he succeeds, DER's decision reflected in the rejection is overturned and DER must issue this order. Thus, like Chicago, Herr has his opportunity for a full review of DER's decision.

**Burden Of Proof**

The first issue before us in the remaining appeal concerns the question of what party or parties have the burden of proof. Herr contends that because DER initially granted Herr's request to issue an administrative order to Pequea to amend its 537 Plan to accommodate Millwood and later withdrew that order and rejected Herr's request, the net effect of these actions is sufficiently identical to a permit revocation scenario to place the burden of proof on DER and

on Pequea, which sides with DER. DER and Pequea assert the contrary, and argue that this burden is on Herr.

We agree with DER and Pequea that the burden of proof is properly on Herr under our rules. In the Pequea v. DER, proceeding involving DER, Herr and Pequea, it was Pequea which was the appellant and bore the burden of proof. Pequea was seeking to overturn DER's order to it in that appeal and was successful in obtaining supersedeas of DER's Order from this Board. Thereafter, with its order superseded, DER elected to withdraw its Order to Pequea. That DER decision brought an end to that proceeding and to Herr's own separate appeal from DER's order to Pequea which was consolidated therewith because the two appeals became moot. They were dismissed as such and that ended those proceedings.

The current consolidated appeals involve the new acts of DER taken in connection with the ongoing Pequea/Herr dispute. They are separate appeals distinct from the previously mooted appeals, and they arise from separate distinct actions taken by DER. The fact that DER took a series of actions does not change this procedural fact nor cause this entire series of actions by DER to be so like a permit revocation as to shift the burden to DER and Pequea as Herr asserts.

Moreover, as pointed out by Pequea's Post-Hearing Brief, this series of DER actions is unlike a permit revocation in another significant way. For a permit revocation to occur, DER must first issue a permit to a permittee vesting it with certain rights and privileges and then attempt to revoke that permit, effectively terminating those rights. Here, DER did initially order Pequea to amend its 537 Plan, but in so doing it vested no rights or privileges in Herr. Moreover, that DER order was immediately superseded after a hearing before this Board. As a result, all that Herr could have gotten from DER's action in initially issuing

its order was an expectation that if DER's order was not appealed or was unsuccessfully appealed, and then Pequea either complied with it voluntarily or was compelled by a Court to comply therewith that Pequea would amend its 537 Plan to cover Herr's tract. In short, when DER issued its order Herr was vested with nothing other than a potential that he might have some rights at a later date.

Since we reject Herr's argument in this regard, it is clear the burden of proof is his under 25 Pa. Code §21.101(a). Herr asserts the affirmative as to DER's letter denying his request to issue an administrative order to Pequea, i.e., Herr is the party asserting DER's rejection of his request should be reversed. His position is thus most similar to that of a permit applicant challenging a DER denial of its application, and under 25 Pa. Code §21.101(c)(1) such appellants bear the burden of proof.

Finally, we reject Herr's assertion that this is not a normal appeal and consequently, we should reverse the normal burden of proof. Herr offers no basis for this contention other than his "like a revocation" argument rejected above. DER has reversed its position as Herr suggests but did so not for some abnormal reason. DER saw that the first Board interpretation of 25 Pa. Code §71.32(c) as set forth in Pequea v. DER, was contrary to its own prior interpretation and acted to conform its position to that set forth in our opinion. This would appear to be a normal reaction. Herr appealed therefrom because he disagrees therewith but his appeal occurred in a normal fashion. Thus, this proceeding represents a normal, rather than abnormal, situation. As a result, it evidences no grounds for a variation from our normal assignment of the burden of proof. Moreover, changing this burden of proof after the record is closed so that DER and Pequea must prove the negative, i.e., Herr is not entitled to a reversal of

DER's decision, would be highly prejudicial to DER and Pequea, who would not have been warned of this burden's shift until after the record was made.

**Subsection 508(4)(i) Of The Municipalities Planning Code**

In support of the merits of his assertion that DER erred in rejecting his private request, Herr asserts that plans promulgated under Act 537 are covered by Section 508(4)(i) of the MPC, 53 P.S. §10508(4)(i), and, thus, the 537 Plan in effect at the time at which Herr submitted his plat plan to the LCPC, rather than the 537 Plan subsequently adopted by Pequea in 1992, govern DER's decision. The first question raised by this argument is whether the 537 Plan adopted by Pequea in 1992 became deemed to be approved by DER, and thus Pequea's official 537 Plan under Act 537 as of that time. If it did not, then Pequea's 537 Plan from 1971 remained its only plan, and Herr prevails on that basis. The evidence establishes that Pequea adopted a 537 Plan originally in 1971, but that was its 537 Plan only until 1992. On June 3, 1992, Pequea adopted a new 537 Plan and submitted it to DER for approval as required by 25 Pa. Codes §71.11 and 71.12 and Section 5 of Act 537, 35 P.S. §750.5. In the resolution adopting this new 537 Plan Pequea repealed its former plan. DER received this new 537 Plan from Pequea on June 22, 1992. It did not communicate with Pequea on Pequea's submission until it sent Pequea a letter dated October 20, 1992.

DER's letter of October 20, 1992 said DER needed more time to complete its review of Pequea's plan. However, Pequea received this letter on October 21, 1992, which is 121 days after DER received Pequea's proposed 537 plan for review. Thus, for the reasons set out in the supersedeas opinion, by operation of 25 Pa. Code §71.32(c), Pequea's proposed 537 Plan is considered as if it had been approved by DER. This is because DER failed to act on this plan or to

communicate to Pequea that DER needed more time to review it within the time frame provided in 25 Pa. Code §71.32(c).

Accordingly, as of October 21, 1992, the day after Herr initially submitted his private request to DER and over a year before Herr provided DER the final documents regarding his private request, Pequea had a new 537 Plan against which Herr's private request had to be evaluated by DER.

To support Herr's argument, we must accept the idea that where Section 508(4)(i) of the MPC says that once Herr's plat is filed "no change or amendment of the zoning, subdivision or other ordinance or plan shall adversely affect the decision on such an application adversely to the applicant and the applicant shall be entitled to a decision in accordance with the provision of the governing ... plans as they stood at the time the application was duly filed", the legislature did not intend to limit that section to plans adopted by Pequea under the MPC, but intended to include plans adopted by Pequea under the MPC, Act 537 and any other act, ordinance or regulation, i.e., literally any plan is a plan covered by this all inclusive section of the statute.

While this issue was raised previously in Quehanna-Covington-Karthaus Area Authority v. Sandy Creek Forest, Inc., 146 Pa. Cmwlth. 675, 606 A.2d 968 (1992), it was not resolved there. Our analysis of this issue starts with the conclusion that at least since 1975, the Commonwealth Court has made it clear that land use/zoning issues are not issues for DER evaluation. Delaware County Community College, et al. v. Fox, et al., 20 Pa. Cmwlth. 335, 342 A.2d 468 (1975) ("Fox"). We have continued to follow Fox on Act 537 issues and pointed out the General Assembly's division of responsibility on issues of real estate development between DER (Act 537 issues) and municipal governments (planning land use and

zoning issues) in opinions such as Morton Kise, et al. v. DER, et al., 1992 EHB 1580. As the Commonwealth Court stated in Fox:

> As we read the Sewage Facilities Act, the function of the DER is merely to insure that proposed sewage systems are in conformity with local planning and consistent with statewide supervision of water quality management; it is the local government agencies, who are responsible for planning, zoning and other such functions.

20 Pa. Cmwlth. at ____, 342 A.2d 478.

Thus, we conclude the Court pointed to the two separate areas of responsibility addressed by the two separate units of government under two different statutes.

The Commonwealth Court has also continued to try to make this separation of responsibility clear to parties disputing where control lies (when one of them does not obtain the result it seeks). Carroll Township Board of Supervisors v. Department of Environmental Resources, ____ Pa.Cmwlth. ___, 646 A.2d 738 (1994); and Reimer v. Board of Supervisors of Upper Mount Bethel Township, 150 Pa. Cmwlth. 323, 615 A.2d 938 (1992); In Re Appeal of Little Britain Township, ___ Pa. Cmwlth. _____, 651 A.2d 606 (1994). Reading these opinions together leads to only one conclusion which we restate here. Neither Section 508(4)(i) of the MPC nor its other sections (none of which mention Act 537) is intended to supersede or override the distinct and separate functions of Act 537. Local planning and zoning matters are covered by the various provisions of the MPC and are local issues rather than issues over which DER is to exercise control. DER's role is to insure proper, but separate, Act 537 sewage planning by local governments, and such Act 537 planning is not controlled by provisions of the MPC. The separate planning actions occurring under provisions of both statutes do abut each other, but they are logically separable, and real estate developers

must comply with both independently of the other rather than comply with one and argue it controls compliance with the other. That this is so and recognized locally is even evident by LCPC conditioning its approval under the MPC of Herr's plan for Millwood on his subsequently obtaining DER's Act 537 approval. Further, if, as Herr advances, the 537 Plan from 1971 was still in effect, and Section 508(4)(i) of the MPC required its use by DER, then DER's role here would be solely ministerial. Nothing in either statute suggests such a legislative intent.

Moreover, as DER points out, the way Act 537 is set up to operate is inconsistent with the concept that filing of a plat with LCPC locks in the then existing 537 Plan's application to the tract covered by that plat. Act 537 envisions continuing changes to a base 537 Plan through municipal and DER approvals of revisions thereof which are specific to individual tracts within the municipality's boundaries, (see section 5(a) of Act 537 and 25 Pa. Code Chapter 71 Subchapter C), revision of a base plan based on private revisions compelled of the municipality by DER under section 5(b) of Act 537 and 25 Pa. Code §71.14; and municipal revisions to a 537 Plan of an area-wide, as opposed to tract-specific nature (section 5(a) of Act 537 and 25 Pa. Code §§71.12 and 71.13). Such a continuing revision process is inconsistent with a "locking-in" of an applicable 537 Plan for a five year period.

In reaching this conclusion, we reject the assertion in Herr's Brief that the Commonwealth Court has recognized that land use laws and principles govern this situation. The case citation for this principle in Herr's Brief is incomprehensible. It gives only the name of the Commonwealth as a party in the case, dates the decision as issued in 1975, but reflects a volume and page in opinion reporters covering an appeal decided in 1991. Moreover, the opinion at

that location, Bichler v. Department of Environmental Resources, 144 Pa. Cmwlth. 55, 600 A.2d 686 (1991) ("Bichler"), does not stand for this proposition. Bichler concerns the issue of whether Bichler timely sought to apply for a new permit for his landfill, i.e., applied therefor within a regulatory window covering existing permitted landfill sites. There, the Commonwealth Court addressed DER's argument for strict adherence to the deadline set forth in the solid waste regulations it administers, saying:

> In the instant action, the Department asserts that Bichler admits that he had a permit for a construction/demolition waste landfill and that that permit was still in effect on April 9, 1988, the effective date of the new Regulations. Consequently, the Department argues that Bichler failed to timely file a preliminary application. However, with regard to filing a preliminary application for permit modification while litigation affecting that permit is pending, the law is silent. Because of pending litigation, Bichler did not and could not know what modification to his permit would be necessary. Under Section 271.111(b) of the Regulations, a permit holder must explain the modifications to an existing permit. Bichler challenged Permit Conditions 1 and 4 and won. Prior to the expiration of the appeal period and the resolution of any appeal from the Board's decision, it would be difficult for Bichler to know to what extent modification of his permit would be necessary. Futile and unproductive second-guessing will not be tolerated by this Court. Due to the unique circumstances in this case, we believe it equitable to extend the filing deadline.

144 Pa. Cmwlth. at _____, 600 A.2d at 689.

As this is the Bichler holding, it simply will not support this assertion on Herr's behalf. The only other case cited in this brief paragraph in Herr's brief is cited as "Flynn". At a subsequent page in Herr's brief is a citation to Commonwealth, DER v. James L. Flynn, 21 Pa. Cmwlth. 204, 344 A.2d 720 (1975) ("Flynn"), we assume this is the Flynn referenced. This Flynn does not stand for this proposition either and is discussed in more depth later in this opinion. Based on Herr's failure to point to any authority for this proposition and this Boards' lack of knowledge of any authority for it, we reject this argument as well.

Herr also asserts that "a regulation cannot trump a statute", and argues that this means that while regulations adopted under section 9(a) of Act 537 (35 P.S. §750.9(a)) supersede ordinances and regulations of local agencies, such regulations do not supersede "the MPC's grandfathering provision". As a result, Herr claims 25 Pa. Code §§71.14(e) and 71.53(f) are either *ultra vires* or must be interpreted as not trumping or superseding Section 508(4)(i) of the MPC. We agree with Herr's contention that these cited regulations cannot be enforced to supersede Section 508(4)(i) of the MPC and that regulations promulgated under Act 537 are only authorized by Act 537 to supersede local ordinances and regulations. However, our agreement with Herr is based on our conclusion outlined above that neither Act 537 nor the MPC supersedes the other, and both of the statutes represent the General Assembly's decision to have responsibility for supervision of planning in land development shared--with DER addressing sewage planning and the LCPC and Pequea addressing land use and zoning issues. This conclusion by this Board requires rejection of Herr's argument because we never reach the point of determining the predominance of one of the two legislative schemes. Instead, they proceed independently, although frequently in parallel fashion, to their own separate goals.

Herr next argues that since his request was submitted while 25 Pa. Code §71.32(c)'s 120 day deemed approved clock was still ticking, his private request was timely. Herr's argument uses "timely" to mean his request to DER was made before Pequea's 1992 537 Plan became valid by operation of Section 71.32(c)'s 120 day clock, so he contends that DER and Pequea are locked into considering his request as if Pequea's 1971 537 Plan was its only 537 Plan.

In the chronology of supposed events critical to Herr's argument, it is clear that the 1970 plan must be found to be in effect until after October 20,

1992, and that in July of 1992, Herr asked Pequea to amend its Act 537 Plan to accommodate Millwood. But, it is undisputed that Pequea rejected his request on September 2, 1992, and, on October 19, 1992, Herr wrote to DER asking it to act under §71.14 and Act 537 to issue an order to Pequea. (DER received that letter on October 20, 1992, which is the last day in the 120 day period). However, Section 71.14 outlines all that a party like Herr is to submit to DER before DER acts on his request, and Herr has joined the other parties in stipulating he did not give DER all of his documents until November 10, 1993, which is almost 13 months after Pequea's 1992 Plan took effect. If DER was to have all of Herr's information before it acted, it would not have had it until November of 1993, which is long after the 1992 537 Plan took effect. Moreover, Herr points to nothing in either Act 537 or 25 Pa. Code Chapter 71 to support the concept that Herr can lock in use of only Pequea's 1971 vintage 537 Plan when DER and this Board evaluate the circumstances now before us. This Board knows of no provision in Act 537 or regulations supporting Herr's theory and has indicated above that the MPC does not predominate over Act 537, so any "locking in" concept in the MPC does not cause a "locking in" under Act 537.

Further, an examination of Section 71.14 requires rejection of such an idea. Under §71.14(d), after receipt of a private request, DER is required to request comments from Pequea and LCPC as the municipality and local planning agencies and they are to submit their written comments within 60 days. Further, in deciding whether to act favorably on a private request or not, under Section 71.14(e) DER must consider planning agency and municipal comments so DER could not be in a position to act on Herr's request until a point in time more than two months (the sixty days for comments) after it receives a fully documented request letter from Herr. This is a point in time long after the 537 Plan deemed approved

in 1992 had become operative. Finally, in rejecting this argument on Herr's behalf the Board again points out that as asserted in DER's Brief, a "locked-in" concept is foreign to Act 537's planning concept. Not only does section 5(a) of the statute (35 P.S. §750.5(a)) allow a municipality to revise its official plan at anytime, but there is a constant revision process for new land development under 25 Pa. Code Chapter 71, Subchapter C in addition to the private revision request concept envisioned in 25 Pa. Code §71.14.

**Herr's Reliance And Good Faith**

Herr next argues that he is an innocent victim who, in good faith, relied on the situation created by DER's actions and errors to his detriment, so that even if we do not agree with his MPC arguments, he has a right to proceed to sewer and develop Millwood as proposed. In support of this argument, Herr cites us to Petrosky v. Zoning Hearing Board of Township of Upper Chichester, Delaware County, 485 Pa. 501, 402 A.2d 1385 (1975) ("Petrosky"), (Flynn"), and Bichler.

DER and Pequea do not dispute the holdings of Petrosky, Flynn or Bichler but raise a number of arguments which correctly assert that Herr does not fit within their umbrella. Citing to Flynn the Supreme Court wrote in Petrosky that there are five factors necessary before a person like Herr may acquire a vested right to have a specific governmental determination upheld in his favor, even it is later shown to be incorrect.[4] These factor's are:

1. his due diligence in attempting to comply with the law;

2. his good faith throughout the proceedings;

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[4]In Flynn, Flynn relied on his receipt of a permit for an on-lot sewage system and built his home, only to have it discovered later by DER that the township should not have issued this permit because of poor soils on Flynn's lot. In Petrosky, the township issued zoning, building and use permits for a truck garage, and after construction and use of it, the township discovered violations of the zoning ordinance's set back requirements.

3. the expenditure of substantial unrecoverable funds;

4. the expiration without appeal of the period during which an appeal could have been taken from the issuance of the permit;

5. the insufficiency of the evidence to prove that individual property rights or the public health, safety or welfare would be adversely affected by the use of the permit.

85 Pa. at _____, 402 A.2d at 1388.

The most obvious of the factors missing in this appeal is No. 4. While Herr received LCPC approval of his Millwood plan without a timely appeal therefrom by Pequea, LCPC gave Herr an approval conditioned on his obtaining Act 537 approval from DER. Herr unsuccessfully sought Pequea's agreement on sewering Millwood and then made his private request to DER to order Pequea to amend its 537 Plan to allow the sewering of Millwood. When DER issued that order, instead of the appeal period passing without an appeal, Pequea appealed and obtained supersedeas of DER's order, which supersedeas remained in effect until DER withdrew its order and formerly rejected Herr's private request. Thus, clearly the appeal period did not pass without a timely and successful challenge, and even if this Board did not issue an adjudication in that appeal proceeding prior to the Order's withdrawal by DER, that is not the issue under Flynn and Petrosky, and in this opinion we have affirmed the supersedeas opinion.

As is also evident from the facts laid out above, unlike Flynn and Petrosky, Herr never secured a "permit" to which vested rights could attach under the vested rights doctrine. Herr's LCPC approval was conditioned on DER Act 537 approval, and he never obtained the Act 537 approval as to sewering Millwood. DER's issuance and subsequent withdrawal of its order was not modification of Pequea's 537 Plan, even at the stage before the withdrawal occurred. At most,

it was a direction to Pequea to do this, and a direction which Pequea resisted.

Just as Flynn and Petrosky do not support Herr here, Bichler also fails to do so. As to Bichler, Herr argues DER's mistake in first issuing its order to Pequea and then correcting the mistake by withdrawing same caused Herr to engage "in a futile and unproductive effort, an intolerable result." The first problem with this argument is the lack of any citation by Herr to any evidence before us of what Herr's "futile and unproductive effort" might have been. What futile effort he expended is not set forth in the evidentiary record. The only effort the Board is aware of are those of his counsel in representing Herr in Pequea v. DER. If those are the efforts referenced by this argument, they will not support it because in that appeal Herr was a non-party who petitioned to intervene and he was not required to participate therein. DER was defending its order in Pequea's appeal; Herr was not forced by DER to expend these efforts but undertook them voluntarily. Moreover, here, if Herr's characterization is correct, DER made a mistake, recognized it, and corrected it. Herr seeks to profit from DER's correction thereof. To reward Herr in such a scenario is to discourage DER efforts to correct such "mistakes". Further, this is another fundamental distinction between the instant appeal and Bichler. DER did not try correction of its own "mistake" in Bichler; rather, Bichler's motion for summary judgment was sustained by this Board and the conditions DER inserted in Bichler's permit were thrown out. Accordingly, we conclude that Bichler is not applicable here, either.

**Deemed Approval Of Herr's Request**

Herr next argues that his sewering proposal for Millwood also benefits from the 120 days deemed approval concept found in 25 Pa. Code §§71.32(c) and 71.54(d). He asserts the concept amends whatever 537 Plan is in effect for

Pequea to include Millwood. In support of this argument, Herr asserts that he submitted his final documents for his private request to DER on November 10, 1993 and that started the regulation's 120 day clock running. He then asserts that, since as of March 16, 1994, DER was arguing before this Board in opposition to Pequea's Petition For Supersedeas and in favor of its Order, the 120 day period expired, giving him a deemed approval. His argument thus is that the 120 day period applicable to his proposal expired on March 10, 1994.

However facially attractive this argument may be, any close examination of it shows it must be rejected. According to his Brief, Herr's 120 day clock is contained in 25 Pa. Code §71.32(c) and 25 Pa. Code §71.54(d). To be an official plan revision under Section 71.32(c) or plan revision for new land development and Section 71.54(d), a plan revision must be submitted for DER approval by the municipality which proposes that modification to its 537 Plan. Herr's plan for sewerage service for Millwood was rejected by Pequea rather than being approved by it and was never submitted by Pequea to DER on Herr's behalf. It is precisely because of Pequea's rejection of Herr's plan and DER's subsequent rejection of his request to order Pequea to revise its plan that this proceeding is before this Board. It is this lack of municipal submission of his plan that trips up Herr's argument as to a deemed approval. Clearly absent municipal approval, the cited provisions of 25 Pa. Code §§71.32 and 71.54 do not apply.

**Abuse Of Discretion**

Herr also argues that DER's withdrawal of its Order constitutes an abuse of DER's discretion because DER could have allowed Pequea v. DER to continue through a merits hearing rather than forcing Herr into the instant appeal's "relitigation", Herr asserts there are no safety or health problems associated with his proposal which DER has now rejected, but DER has let stand Pequea's

deemed approved 537 Plan despite the fact that DER found it to have 12 deficiencies. (See DER's letter to Pequea dated November 16, 1992, which is Exh. A-14). In support of this argument Herr cites Sussex, Inc. v. DER, 1984 EHB 355 ("Sussex").

Of course the first question which Herr's argument raises is whether, when DER learns through a supersedeas opinion that this Board thinks DER is likely to lose if a merits hearing occurs, DER abuses its discretion by failing to take the initial appeal through a merits hearing. Herr's argument suggests that even where DER sees its position is likely to fail it must nevertheless reprise the role of Custer at the Little Bighorn River and press that appeal into a full blown defeat. We do not see any case law or statute as imposing such an obligation on DER. Moreover, in light of the Act of December 13, 1982, P.L. 1127, No. 257, as amended, 71 P.S. §2031 *et seq.*, commonly called the Costs Act, there is a good monetary reason for an agency like DER to rethink its decisions when it appears DER may be in error. If DER had pressed Pequea v DER, to a merits hearing, DER would have lost. This is evident from our affirmance of the supersedeas opinion's interpretation of 25 Pa.Code §71.32(c) earlier in this opinion. However, because of the Costs Act, DER would not only have been faced with this same result; it might also have been faced with a petition by Pequea for costs and fees incurred in litigating the merits of that appeal. A change of position in this circumstance hardly seems unreasonable.

A second equally valid reason to reject Herr's argument stems from its misstatement of what had occurred as to Pequea's 1992 537 Plan. Herr contends his proposal was satisfactory from a safety and health standpoint, but Pequea's deemed approved 537 Plan had 12 areas of deficiency identified in DER's letter and, despite this list of deficiencies, DER let that Plan stand. This argument

completely misses the point that DER did not let Pequea's Plan stand. There was no choice on DER's behalf, no election, decision or volitional act with regard to Pequea's 537 Plan. Pequea's 537 Plan became its Official 537 Plan by operation of 25 Pa. Code §71.32(c). DER had no say in that occurrence because it failed to timely raise its claims of deficiency therein. When in 1992 Pequea's proposed plan became its 537 Plan by operation of this regulation, Herr, Pequea and DER were faced with a new 537 Plan and Herr's proposal which did not conform therewith. DER then acted on Herr's private request in conformance with the 537 Plan and its duties under 25 Pa. Code §71.14(e). In that circumstance, either Pequea or Herr had to be the loser as to the result. Under Section 71.14(e), DER decided to stay with the new 537 Plan, a decision we sustain here. That was not an abuse of discretion or unlawful. Herr may not agree with it, but as we said in the Sussex opinion cited to us by Herr:

> A mere difference of opinion, or even a demonstrable error in judgment, is insufficient under Pennsylvania decisional law to constitute an abuse of discretion; such abuse comes about only where manifestly unreasonable judgment, partiality, prejudice, bias, ill-will, misapplication or overriding of the law, or similarly egregious transgressions on the part of DER or other decision-making body can be shown to have occurred.

Herr's arguments fail to make this showing.[5]

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[5]Herr also again argues the unnecessary cost to him of this proceeding. What those costs are is not of record here, and we do not believe they exist. Had Pequea v. DER progressed through a merits hearing, the step after that opinion's issuance would have been the parties' submission of their Post-Hearing Briefs and an adjudication of the issues by this Board. That is precisely what occurred, but it occurred in Herr's appeal, not that of Pequea. Moreover, the merits hearing in this appeal by Herr consisted of a submission of the appeal for adjudication based on a stipulated record, of which a major part was the supersedeas hearing's transcript rather than a full evidentiary hearing. Since the parties also filed Post-Hearing Briefs in this appeal, it would appear that Herr's costs for adjudicating this dispute were roughly equal regardless of in which appeal the adjudication occurred, and they do not form any basis for an assertion of abuse of DER's discretion.

Accordingly, Herr's appeal must be rejected and DER's denial of his private request sustained. In accordance with this conclusion, we make the following conclusions of law and enter the appropriate order.

**CONCLUSIONS OF LAW**

1. The Board has jurisdiction over the parties and the appeal by Herr from DER's denial of his private request, as docketed at Docket No. 94-099-E.

2. The Board lacks jurisdiction over Herr's appeal from DER's withdrawal of its administrative order to Pequea docketed at Docket No. 94-098-E because DER's decision there is not a type of action reviewable by this Board.

3. Herr bears the burden of proof pursuant to 25 Pa. Code §21.101(a) with regard to his contentions in his appeal at Docket No. 94-099-E, because it is a separate appeal from that in Pequea v. DER, which was dismissed as moot so that the two cannot be considered together to be a "revocation" action by DER.

4. Section 508(4)(i) of the MPC governs actions taken under the provisions of the MPC as to land development plans, but does not govern actions taken under Act 537 by either DER or Pequea. As a result, the Act 537 Plan in effect when Herr filed his land development plat with LCPC does not govern sewerage disposal at his property if, thereafter, but prior to submission of Herr's request that DER order Pequea to revise its 537 Plan, Pequea adopts a new 537 Plan and it becomes deemed as approved by DER pursuant to 25 Pa. Code §71.32(c).

5. Where DER fails to communicate to Pequea DER's decision that it needs more time to evaluate the adequacy of Pequea's proposed revision of its 537 Plan until 121 days after DER's receipt of that proposed Plan, pursuant to 25 Pa. Code §71.32(c) Pequea's proposal is deemed approved by DER as the township's replacement 537 Plan.

6. DER's mailing of a letter to Pequea saying DER needed more time to evaluate Pequea's proposed replacement 537 Plan on the 120th day after DER receives the proposal for review does not prevent the deemed approval concept in 25 Pa. Code §71.32(c) from operating, because this regulation envisions completion of the act of communicating this need for more time within the 120 day, not merely the act's commencement.

7. Where Pequea's newly deemed approved 537 Plan does not provide for sewerage service to Herr's property so Herr's proposal is in conflict therewith, DER does not abuse its discretion by refusing under 25 Pa. Code §71.14(e) to order Pequea to amend its 537 Plan to provide for the service Herr proposed.

8. DER is not to evaluate land use/zoning issues in acting pursuant to Act 537, but the General Assembly has given it sewage planning responsibility for land development while vesting responsibility for land use/zoning issues with local governments.

9. Because Act 537 and regulations promulgated under it do not address land use or zoning issues, they do not supersede the provisions of the MPC addressing same.

10. Herr's proposal for an amendment of Pequea's 537 plan is not deemed approved merely because DER failed to reject it within 120 days of Herr's submission thereof, because Herr did not have the municipal approval of his proposal necessary to activate the 120 period set forth in 25 Pa. Code §§71.32(c) and 71.54(d).

11. The fact that Herr's request for a private revision was made on the last day before DER's inaction caused Pequea's revision to its 537 to be deemed approved does not lock in use of Pequea's superseded 537 Plan in considering Herr's request, because Herr failed to provide DER all of the information needed

for it to act until months after expiration of that period, and DER could not act on his request pursuant to 25 Pa. Code §71.14 until after giving Pequea 60 days to comment on it, which period put DER and Herr beyond the expiration of the deemed approval period.

12. Herr does not qualify for a claim of vested rights in his proposal under Petrosky and Flynn, because as soon as the appeal period from DER's order began to run, Pequea appealed and obtained a supersedeas of DER's order, and because Herr thus never had an unappealed order to rely upon.

13. Bichler does not provide grounds for Herr to escape the impact of Pequea's 1992 537 Plan on his proposal because there is no record that Herr ever expended any efforts of a futile and unproductive nature based on DER's action. Herr's only efforts were those initiated by him through his intervention in Pequea v. DER, and because where DER seeks to correct its "mistake", Bichler does not apply to let Herr profit thereby.

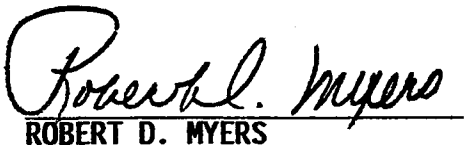
14. Pequea's deemed approved 537 Plan came into effect by operation of 25 Pa. Code §71.32(c) rather than virtue of a DER decision that it was adequate.

15. Where DER learns through the Board's issuance of a supersedeas opinion that a DER interpretation of a regulation is incorrect, DER does not abuse its discretion or act unlawfully when it acts on Herr's request in conformance with that opinion.

## ORDER

AND NOW, this 7th day of March, 1995, it is ordered that Herr's consolidated appeals are dismissed.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: March 7, 1995

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M. DIANE SMITH
SECRETARY TO THE BOARD

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| NORTHEASTERN EQUITY ASSOCIATES, INC. | : | |
| | : | |
| v. | : | EHB Docket No. 94-328-MR |
| | : | |
| COMMONWEALTH OF PENNSYLVANIA, | : | |
| DEPARTMENT OF ENVIRONMENTAL RESOURCES | : | Issued: March 15, 1995 |

**OPINION AND ORDER SUR**
**MOTION FOR PROTECTIVE ORDER**
**AND MOTION FOR SANCTIONS**

**By Robert D. Myers, Member**

**Synopsis:**

The Board grants in part a Motion for Protective Order to a non-party corporation when the notice of deposition and subpoena *duces tecum* are overbroad. The Board denies a motion for sanctions but, since the corporation waited until the last minute to seek the protective order and gave no advance notice to opposing counsel, the corporation will be required to have its designee appear at the place named by opposing counsel when a future deposition is scheduled.

**OPINION**

Northeastern Equity Associates, Inc. (Appellant) is the recipient of a Compliance Order (C.O.) issued on October 17, 1994 by the Department of Environmental Resources (DER) and took an Appeal to this board on November 17, 1994. The C.O. charges Appellant with failure to properly maintain a stream enclosure on its land in East Bangor Borough, Northampton County, causing flooding of S.R. 1035 and railroad tracks of Consolidated Rail Corporation (Conrail).

On January 4, 1995 Appellant sent a Notice of Oral Deposition to Conrail requiring the designation of a person pursuant to Pa. R.C.P. 4007.1(e) to testify at a deposition to be taken at 11:00 a.m. on February 7, 1995 at the offices of Appellant's legal counsel in Bangor, Pennsylvania. Accompanying the Notice was a Subpoena requiring the designated deponent to bring to the deposition "all notes, correspondence, copies thereof, memoranda, maps, sketches, reports, filings, documents, maps or material or data of any kind and nature pertaining to the subject matter of the deposition. (See Notice of Deposition)."

The Notice of Deposition states that the subject of inquiry will be

> all circumstances, facts, data, or materials of any kind in any way, directly or indirectly connected with a Conrail right-of-way running approximately parallel to or adjacent to the premises of the Appellant situate in the Borough of East Bangor, County of Northampton and Commonwealth of Pennsylvania which is the subject of the Compliance Order issued upon the Appellant and attached hereto, for reference, to this Notice. Particular attention is called to paragraphs V, W, X, Y, Z.

Conrail did not make a designation, did not have anyone appear on its behalf at the place of deposition and did not contact Appellant's legal counsel in advance of the deposition to indicate it would not honor the Notice and Subpoena. Instead, it filed with the Board on February 7, 1995 a Motion for a Protective Order. Appellant filed an Answer to this Motion on February 13, 1995 and also filed a Motion for Sanctions on that date. Conrail filed its Answer to the latter Motion on March 7, 1995. Both matters are now ready for disposition.

In its Motion for a Protective Order, Conrail complains that the Notice of Deposition and Subpoena fail to comply with the Rules of Civil Procedure because they are overbroad and, therefore, burdensome. We agree. The subject matter is not limited in any way or for any period of time. To respond, Conrail would have to designate a multitude of persons knowledgeable about all facets of the right-

of-way and dredge up extensive documentation to support their testimony. This imposes an unreasonable burden and amounts to a fishing expedition.

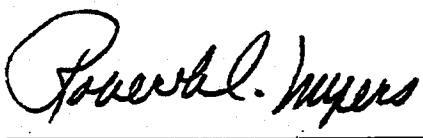
While we generally take a broad view of discovery depositions, we do place limits upon them. Accordingly, we will grant the Motion for Protective Order in part and deny the Motion for Sanctions. However, we will not excuse Conrail's waiting to the last minute to request a protective order without giving Appellant's legal counsel advance notice. We will require Conrail's designated deponent to appear in Bangor rather than at Conrail's office in Philadelphia.

**ORDER**

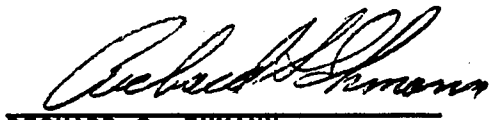
AND NOW, this 15th day of March, 1995, it is ordered as follows:

1. The Motion for Protective order is granted in part as follows:
   (a) Appellant may take the deposition of Conrail's designee or designees at the office of its legal counsel in Bangor, Pennsylvania at a time and date agreeable to the parties;
   (b) In its Notice of Deposition and Subpoena *duces tecum*, Appellant shall designate *with particularity* the specific subjects and time periods that will be inquired into.
2. The Motion for Sanctions is denied.

**ENVIRONMENTAL HEARING BOARD**



**ROBERT D. MYERS**
**Administrative Law Judge**
**Member**



**RICHARD S. EHMANN**
**Administrative Law Judge**
**Member**

**DATED:** March 15, 1995

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SECRETARY TO THE BOARD

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| SKY HAVEN COAL, INC. | : | |
| | : | |
| v. | : | EHB Docket No. 94-241-E |
| | : | |
| COMMONWEALTH OF PENNSYLVANIA, | : | |
| DEPARTMENT OF ENVIRONMENTAL RESOURCES | : | Issued: March 17, 1995 |

## OPINION AND ORDER
## SUR MOTION TO DISMISS

By: Richard S. Ehmann, Member

Synopsis:

A motion to dismiss filed by DER for lack of jurisdiction is granted. Service of a compliance order on an employee of the appellant during a meeting with DER, at which the employee is representing the appellant, constitutes service on the appellant because the employee was acting within the scope of his actual or apparent authority. Since the appeal was filed more than thirty days after service of the compliance order on the appellant, the Board lacks jurisdiction over it. The failure of DER to raise this jurisdictional issue until now does not bar our consideration of it because jurisdiction is an issue which can be raised at any stage of the proceeding.

## OPINION

On September 12, 1994, Sky Haven Coal, Inc.("Sky Haven") filed an appeal from Compliance Order No. 944074, issued by the Department of Environmental Resources ("DER") on August 8, 1994. The notice of appeal states that Sky Haven received notice of the compliance order on August 10, 1994, via the mail.

On January 20, 1994, the Board received from DER a motion to dismiss Sky Haven's appeal for lack of jurisdiction. The motion asserts that Sky Haven was first served a copy of the compliance order, not on August 10, 1994 as stated in the notice of appeal, but on August 8, 1994 during a meeting between DER representatives, Surface Mine Inspector Supervisor Steven C. Starner and Mine Conservation Inspector David E. Butler, and Sky Haven representative, engineer Joel Albert. According to the affidavits of Steven Starner and David Butler, attached to the motion to dismiss, Mr. Starner handed Mr. Albert a copy of the compliance order at the August 8, 1994 meeting, and Mr. Albert signed for the order in the space marked "Operator/Representative Signature". (Starner Affidavit, para. 6; Butler Affidavit, para. 3) Because the appeal was filed more than thirty days after service to Mr. Albert, DER asserts that the Board lacks jurisdiction over the appeal and, therefore, it must be dismissed.

Sky Haven filed a response on February 10, 1995, which raised several arguments challenging DER's motion. First, Sky Haven asserts that DER failed to file a timely proof of service indicating that the compliance order was served on Sky Haven on August 8, 1994. Second, Sky Haven argues that DER's motion is untimely since it did not raise the issue of the timeliness of the appeal until after Sky Haven had filed its pre-hearing memorandum and discovery had been initiated. Third, Sky Haven contends that because of DER's failure to respond to Sky Haven's request for admissions, DER has admitted that it lacks authority to administer and enforce the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq., under which the compliance order in question was issued, and has further admitted that there is no hydrogeologic connection between Sky Haven's mine site and the discharges which were the subject of the order. As such, argues Sky Haven, DER is without

standing to move to dismiss the appeal at this time. Finally, Sky Haven contends that Mr. Albert is not authorized to receive service on behalf of the company.

In order to be timely, appeals must be filed with the Board within thirty days after the party has received notice of DER's action. 25 Pa. Code §21.52(a); Alvin and Lois Lampenfeld v. DER, EHB Docket No. 94-268-E (Opinion and Order Sur Timeliness of Appeal issued November 9, 1994), p.2. An untimely filing deprives the Board of jurisdiction over the appeal. Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976); Lampenfeld, supra.

Sky Haven's first three objections above may be dismissed by pointing out that jurisdictional issues may be raised at any stage of the proceeding. Commonwealth, Department of Transportation v. Forte, 29 Pa. Cmwlth. 415, 371 A.2d 526, 527 (1977); Carter Farm Joint Venture v. DER, 1990 EHB 709,714; Fitzsimmons v. DER, 1986 EHB 1190, 1193. The issue of jurisdiction may be raised either by the parties or by the tribunal, sua sponte. Reading Anthracite Co. v. Rich, 525 Pa. 118, 577 A.2d 881, 886 (1990).

Sky Haven complains that no proof of service was provided by DER in accordance with Rule 405 of the Pennsylvania Rules of Civil Procedure until January 20, 1995, when the motion to dismiss was filed with supporting affidavits. There are two defects with Sky Haven's argument. First of all, the Board's rules do not require that DER file a return of service in accordance with Pa. R.C.P. 405. As Sky Haven itself points out in its response, 25 Pa. Code §21.34 of the Board's rules states that the Board may require proof of service, where appropriate.[1] Sky Haven admits that no proof of service was required by the Board until the filing of the motion to dismiss. This is because no proof of service was necessary until the filing of DER's motion to dismiss raised the

[1]Sky Haven incorrectly cites this provision as 25 Pa. Code §21.35.

issue of the timeliness of Sky Haven's appeal. Had this question not been raised, there would have been no need for DER to establish that service was made on Sky Haven on August 8, 1994, as opposed to August 10, 1994. The second defect with Sky Haven's argument is that it does not dispute the validity of the affidavits provided by DER in support of its motion, but only their timeliness. As noted above, jurisdiction is an issue which may be raised at any time, and, therefore, DER's affidavits do not represent an untimely effort to establish the date of service of the compliance order on Sky Haven.

Sky Haven's second objection is that DER should be estopped from raising the issue of the timeliness of Sky Haven's appeal at this time, after the filing of Sky Haven's pre-hearing memorandum and the initiation of discovery, when this issue could have been determined at the start of this appeal. As we have stated above, however, the timeliness of an appeal to this Board is a jurisdictional issue which may be raised at any time during the proceeding, even at the appellate level. Forte, 29 Pa. Cmwlth. at ___, 371 A.2d at 527. Thus, DER is not estopped from raising this issue at this stage of the appeal. See Fitzsimmons, supra (DER could not be estopped from raising the issue of timeliness of the appeal seventeen months after the appeal had been filed); Carter Farm, supra (Board could consider the issue of timeliness, even after a supersedeas hearing had been held and even though more than two years had passed since the appeal had been filed since this issue may be raised at any stage of the proceeding).

Sky Haven next challenges DER's standing to bring a motion to dismiss based on its failure to respond to a request for admissions served on it by Sky Haven. Among the request for admissions was a request that DER admit that it is not the agency with the authority to administer and enforce the Surface Mining

Conservation and Reclamation Act, supra, and that there is no hydrogeologic connection between Sky Haven's mine site and the discharges which are the subject of DER's order. Sky Haven asserts that DER's failure to timely respond to the request for admissions deems them admitted. As a result, argues Sky Haven, DER is without standing to move for dismissal of the appeal. Even if we accept this argument, it is irrelevant since the Board, sua sponte, may raise the issue of jurisdiction. Thus, if it is established that an appeal is untimely, the Board must dismiss the appeal for lack of jurisdiction regardless of whether DER has moved for dismissal on that basis.

Sky Haven's final argument is that Joel Albert was not authorized to accept service on behalf of the company. Sky Haven points to the fact that Mr. Albert is not an officer of the company. It also contends that Mr. Albert is without sufficient recollection to make a statement under oath as to whether he, in fact, did or did not receive a copy of the compliance order at the August 8, 1994 meeting.

We first dispose of the fact that Mr. Albert cannot recall whether or not he was given a copy of the compliance order at the August 8, 1994 meeting. Attached to DER's motion are the affidavits of DER Surface Mine Conservation Inspector Supervisor Steven C. Starner and Surface Mine Conservation Inspector David E. Butler. Both affidavits affirm that Mr. Starner handed Mr. Albert a copy of the compliance order at the August 8, 1994 meeting, that Mr. Albert signed the order in the space marked "Operator/Representative Signature", and that Mr. Starner marked the date of service as August 8, 1994. A copy of the compliance order is attached to DER's motion as Exhibit A. The compliance order states the date of service as August 8, 1994. In the space marked "Name and Title of Person Served" appears "Joel Albert Engineer Sky Haven". At the bottom

of the compliance order appears Mr. Albert's signature. Therefore, we have no doubt in concluding that Mr. Albert was served a copy of the compliance order on August 8, 1994.

Nor do we have any difficulty in concluding that Mr. Albert had at least apparent, if not actual, authority to accept service on behalf of Sky Haven. "Apparent authority" exists when the principal has led a third party to believe that the individual may act as the principal's agent. Sauers v. Pancoast Personnel, Inc., 294 Pa. Super. 306, 439 A.2d 1214, 1215 (1982); Louis Beltrami v. DER, 1989 EHB 594, 596. An agent can bind the principal when acting within the scope of his apparent authority. Id.

In the present case, the purpose of the August 8, 1994 meeting was to discuss the alleged violations cited by DER in the compliance order. Mr. Albert was the sole representative of Sky Haven to attend the meeting. Upon receipt of the order at the meeting, Mr. Albert did not qualify his acceptance of it in any manner. Moreover, according to DER's unrebutted affidavits, Mr. Albert has in the past accepted compliance orders on behalf of Sky Haven and has been the individual at Sky Haven whom DER has contacted regarding compliance matters involving the company.[2] Finally, Mr. Starner's affidavit indicates that, as of August 8, 1994, he believed that Mr. Albert possessed the authority to represent Sky Haven at the August 8, 1994 meeting. Based on these facts, it is clear that Mr. Albert was acting within the scope of his actual or apparent authority in accepting service of the compliance order on behalf of Sky Haven.

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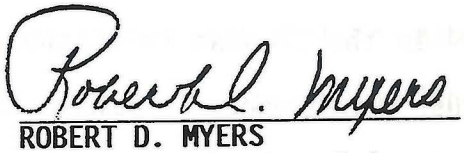
[2]These facts are set forth in the affidavits of Mr. Starner, Mr. Butler, and DER Surface Mine Conservation Inspectors George J. Loomis II, James E. Fetterman, James Parlavecchio, and Walter A. Kuzemchock, attached to DER's motion to dismiss.

Based on the above, we conclude that Sky Haven received notice of the compliance order on August 8, 1994. Because its appeal was not filed within thirty days of that date, it is untimely and we lack jurisdiction over it. Therefore, we enter the following order:

**ORDER**

AND NOW, this 17th day of March, 1995, it is ordered that DER's Motion to Dismiss is granted, and the appeal of Sky Haven at EHB Docket No. 94-241-E is dismissed.

**ENVIRONMENTAL HEARING BOARD**



**ROBERT D. MYERS**
**Administrative Law Judge**
**Member**

**RICHARD S. EHMANN**
**Administrative Law Judge**
**Member**

**DATED:** March 17, 1995

cc: **DER Bureau of Litigation:**
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| GENERAL GLASS INDUSTRIES CORPORATION | : | |
| | : | |
| v. | : | EHB Docket No. 95-038-E |
| | : | |
| COMMONWEALTH OF PENNSYLVANIA, | : | |
| DEPARTMENT OF ENVIRONMENTAL RESOURCES | : | Issued: March 17, 1995 |

**OPINION AND ORDER SUR**
**THE PEOPLES NATIONAL GAS COMPANY'S**
**PETITION FOR LEAVE TO INTERVENE**

**By Richard S. Ehmann, Member**

**Synopsis:**

A Petition for Leave to Intervene, filed by an unsecured creditor of the Chapter 7 Bankrupt Appellant, is denied where the Petition fails to establish that petitioner has a sufficient interest in the outcome of this appeal to warrant granting that Petition.

**OPINION**

This appeal was filed with the Board by General Glass Industries Corporation (Glass) on February 7, 1995. It challenges the Department of Environmental Resources' ("DER") modification of Glass' RACT proposal to control $NO_x$ air pollution by including use of low $NO_x$ burners at its plant in Jeanette, Westmoreland County. According to the Supplemental Filing for Notice of Appeal received by the Board from Glass' counsel, Glass is a Chapter 7 debtor subject to proceedings at No. 94-20023-JLC in the United States Bankruptcy Court for the Western District of Pennsylvania and Attorney Robert Slone is its Chapter 7 Trustee (it was he who initially filed this appeal on Glass' behalf).

On February 28, 1995, The Peoples Natural Gas Company ("Peoples") filed a one and a half page Petition For Leave To Intervene in this appeal. In the petition it sets forth its basis for intervention as:

> Petitioner believes it is entitled to intervene in the above matter for the following reasons: (a). Petitioner has a financial interest in the litigation because it is a major unsecured creditor in General Glass Industries Corporation's ("General Glass") Chapter 7 Bankruptcy. (b). Petitioner has a direct interest in seeing that all lawful emissions credits are registered because this will permit future industrial activity at the General Glass site and promote the sale of natural gas services.

DER has filed a Response to Petition For Leave To Intervene and Memorandum In Support Of Response, which opposes the intervention sought by the Petition.[1] In it DER points out that Glass' plant is closed, that Glass has sought Emissions Reduction Credits ("ERC") from DER which are "permanent enforceable quantifiable" surplus emission reductions usable to offset other emissions. It avers that DER's modifications of the RACT reduced the ERCs. DER asserts Peoples' Petition fails to meet the standards for the granting of intervention because Peoples' interest is not sufficiently substantial, direct and immediate, which is the test for granting such Petitions. DER states that Peoples' interest is averred as that of an unsecured creditor of a Chapter 7 debtor and this Board lacks jurisdiction over such bankruptcy matters, so Peoples has no legally cognizable interest as to this proceeding and thus has no substantially, directly, and immediately affected interest. DER also asserts Peoples' claims as to interest in seeing lawful emission credits registered to

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[1]Environmental counsel for Glass has advised us by letter that Glass does not oppose the Petition.

permit future industrial activity and promote gas sales, are not substantial, immediate and direct.[2]

Precisely what the standard is by which to measure petitions to intervene in appeals pending before this Board is less than clear, but it is summarized excellently in Concord Resources Group of Pennsylvania, Inc. v. DER, 1992 EHB 1563 at 1565 and 1566. As was said there,

> The issue of what standards are to be applied by the Board in deciding petitions to intervene has become somewhat muddled since the passage of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7511 et seq. Section 4(e) allows any interested party to intervene in proceedings before the Board. Prior to this, the Board evaluated petitions to intervene for conformance with its rules of practice and procedure at 25 Pa. Code §21.62, applying a five part test.[3] See, e.g., City of Harrisburg v. DER, 1988 EHB 946. However, this five part test was rejected by the Commonwealth Court in a series of opinions beginning with Browning-Ferris, Inc. v. Department of Environmental Resources, ___ Pa.Cmwlth. ___, 598 A.2d 1057 (1991), and the companion case, Browning-Ferris, Inc. v. Department of Environmental Resources, ___ Pa.Cmwlth. ___, 598A.2d 1061 (1991, (the BFIs).
>
> In the BFIs the Court interpreted the language of §4(e) of the Environmental Hearing Board Act, allowing "any interested party" to intervene in proceedings before the Board as requiring the party to show that it will "either gain or lose by direct operation of the Board's ultimate determination." 598 A.2d 1060-1061. Three months later another panel of the Commonwealth Court, in Borough of Glendon and Glendon Energy Company v. Department of Environmental Resources, ___ Pa.Cmwlth. ___, 603 A.2d 226 (1992), applied the criteria articulated in William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975)[4] in holding that a municipality's intervention in an appeal before the Board of a solid waste permit was warranted. But, shortly thereafter in Wheelabrator Pottstown Inc. v.

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[2]Further, DER asserts that Peoples has failed to show a need for its intervention and failed to show Glass cannot adequately represent its interests in these ERCs. We agree with DER in this regard, but, as stated in Pagnotti Enterprises, Inc. v. DER, 1992 EHB 433, such a showing need no longer be made. *See* Borough of Glendon *et al.* v. DER, 145 Pa.Cmwlth. 238, 603 A.2d 226 (1992).

> Department of Environmental Resources, ___ Pa.Cmwlth. ___. 607 A.2d 866 (1992), the court again applied the standard for intervention articulated in the BFIs.
>
> The Commonwealth Court was not suggesting in any of these decisions that there is an automatic right of intervention under §4(e) of the Environmental Hearing Board Act. Rather, it held that a party must establish some interest in the proceedings before the Board. While the test in BFI/Wheelabrator Pottstown is seemingly less elaborate than the test in Glendon Energy, an examination of the wording leads to the conclusion that the Commonwealth Court was directing the Board to apply the "substantial, immediate and direct" language of William Penn to ascertain whether a party is "interested" for purposes of intervention. Gaining or losing by direct operation of the Board's ultimate decision is just another expression of the direct, immediate, and substantial interest required by William Penn.
>
> (footnotes omitted)

We apply this test here.

To define these terms, we turn to Empire Coal Mining and Development, Inc. v. Commonwealth, DER, 154 Pa.Cmwlth. 296, 623 A.2d 897 (1993), *appeal denied*, ___ Pa. ___, 629 A.2d 1384 (1993). There, a "substantial" interest is defined to be one of substance (a discernable greater interest) surpassing the common interest of all citizens in seeking obedience to the law. A "direct" interest is one to which harm is caused by the DER action on the ERCs of Glass. So, Peoples must show some injury to it from DER's action. An "immediate" interest is one with a causal connection between DER's action and any injury assertedly done to Peoples. That is to say, injuries to Peoples cannot be a remote consequence of DER's action.

Applying these concepts here compels us to deny Peoples' Petition. This unverified Petition contains too little by way of allegations for us to judge whether or not Peoples has the requisite interest, and it is Peoples, as the Petitioner, which bears the burden of making that demonstration. With regard

to Peoples' status as an unsecured creditor of Glass, there is no explanation of how the reduction in ERCs impacts on Peoples' financial claims against Glass. Are ERCs salable and thus an asset of Glass which could be used to pay Peoples' claims? We do not know. There are neither allegations to this effect in the Petition nor affidavits attached to it setting forth facts on this point. As to Peoples' desire to see lawful emission credits registered to permit future industrial activity, how is Peoples' interest substantial, *i.e.*, greater, than that of all citizens in seeking compliance with the law? Again, the Petition is silent on this point. The mere fact Peoples sells natural gas does not make the necessary showing on this point and begins to raise a concern that its interests are remote rather than immediate as to the DER action. Thus, we must conclude that Petitioner never makes the effort to address the concerns cited by DER, much less stating why Peoples qualifies for status as an intervenor.

Accordingly, we have no option but entry of the following Order.

## O R D E R

AND NOW, this 17th day of March, 1995, it is ordered that Peoples' Petition For Leave To Intervene is denied.

**ENVIRONMENTAL HEARING BOARD**

**RICHARD S. EHMANN**
**Administrative Law Judge**
**Member**

**DATED:** March 17, 1995

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| WILLIAM PICKELNER | : | |
| | : | |
| v. | : | EHB Docket No. 93-363-MR |
| | : | |
| COMMONWEALTH OF PENNSYLVANIA, | : | |
| DEPARTMENT OF ENVIRONMENTAL RESOURCES | : | Issued: March 21, 1995 |

## OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT

By Robert D. Myers, Member

Synopsis:

The Board enters summary judgment in favor of DER in an appeal from a DER Order citing Appellants with responsibility for a release of gasoline from underground storage tanks and directing them to perform a site characterization, prepare a corrective action plan and implement the same. In reaching this result, the Board finds that there are no genuine disputes of material fact and that DER is entitled to judgment as a matter of law. Facts and legal arguments related to Appellants' attempts to comply with the Order are held to be irrelevant and are not considered.

## OPINION

Mr. William Pickelner and Pickelner Fuel Oil, Inc. (Appellants) filed a Notice of Appeal on December 2, 1993 seeking review of an Order issued by the Department of Environmental Resources (DER) on November 10, 1993. The Order charged Appellants with responsibility for a release of gasoline from underground storage tanks (USTs) on a property owned and operated by Appellants at the corner of Walnut and High Streets in the City of Williamsport, Lycoming County (Site).

On August 29, 1994 DER filed a Motion for Summary Judgment with supporting exhibits, affidavits and legal memorandum. Appellants filed an Answer on September 20, 1994 without supporting affidavits or legal memorandum. On October 4, 1994 DER filed two motions - a Motion to Strike Appellants' Answer and a Motion for Opportunity to Reply to Appellants' Answer. Appellants responded to these motions on October 25, 1994. On November 3, 1994 the Board denied the Motion to Strike but granted the Motion to Reply. The Reply attached to the Motion was filed and considered in the disposition of the Motion for Summary Judgment.

We can grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law: Pa. R.C.P. 1035(b). We must view a motion for summary judgment in the light most favorable to the non-moving party, Appellants in this case: *Robert C. Penoyer v. DER*, 1987 EHB 131.

DER bases its Motion for Summary Judgment on official reports documenting the release of gasoline, on Request for Admissions which Appellants failed to answer, on certain of Appellants' Answers to DER Interrogatories, on reports prepared by Appellants' consultants and submitted to DER, and on two affidavits of DER personnel. The most significant of these are the Request for Admissions. Since Appellants neither answered nor objected to them they are deemed admitted under Pa. R.C.P. 4014(b).

These admissions establish, *inter alia*, that Appellants own and operate a gasoline service station at the Site; that on February 21, 1990 there were gasoline odors in the vicinity of the Site and inside a private residence adjacent to the Site; that on February 23, 1990 three 4,000 gallon USTs were dug

up and removed from the Site at which time it was determined that at least one of the USTs had been leaking through a hole in the tank wall; that soil samples collected from the walls of the excavated pit on February 28, 1990 were found to contain benzene, toluene, ethylene and xylene (BTEX), constituents of gasoline, and that between February 26, 1990 and March 2, 1990 about 280 tons of gasoline-contaminated soil were excavated from the Site and disposed at the Clinton County Landfill.

The admissions also reveal that on February 26, 1990 DER issued to Appellants a Waste Discharge Inspection Report which requested Appellants, *inter alia*, to prepare a groundwater assessment to identify the extent of groundwater contamination; that during installation of three new USTs in early March, 1990, Appellants installed (without the proper permits) a soil ventilation system near where the previous USTs had been located in order to alleviate gasoline fumes in a neighboring residence; that, at the request of DER, Appellants installed three groundwater monitoring wells at the Site in March 1990 and a fourth well in November 1990; that eight sets of samples collected from the monitoring wells between June 1990 and May 1993 contained BTEX; that DER on June 12, 1990 requested Appellants to prepare an "initial site characterization" in accordance with 40 CFR Part 280, §280.63 and to submit a corrective action plan to DER by August 17, 1990 pursuant to 40 CFR Part 280, §280.66; that on August 1, 1991 DER notified Appellants that their limited actions to assess contamination and perform remediation were not acceptable; that Appellants submitted to DER in September 1991 documents identified as an "update and corrective action plan" which proposed continued operation of the soil ventilation system and monitoring the existing wells for another year before developing a remediation plan; and that DER notified Appellants on November 13, 1991 that their proposal was not

acceptable because the high levels of BTEX warranted more aggressive remediation.

Finally, the admissions establish that Appellants are collectively an "owner" and "operator" of all the USTs at the Site as defined in Section 103 of the Storage Tank and Spill prevention Act (STA), Act of July 6, 1989, P.L. 169, 35 P.S. §6021.103; that as of March 31, 1994 Appellants have not determined the direction of groundwater flow, the soil, geologic, hydrogeologic and aquifer characteristics, the horizontal extent and thickness of free product[1], the vertical and horizontal extent of soil and groundwater contamination beyond the boundaries of the Site, and the appropriate groundwater methodologies to characterize the Site; and that as of March 31, 1994 Appellants have not submitted a site characterization report that sets forth the vertical and horizontal extent of soil and groundwater contamination at the Site or that has been approved by DER.

Appellants make no effort to avoid these admission, stating in paragraph 35 of their Answer to the Motion that, as of March 31, 1994, they "were generally admitted" during a discussion with legal counsel for DER. They contend, however, that a Property Site Characterization prepared by Storb Environmental, Inc. and submitted to DER on May 9, 1994, satisfies some or all of the deficiencies cited by DER with respect to earlier filings. DER, in turn, claims that the Storb report also is deficient.

All of this represents a good deal of wasted effort and emotion. The issue before us is DER's Order of November 10, 1993 - whether it was authorized by law and whether it constituted an appropriate exercise of DER's discretion. That Order cited Appellants with responsibility for the gasoline leak and claimed

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[1]"Free product" is defined in the regulations at 25 Pa. Code §245.1 as a regulated substance (including gasoline) present as a liquid not dissolved in water.

that their Site characterization and remediation activities had not been adequate. It then went on to order specific and highly detailed action within specific time limits to prepare a comprehensive Site Characterization Report, a Remedial Action Plan and to implement the same.

The validity and appropriateness of this order necessarily must be determined on the basis of the facts known by DER on November 10, 1993, the date of issuance. Facts dealing with Appellants' efforts to comply with the Order are not relevant: *Max L. Starr v. DER*, 1991 EHB 494. The Storb Report, filed 6 months after the Order, is in that category.

The only other facts disputed by Appellants in their Answer to the Motion deal with the following: (a) whether free product was present in the storm sewers, and (b) whether the amount of gasoline that had leaked was enough to require Appellants to assess the extent of resulting contamination. DER maintains that the affirmative of these issues is true and supports it by the affidavit of Martha H. Kern, a DER hydrogeologist who was at the Site on February 21, 1990 and February 26, 1990. She avers that free product (gasoline) was present in the storm sewers adjacent to the Site on February 21, 1990. She also avers that, when the USTs were removed on February 26, 1990, it was apparent that at least one of them had been leaking and that soil in the excavated pit was soaked with gasoline. She avers then that the "perceived amount of gasoline that had leaked" required Appellants to define the extent of contamination.

Anne B. Hughes, another DER hydrogeologist, avers in her affidavit that, in order to assess the extent of contamination at the Site and prepare a remedial action plan, it is necessary to characterize the aquifer and the soils. The requirements of paragraphs 2 and 3 of the Order, according to Hughes, are necessary to define the extent of, and to address, the contamination at the Site.

In their Answer, Appellants simply deny the truth of these averments and demand proof. They submit no counter-affidavits or any other document or exhibit to demonstrate that a genuine factual dispute exists as to these matters. Even the denial in their Answer to the Motion is a general denial, offering no counter-averment of fact. This is not an adequate response to bar the entry of summary judgment: *Northampton Residents Association v. Northampton Township Board of Supervisors*, 14 Pa. Cmwlth. 515, 322 A.2d 787 (1974).

Appellants contend that, since their Answer is supported by a verification, it amounts to an affidavit. We have held previously that a verification will not take the place of an affidavit: *E. P. Bender Coal Co. v. DER*, 1990 EHB 1624. And where a motion for summary judgment is concerned, affidavits must adhere to strict guidelines. Pa. R.C.P. 1035(d) requires that they be made "on personal knowledge", set forth "facts as would be admissible in evidence" and "show affirmatively that the signer is competent to testify to the matters stated therein." Kern's and Hughes' affidavits meet this requirement; Appellants' Answer to the Motion does not. First of all, it is signed by Appellants' legal counsel and verified on "knowledge, information and belief" rather than "personal knowledge." Secondly, it does not give any indication that the signer (legal counsel) is competent to testify to any of the facts alleged to be in dispute. There is no representation that legal counsel was present at the Site either on February 21 or 26, 1990 when Kern made the observations about free product and the magnitude of the leakage. There is no indication that legal counsel has the necessary qualifications as a hydrogeologist to dispute Hughes' opinions. Pa. R.C.P. 1035(d) provides that, when a motion for summary judgment is made and properly supported, the opposing party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as

otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."(emphasis added) Even if we were to accept the Answer to the Motion as an affidavit, we would still find its general denials to be inadequate under this language: *Northampton Residents Association, supra.*

We conclude, therefore, that there are no genuine issues of material fact. We next consider whether DER is entitled to judgment as a matter of law.

Under the regulations in effect at the time of the leakage (25 Pa. Code §245.2), corrective action was governed by Federal Regulations at 40 CFR Part 280 which was incorporated by reference into the Pennsylvania regulations. Subpart F of Part 280 of the Federal regulations, consisting of §280.60 through §280.67, governed response and corrective action required of owners and operators of USTs. In response to a confirmed release, they were to comply with the requirements of Subpart F (40 CFR §280.60). This included interim response measures (40 CFR §280.61) and initial abatement measures (40 CFR §280.62) but also included site characterization work (40 CFR §280.63 and §280.65) and corrective action (40 CFR §280.66).

DER, in its Waste Discharge Inspection Report of February 26, 1990, advised Appellants that

> A ground water assessment will have to be made to define the extent of possible contamination. The investigation is to determine flow directions and rates of flow, and the presence and amounts of gasoline in and on the groundwater. Possible impacts of the product release are to be evaluated. You are also to take all necessary steps to alleviate the vapor problems.

These directions are clearly within the scope of the requirements set forth in 40 CFR §280.63 and §280.65. Lest there by any doubt, however, DER sent a letter to Appellants on June 12, 1990 requesting, *inter alia*, a site characterization pursuant to 40 CFR §280.63 and a corrective action plan pursuant

to 40 CFR §280.66. As noted, these requirements were necessary to assess the extent of, and to address, the contamination.

It is admitted that Appellants' response to these directives over the course of the next three years was inadequate. DER made this clear to them, urging that the contaminant levels of BTEX in the monitoring wells mandated more aggressive action. In spite of these admonitions, DER as of November 10, 1993 when the Order was issued, still did not have any information from Appellants establishing the vertical and horizontal extent of soil and groundwater contamination either on the Site or off the Site, determining the direction of groundwater flow, determining the soil, geologic, hydrogeologic and aquifer characteristics at the Site, or measuring the horizontal extent and thickness of free product at the Site. This information was all within the scope of the requirements of 40 CFR Part 280, Subpart F, and were necessary to properly address the situation. As a result, DER was fully authorized by law (the STA, among other statutes) to issue the Order and was fully justified in exercising its discretion to do so.

The corrective action mandated by the Order is contained in the first five paragraphs which read as follows:

> 1. Pickelner shall, within sixty (60) days of receipt of this Order, submit to the Department for approval or modification, a report detailing the results of investigations, characterizations, and assessments conducted at the site to determine the vertical and horizontal extent of groundwater and soil contamination at, and emanating from, the site ("Site Characterization Report").
>
> 2. The Site Characterization Report shall contain, but not be limited to, recommendations and a schedule for the collection and analysis of sufficient monitoring well data and water analysis results to assure the detection of any existing groundwater contamination at, and emanating from, the site including at a minimum:

a. sufficient physical data, through field observations, to determine the extent of migration of the regulated substances in groundwater, soil or sediment;

b. sufficient information to define and assess the relative merits of remedial action options;

c. sufficient information to allow for completion of a remedial action plan or a design for remedial action;

3. In preparation of the Site Characterization Report, Pickelner shall perform, at a minimum, the following tasks:

a. Identify adjacent properties which have been, or have the potential to be, affected by the release.

b. Review the site history.

c. Drill soil borings, conduct soil gas surveys and collect soil samples to determine soil characteristics and the horizontal and vertical extent of soil contamination.

d. Use piezometers, well points, monitoring wells and public and private wells to:

1. determine the direction of groundwater flow;

2. determine soil, geologic hydrogeologic and aquifer characteristics;

3. measure the horizontal extent and thickness of free product;

4. sample groundwater to determine the horizontal and vertical extent of groundwater contamination;

e. Assess potential migration pathways, including sewer lines, utility lines,

wells, geologic structures and hydrogeologic conditions.

f. Perform site survey and topographic mapping.

g. Identify and apply appropriate groundwater methodologies to characterize the site.

h. Institute a quality assurance/quality control program for the performance of site characterization field activities and for the accurate collection, storage, retrieval, reduction, analysis and interpretation of site characterization data.

4. Within forty-five (45) days of receiving written approval of the Site Characterization Report, as approved or modified by the Department, Pickelner shall submit to the Department a Remedial Action Plan. The Remedial Action Plan shall comply with the provisions of 25 Pa. Code 245, Section 245.311(a)(b).

5. Upon receiving written approval of the Remedial Action Plan, as approved or modified by the Department, Pickelner shall implement the Remedial Action Plan in accordance with the provisions of 25 Pa. Code 245, Section 245.312.

These requirements are all derived from 25 Pa. Code §245.309, effective August 21, 1993, and intended to supersede so much of the Federal regulations as conflict with it (23 *Pa. Bulletin* 4033, August 21, 1993). This regulation was in effect on November 10, 1993 when the Order was issued. Appellants make no claim that it should not apply to them because their leakage predated the regulation. In any event, we find the requirements to be necessary to properly address the situation and to be of the type that reasonably could have been imposed under 40 CFR Part 280, Subpart F, prior to adoption of 25 Pa. Code §245.309.

Finding that DER was legally authorized to issue the Order and that issuance was an appropriate exercise of its discretion; and finding further that

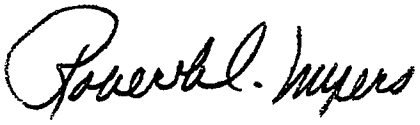
the terms of the Order were legally authorized and were an appropriate exercise of DER's discretion, we conclude that DER is entitled to summary judgment as a matter of law.

**ORDER**

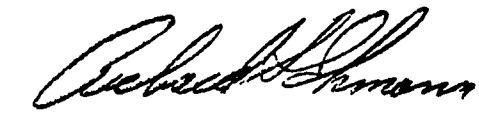
AND NOW, this 21st day of March, 1995, it is ordered as follows:

1. DER's Motion for Summary Judgment is granted.
2. Summary judgment is entered for DER and the appeal is dismissed.

**ENVIRONMENTAL HEARING BOARD**



**ROBERT D. MYERS**
**Administrative Law Judge**
**Member**



**RICHARD S. EHMANN**
**Administrative Law Judge**
**Member**

**DATED:** March 21, 1995

**cc:** **DER Bureau of Litigation:**
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**For the Commonwealth, DER:**
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M. DIANE SMITH
SECRETARY TO THE BOARD

| | | |
|---|---|---|
| ROBINSON COAL COMPANY | : | |
| | : | |
| v. | : | EHB Docket No. 94-204-MR |
| | : | (consolidated) |
| COMMONWEALTH OF PENNSYLVANIA, | : | |
| DEPARTMENT OF ENVIRONMENTAL RESOURCES | : | Issued: March 21, 1995 |

**OPINION AND ORDER SUR**
**PETITION TO INTERVENE**

**By Robert D. Myers, Member**

**Synopsis:**

Where one of two parties to whom a DER order is addressed fails to take an appeal, he is not entitled to intervene in the appeal taken by the other party if his purpose is to challenge the validity of the Order. Where as here the purpose is to challenge the manner in which the Order might be complied with, the purpose is beyond the scope of these proceedings which are limited to considering only whether the order is valid.

**OPINION**

On July 25, 1994, Robinson Coal Company (Robinson) filed a Notice of Appeal at Board Docket No. 94-204-MR, seeking Board review of an Order issued July 1, 1994 by the Department of Environmental Resources (DER). The Order, addressed both to Robinson and Robert Burgoon (Burgoon), related to a discharge of acid mine drainage (AMD) on Burgoon's land which is adjacent to and east of the Putt Mine, a surface coal mine operated by Robinson in Robinson Township, Washington County, pursuant to Coal Surface Mining Permit No. 63840106. The Order declared that both Robinson and Burgoon were responsible for the discharge, directed

Robinson to devise and implement a suitable treatment plan, and directed Burgoon to give Robinson access to Burgoon's land for the purpose of devising and implementing the treatment plan. Burgoon took no appeal from the Order.

On September 13, 1994, Robinson filed a Notice of Appeal at Board Docket No. 94-245-MR, seeking Board review of Special Condition No. 26 contained in Coal Surface Mining Permit No. 63940101 issued to Robinson by DER on August 15, 1994. Condition No. 26 of this Permit, which related to the Arnot Mine, a surface coal mine in Robinson and Smith Townships, Washington County, required Robinson to continue complying with the Order forming the basis for the appeal at Board Docket No. 94-204-MR.

The two appeals were consolidated at Board Docket No. 94-204-MR on November 10, 1994. On February 7, 1995 Burgoon filed a Petition to Intervene in the consolidated appeals. Robinson filed Objections to the Petition on February 27, 1995 to which DER joined by way of a letter received that same date. The Petition is now ready for disposition.

Robinson argues that the rationale announced in *Avery Coal Company, Inc. v. DER*, 1991 EHB 662, applies here and, accordingly, the Petition should be denied. *Avery* involved a DER compliance order issued both to Avery and Thompson. Avery appealed; Thompson didn't. About six months later, Thompson petitioned to intervene. The Board held that, since Thompson could have appealed but didn't appeal the compliance order, it was final as to Thompson and could not be collaterally attacked through intervention in Avery's appeal.

*Avery's* rationale applies here to prevent Burgoon from challenging DER's July 1, 1994 Order which has become final as to him. It is not certain, however, that he seeks to do that by his intervention. He avers in his Petition that he has fully complied with the July 1, 1994 Order, especially with respect to his

obligation to allow Robinson access to his land. He then avers that (1) DER and Robinson have agreed tentatively to a treatment plan which involves the surface mining of Burgoon's land; that (2) Robinson requested Burgoon to agree to the surface mining at a low royalty, which Burgoon rejected; that, (3) subsequent to the rejection, Robinson began a civil action against Burgoon in the Court of Common Pleas of Washington County claiming that Burgoon is solely responsible for the AMD discharge. He concludes from all of this that DER will approve a treatment plan involving the surface mining of Burgoon's land without his consent and/or for an inadequate consideration.

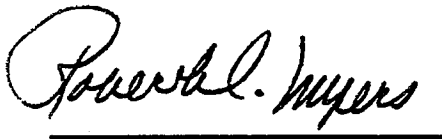
Burgoon's concerns may not be with the Order itself but with the treatment plan that might be approved. If so, he is not disqualified by *Avery* but is disqualified by another factor. The proceedings before this Board relate only to the Order - whether it was authorized by law and whether it was an appropriate exercise of DER's discretion. The treatment plan which might be proposed by Robinson and approved by DER is an element of compliance with that Order. That is a separate and distinct subject that is not a part of the appeals before us.

Since the issues Burgoon desires to raise are either final as to him or are beyond the scope of these consolidated appeals, his request to intervene cannot be granted.

## ORDER

AND NOW, this 21st day of March, 1995, it is ordered that Burgoon's Petition to Intervene is denied.

**ENVIRONMENTAL HEARING BOARD**



**ROBERT D. MYERS**
**Administrative Law Judge**
**Member**

**DATED:** March 21, 1995

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| | | |
|---|---|---|
| KELLY RUN SANITATION, INC. | : | |
| | : | |
| v. | : | EHB Docket No. 94-270-E |
| | : | Consolidated with |
| COMMONWEALTH OF PENNSYLVANIA, | : | 94-351-E |
| DEPARTMENT OF ENVIRONMENTAL RESOURCES | : | Issued: March 22, 1995 |

## OPINION AND ORDER
## SUR MOTION FOR SUMMARY JUDGMENT

By: Richard S. Ehmann, Member

Synopsis

The Board grants the Department of Environmental Resources' (DER) motion for summary judgment. The appellant/landfill operator's challenges to conditions set forth in modifications to its Solid Waste Disposal and/or Processing Permit are precluded by the doctrine of administrative finality, and, thus, we lack jurisdiction over this consolidated appeal.

## OPINION

Background

Appellant Kelly Run Sanitation, Inc. (Kelly Run) commenced an action with us at Docket No. 94-270-E on October 7, 1994, seeking our review of DER's September 9, 1994 modification, pursuant to the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq., to Kelly Run's Solid Waste Disposal and/or Processing Permit No. 100663 (permit) for the operation of its municipal waste landfill located in Forward Township, Allegheny County.

Kelly Run's notice of appeal at Docket No. 94-270-E, *inter alia*, raises objections based on DER's precluding Kelly Run from accepting waste from states

other than Pennsylvania and counties other than the Pennsylvania counties of Allegheny, Washington, and Philadelphia, and from places of origin not approved within its permit or any subsequent permit modifications. Kelly Run also asserts in its notice of appeal that DER's action is a violation of the Interstate Commerce Clause of the United States Constitution.

DER subsequently issued another modification to Kelly Run's permit on November 23, 1994. We received from Kelly Run, on December 22, 1994, a notice of appeal, originally assigned Docket No. 94-351-E, *inter alia*, objecting to "any provisions, permit condition or paragraph in any modification that restricts receipt of waste based on geographic waste origin". By an order issued January 23, 1995, we consolidated Kelly Run's appeals at Docket Nos. 94-270-E and 94-351-E at the instant docket number.

It is clear from the record that DER issued a series of modifications to Kelly Run's permit (originally issued on December 4, 1972), specifically: 1) a September 14, 1990 modification (1990 modification); 2) a March 31, 1993 modification; 3) an August 30, 1994 modification (August 1994 modification); 4) a September 9, 1994 modification (September 1994 modification); and 5) a November 23, 1994 modification (November 1994 modification). The September 1994 modification provided:

> 1. This permit modification amends Permit Condition No. 37 of the August 30, 1994 modification regarding management of special handling municipal waste and residual waste as follows:
>
> > This facility is permitted to accept the following specific waste types and waste composition:
> >
> > Residual waste(s) identified in Permit Condition No. 5 of the March 31, 1993 permit modification.
> >
> > Special handling municipal waste(s) identified in Permit Condition No. 5 of the March 31, 1993 permit modification.

> Special handling residual waste(s) identified in Permit Condition No. 5 of the March 31, 1993 permit modification.
>
> Municipal waste from Allegheny, Washington and Philadelphia Counties.
>
> Except to the extent this permit provides otherwise, the permittee shall conduct solid waste management activities as described in the approved application. The permittee shall not accept any municipal waste from places of origin not approved in this permit modification. The permittee shall file an application for a permit modification with the Department and shall receive approval from the Department prior to receiving any waste volumes in excess of the maximum or average daily volume stated in the permit, any waste from any place of origin not approved in the permit.
>
> 2. If Kelly Run Sanitation, Inc. is not designated in the revised Washington County Solid Waste Management Plan, then the facility will no longer be able to accept municipal waste from Washington County once the facilities' existing contracts expire.
>
> 3. Unless amended by this permit modification, all previous conditions remain in effect.
>
> This modification shall be attached to the existing Solid Waste Permit described above and shall become a part thereof effective on September 9, 1994.

(See Exhibit A to notice of appeal at Docket No. 94-270-E.)

The November 1994 modification states in pertinent part:

> 1. Permit Condition No. 37 of the August 30, 1994 permit modification and Permit Conditions Nos. 1 and 2 of the September 9, 1994 permit modification are hereby deleted.

This modification shall be attached to the existing Solid Waste Permit described above and shall become a part thereof effective on November 23, 1994.

(See Exhibit A to Kelly Run's notice of appeal at Docket No. 94-351-E.)

In an opinion and order issued on February 13, 1995, we considered DER's motion to dismiss Kelly Run's appeal of the September 1994 modification. DER argued a deletion of Condition No. 37 of the August 1994 modification and

Conditions Nos. 1 and 2 of the September 1994 modification, and a "reinstatement" of prior conditions occurred by way of the November 1994 modification, and that Kelly Run's appeal at Docket No. 94-270-E was moot as to all three conditions set forth in the September 1994 modification. In response, Kelly Run claimed that "the matter before this Board involves a challenge to the alleged unlawful permit conditions propounded by [DER] that preclude Kelly Run from receiving out of county or out of state waste at its landfill when such preclusion is in violation of the interstate commerce clause of the Constitution." (Brief in Response to Appellee's Motion to Dismiss at p. 6.) Kelly Run argued that the only permit condition precluding it from accepting waste from other counties was paragraph 13 of the modification to its permit issued in 1990. Kelly Run further urged that paragraph 13 was amended by the September 1994 modification, and, thus, did not remain in effect (via Condition No. 3 of the September 1994 modification), but rather was reinstated by the November 1994 modification. On this basis, Kelly Run argued that its challenge to paragraph 13 was timely and that the Board had jurisdiction over it.

We granted, in part, DER's motion on the basis that DER's issuance of the November 1994 modification rendered Kelly Run's appeal at Docket No. 94-270-E moot with regard to Conditions Nos. 1 and 2 of the September 1994 modification. We ruled, however, that it was unclear whether Kelly Run's challenge to Condition No. 3 of the September 1994 modification should be dismissed as moot or precluded by the doctrine of administrative finality because neither paragraph 13 of the 1990 modification nor Condition 37 of the August 1994 modification was in the record as it existed before us. We thus denied DER's motion to dismiss as to Condition No. 3 of the September 1994 modification.

Should Summary Judgment Be Granted in DER's Favor?

On February 13, 1995, we received from DER a motion seeking summary judgment as to what remains of DER's action in the consolidated appeal, along with a supporting memorandum of law, exhibits, and an affidavit. Upon our receipt of this motion, we directed Kelly Run to address the impact of the doctrine of administrative finality on the issues raised in its appeal. Kelly Run filed its response to DER's motion for summary judgment on March 6, 1995. It is this motion which is presently before us.

In order for us to grant summary judgment in DER's favor, the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, must show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Robert L. Snyder, et al. v. Department of Environmental Resources, 138 Pa. Cmwlth. 534, 588 A.2d 1001 (1991); Pa. R.C.P. 1035(b). "A fact is material if it directly affects the disposition of a case." Fulmer v. White Oak Borough, 146 Pa. Cmwlth. 473, __, 606 A.2d 589, ___ (1992). Summary judgment may only be granted if the case is clear and free of doubt. Hayward v. Medical Center of Beaver County, 530 Pa. 320, 608 A.2d 1040 (1992). In deciding a motion for summary judgment, the Board will view the facts in a light most favorable to Kelly Run, as it is the non-moving party. Id.; New Castle Township Board of Supervisors v. DER and Reading Anthracite Company, 1993 EHB 1541.

Kelly Run, as the party seeking to avoid the imposition of summary judgment, has to show by specific facts in its depositions, answers to interrogatories, admissions, or affidavits that there is a genuine issue for trial. Marks v. Tasman, 527 Pa. 132, 589 A.2d 205 (1991); DER v. East Penn

Manufacturing Company, EHB Docket No. 94-196-CP-E (Opinion issued February 15, 1995).

The parties do not dispute that through the 1990 modification, DER modified Kelly Run's permit, which was issued on December 4, 1972, by, *inter alia*, restricting the counties from which Kelly Run could accept municipal waste. DER has attached to its motion for summary judgment as Exhibit A a copy of paragraph 13 of the 1990 modification, which provided:

> 13. This permit is, hereby, conditioned to prohibit the facility's receipt and processing or disposal of municipal wastes from any municipality whose Department approved solid waste management plan designates another facilty for the current receipt and processing or disposal of its municipal wastes. However, this condition shall not apply in those instances in which the plan designated facility is unable to accept such municipal wastes in a manner that is consistent with the rules and regulations of the Department.

Further, the parties do not dispute that on August 30, 1994, DER modified Kelly Run's permit by, *inter alia*, specifying the counties from which the landfill could accept certain waste types. DER has attached to its motion for summary judgment as Exhibit B a copy of Condition No. 37 of Kelly Run's August 1994 modification, which provided:

> 37. This facility is permitted to accept the following specific waste types and waste composition:
>
> > Residual waste(s) identified in Permit Condition No. 5 of the March 31, 1993 permit modification.
> >
> > Special handling municipal waste(s) identified in Permit Condition No. 5 of the March 31, 1993 permit modification.
> >
> > Special handling residual waste(s) identified in Permit Condition No. 5 of the March 31, 1993 permit modification.
> >
> > Municipal waste from Allegheny and Philadelphia Counties.

DER contends that the doctrine of administrative finality precludes Kelly Run from challenging this condition in this appeal (citing Commonwealth, DER v. Wheeling-Pittsburgh Steel Corp., 22 Pa. Cmwlth. 250, 348 A.2d 765 (1975), aff'd, 473 Pa. 432, 375 A.2d 320 (1977), cert. denied, 434 U.S. 969 (1977), and Specialty Waste Services, Inc. v. DER, 1992 EHB 382)). The doctrine of administrative finality precludes a person from raising an issue which could have and should have been raised in an earlier proceeding. Wheeling-Pittsburgh, supra; Borough of Ridgway v. DER, EHB Docket No. 93-231-MJ (Opinion issued July 28, 1994). This Board has consistently held that in accordance with the principles of administrative finality, "the factual and legal bases of unappealed administrative orders are final and unassailable." Ingram Coal Co. v. DER, 1988 EHB 800, 803. Relying on the exception to the doctrine of administrative finality discussed in Bethlehem Steel Corporation v. Commonwealth, DER, 37 Pa. Cmwlth. 479, 390 A.2d 1383 (1978), we ruled in Specialty Waste Services, supra, that in permit renewal appeals, the appellant may raise issues which have arisen between the time the permit was first issued and the time it was renewed, but that an appellant may not challenge the renewal by raising arguments which were available when the permit was first issued.

Specifically, DER asserts that Kelly Run is seeking to challenge limitations on its acceptance of municipal waste which have been in place since the 1990 modification to Kelly Run's permit. DER claims that Condition No. 37 of the August 1994 modification was consistent with paragraph 13 of the 1990 modification and merely identified the specific counties from which the 1990 modification allowed Kelly Run to accept waste, and that pursuant to Condition 3 of the September 1994 modification, the general provision restricting Kelly Run's acceptance of out of county waste (paragraph 13) has remained in

"continuous effect" since DER issued the 1990 modification. DER asserts, and Kelly Run admits, that paragraph 13 of the 1990 modification was never deleted. DER argues, accordingly, that paragraph 13 was not reinstated by the November 1994 modification, and that even if it was reinstated, DER did not consider any additional issues in issuing the November 1994 modification. DER thus contends that summary judgment should be granted in its favor on the issue of the Board's lack of jurisdiction over this appeal.

While Kelly Run admits it did not appeal the modifications to its permit containing paragraph 13 and Condition No. 37 when issued, citing Dithridge House Ass'n v. Commonwealth, Department of Environmental Resources, 116 Pa. Cmwlth. 24, 541 A.2d 827 (1988), and Clark v. Troutman, 509 Pa. 336, 502 A.2d 137 (1985), Kelly Run argues that the Supreme Court's decision in C & A Carbone, Inc. v. Town of Clarkstown, ___ U.S. ___, 114 S.Ct. 1677, 128 L. Ed.2d 399 (1994) (in which the Court held that the flow control ordinance at issue violated the Commerce Clause) is an intervening change in legal context which justifies our applying an exception to general principles of issue preclusion. Based on the Supreme Court's holding in Carbone, Kelly Run contends that paragraph 13 and Condition No. 37 were violative of the Interstate Commerce Clause of the United States Constitution and, thus, void *ab initio* and ineffective. Kelly Run argues any appeal by it on the constitutional ground it now asserts would not have been ripe until after the United States Supreme Court's decision in Carbone.[1] Moreover, Kelly Run contends that DER, in issuing the November 1994 modification,

---

[1] Carbone has not yet been followed in Pennsylvania as to solid waste flow control. The most recent example of this fact is Delaware County, et al. v. Raymond T. Opdenaker & Sons, ___ Pa. Cmwlth. ___, 652 A.2d 434 (1994). All of the opinions issued in Pennsylvania to date, contrary to Kelly Run's constitutionality argument, are cited therein.

considered the issues related to receipt of "outside" waste, since DER specifically deleted the relevant conditions in the September 1994 modification, and that DER took this action in order to avoid review of an important constitutional issue. It is Kelly Run's position that on this basis, the September 1994 modification provided these restrictions on the landfill's acceptance of out of county waste "anew" and, thus, that its appeal is timely filed.

Upon our review of the modification provisions which have now been made part of the record before us (paragraph 13 of the 1990 modification and Condition No. 37 of the August 1994 modification), we agree with DER that paragraph 13 of the 1990 modification was not reinstated by the November 1994 modification but remained continuously in effect throughout the series of modification issuances.

To the extent that Kelly Run is relying on Dithridge House and Clark, supra, its argument is misplaced. We rejected a similar argument in City of Philadephia, Streets Department v. DER, 1992 EHB 736. In City of Philadelphia, the appellant/municipality (Philadelphia) argued that pursuant to Dithridge House, supra, it should be permitted to challenge certain conditions placed in its Act 101 Plan (although it had failed to timely challenge DER's inclusion of these conditions), because these conditions now appeared to be unlawful on the basis of an intervening opinion by the Board in another matter where we had invalidated DER's imposition of conditions in another appellant/county's Act 101 Plan. We rejected the applicability of Dithridge House in City of Philadelphia. In Dithridge House, the Commonwealth Court applied equitable principles because there had been a statutory change which went to the question of whether the appellant was required to possess a permit. We ruled in City of Philadelphia that Dithridge House does not allow for the collateral attack Philadelphia was

attempting, pointing out that Philadelphia could have challenged the conditions in its plan for the same reasons the other county had advanced in its appeal. Additionally, we pointed out that if we were to hold otherwise, "we would be authorizing new appeals whenever subsequent opinions by this Board further interpreted any particular statutes or regulations and no DER action would ever be able to be said to be considered final." City of Philadelphia, 1992 EHB at 741.

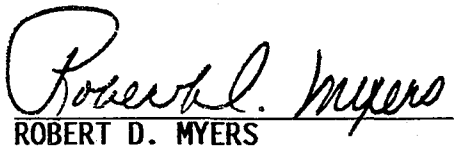
Here, there has been no statutory change as there was in Dithridge House. The constitutional challenge which Kelly Run is now seeking to make was available when the 1990 modification containing paragraph 13 was issued, and Kelly Run admittedly failed to timely raise any such challenge. If Kelly Run had any objections to DER's issuance of the 1990 modification based upon the constitutionality of paragraph 13, it should have raised these objections at the time the modification was issued. Strongosky v. DER, 1993 EHB 412.

We accordingly find that Kelly Run's consolidated appeal is barred by the doctrine of administrative finality. We enter the following order granting DER's motion for summary judgment and dismissing Kelly Run's consolidated appeal.

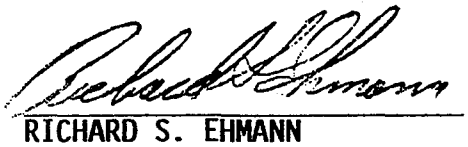
## ORDER

**AND NOW**, this 22nd day of March, 1995 it is ordered that DER's motion for summary judgment is granted, and the appeal at Docket No. 94-270-E (Consolidated) is dismissed.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: March 22, 1995

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M. DIANE SMITH
SECRETARY TO THE BOARD

| | | |
|---|---|---|
| V. R. PATTERSON & KAREN A. PATTERSON and COUNTY OF ADAMS, Intervenor | : | |
| v. | : | EHB Docket No. 94-347-MR |
| COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and FREEDOM TOWNSHIP and LIBERTY TOWNSHIP, Permittees, and MIDDLE CREEK BIBLE CONFERENCE, INC., Intervenor | : | Issued: March 30, 1995 |

**OPINION AND ORDER**
**SUR**
**PETITION TO INTERVENE**

**Robert D. Myers, Member**

**Synopsis**

The host County where a proposed development will be located is allowed to intervene in an appeal from approval of a planning module for land development as revisions to official sewage facilities plans in two of the county's constituent municipalities. Since the municipalities do not intend to take an active role in the appeals, the county is the only other governmental unit with an interest in seeing to it that local planning considerations are presented. While intervention is allowed, the County is limited to litigating the issues raised by the Appellants in their notice to appeal.

**OPINION**

Adams County, on February 23, 1995, filed a Petition to Intervene in this appeal instituted on December 19, 1994 by V.R. Patterson and Karen

Patterson. Since the appeal challenges the approval by the Department of Environmental Resources (DER) on November 22, 1994 of Planning Modules for Land Development as Revisions to the Official Plans of Freedom and Liberty Townships, Adams County, those municipalities automatically became parties. Middle Creek Bible Conference, Inc. (Middle Creek), the developer of the proposed land development, was permitted to intervene on February 9, 1995.

Although the Pattersons agree to the County's intervention, Middle Creek opposes it. DER agrees to the intervention but opposes any attempt by Adams County to broaden the scope of this appeal. This basis for DER's opposition also is raised by Middle Creek.

We believe that Adams County has sufficient interest to warrant intervention. This appeal calls into question the basis for DER's approval of revisions to official sewage facilities plans of two of the County's constituent municipalities - automatic parties that do not intend to take an active role in the appeal. The County is the only other governmental unit with an interest in seeing to it that local planning considerations are presented.

While we agree to the County's intervention, we do not agree to the proposed broadening of the scope of the appeal. As we said in *Multilee, Inc. v. DER*, Board Docket No. 94-047-MJ, Opinion and Order issued July 15, 1994, "intervention will not be permitted where it will expand the scope of the appeal or where the evidence sought to be introduced by the intervenor is not relevant to the issues before the Board." Accordingly, the County will be limited to litigating the issues properly raised by the Pattersons in their Notice of Appeal.

# O R D E R

AND NOW, this 30th day of March 1995, it is ordered as follows:

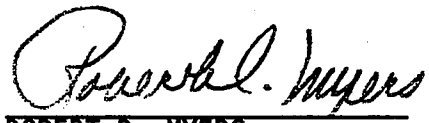
1. The Petition to Intervene is granted in part.

2. Adams County is permitted to intervene as a party Appellant but may litigate only the issues raised by V.R. Patterson and Karen A. Patterson in their Notice of Appeal.

3. Henceforth, the caption shall be as follows:

| | |
|---|---|
| **V.R. PATTERSON & KAREN A. PATTERSON and COUNTY OF ADAMS, Intervenor** | |
| **v.** | **EHB Docket No. 94-397-M** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and FREEDOM TOWNSHIP and LIBERTY TOWNSHIP, Permittees, and MIDDLE CREEK BIBLE CONFERENCE, INC., Intervenor** | |

**ENVIRONMENTAL HEARING BOARD**



**ROBERT D. MYERS**
**Administrative Law Judge**
**Member**

**DATED:** March 30, 1995

See next page for service list.

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| | | |
|---|---|---|
| V.R. PATTERSON & KAREN A. PATTERSON and COUNTY OF ADAMS, Intervenor | : | |
| v. | : | EHB Docket No. 94-347-MR |
| COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and FREEDOM TOWNSHIP and LIBERTY TOWNSHIP, Permittees and MIDDLE CREEK BIBLE CONFERENCE, INC., Intervenor | : | Issued: March 30, 1995 |

**OPINION AND ORDER**
**SUR**
**MOTION TO DISMISS APPEAL**

**By Robert D. Myers, Member**

**Synopsis:**

The Board denies a Motion to Dismiss Appeal, rejecting the argument that DER's approval of Planning Modules as Revisions for New Land Development is nonappealable. After reviewing the regulatory scheme, the Board follows its own precedent (affirmed by Commonwealth Court) and holds that DER approvals or denials of Revisions for New Land Development are appealable actions. The Board also rejects a contention that DER's prior approval of an Update Revision prohibits the present appeal, pointing out that these are distinct DER actions.

**OPINION**

V.R. Patterson and Karen A. Patterson (Appellants) filed a Notice of Appeal on December 19, 1994 seeking Board review of the approval by the Department of Environmental Resources (DER) on November 22, 1994 of Planning Modules for Land Development as Revisions to the Official Plans of Freedom and Liberty Townships, Adams county. Middle Creek Bible Conference, Inc. (Middle

Creek), developer of the proposed land development, was permitted to intervene on February 9, 1995.

On February 24, 1995, Middle Creek filed a Motion to Dismiss the Appeal accompanied by a supporting brief. Neither Appellants nor DER filed answers to the Motion but Appellants filed a legal memorandum in opposition to the Motion.

In its Motion, Middle Creek claims that DER's November 22, 1994 letter does not constitute an appealable action and that the appeal is "but one more attempt to further drag out Middle Creek's permit process; a process which has now spanned some eight years...." The Motion relies on our decision in *Environmental Neighbors United Front v. DER*, 1992 EHB 1247, affirmed 159 Pa.Cmwlth. 326, 632 A.2d 1097 (1993), which is one of a series of decisions in which the Board held that provisional, pre-final decisions made by DER while processing an application are not appealable. This is still our rule of law but its applicability depends on the particular regulatory scheme being considered.

In *Environmental Neighbors*, *supra*, DER was reviewing an application for a hazardous waste landfill and treatment facility. One of the requirements was satisfaction of Phase I siting criteria - a requirement that had to be met before any additional consideration could be given to the application. DER's letter notifying the applicant that it had satisfied this requirement was held to be nonappealable because it was simply the first step in a multi-step process and would be final only when all steps had been taken and a permit either granted or denied.

The regulatory scheme before us in this appeal is quite different. Under the Pennsylvania Sewage Facilities Act (SFA), Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 *et seq.*, local governments are required

to adopt and secure DER approval of Official Plans and Revisions for providing adequate sewage treatment facilities so as to prevent the discharge of untreated or inadequately treated sewage into waters of the Commonwealth (35 P.S. §750.5). Official Plans, *inter alia*, must delineate areas where community sewage systems are now in use, areas where they are planned to be available within a 10-year period and areas where they are not planned to be available within a 10-year period (35 P.S. §750.5). Once approved, Official Plans govern the type of sewage facilities that will be permitted either at the local level or the state level (35 P.S. §750.7; 25 Pa.Code §91.31).

Regulations at 25 Pa.Code Chapter 71 deal with the administration of the sewage facilities planning program. Among the definitions in §71.1 are "Official Plan" and "Official Plan Revision," the latter term being subdefined as "Update Revision," "Revision for New Land Development" and "Special Study." Regulations governing revisions for new land development are found at §71.51 *et seq*. According to those regulations, a municipality must revise its Official Plan when (1) a new subdivision is proposed, (2) the Official Plan is inadequate to meet the needs of the new land development, (3) newly discovered or changed conditions make the Official Plan inadequate to meet the needs of the new land development, (4) a permit is required from DER under §5 of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.5.

The Planning Module, which serves as the application for a Revision for New Land Development, is required to contain extensive information and documentation detailing, *inter alia*, the nature and location of the development, the proposed sewage facilities and their relationship to existing or proposed facilities in the area: §71.52. As a result, when a Revision for New Land Development is approved by the municipality: §71.53, and by DER: §71.54, it is

specific to a particular site and a particular sewage facilities layout and method of treatment. Perhaps for this reason, this Board has traditionally treated as appealable DER's approval or disapproval of these Official Plan Revisions.[1] This is especially clear from a reading of *Dwight L. Moyer, Jr., et al. v. DER, et al.*, 1989 EHB 928, where DER's approval of an Official Plan Revision was the subject of intense scrutiny.

The consequences of failing to contest planning issues during the planning stage were apparent in *Bobbi L. Fuller et al. v. DER et al.*, 1990 EHB 1726, where the Board held that treatment plant location could not be raised in an appeal from issuance of a construction permit. Commonwealth Court affirmed, 143 Pa.Cmwlth. 392, 599 A.2d 248 (1991). More recently, in *Cesar Munoz et ux. v. DER et al.*, Board Docket No. 93-373-MR, Opinion and Order issued February 16, 1995, the Board ruled that siting issues related to the location of sewage facilities (including spray irrigation fields) were planning issues that had to be raised in an appeal from DER's approval of the Planning Module as a Revision for New Land Development and could not be raised in an appeal from issuance of the construction permit.

Under the regulatory scheme governing the provision of sewage facilities for new land developments, therefore, planning issues must be raised at the time the Official Plan Revision is approved. It is obvious that those issues cannot be raised if DER's approval is a nonappealable decision. As we have noted, both approvals and denials have been consistently treated as appealable and we find no sound reason for changing that rule of law.

Middle Creek also contends that DER's November 22, 1994 letter is not

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[1]At least as far back as *Township of Heidelberg et al. v. DER et al.*, 1977 EHB 266.

an approval of an Official Plan Revision for Freedom Township. That occurred, the argument goes, on February 7, 1992 when DER sent a letter attached to the brief as Exhibit A. Middle Creek is confusing two distinct DER actions. The February 7, 1992 letter gave approval to Freedom Township's Update Revision - a comprehensive revision to an existing Official Plan (see definition in 25 Pa.Code §71.1) - which DER had mandated on May 10, 1989. This history is set forth in Commonwealth Court's opinion in *Middle Creek Bible Conference, Inc. v. Department of Environmental Resources*, ___ Pa.Cmwlth. ___, 645 A.2d 295 (1994) at 297-298.[2] The November 22, 1994 letter approved Middle Creek's Planning Modules as Revisions for New Land Development. It is this latter action that has been appealed. The earlier approval of the Update Revision has nothing to do with it.

[2]Commonwealth Court states that the Update Revision was approved by DER on February 2, 1992 rather than February 7, 1992, the date of DER's approval letter. Although we are unable to resolve this discrepancy, we are satisfied that the February 7, 1992 letter is the approval of the Update Revision.

## O R D E R

AND NOW, this 30th day of March, 1995, it is ordered that the Motion to Dismiss Appeal is denied.

**ENVIRONMENTAL HEARING BOARD**

**ROBERT D. MYERS**
**Administrative Law Judge**
**Member**

**DATED:** March 30, 1995

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M. DIANE SMITH
SECRETARY TO THE BOARD

| | | |
|---|---|---|
| **MARILYN MORINIERE, et al.** | : | |
| **v.** | : | **EHB Docket No. 94-156-E** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and SUSQUEHANNA TOWNSHIP SUPERVISORS, Permittee, and CENTRAL PENN, INC., Intervenor** | : | **Issued: April 3, 1995** |

**OPINION AND ORDER SUR**
**MOTION TO DISMISS**

**By: Richard S. Ehmann, Member**

**Synopsis**

Where the Department of Environmental Resources ("DER") rescinds its approval of a planning module for sewering a real estate development, which approval is challenged in this appeal, DER's Motion To Dismiss for mootness must be granted. A rescission of the DER approval appealed from eliminates the basis for the appeal to this Board. Since DER has elected to rescind its approval, and such a rescission decision is also an action of the type appealable to this Board, this instant appeal is not of such a class as will escape review if it is dismissed as moot. Rather, since Central Penn, Inc. ("Central Penn"), has already filed an appeal of the rescission, DER's action is one which will receive a full review. The allegations by Central Penn that its constitutional rights are violated by DER's rescission of its action are properly raised in Central Penn's appeal from the rescission but constitute no grounds to deny DER's Motion To Dismiss the appeal from its rescinded approval.

Since Central Penn took no timely appeal from DER's initial approval action, it may not prevent this appeal's dismissal where appellants do not oppose rescission, and Central Penn, as an intervenor siding with DER, has taken a separate appeal of the rescission.

**OPINION**

On May 31, 1994, DER formally approved a planning module for land development submitted by Susquehanna Township with regard to a development known as "Sturbridge", to be located in Susquehanna Township, Dauphin County. The module proposed an amendment to the township's Official Plan promulgated under the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, as amended, 35 P.S. §750.1 *et seq.*, and provided municipal sewage disposal for the homes to be built in Sturbridge via construction of a pump station and force main[1] instead of a gravity interceptor. (See DER's letter attached to the Notice Of Appeal)

On June 27, 1994, a group of 56 neighboring landowners appealed DER's decision to this Board. The Susquehanna Township Supervisors ("Susquehanna") automatically became a party appellee as a result of 25 Pa. Code §21.51(g). On August 18, 1994, Central Penn petitioned to intervene in the appeal because, as pointed out in its Petition, it is the owner of Sturbridge. Its petition was granted by Order dated September 2, 1994.

Thereafter, the appellants filed their Pre-Hearing Memorandum, and Central Penn filed an answering Pre-Hearing Memorandum. On February 21, 1995 (after a

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[1]A force main is a pipeline which carries water (here sewage) under pressure. A pump station is a station at which waste water is pumped to a higher level. In most sewers pumping is unnecessary; waste water flows by gravity to the treatment plant. See C.C. Lee, Environmental Engineering Dictionary, Government Institutes, Inc., 1989.

merits hearing had been scheduled in this appeal) DER filed the instant Motion To Dismiss. DER's Motion states that on February 7, 1995, DER rescinded its May 31, 1994, approval of the force main/pump station module for Sturbridge. Based on this action, DER contends our jurisdiction is rescinded and this appeal has become moot.

The 56 appellants (collectively hereafter "Moriniere") have responded, concurring with DER's Motion. Their response points to a Central Penn-initiated Commonwealth Court proceeding at No. 39 M.D. 1995, wherein Central Penn unsuccessfully sought to enjoin DER from rescinding this approval, but says that if that decision should be reversed, they do not wish to be found to have forfeited their rights to raise all claims currently raised in their appeal.

Central Penn has also responded to DER's Motion and, for obvious reasons, opposes same based upon the arguments set forth below.

DER's Motion To Dismiss has merit and must be sustained. DER acted to approve the force main/pump station module, and that action generated the instant appeal. DER apparently reevaluated its position on this module (see the letter which is Exhibit No. 1 to DER's Motion), and it has rescinded that approval. However, the rescission, while an action appealable to this Board, was not the DER action before us in this appeal. Moreover, in acting in this fashion, DER has withdrawn its initial approval decision from the scope of our review. For purposes of review of it by this Board, it is as if that approval did not occur.

We have held on more than one occasion that when this Board can no longer grant meaningful relief to appellants an appeal is moot. Centre Lime & Stone Company, Inc. v. DER, et al., 1992 EHB 947; Pequea Township, et al. v. DER, EHB Docket No. 94-044-E (Consolidated) (Opinion issued May 27, 1994) ("Pequea"). Here, DER's action which was appealed has been rescinded. With regard to it, we

can no longer grant Moriniere any relief as to that action. In the past, we have not hesitated to declare moot an appeal from a DER action which DER later rescinds. Pequea; Carol Rannels v. DER, 1993 EHB 586; Roy Magarigal, Jr. v. DER, 1992 EHB 455 ("Magarigal"); Robert L. Snyder and Jesse M. Snyder, et al. v. DER, 1990 EHB 964. We follow those decisions here. We can give no relief to Moriniere or to Central Penn (which did not appeal from DER's module approval and merely intervened on DER's side) because there is no longer a DER module approval, and thus there can be no appeal from it. Accordingly, the appeal must be dismissed as moot.

Central Penn, which is not an appellant in this proceeding, argues that dismissal for mootness is inappropriate because DER's rescission action does not resolve all issues. It cites James F. Wunder v. DER, 1993 EHB 1244, in support of this claim. We agree with Central Penn that all issues are not resolved by DER's rescission; however, this appeal is still moot. According to the Board's docket on March 7, 1995, Central Penn filed an appeal with this Board from DER's letter of February 7, 1995 announcing its rescission decision. That appeal bears this Board's Docket No. 95-053-E. As a result, Central Penn may challenge DER's rescission decision for each reason timely raised therein. If successful there, Central Penn will overturn this rescission. Moreover, Central Penn is not the appeallant here, it was not adversely affected by DER's initial approval of the planning module for Sturbridge since that approval gave it what it wanted. It merely intervened on DER's side in opposition to Moriniere, so it cannot use the forum of this Moriniere appeal to challenge that approval. Thus, unlike Wunder, who, as an appellant, did not get complete relief, Central Penn is not an appellant and must pursue its relief in its own separate appeal.

Central Penn also argues an exception to the mootness doctrine bars dismissal. It asserts dismissal for mootness does not lie here because DER's actions are capable of repetition and involve questions of great public import which will evade review unless this appeal goes forward. Of course, the first hole in this argument is that Moriniere could withdraw this appeal now based on DER's letter of February 7, 1995 and end this appeal despite Central Penn's arguments because they, not Central Penn are the appellants. Central Penn's intervention in Morinieres' appeal did not make it an appellant. It cannot use its intervention in opposition to this appeal to now assert a bar to dismissal for mootness. The second hole in this argument is that there can be no evasion of review of DER's action. Central Penn had a right to appeal the February 7, 1995 DER rescission action and exercised that right. It has an appeal therefrom pending before us as stated above. If it is successful there, the DER rescission will be overturned, but there will be a full review of DER's action in that appeal.[2] Accordingly, this mootness exception is inapplicable here.

Central Penn also asserts the Moriniere appeal is not moot because the rescission action by DER is an abuse of discretion and is arbitrary and capricious. In support of this contention, Central Penn cites New Hanover Corporation v. DER, 1993 EHB Docket 91-329 (Opinion issued April 16, 1992). No such 1993 or 1992 opinion by this name exists. We will not hazard a guess as to what case Central Penn intended to cite for this proposition. It is irrelevant anyway. If Central Penn believes DER has acted in an arbitrary and capricious

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[2]We agree with Central Penn that DER is capable of changing its mind, so repetition is possible; but, where DER determines its first decision was in error, it should be encouraged to change its mind and correct the error. Of course, we do not encourage DER to "flip/flop" on issues and believe it should try to decide them properly the first time; but, on the occasion when that does not occur, correction is preferred over a cover-up or continuation of the mistake.

fashion or it has abused its discretion in rescinding approval of the Sturbridge planning module, that is properly an issue to raise in its appeal of that rescission. We can see no reason why that allegation is a ground to deny this motion here, however. As we said in Magarigal, just because there is a controversy remaining between the parties does not mean the appeal is not moot. For there to be Board jurisdiction, there must be a DER action, not merely a controversy. Currently, the only DER action is the rescission now under appeal by Central Penn, so it is there that Central Penn must address this allegation.

Next, Central Penn asserts the rescission of February 7, 1995 violates its rights to equal protection under the law guaranteed under the constitutions of the United States and Pennsylvania. It then asserts procedural due process and substantive due process rights abridgements by this DER action. (In its Objection No. 1 in its appeal from the DER rescission action, Central Penn raises these identical constitutional challenges. It has thus preserved them for adjudication on their merit there.) We do not judge the merit of these arguments in this proceeding. But, even if it is assumed that these arguments have merit, they constitute no grounds to deny DER's Motion here. Central Penn only raises them as to the February 7, 1995 rescission; they are not raised as to the planning module approval before us in this appeal. As a result, they constitute no defense to DER's motion here.

Finally, Central Penn says dismissal for mootness would be an error because a case or controversy continues to exist despite DER's rescission of the approval. In granting DER's Motion in this appeal, this Board will not be dismissing Central Penn's appeal at Docket No. 95-053-E, but only that at the instant docket number. Here, the controversy between DER and the appellants was over the planning module's approval, and it has been resolved through DER's

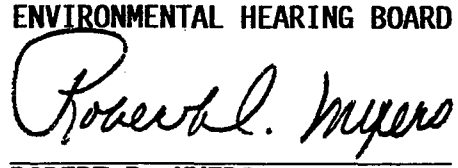
rescission of its prior approval thereof. Thus, no controversy or case exists here any longer, and, to the extent a new controversy exists because of the rescission, it may go forward to resolution in Central Penn's appeal.

Accordingly, we enter the following Order:

**ORDER**

AND NOW, this 3rd day of April, 1995, it is ordered that DER's Motion To Dismiss is granted and the instant appeal is dismissed.[3]

**ENVIRONMENTAL HEARING BOARD**



**ROBERT D. MYERS**
**Administrative Law Judge**
**Member**

**RICHARD S. EHMANN**
**Administrative Law Judge**
**Member**

**DATE:** April 3, 1995

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[3]In dismissing this appeal, we deny Morinieres' request that the appeal be "withdrawn from the Board without prejudice to" their rights to reassert their claims should the rescission be rejected as invalid by this Board or a court. Moriniere recognizes in their response to DER's motion that this appeal is moot. Because it is moot, the appeal must be dismissed; it cannot be dismissed with reservations as to Morinieres' rights. An appeal is moot, or it is not; it cannot be a little moot or moot with rights reserved. To the extent Moriniere wishes to defend the propriety of DER's rescission, they should promptly seek to intervene in Central Penn's appeal. If they do not wish to do so, the dispute raised there by Central Penn will be resolved in an adjudication involving it and DER. In the event the rescission is not sustained and DER is compelled thereby to act differently, Moriniere will have to consider the taking of an appeal from any such new DER acts.

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M. DIANE SMITH
SECRETARY TO THE BOARD

| | | |
|---|---|---|
| WASHINGTON TOWNSHIP, et al. | : | |
| | : | |
| v. | : | EHB Docket No. 94-316-M |
| | : | (Consolidated Docket) |
| COMMONWEALTH OF PENNSYLVANIA, | : | |
| DEPARTMENT OF ENVIRONMENTAL RESOURCES | : | Issued: April 3, 1995 |
| and MARTIN STONE QUARRIES, INC., Permittee | : | |
| and PANEL & HOME CENTER, INC., Intervenor | : | |

## OPINION AND ORDER SUR MOTION TO DISMISS APPEAL

By Robert D. Myers, Member

Synopsis:

Where the Board orders appellants to file proof of service of a copy of the appeal upon the permittee and follows with a Rule to Show Cause why the appeal should not be dismissed for failure to file proof of service but, for some unknown reason, discharges the Rule before the return date and before expiration of the appeal period, thereby leading appellants to believe the appeal is perfected without more, the permittee's motion to dismiss the appeal will be denied and appellants given leave to perfect it *nunc pro tunc*. The Board's premature discharge amounts to a breakdown in the administrative process.

## OPINION

On October 25, 1994, Harold Weiss and a number of other individuals (collectively called Citizens) claiming to reside within 1,000 feet of the Gabel Quarry filed a Notice of Appeal (Board Docket No. 94-283-MR) from the issuance by the Department of Environmental Resources (DER) on October 5, 1994 of Noncoal

Surface Mining Permit No. 06920301 to Martin Stone Quarries, Inc. (Permittee). On November 4, 1994, Washington Township, Berks County (Township), filed a Notice of Appeal (Board Docket No. 94-316-MR) from the issuance of the same Noncoal Surface Mining Permit, as well as NPDES Permit No. PA0595641 and Authorization to Mine Permit No. 300698-06920301-01. These two latter permits also were issued to Martin Stone Quarries, Inc. on October 5, 1994 and also pertain to the Gabel Quarry.

The Notice of Appeal filed by the Citizens, who are acting without legal counsel, did not contain all of the information required by the Board's procedural rules at 25 Pa. Code §21.51. Accordingly, on October 26, 1994 the Board issued an Order requiring the Citizens on or before November 10, 1994 to supply the additional information. To be included was an indication that the persons listed on page three of the attached Notice of Appeal form[1] have been notified of the appeal.

By letter dated November 8, 1994 (received and docketed by the Board on November 16), the Citizens supplied some but not all of the missing information. They noted that a Notice of Appeal form had not been attached to the October 26 Order and, consequently, they didn't know who were designated to receive notice of the appeal. They asked the Board to send a Notice of Appeal form. They also asked that their appeal be consolidated with the one filed by the Township.

On November 17, 1994, the Board issued a Rule to Show Cause why the appeal should not be dismissed for failure to supply all of the missing information. The Rule was returnable on December 2, 1994 and provided that filing of the missing information on or before that date would bring about a discharge of the

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[1]This included the officer of DER who took the action, the recipient of the permit and an individual in DER's Office of Chief Counsel, Bureau of Litigation.

Rule. There is no indication whether a Notice of Appeal form was sent to the Citizens along with the Rule.

On November 28, 1994 the Board issued an Order stating that "upon consideration of [the Citizens'] November 8, 1994, letter," the Rule of November 17 is discharged and the appeal is consolidated with the Township's appeal at Board Docket No. 94-316-MR.

On January 11, 1995, Permittee filed a Motion to Dismiss the Citizens' appeal at Board Docket No. 94-283-MR because of their failure to perfect the appeal by notifying, and serving a copy of the appeal on, Permittee. The Citizens filed their response to the Motion on January 27, 1995. The Township filed its opposition to the Motion on February 2, 1995. Permittee filed its reply to these filings on February 8, 1995. DER notified the Board on January 18, 1995 that it neither joins in nor objects to the Motion.

In order to invoke the Board's jurisdiction, a Notice of Appeal must be filed setting forth detailed information and objections: 25 Pa. Code §21.51(a)-(e). The appellant also is required, within 10 days after filing the notice of appeal, to serve a copy on the three individuals mentioned above in footnote 1: 25 pa. Code §21.51(f); and, upon request by the Board, to provide proof of service: 25 Pa. Code §21.51(h). The appeal must be perfected within the 30-day appeal period but cannot be considered perfected until service is made upon the permittee: 25 Pa. Code §21.52(a) and (b).

In its Motion to Dismiss, Permittee alleges that it was never served with a copy of the Citizens' appeal. As a result, the appeal was not perfected and, since the appeal period has now expired, cannot be perfected. It must be dismissed because the board lacks jurisdiction. In their response, the Citizens point out that the Board's Rule to Show Cause was discharged on November 28,

1994, leading them to conclude that their appeal was properly perfected. If that was incorrect, they request permission to perfect the appeal *nunc pro tunc* pursuant to 25 Pa. Code §21.53. In its Answer, the Township suggests that, since the Citizens were acting without legal counsel and were misled by the Board's Order discharging the Rule, they should be allowed to correct the omission and proceed. Permittee replies that ignorance of Board rules of procedure is not good cause justifying an appeal *nunc pro tunc*.

We note initially that the issuance of the Noncoal Surface Mining Permit that is the subject of the Citizens' appeal was published in the *Pennsylvania Bulletin* on November 5, 1994 (24 Pa. B. 5595). With respect to third party appeals such as the Citizens is, the appeal period begins to run from the date of publication even if notice of the issuance was actually received prior to that date: *Lower Allen Citizens Action Group, Inc. v. Commonwealth, Dept. of Environmental Resources*, 119 Pa. Cmwlth. 236, 538 A.2d 130 (1988), affirmed on reconsideration, 546 A.2d 1330 (1988). As a result, the appeal period did not expire until December 5, 1994.

Prior to that date the board had ordered the Citizens, *inter alia*, to provide proof of service of the Notice of Appeal on Permittee and had followed with a Rule to Show Cause why the appeal should not be dismissed for failure to make the service.

For some reason that is not apparent on the record, the Board discharged the Rule before the return date and before the expiration of the appeal period. It was reasonable for the Citizens to conclude that their appeal had been perfected and that nothing more was required to invoke the Board's jurisdiction. Nonetheless, the fact remains that the appeal was not perfected by service upon Permittee and, therefore, is not timely.

We can grant leave to file an appeal *nunc pro tunc* under 25 Pa. Code §21.53 for good cause shown. We have generally limited good cause to encompass 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: *Loretta Fisher v. DER*, 1993 EHB 425. We believe this case qualifies. The Board's premature discharge of the Rule was a breakdown in the administrative process resulting in a non-negligent failure on the part of the Citizens to perfect their appeal in a timely manner. Accordingly, we will grant leave for them to perfect the appeal *nunc pro tunc*.

## O R D E R

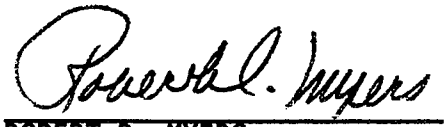
AND NOW, this 3rd day of April, 1995, it is ordered as follows:

1. The Motion to Dismiss the Appeal is denied.

2. The Citizens are granted leave to perfect their appeal *nunc pro tunc*.

3. The Citizens shall, on or before April 18, 1995, serve a copy of their Notice of Appeal on Permittee at its address: P.O. Box 297, Bechtelsville, PA 17505. Within 10 days after service, the Citizens will file with the Board written proof of same.

**ENVIRONMENTAL HEARING BOARD**



**ROBERT D. MYERS**
**Administrative Law Judge**
**Member**

**RICHARD S. EHMANN**
**Administrative Law Judge**
**Member**

**DATED:** April 3, 1995

**cc:** **DER Bureau of Litigation:**
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**For Concerned Citizens of Washington Township:**
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SECRETARY TO THE BOARD

| | | |
|---|---|---|
| CESAR MUNOZ, et ux. | : | |
| v. | : | EHB Docket No. 93-373-MR |
| COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and PLEASANT VALLEY SCHOOL DISTRICT, Permittee | : | Issued: April 4, 1995 |

**OPINION AND ORDER SUR MOTION TO DISMISS APPEAL, OR IN THE ALTERNATIVE, MOTION TO LIMIT ISSUES AND REQUEST FOR A MORE SPECIFIC PRE-HEARING MEMORANDUM**

By Robert D. Myers, Member

**Synopsis:**

The Board finds a pre-hearing memorandum to be deficient in the statements of fact appellants intend to prove, in the citations to authority supporting each legal contention and in the summary of expert testimony. It refuses to dismiss the appeal but directs appellants to file a revised pre-hearing memorandum curing the deficiencies. Since a partial summary judgment has been entered, the revised pre-hearing memorandum is ordered to be limited to the one remaining issue - an issue which the Board rules is properly raised in the general language of the Notice of Appeal.

**OPINION**

Cesar Munoz *et ux.*, Appellants, filed a Notice of Appeal on December 13, 1993 seeking Board review of the issuance by the Department of Environmental Resources (DER) of Water Quality Management Permit No. 4593407 (Permit) to Pleasant Valley School District (Permittee). The Permit authorized construction

of a sewage treatment plant and spray irrigation system to serve the Pleasant Valley School District Elementary School in Polk Township, Monroe County.

On August 9, 1994, Permittee filed a Motion for Summary Judgment which the Board granted with respect to all but one issue[1] in an Opinion and Order issued on February 16, 1995. Before us now for disposition is Permittee's Motion to Dismiss Appeal, or in the Alternative, Motion to Limit Issues and Request for a More Specific Pre-Hearing Memorandum, filed on August 17, 1994. Appellants filed Objections to this Motion on September 12, 1994. Although granted leave to file an omnibus brief covering this Motion and the Motion for Summary Judgment, Appellants failed to do so.

The Motion attacks Appellants' pre-hearing memorandum filed on July 21, 1994. Since there is only one issue left in the appeal, we will disregard Permittee's contentions on the issues that have been disposed of by summary judgment.

The first argument is that the statement of facts that Appellants intend to prove is not sufficiently specific as required by Pre-Hearing Order No. 1 issued December 17, 1993. With respect to the storm sewer issue, Appellants state that the School District property is topographically higher than Appellants - the slope being 3 to 1 - and that Appellants' property historically has had problems with runoff from the School District property. While this statement is adequate as far as it goes, it says nothing about the ability of the storm sewer system to handle the runoff and nothing about the presence of features in the construction documents to control runoff. Statements concerning these matters are essential, in our judgment, to narrow the issue: *James E. Wood*

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[1]The excepted issue pertains to whether the proposed project will overload the storm sewer system serving Appellants' property.

*v. DER et al.*, 1993 EHB 299, and to make out a *prima facie* case.

The next argument is that the contentions of law are not supported with detailed citations to authorities - including specific sections of statutes, regulations, etc. - relied upon by Appellants, as required by Pre-Hearing Order No. 1, *supra*. The argument is valid. The contentions of law in Appellants' pre-hearing memorandum are that the proposed activity amounts to a taking of Appellants' property, constitutes a nuisance, and causes irreparable harm by downgrading the property value and adversely affecting the water supply and air quality. No citations to authority are included,[2] leaving the other parties and the Board to speculate what they are. These citations are essential to focusing attention on the precise nature of Appellants' legal position.

In a letter to the Board dated March 22, 1995, Permittee calls our attention to that portion of its Motion arguing that the overloading of the storm sewers was not properly raised in Appellants' Notice of Appeal and, therefore, cannot be raised at all in these proceedings. We have examined the objections contained in the Notice of Appeal and have measured them against the standard enunciated by Commonwealth Court in *Croner, Inc. v. Department of Environmental Resources*, 139 Pa.Cmwlth. 43, 589 A.2d 1183 (1991). We conclude that the overloading of the storm sewer, while not specifically mentioned, fits within the general scope of those objections.

Permittee raises other arguments, at least one of which (summary of expert testimony) has merit. We will handle this in our Order and see no need to discuss it at this point.

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[2]After stating the contentions, Appellants request leave to file a trial brief setting forth these citations. Since Pre-Hearing Order No. 1 requires the pre-hearing memorandum to contain these citations, there was no need for a trial brief and no need to request permission to file one.

Permittee also claims that the appeal should be dismissed because of Appellants' failure to file a proper pre-hearing memorandum. While a sanction that severe is appropriate in some cases where the conduct is especially egregious, it is not appropriate here. Appellants will be directed to file a revised pre-hearing memorandum curing the defects and limited to the storm sewer issue.

## O R D E R

AND NOW, this 4th day of April, 1995, it is ordered as follows:

1) Permittee's Motion is granted in part.

2) On or before April 24, 1995, Appellants shall file with the Board and serve on the other parties a revised pre-hearing memorandum

a. limited to the overloading of the storm sewer system serving Appellants' property;

b. containing additional statements of facts Appellants intend to prove as set forth in the foregoing Opinion;

c. containing citations to legal authority supporting each contention of law;

d. containing the name of each expert witness and a meaningful summary of the testimony each expert witness will give; and

e. containing such other revisions as are necessary to confine the pre-hearing memorandum to the one remaining issue.

**ENVIRONMENTAL HEARING BOARD**

**ROBERT D. MYERS**
**Administrative Law Judge**
**Member**

**DATED:** April 4, 1995

**See following page for service list.**

**EHB Docket No. 93-373-MR**
**(Service List)**

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| | | |
|---|---|---|
| MEDUSA AGGREGATES COMPANY and QUALITY AGGREGATES, INC. | : | |
| v. | : | EHB Docket No. 94-324-E |
| COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES | : | Issued: April 6, 1995 |

**OPINION AND ORDER SUR PETITION FOR AWARD OF COSTS AND ATTORNEY'S FEES**

Richard S. Ehmann, Member

Synopsis

A DER letter which states that mining is no longer authorized on a certain area of land, for which DER had previously granted authorization to mine, constitutes an appealable action. Oral statements made by a DER inspector may give rise to an appealable action if the statements constitute a directive, as opposed to a mere expression of opinion.

A company which has purchased the assets of the permittee of a mine site, and has applied for a transfer of the permit, has standing to appeal an action by DER which restricts the area on which mining may take place.

A petition for attorney fees and costs filed under §4(b) of SMCRA and §307(b) of the CSL is deficient on its face when it fails to contain any evidence from which the Board may assess the accuracy and reasonableness of the fees sought to be recovered by the petitioner, as clearly set forth in prior Board decisions. Evidence to support such a petition, is to be

submitted with the petition itself, not 3 1/2 months after the filing of the petition as part of an unsolicited reply to DER's response to the petition. There is no indication that the Legislature, in enacting §4(b) of SMCRA and §307(b) of the CSL, intended that a petition for attorney fees and costs should give rise to what is virtually a separate cause of action over fees and costs, involving the filing of motions to dismiss, replies, sur-replies, and memoranda in support of each, and we reject the concept that parties involved in a fee dispute should engage in this practice.

**OPINION**

This matter was initiated with the filing of a notice of appeal on November 15, 1994, by Quality Aggregates, Inc. ("QAI") and Medusa Aggregates Company ("Medusa"), seeking review of a November 4, 1994 letter from the Department of Environmental Resources ("DER") and oral statements made by a DER inspector to QAI in connection with the Appellants' surface mining operation at the Boyers Mine, in Marion Township, Butler County. Medusa is the permittee of the Boyers Mine site pursuant to Surface Mining Permit No. 10870106 ("SMP"). On May 3, 1994, QAI purchased the assets of Medusa and applied to DER for a transfer of Medusa's SMP. According to the notice of appeal, QAI is currently operating the mine.

Within 300 feet of the area covered by the SMP is a house, known as the Fisher House, located on property identified in Medusa's permit application as property #19. At the time Medusa submitted its permit application it owned property #19, including the Fisher House. In accordance with §§4.2(c) and 4.5(h)(5) of the Surface Mining Conservation & Reclamation Act ("SMCRA"), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.*, at §§1396.4b(c) and 1396.4e(h)(5), which prohibit surface mining within 300 feet of an occupied dwelling unless a waiver is obtained from the owner,

Medusa granted to itself a waiver with respect to the Fisher House. Thereafter, DER granted Medusa authorization to mine within 300 feet of the Fisher House.

On or about October 14, 1994, property #19 and the Fisher House were conveyed to Victor Ferrere. On October 21, 1994, DER surface mine inspector Hank Thomas allegedly verbally advised QAI not to conduct any mining activities, other than reclamation, within 300 feet of the Fisher House.[1] On November 2, 1994, DER sent Medusa a letter, signed by Lori Odenthal, Chief of Technical Services, District Mining Operations. The letter noted that property #19 had recently changed ownership and that 25 Pa. Code §§86.37 and 86.102 of the surface mining regulations prohibit mining activities within 300 feet of an occupied dwelling without a written waiver from the owner. The letter concluded as follows:

> You may choose to provide a written release from the current owner consenting to mining within the 300 foot barrier or to revise your maps and plans to limit any further activity within the barrier to reclamation only. Please inform us of your plans at your earliest possible convenience. No further mining activities are presently authorized within the barrier.

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[1]The date of Mr. Thomas' statements to QAI is not clear. The first page of QAI and Medusa's notice of appeal states that Mr. Thomas' statements were made to QAI on October 14, 1994, which would make the notice of appeal, filed on November 15, 1994, untimely with respect to Mr. Thomas' statements. However, the body of the notice of appeal and the affidavit of Nile A. Linberg attached to QAI's petition for supersedeas, filed concurrently with the notice of appeal, state that Mr. Thomas' remarks were made on October 21, 1994. In addition, QAI's response to DER's motion to dismiss also recites October 21, 1994 as the date on which the statements were made. DER has not disputed the allegation that Mr. Thomas' statements were made on October 21, 1994, but has questioned only whether they constitute an appealable action. Based on Mr. Linberg's affidavit and the lack of any challenge thereto by DER, we accept October 21, 1994 as the date of Mr. Thomas' oral statements.

Mr. Ferrere has refused to sign a waiver consenting to mining within 300 feet of the Fisher House.

On November 15, 1994, QAI and Medusa filed the present appeal, along with a petition for supersedeas filed by QAI alone. Prior to a hearing on the supersedeas petition, DER, by letter dated November 23, 1994, stated that it had reversed its position as stated in its earlier letter of November 2, 1994. Based on DER's reversal, on November 28, 1994, the Board dismissed the appeal as moot, but preserved to DER the right to raise the issue of whether the Board had jurisdiction over this appeal as a defense to any petition for attorney fees which might be filed.

On December 30, 1995, QAI and Medusa submitted to the Board a petition for award of costs and attorney fees in this matter.[2] The petition is filed under §4(b) of SMCRA, 52 P.S. §1396.4(b), and §307(b) of the Clean Streams Law("CSL"), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, at §691.307(b). DER responded to the petition by filing not only a response in opposition, but also a motion to dismiss the petition, along with a supporting brief. QAI filed separate responses to each of DER's filings. DER then sought leave to file a reply to QAI's responses, which request was denied.[3]

DER's response and motion to dismiss raise three grounds for denying QAI and Medusa's request for attorney fees and costs and for dismissing the

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[2]In its response, DER incorrectly states that the petition was filed solely by QAI. Although the heading states "Petition of Quality Aggregates, Inc. for Award of Costs and Attorney's Fees," the first line of the petition names both Medusa and QAI as the petitioners.

[3]As will be discussed in detail subsequently in this opinion, much of the paperwork filed by the parties in this matter was duplicative, untimely, and unnecessary. In the future, DER and parties seeking attorney fees and costs are instructed not to engage in similar practices.

petition: 1) DER's November 2, 1994 letter and Inspector Thomas' oral statements were not appealable actions; 2) QAI lacked standing to bring this appeal; 3) neither §4(b) of SMCRA nor §307(b) of the CSL provide authority for an award of costs and attorney fees in this matter. Because the first two grounds involve the question of whether the Board has jurisdiction over this matter, we must address them before turning to the substance of QAI and Medusa's petition.

Is DER's November 2, 1994 Letter An Appealable Action?

An action of DER is appealable when it affects "personal or property rights, privileges, immunities, duties, liabilities or obligations." 25 Pa. Code §21.2(a); Thomas Kilmer v. DER, EHB Docket No. 91-355-W (Adjudication issued November 23, 1994), p. 6.

DER argues that the November 2, 1994 letter to Medusa was not an appealable action because it merely informed Medusa and QAI of the applicable law with respect to mining within 300 feet of an occupied dwelling and "suggested a course of action which would comply with the Department's interpretation of the house barrier requirements." (DER Brief, p. 11) DER contends that the letter did "not make any final determination of Medusa's of [sic] QAI's duties, rights, liabilities, or obligations; it only state[d] the Department's interpretation of what those duties, rights, obligations, or liabilities are." (DER Brief, pp. 12-13) DER asserts that, unlike an order requiring a party to take certain action or refrain from certain action, the letter merely provided Medusa and QAI with various options, as follows: discontinue mining within the 300 foot zone around the Fisher House, obtain a new waiver from Mr. Ferrere either voluntarily or through the court, continue mining within the barrier and face a possible enforcement action by DER, or seek injunctive or declaratory relief through the Commonwealth Court.

We disagree with DER's characterization of the letter as not affecting Medusa's and QAI's rights or obligations. Although DER's action was in the form of a letter rather than a cease and desist order, the implication of the letter's final sentence is clear: Medusa and QAI must refrain from any further mining within the 300 foot barrier around the Fisher House unless and until a new waiver is obtained. Contrary to DER's argument, the letter clearly restricts Medusa and QAI's ability to mine the area in question. DER's withdrawal of Medusa and QAI's authorization to mine in the 300 foot barrier is tantamount to ordering Medusa and QAI to refrain from mining this area. Where the effect of a DER letter is to impact on a prospective appellant's personal or property rights, privileges, immunities, duties, liabilities, or obligations, it is an appealable action. Kilmer, *supra*.

Likewise, we disagree with DER's contention that the letter was not appealable because it provided QAI and Medusa with options, one of which was to continue mining in the subject area and risk an enforcement action by DER. As a practical matter, such options are always available to a party against whom DER has issued an order or other directive - comply with the order, fail to comply with the order and face the risk of further enforcement action, seek injunctive relief. Moreover, it is clear that the November 1994 letter was not intended simply as a notice to Medusa and QAI of their "options." The purpose of the letter was to prohibit further mining by Medusa and QAI around the Fisher House without first obtaining a new waiver from Mr. Ferrere.

DER makes the argument on page 13 of its brief that the final sentence of the letter does not constitute an "action," but a "failure to act," i.e. a failure to authorize mining within the subject area, which, argues DER, did not alter the status quo. Again, we disagree. Prior to the issuance of the November 1994 letter, Medusa had authorization to mine within

the 300 foot zone around the Fisher House pursuant to its waiver. The effect of DER's letter was to rescind that authorization and to require Medusa and QAI to obtain a new waiver from Mr. Ferrere before mining within the subject area could continue. Thus, the issuance of the letter clearly altered the status quo ante. We have held that where a DER letter changes the status quo ante for a prospective appellant from what existed prior to the letter's issuance, it is that change which gives rise to a right to appeal. George M. Lucchino v. DER, EHB Docket No. 94-178-E (Opinion and Order Sur Motion to Dismiss issued September 23, 1994), p. 5.

DER argues that the letter's failure to set a time frame for Medusa and QAI's response is evidence that it was not intended to be compulsory in nature. We are not persuaded by this argument, particularly since the implication of the letter is that the prohibition against mining within the 300 foot barrier was effective immediately upon receipt of the letter. Moreover, the lack of a time frame for carrying out the directive issued by DER in no way affects the appealability of the action in question.

Nor are we swayed by the fact that the letter did not contain a notice to Medusa advising it of its right to appeal. It is not the inclusion or absence of such a notice which makes a DER letter appealable, but the content of the letter itself. See, QL, Inc. v. DER, EHB Docket No. 93-199-MR (Opinion and Order Sur Request to Appeal *Nunc Pro Tunc* and Motion to Quash issued September 7, 1994), p. 4. See also, Quaker State Oil Refining v. DER, 108 Pa. Cmwlth. 610, 530 A.2d 942, 944-945 (1987) (Where regulations provide a duly published procedure for an appeal, due process of law does not require an agency to extend additional notice of such right.)

DER cites Lehigh Township v. DER, 154 Pa. Cmwlth. 647, 624 A.2d 693 (1993), in support of its argument that the absence of a notice of the right

to appeal reflects the letter's non-appealable nature. In Lehigh, the Commonwealth Court held that the DER letter in question did not constitute a final, appealable action. However, the Court reached this decision not solely because of the letter's failure to contain a notice of the right to appeal, but because the lack of a notice was coupled with conditional language in the letter itself. In the present appeal, the language of DER's letter is not conditional; it states clearly that Medusa and QAI are no longer authorized to mine within 300 feet of the Fisher House.

Finally, we find no merit to DER's assertion that, if Medusa and QAI questioned the effect of the letter, they should have filed an action for injunctive or declaratory relief with the Commonwealth Court. The Board's jurisdiction includes the review of DER actions. Because we have determined that the November 1994 letter constitutes an appealable action, Medusa and QAI have properly filed this appeal with the Board.

Do the Statements of Inspector Thomas Constitute an Appealable Action?

DER contests the appealability of the oral statements made by DER Inspector Hank Thomas on two grounds. First, DER points out that neither the notice of appeal nor the fee petition contains an affidavit by the person to whom Inspector Thomas spoke and, therefore, we have no evidence of the exact content of Inspector Thomas' statements, but only QAI and Medusa's interpretation thereof. Second, DER argues that oral statements made by DER staff are not appealable, citing the Board's decision in JEK Construction Co., Inc. v. DER, 1990 EHB 535.

DER is incorrect in its contention that oral statements made by DER personnel may never be appealable. Oral directives by a DER inspector are

appealable so long as they meet the definition of an "action." To hold otherwise would allow DER to avoid appeals by simply issuing verbal, as opposed to written, orders.

DER argues that the Board's decision in JEK, *supra*, stands for the proposition that oral statements made by DER employees are not appealable. This is an incorrect interpretation of the holding in JEK, however. Although the Board in JEK found that oral statements made by a DER staff member were not appealable, the facts are distinguishable from those in the present appeal. In JEK, a DER representative allegedly advised JEK orally that DER would not approve a landfill permit where certain conditions existed on the proposed site. In holding that the oral statements were not appealable, the Board stated as follows:

> DER acts pursuant to statutes and regulations which require permits in writing, detailed written applications, and the myriad of other pieces of paper which form the gasoline on which DER's bureaucratic engine runs. For better or worse and whether we like it or not, we exist in a regulated world where the final word is a written word. Persons may have oral discussions, but their commitments to each other in this regulated world are on paper (in one form or another). It is that paper which records precisely what a party means others to conclude as to its position on various matters.

Id. at 543. (emphasis in original). It is the language above on which DER focuses in arguing that oral statements may not be appealable actions. However, the type of "oral statement" to which the Board was referring in JEK involved an expression of opinion, as opposed to an oral directive such as that alleged in the present appeal. When DER issues a directive which affects personal or property rights or obligations, it is an appealable action, and the mode of expression - written or oral - makes no difference.

We do, however, agree with DER that Medusa and QAI have failed to provide sufficient evidence from which we can determine whether the statements of Inspector Thomas did, in fact, amount to an action which is appealable. Neither the notice of appeal nor the petition for attorney fees contains an affidavit from the person to whom Inspector Thomas directed his statements. Attached to the petition for supersedeas filed by QAI is an affidavit signed by Nile A. Linberg. Mr. Linberg is the Director of Environmental Services for Aloe Mining Company and, in this capacity, provides consultation to QAI. (Linberg Affidavit I, para. 3)[4] In paragraph 19 of his affidavit, Mr. Linberg states, "On October 21, 1994, DER surface mine inspector, Hank Thomas, advised QAI not to conduct any mining activities other than reclamation activities within 300 feet of the Fisher House." Mr. Linberg's affidavit, however, does not state whether he was a witness to Inspector Thomas' remarks, nor does he specify Inspector Thomas' exact words. Thus, we have only his and QAI's interpretation of Mr. Thomas' remarks. Without knowing the exact statement made by Inspector Thomas, we cannot rule on whether the content of his statement amounted to an appealable action.

However, because we conclude that QAI and Medusa are not entitled to an award of attorney fees and costs for the reasons set forth later in this opinion, it is not necessary at this point to take further evidence on the issue of the appealability of Inspector Thomas' statements.

Does QAI Have Standing To Appeal?

A separate jurisdictional issue raised by DER, in addition to the question of the appealability of the disputed actions, is the question of

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[4]"Linberg Affidavit I" refers to the affidavit of Nile Linberg attached to QAI's petition for supersedeas. The affidavit of Mr. Linberg attached to QAI's response to DER's motion to dismiss is referred to herein as "Linberg Affidavit II."

whether QAI had standing to bring this appeal. In both its response and its motion to dismiss, DER asserts that because QAI lacked standing to bring an appeal in this matter it has no basis for requesting an award of attorney fees and costs. Because standing is a jurisdictional issue, it may be raised at any time in the proceeding. Mary A. Sennet v. DER, 1993 EHB 10.

In order to have standing to challenge a governmental action, an aggrieved party must show that the alleged harm resulting from the challenged action is direct, substantial, and immediate. William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). A "substantial" interest is one which has a discernible adverse effect on some interest other than the abstract interest of all citizens in having others comply with the law. Id. at ___, 346 A.2d at 282. An interest is "direct" when there is causation between the harm alleged and the matter on appeal. Id. Lastly, an interest is "immediate" when it is more than merely a remote consequence of the appealed action. Id. at ___, 346 A.2d at 203.

DER argues that QAI lacks standing, first, because DER has not taken a final action and, second, because it does not have a legal right to mine the site in question. We may dispose of DER's first challenge to the question of QAI's standing since we have ruled that the November 2, 1994 letter was, in fact, a final, appealable action by DER.

DER's second challenge to the question of QAI's standing deals with QAI's right to mine the Boyer site. According to the affidavit of Lori Odenthal, attached to DER's motion to dismiss and response, QAI had submitted to DER an application to transfer Medusa's SMP to QAI, but DER had taken no action on the application as of the date of the appeal. (Odenthal Affidavit,

para. 3) Odenthal further states that Medusa did not identify QAI as a contract operator in either its mining permit or mine operator's license, as required by §3.1(d) of SMCRA and §87.14(i) of the regulations.

Section 3.1(d) of SMCRA states in relevant part as follows:

> 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 [DER] prior to their engaging in surface mining operations ...
>
> 52 P.S. §1396.3a(d)

Section 87.14 of the regulations requires that an application for a surface mining operator's license identify any contractor and subcontractor, any person who by contract owns or controls the coal to be mined or has the authority to determine the manner in which the surface mining activity is to be conducted, and any person whose relationship with the permit applicant gives that person authority directly or indirectly to determine the manner in which the surface mining activity is to be conducted. 25 Pa. Code §87.14(1)(vii),(ix), and (x). DER argues that, because Medusa has not named QAI as a contractor under its surface mining license and permit, and because QAI has not obtained DER approval to mine the Boyer site, QAI has no legally recognizable interest in the mining of the Boyer site.

QAI and Medusa argue that DER's reliance on §3.1(d) of SMCRA and §87.14 of the regulations is misplaced since they deal with permit <u>applicants</u>, and Medusa was not an applicant for a permit but a permit-holder when it named QAI as a contract operator. Medusa and QAI assert that the applicable regulation is 25 Pa. Code §86.53, which deals with the reporting of new information to DER by a permittee. This section requires that a permittee notify DER of any changes in ownership and control and in facts or information

presented in the application. Medusa claims that it complied with this provision by notifying DER by letter dated May 3, 1994 that QAI would be operating as a contract operator at the Boyers Mine. A copy of this letter is attached as Exhibit C to the affidavit of Nile Linberg submitted with QAI's response. (Linberg Affidavit II) Thus, we may dismiss DER's argument that it was never notified of QAI's status as a contract operator.

DER argues, however, that because QAI has never been approved by it as contract operator, it has no legal right to mine the site. DER likens this case to the factual situation in Empire Coal Mining and Development Inc. v. DER, 1992 EHB 657. In Empire, the Board determined that a mining company lacked standing to challenge an order to a landfill operator to implement a closure plan where the mining company could not demonstrate that it had any legal right to mine the landfill site. Unlike the situation in Empire, however, QAI possesses an interest in this matter separate and apart from its status as a contract operator.

The petition for attorney fees states that, on May 3, 1994, QAI purchased the assets of Medusa. (Petition, para. 2) These assets included the lease granting Medusa the right to mine limestone on property which included the zone around the Fisher House. (Linberg Affidavit II) DER's response does not deny this averment. Thus, as of May 3, 1994, QAI, as the owner of Medusa, owned whatever rights Medusa possessed in connection with mining the Boyer site. As such, QAI holds a direct, substantial, and immediate interest in any restriction placed on Medusa's right to mine the Boyer site. Therefore, regardless of whether QAI has yet to secure a transfer of Medusa's permit or has been approved by DER as a contract operator, as the owner of Medusa, it has standing to challenge any action taken against Medusa by DER. On that basis, we find that QAI has standing to bring this appeal.

Are QAI and Medusa Entitled to an Award of Costs and Attorney Fees?

Having determined that DER's November 2, 1994 letter was an appealable action and that QAI had standing to bring this appeal,[5] we now turn to the question of whether Medusa and QAI are entitled to an award of costs and attorney fees under §4(b) of SMCRA and §307(b) of the CSL. Upon reviewing QAI and Medusa's petition for fees and costs, we conclude that we must deny the petition on the basis that it is deficient on its face. In light of this deficiency, we need not consider whether QAI and Medusa would otherwise meet the requirements necessary for an award of fees and costs under §4(b) of SMCRA and §307(b) of the CSL.

In Township of Harmar v. DER, EHB Docket No. 90-003-MJ (Opinion and Order Sur Petition for Award of Attorney Fees and Costs issued August 9, 1994) ("Harmar Township"), we considered the question of what amount and type of evidence was necessary to support a petition for attorney fees and costs filed under §4(b) of SMCRA. Therein, we held that a petition for costs and fees filed under §4(b) of SMCRA must be supported by sufficient evidence from which the Board may calculate the number of hours reasonably expended on the appeal and the reasonable market value of the services rendered. Id. at 10. In calculating the reasonable market value of the services rendered, or the "reasonable hourly rate" for such services, we must consider, *inter alia*, the prevailing market rate for work of a similar nature in the legal community in question; the level of skill, experience, and reputation of the attorney handling the case; and the level of skill necessary to bring the case to

[5]DER did not question Medusa's standing to bring this appeal.

trial.[6] *Id.* at 12, 13; Jay Township v. DER, 1987 EHB 36. Thus, the petitioner must submit evidence of such in support of its petition.[7] Such evidence may consist of data as to rates billed by other practitioners in the legal community in question for work of a similar nature. It may also consist of an affidavit from an attorney in the legal community in question who is qualified to render an expert opinion on the reasonableness of the rates and hours billed by the petitioner's counsel.

In the present appeal, the parties have tried to inundate the Board with a seemingly endless plethora of paperwork in connection with the request for costs and attorney fees. Much of it was either redundant or untimely and added little to a final resolution of this matter.

On January 19, 1995, DER filed a response to the petition for costs and attorney fees, as instructed by the Board's letter of January 3, 1995. Concurrent with its response, however, DER also inexplicably filed a motion to dismiss the petition, along with a supporting brief, setting forth the same general objections as were stated in its response. Since the Board's January 3, 1995 letter directed DER to submit only a response to the petition and, if appropriate, a supporting brief, and, further, since the motion basically set forth the same objections to the petition as did the response, DER's filing of the motion was both superfluous and contrary to the Board's directive.

Having received the motion to dismiss, however, we notified QAI and Medusa that any response to the motion was due on or before February 9, 1995.

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[6]The same factors apply to the calculation of expert witness fees sought by the petitioner.

[7]In addition, although the Board has not had an occasion to address a fee petition filed under §307(b) of the CSL, we hold that the same type and amount of evidence is required in support of a petition for fees under §307(b) of the CSL as for §4(b) of SMCRA.

At QAI's request, this date was extended to February 11, 1995.[8] QAI submitted a response to the motion within the allotted time frame.

The following day, DER stated in a letter that it intended to file a reply to QAI's response to the motion to dismiss. Because the filing of a reply is at the Board's discretion, the Board member to whom this matter was assigned issued an Order on February 15, 1995, stating that the Board would not entertain the filing of a reply by DER at that time. The Order further stated, "Parties before this Board have the right to file appropriate motions and responses thereto but there is nothing in our rules establishing a right to file replies, sur-replies, rebuttals or rehash in endless fashion."

In disregard of the language of the February 15, 1995 Order, QAI filed an unsolicited "Reply to Department's Response in Opposition to the Petition of [QAI]" on February 23, 1995. QAI did not seek the Board's leave to file the reply, nor did it explain why this document could not have been filed with its response to DER's motion to dismiss.

Not to be outdone, DER, on February 27, 1995, filed a "Motion to Consider Reply", "Factual Objections to QAI's Response to the Department's Motion to Dismiss", and a "Brief in Reply to the Response by QAI to the Department's Motion to Dismiss." In light of our disposition of QAI and Medusa's petition for fees and costs, we need not rule on DER's Motion to Consider Reply, nor will we consider DER's Factual Objections or brief in support of its reply.

As to QAI's Reply to Department's Response in Opposition to the Petition of QAI, although we deem the filing of this reply inappropriate for the reasons set forth above, we must address the fact that it attempts to

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[8]Because February 11, 1995 fell on a Saturday, the actual deadline for filing was February 13, 1995.

correct certain deficiencies in the petition for costs and fees which were pointed out in DER's response to the petition. QAI's reply responds to, inter alia, DER's assertion that the petition for costs and fees should be denied because it fails to contain evidence from which the Board may assess the reasonableness of the hours and rates billed by counsel for the petitioners. In its reply, QAI acknowledges "that it has the burden of establishing the number of hours reasonably expended by attorneys and others working on behalf of QAI and proving the community market rate for the attorneys and other legal professionals performing the work." Attached to the reply are several affidavits and exhibits submitted by QAI as evidence that the rates and hours billed in this matter were reasonable. No such affidavits or exhibits were submitted with the petition for costs and fees. In fact, the petition itself is completely devoid of any evidence in support of the reasonableness of the rates and hours billed in this matter. Thus, without the affidavits and exhibits submitted on February 23, 1995, the petition is deficient on its face for failure to contain the necessary documentation in support thereof, as explicitly spelled out in Harmar Township, supra.

We note that in Harmar Township, the Township's petition for attorney fees also did not contain evidence as to the reasonableness of the rates billed by the Township's counsel and legal staff. DER raised this as one of its objections to the petition. The Township was granted leave to file a response to DER's objections, and with its response, it filed an affidavit from an attorney who had practiced environmental law in the community for nearly twenty years. The affidavit stated that the rates and hours billed by the Township's counsel were reasonable, in light of the prevailing market rate and level of difficulty of the appeal. The Board accepted the affidavit as competent evidence in support of the petition.

Prior to Harmar Township, the Board had never addressed the issue of the specific type of evidence which must be submitted in support of a petition for attorney fees under §4(b) of SMCRA. The closest the Board had come to addressing this issue was in Jay Township v. DER, 1987 EHB 36, wherein the Board noted in a footnote:

> ...Petitioners have produced the absolute minimum amount of evidence necessary in satisfying their burden of proving the market rate for comparable services in the locality. In the future, the Board advises petitioners seeking fees under Pa SMCRA to look to the regulations of 43 CFR Part 4, and applicable case law, for guidance regarding the type of evidence to produce in support of a petition for fees.

Id. at 48, n. 2. Because the Board had not specifically addressed this issue before, it allowed the petitioner in Harmar Township an opportunity to submit with its response the evidence the Board deemed necessary to assess the reasonableness of the fees sought by the petition. However, the Board refused to provide the Township with another opportunity to submit additional evidence when it was determined that the affidavit submitted with the Township's response cured some but not all of the deficiencies in the petition. Id, at 18-19.

Unlike the petitioner in Harmar Township, QAI and Medusa had specific guidelines for determining what evidence was needed to support their petition for costs and fees. The decision in Harmar Township was issued on August 9, 1994, more than two months before QAI and Medusa filed their fee petition. Thus, QAI and Medusa should have been aware of the type of evidence which the Board requires in support of a petition for costs and fees filed under §4(b)

of SMCRA.[9] This evidence should be submitted with the petition itself, not, as in this case, three and one-half months after the filing of the petition as part of an unsolicited reply, particularly where QAI and Medusa acknowledge that they had the burden of demonstrating the reasonableness of the fees sought by their petition. Moreover, unlike the petitioner in Harmar Township, QAI never sought leave of the Board to file a reply to DER's response, but simply filed it of its own accord and according to its own time schedule. We observe that had this been a petition for costs and attorney fees filed under the Costs Act, Act of December 13, 1982, P.L. 1127, 71 P.S. §2031 et seq., which requires the Board to render a decision within thirty days of the filing of the petition, QAI and Medusa could not have been given an opportunity to attempt to correct the deficiencies of their petition because the thirty day provision prevents submissions 100 days later.

The jurisdiction of the Board is to hear appeals of actions taken by DER under the various environmental statutes and regulations which it enforces. As an aside, after ruling on the merits of the parties' respective positions with regard to the environmental issues arising from DER's action, the Board is also empowered to award costs and attorney fees in a small number of cases. The Board's function was not intended by the Legislature to be one in which it spends substantial quantities of its limited time adjudicating claims for attorney fees and costs. Rather, after adjudicating the merits of

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[9]As noted earlier herein, QAI and Medusa's petition was filed under both §4(b) of SMCRA and §307(b) of the CSL. Although no prior Board decisions have addressed the type of evidence required to support a petition for costs and fees filed under §307(b) of the CSL, the language of the two provisions is identical, except that §307(b) applies to all proceedings under the CSL, whereas §4(b) applies only to those arising under §4 of SMCRA. Because the provisions are nearly identical, it would have been illogical for QAI and Medusa to assume that the Board will require a different type of evidence in support of a fee petition filed under §307(b) of the CSL, as under §4(b) of SMCRA.

the appeal, the Board is to quickly and succinctly address the relatively inconsequential issue of fees and costs, and then return to the other environmental matters awaiting their turn.

This matter arose from an environmental issue which the parties virtually resolved themselves. Despite that, the parties have seen fit to battle unceasingly over fees and costs, consuming an inordinate amount of the Board's time with this fee dispute. The number of hours committed by the parties' lawyers in their battle over the fee petition now clearly exceeds the number of hours spent on resolving the merits of the underlying appeal, as evidenced by the great volume of paper which both sides have felt compelled to file.[10] It would even appear that the parties are setting themselves up for a virtually never-ending dispute over fees and costs since one can easily foresee additional claims being filed to recover costs and fees incurred in the battle over this fee petition.[11] If that claim is then opposed by DER, generating another round of responses, replies, and sur-replies, the groundwork has thus been laid for filing yet a third petition for fees and costs to battle over that issue. The parties have offered this Board nothing from which we could imply that the Legislature intended the direction these parties would have us take under §4(b) of SMCRA or §307(b) of the CSL on costs

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[10]The underlying appeal was resolved even before the parties filed pre-hearing memoranda on the merits of the appeal. The only paperwork submitted by the parties in the underlying appeal consists of the notice of appeal itself, and a petition for supersedeas and response thereto. We commend the parties for their speed in resolving the underlying appeal at such an early stage of the proceeding, a skill lacking in this appeal since then.

[11]Indeed, in paragraph 22 of QAI and Medusa's fee petition, they state, "In addition to recovery of costs and fees reasonably incurred in the underlying action, Petitioners are entitled to recover costs and attorney's fees which they reasonably incur in prosecuting this fee petition. Evidence of such costs and fees will be provided to the Board and DER as a supplement to this Petition."

issues. Our own research discloses no such intent either and we can see no justification for such an expenditure of effort. As a result it is clear to this Board that the battle over costs and fees was not intended to be "The Never-Ending Story." On this basis, coupled with the fact that we have laid out as clear a set of instructions as possible in our prior decisions as to what the Board requires with respect to a petition for attorney fees and costs, we reject the concept that parties involved in a dispute over fees and costs may file motions to dismiss, replies, sur-replies, and memoranda in support of each of these.[12]

Because QAI and Medusa's petition is deficient on its face for failing to provide any supporting evidence from which the Board may determine the reasonableness of the fees sought by the petitioners and, further, because we have concluded that we will not allow the petitioners to attempt to correct this deficiency by the filing of an unsolicited reply to DER's response to the petition, submitted three and one-half months after the filing of the petition, we find that QAI and Medusa are not entitled to an award of costs and attorney fees under §4(b) of SMCRA and §307(b) of the CSL. Therefore, we enter the following order.

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[12]We do not wish to imply that, where DER's response to a petition for costs and attorney fees raises certain substantive issues, such as the jurisdictional issues involved in the present appeal, the petitioners will not be given an opportunity to reply to such matters. However, where DER's response simply points out deficiencies in the petition, the petitioner will not be permitted to use the filing of a reply to correct or supplement its petition, unless leave is sought and granted after cause is shown.

## ORDER

AND NOW, this 6th day of April, 1995, it is ordered that QAI and Medusa's Petition for Award of Costs and Attorney's Fees, filed at EHB Docket No. 94-324-E, is denied.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: April 6, 1995

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